UNITED STATES OF AMERICA
BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	))	CG Docket Nos. 18-152 and 02-278

REPLY COMMENTS OF THE AMERICAN GAS ASSOCIATION, AMERICAN PUBLIC POWER ASSOCIATION, EDISON ELECTRIC INSTITUTE AND THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

In 2015, the Federal Communications Commission (Commission or FCC) issued an order in *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd 7961 (2015) ("Remanded Order") with the goal of "affirm[ing] consumer protections of the TCPA" while "encouraging pro-consumer uses of modern calling technology." *Id*., ¶ 2. Earlier this year, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed that order in part and remanded it in part in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018)(*ACA Int'l*). Pursuant to the procedural schedule established by the Commission in these dockets, the American Gas Association (AGA), American Public Power Association (APPA), Edison Electric Institute (EEI), and National Rural Electric Cooperative Association (NRECA) (hereinafter Utility Associations) reply to the initial comments of the National Consumer Law Center (NCLC). More specifically, Utility Associations submit reply comments on: (1) what should constitute "using any automatic dialing system" under the Telephone Consumer Protection Act (TCPA) and (2) the Commission's authority to adopt a new safe harbor to replace the "one call safe harbor" approach to addressing calls made to reassigned wireless numbers under the TCPA.

Interests of the Utility Associations

EEI and NRECA, two of the four utility associations joining in these reply comments, have already described their interest in this proceeding.[1] These reply comments, therefore, briefly describe the interests of the two additional organizations joining these reply comments.

APPA is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. APPA represents public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. Approximately 70 percent of APPA's members serve communities with less than 10,000 residents. Like NRECA members, many members of APPA have implemented automated messaging systems to notify their customers about service outages, the status of restoration efforts, and other similar information, and they often send these messages to their customers' wireless numbers.[2]

AGA represents more than 200 municipal and investor owned local energy companies that deliver clean natural gas throughout the United States. There are more than 71 million

[1] *See* https://ecfsapi.fcc.gov/file/10613795116820/EEI%20NRECA%20TCPA%20Comments.pdf

[2] APPA's interest differs from that of the other utility associations in one respect - whether APPA members, as governmental entities, are exempt from the TCPA. In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Broadnet Teleservices LLC Petition for Declaratory Ruling (Broadnet), CG No. 02-278 (July 5, 2016) involved a petition by Broadnet seeking a declaratory order by the Commission that governmental entities, including state and municipal government agencies, are not "persons" within the meaning of that term in the Communications Act and are, therefore, exempt from the provisions of the TCPA, because the TCPA only governs autodialed calls made by a "person." The Commission's July 5, 2016 Declaratory Order in the case granted Broadnet's petition as it related to federal governmental agencies, but left for future determination whether autodialed calls placed by state and local governmental entities also fell outside the TCPA's coverage. APPA participated in the *Broadnet* proceeding and maintained that the TCPA does not apply to public power utilities. In fact, the Commission's conclusion that federal governmental entities are not persons would logically apply to state and local governmental entities, including APPA members, as well. But the Commission has yet to rule on that question. APPA accordingly joins the Utility Associations in asserting that the Commission's current TCPA rules place public utilities at unnecessary risk for conduct that is desired by and benefits their ratepayers. APPA, however, does not waive its position in its comments to the *Broadnet* petition that public power utilities are exempt from the TCPA.

residential, commercial and industrial natural gas customers in the U.S., of which almost 94 percent – more than 68 million customers – receive their gas from AGA members.

As public utilities, APPA and AGA members, like NRECA and EEI members, have been requested by their customers and required in many instances by their regulators, to provide notifications, often by text messaging, about service interruptions, status of facility repair efforts, service restoration updates and other similar information. And, because they often utilize automated dialing technologies to deliver these messages, they are directly affected by the Remanded Order.

Contrary to NCLC's Comments, Manually-Placed Calls Do Not "Use" the Capability of Automatic Dialing Systems.

The Commission's notice posed two questions regarding autodialing equipment. The joint comments of EEI and NRECA have already addressed how the Commission should interpret the TCPA term "capacity" in defining autodialing equipment and Utility Associations will not repeat those comments. The Commission, however, also asked a question not addressed in *ACA Int'l*. While the petitioners in *ACA Int'l* did not pose a "challenge to the Commission's understanding of the statutory words, 'make any call *using*' an ATDS," the Court made clear that this Commission remains free to revisit that issue. 885 F.3d at 704. (emphasis added). NCLC argues that any call made from equipment capable of autodialing, except calls placed from smartphones, would constitute a call "using" an autodialing system. NCLC Comments, pp. 27-29. Utility Associations maintain that such an interpretation is antithetical to the purposes of the TCPA.

Defining the use of autodialing equipment as the mere use of equipment that *could* autodial autodial – the position advanced by NCLC – could significantly impede the utility industry's ability to alert customers to the status of service outages, the presence of repair crews

and other current information customers themselves consider important, if not critical and time-sensitive. Under the Commission's interpretation struck down by the D.C. Circuit, utilities would face potential TCPA liability even if they contact customers through manually-placed live calls because every manually-placed call will have been placed from a phone that could, if reconfigured, place automated calls to wireless phones.

The problem the *Order*'s definition of autodialer has posed for utilities – *and that would be perpetuated by the NCLC proposal* – is wholly unnecessary. The obvious purpose of the TCPA is to prevent companies from placing random, automated, or prerecorded calls to cellphone users without their prior consent. That purpose is not furthered by barring companies from manually placing live calls simply because the callers use phones that, if enabled, could autodial. To be sure, the problem would be lessened by a new interpretation that equipment does not have autodialing capacity if significant effort would be required to enable the autodialing function. But even this standard would be open to endless challenge and interpretation. Rather, Utility Associations urge the Commission to interpret the statute such that prohibited autodialed calls do not include live calls placed manually, even where the caller uses equipment *capable* of autodialing. As the Court observed in *ACA Int'l,* this approach would essentially eliminate disputes over whether a caller would have to make a significant effort in order to utilize a telephone system's autodialing capability.[3] This interpretation is also entirely consonant with the TCPA's consumer protection purposes.

[3] As the Court stated:

> The dissenting commissioner's interpretation would substantially diminish the practical significance of the Commission's expansive understanding of "capacity" in the autodialer definition. Even if the definition encompasses any device capable of gaining autodialer functionality through the downloading of software, the mere possibility of adding those features would not matter unless they were downloaded and used to make calls. Under the dissent's understanding of the phrase, "make any call," then, everyday calls made with a smartphone would not infringe the statute: the fact that a smartphone could be configured to function

As Utility Associations have noted, while the petitioners in *ACA Int'l* did not pose a "challenge to the Commission's understanding of the statutory words, 'make any call using' an ATDS," the Court made clear that this Commission remains free to revisit that issue. 885 F.3d at 704. The TCPA bars persons from making calls to wireless numbers (other than for emergency purposes or with the prior express consent of the called party) "*using* any automatic telephone dialing system,"[4] which it defines as equipment with "the capacity… (A) to store or produce telephone numbers to be called, using a random or sequential generator" and (B) "to dial such numbers."[5] It is more than plausible to read that language to bar only nonconsensual automated (or prerecorded) calls made from telephone systems with enabled autodialing functions, and to protect, as outside the scope of the statute, live, manually-placