

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

REPLY COMMENTS OF NICOR ENERGY SERVICES COMPANY

Nicor Energy Services Company (“Nicor Services”) respectfully submits these reply comments in support of the Petition for Reconsideration of SatCom Marketing, LLC (“SatCom Petition”) and the Petition for Reconsideration of the Professional Association of Customer Engagement (“PACE Petition”).¹ Both petitions advocate the type of changes that the Federal Communications Commission (“Commission”) should make so that its rules protect consumers against unwanted messages and harassment without inhibiting legitimate business practices that benefit consumers. Accordingly, Nicor Services respectfully urges the Commission to grant the petitions by:

- Modifying the prior express consent requirement so that consumers can consent to receive informational calls merely by providing their wireless number to the calling party;
- Explicitly enumerating various means by which callers may obtain prior express written consent from the consumer, including by providing their telephone number to a business for the purpose of being called by that business; and
- Revising the definition of the term “automatic telephone dialing system” or “ATDS” to exclude technologies that are used to improve efficiency without harassing consumers.

¹ *Petition for Reconsideration of SatCom Marketing, LLC*, CG Docket No. 02-278 (filed July 11, 2012) (“SatCom Petition”); *Petition for Reconsideration of the Professional Association of Customer Engagement*, CG Docket No. 02-278 (filed July 11, 2012) (“PACE Petition”).

These changes would facilitate the use of flexible technological solutions that improve interactions between consumers and the businesses they patronize and lower the cost of goods and services without permitting the abusive practices that the rules are designed to prohibit.

About Nicor Energy Services Company

Nicor Energy Services Company (“Nicor Services”) is a subsidiary of AGL Resources formed in 1992 to provide energy-related products and services with a home warranty focus. Nicor Services manages relationships with more than 740,000 customers on behalf of utility partners through its J.D. Power and Associates Certified Call Center and offers a broad selection of products and services created especially for the homeowner.

Nicor Services include a wide range of warranty repair and service plans that provide value and peace of mind for utility customers. Its warranty plans provide repair coverage for heating and cooling equipment, kitchen and laundry appliances and the electrical, plumbing and gas services within the home. In addition, Nicor Services’ wholly owned subsidiary, Nicor Home Services, provides heating, air conditioning, insulation and indoor air quality services through its locally operated companies – D.M. Dykstra, Hawthorn Heating & Air Conditioning, and Tradewinds Heating & Air Conditioning.

Nicor Services relies upon informational outbound phone calls that the Commission recently found to be “highly valuable” to consumers. Using an integrated telephony and customer relationship management system, Nicor Services places outbound phone calls to customers to notify them of changes in service appointments, outstanding entitlements, or program and billing changes. Nicor Services files these comments to respectfully urge the Commission to reconsider aspects of the current rules that inadvertently inhibit efficient and valuable technologies and practices when seeking to end certain consumer abuses.

I. Congress Did Not Intend The TCPA To Interfere With Legitimate Commercial Communications Between Businesses And Consumers

In passing the TCPA, Congress intended to outlaw the practice by telemarketers of engaging in uninvited, disruptive autodialing to unwilling consumers, including the use of an ATDS to call and seize consumer telephone lines.² However, as the Commission itself has noted, Congress found that “legitimate” business practices should be permitted and protected.³ Unfortunately, the rules as currently written inadvertently harm legitimate business practices by defining ATDS in an overly-broad manner and by failing to establish reasonable means for consumers to provide their consent to interactions with businesses. As a result, the rules deter businesses from providing valuable information to consumers in a timely manner, which harms, rather than helps, consumers.

The harm caused by the rules as currently written is compounded by the private right of action under the TCPA, which inadvertently creates incentives for the unscrupulous to exploit ambiguity in the rules for their own profit.⁴ Plaintiffs’ lawyers alleging millions of dollars in class action damages are increasingly challenging beneficial informational calls and text messages, including communications about product recall and safety information, flight notifications, service interruption updates, and data breach notifications. As Communications Innovators notes in its Petition for Declaratory Ruling, class actions involving autodialed calls (including text messages) rose 592% between 2008 and 2011.⁵ Prompt action to eliminate

² See H.R. Rep. no. 102-317 at 11 (1991); S. Rep. No. 102-178 at n.5 (1991)).

³ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, CG Docket No 02-278 at ¶ 24 (2012) (“*2012 TCPA Order*”).

⁴ See, e.g., *Meyer v. Portfolio Recovery Associates, LLC*, No. 11-56600, 2012 WL 4840814 (9th Cir. Oct. 12, 2012).

⁵ Communications Innovators Petition or Declaratory Ruling, CG Docket No. 02-278, at 14-15 (filed June 7, 2012).

ambiguity in the current regulations is necessary so that legitimate businesses can communicate effectively with consumers without the fear of frivolous litigation.

II. The Commission Should Permit Consumers To Provide “Prior Express Consent” By Providing a Caller With A Telephone Number

The SatCom Petition requests that the FCC eliminate its rule requiring a caller to obtain “express written consent” before using an ATDS to place calls to consumers who have provided their mobile number to the caller as their primary contact number.⁶ Nicor Services respectfully urges the Commission to make clear that a consumer can provide its express written consent by providing a business with its mobile number as its primary contract number for the type of call at issue, whether for non-telemarketing, informational calls or for telemarketing calls. The FCC’s rules should not make it unnecessarily difficult for consumers to provide consent to be contacted by businesses to which the consumer provides his or her mobile number for the purpose of being contacted by the business. The FCC should also adopt a definition for “prior express consent.”

The TCPA and the Commission’s Rules require parties to obtain the “prior express consent” from the called party before using an ATDS to place:

- *any* calls to wireless numbers; or
- artificial or prerecorded voice calls to residential numbers.⁷

Unlike the term “prior express *written* consent,” the term “prior express consent” is not defined in the FCC’s rules.⁸ The Commission likewise has never addressed whether autodialed and prerecorded messages of a purely informational nature made to a telephone number voluntarily provided by the called party are made with the prior express consent of that party. Although the

⁶ SatCom Petition at 2.

⁷ 47 U.S.C. § 227(b)(1)(a); 47 C.F.R. § 64.1200(a)(1).

⁸ Compare 47 C.F.R. § 64.1200(f)(8) (defining “prior express *written* consent”) (emphasis added).

Commission has come close to addressing the issue, the agency has yet to provide the necessary clarity.⁹ Accordingly, Nicor Services respectfully urges the Commission to clarify that the “prior express consent” requirement is satisfied when a party voluntarily provides its telephone number (whether mobile or residential) to a business as a primary contact number for the purpose of receiving the type of call at issue (*e.g.*, informational or telemarketing calls), and that the mere act of voluntarily providing a telephone number to a business constitutes “prior express consent” to receive informational, non-telemarketing calls from that business.

The clarification Nicor Services urges the Commission to adopt reflects the intent of Congress for the TCPA. As the House Report for the TCPA explains, “[t]he restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications.”¹⁰ Although the TCPA provides the Commission with significant statutory flexibility to define the terms “prior express consent” and “calls that are not made for a commercial purpose,” neither term should be interpreted broadly because to do so inadvertently discourages purely informational messages that consumers find highly desirable and that Congress did not seek to prohibit.¹¹

The lack of clarity in a key definitional phrase has negatively impacted businesses and consumers in the United States. Absent clear guidance from the Commission, businesses will

⁹ Respectively: *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Request of ACA Int’l for Clarification and Declaratory Ruling*, 23 FCC Rcd. 559, 565 (2008); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd at ¶ 31 (1992) (“1992 TCPA Order”).

¹⁰ House Report 102-317 at 17.

¹¹ 47 U.S.C. §§ 222(b)(1)(A); 222(b)(2)(B); *see Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order at ¶ 24 (2012) (“2012 TCPA Order”), citing 137 Cong. Rec. H11307 (Daily Ed. Nov. 26, 1991). The Commission also notes that the TCPA provided the Commission the authority to exempt certain calls from the TCPA requirements. *Id.* at ¶¶ 27- 29

continue to be deterred from providing valuable information to consumers in a timely manner and consumers will continued to be denied the benefit of timely and useful information.

III. The FCC Should Modify the Prior Express Written Consent Requirement to Facilitate Communications With Consumers While Prohibiting Abuses

The SatCom Petition asks the FCC to eliminate its rule requiring a caller to obtain “express written consent” when placing calls using an ATDS to consumers who have provided their mobile number to the caller.¹² The Commission’s Rules require parties to obtain the “prior express written consent” from the called party to place any call that introduces an advertisement or constitutes telemarketing.¹³ Obtaining “prior express written consent” requires a calling party to disclose in a “clear and conspicuous” manner (1) that the calling party may use an “automatic telephone dialing system” or “prerecorded voice message”; and (2) that the called party is not required to agree to these calls as a condition of purchase.¹⁴

These unnecessarily formalistic requirements prevent valuable communication between businesses and consumers in a way that Congress did not intend and consumers do not want. Requiring consumers to provide explicit consent to be contacted by an ATDS is confusing, because many consumers conflate ATDS with prerecorded messages. Many businesses, however, use live operator call centers linked to the consumer through predictive dialers. For example, Nicor Services places outbound phone calls to customers to notify them of service and warranty options, changes in service terms, and other items of interests to consumers. The customers of Nicor Services should not be required to provide burdensome and confusing formulistic consents before they are able to receive the types of calls they expect from Nicor Services.

¹² SatCom Petition at 2.

¹³ 47 U.S.C. § 227(b)(1)(a); 47 C.F.R. § 64.1200(a)(1).

¹⁴ 47 C.F.R. § 64.1200(f)(8).

The lack of consumer understanding about the differences between calls made with an ATDS and calls delivering prerecorded messages is likely to result in consumers declining to provide the requested consent even though they want the types of calls that the company relies upon an ATDS to provide. Put simply, the use of an ATDS is not itself an abusive practice, but requiring companies to ask for consent before placing a call using an ATDS inaccurately suggests to the consumer that it is. Accordingly, the Commission should eliminate the formulaic consent requirements for “prior express written consent,” and instead permit callers to obtain “prior express written consent” in a manner that informs consumers about the content and nature of the calls they will receive, without unnecessary focus on the technical aspects of the call or on the manner of consent.

IV. The FCC Should Define “Automatic Telephone Dialing System” In A Manner That Protects Consumers But Does Not Interfere With Valuable Communications

A. The Commission’s broad interpretation of what constitutes an ATDS is not mandated by the terms of the TCPA.

Nicor Services urges the Commission to grant Section III of the PACE Petition by modifying its interpretation of the term ATDS in a manner will permit businesses to use advanced telecommunications technologies to reach consumers for legitimate purposes while still preventing abuses.¹⁵ The TCPA defines an ATDS as follows:

The term “automatic telephone dialing system” means equipment which has the capacity –
(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
(B) to dial such numbers.¹⁶

¹⁵ PACE Petition at 12.

¹⁶ 47 U.S.C. § 227(a)(1).

By contrast, under the Commission’s current interpretation, “equipment need only have the capacity to store or produce telephone numbers” to be classified as an ATDS.¹⁷ However, this interpretation is inconsistent with the TCPA itself.

In the TCPA, the phrase “using a random or sequential number generator” modifies the phrase “to store or produce telephone numbers to be called” and limits the scope of equipment covered by the term to equipment that uses “a random or sequential number generator.”

Additional support for interpreting the term ATDS to only cover communications equipment that has the capacity to dial “randomly or sequentially generated” telephone numbers is found in the inclusion of the phrase “to dial such numbers” in part (B) of the ATDS definition. This phrase clearly refers to telephone numbers that have been generated “using a random or sequential number generator” as described in part (A) of the definition, and it must be given its natural meaning. Accordingly, under the TCPA, a caller’s equipment does not meet the statutory definition of ATDS, and thus use of the equipment is not prohibited, unless the equipment stores or produces telephone numbers *that have been randomly or sequentially generated*.

Similarly, the mere fact that equipment could be modified to have the “capacity” to call numbers using a random or sequential number generator does not mean it constitutes an ATDS. Rather, the “capacity” to make such calls must be present at the time the call is made. Banning the use of equipment that merely has the potential to be paired with additional hardware or software giving it the capability to generate random or sequential numbers for calling is fundamentally inconsistent with the plain language and intent of the statute. This interpretation also leads to absurd results: virtually any modern telephone, modem, or computer connected to the Internet could conceivably be connected to additional equipment and/or software that would

¹⁷ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, ¶ 132 (2003) (2003 TCPA Order).

give it the capability to randomly or sequentially generate numbers. The relevant inquiry, therefore, must focus on the capacity of the equipment *at the time the call is made*.

B. The FCC can protect consumers without limiting the ability of business to take advantage of new technologies and means of communications.

The Commission's expansive interpretation of what constitutes an ATDS is unnecessary given other protections in the TCPA and the Commission's rules. Specifically, the Commission can efficiently prevent abuse marketing practices by emphasizing the question of whether the consumer consents to the call, rather than the particular equipment used by a caller to make that call. Indeed, most of the Commission's rules already focus on consent. For example, the Commission's rules currently prohibit all calls using an ATDS to a consumers' wireless number except with the "prior express consent" of the called party.¹⁸ Similarly, the Do-Not-Call Registry provides all consumers (wireless and wireline) an opportunity to indicate that they do not consent to receiving telemarketing calls.¹⁹ The Commission regularly takes enforcement action against those violating these rules.

By revising (and if necessary expanding) its rules to emphasize the issue of consumer consent for commercial calls, the Commission can protect against the harms associated with abusive calling practices, while avoiding harming legitimate business communications.²⁰ To the extent that a consumer receives a call to which they consent, there is no harm to that consumer and no reason for regulation by the Commission, regardless of the equipment utilized by the

¹⁸ 47 C.F.R. § 64.1200(a)(1). Section 64.1200(a)(2) imposes a stricter requirement for most telemarketing calls, requiring "prior express **written** consent." 47 C.F.R. § 64.1200(a)(2).

¹⁹ See 47 C.F.R. § 64.1200(c).

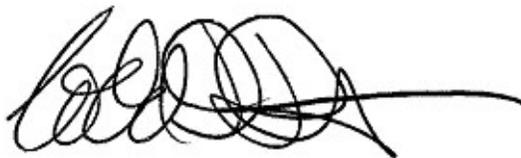
²⁰ In the 2003 TCPA Order, the Commission expressed concern that limiting the definition of an ATDS to equipment that relied upon sequential or random number generation would permit disreputable entities to bypass the rules by using pre-generated "lists" of numbers. 2003 TCPA Order ¶¶ 132-33. Expanding the prior consent requirement nullifies this concern as abusers would not have consent to for such calls.

calling party. Conversely, to the extent that a consumer does not consent to receiving a commercial call, the equipment used by the calling party is immaterial. By focusing on the issue of consumer consent, the Commission can protect consumers without harming legitimate business communications or the ability of businesses to take advantage of the efficiencies offered by modern communications. Because the Commission's rules require consumer consent for all calls to wireless numbers and for calls using an artificial or prerecorded voice for residential numbers, there is simply no need for the Commission to interpret an ATDS in a manner that includes nearly all modern communications platforms in order to prevent abusive practices.

V. Conclusion

For the foregoing reasons, the Commission should (1) revise its rules to permit the prior express consent requirement to be satisfied for informational calls by the provision of a wireless number by the called party; (2) modify the prior express written consent requirement to provide flexibility in the means by which consumers may provide prior express written consent; and (3) revise its interpretation of the TCPA to emphasize the issue of consumer consent rather than the technology used by the caller.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Todd D. Daubert", with a long horizontal flourish extending to the right.

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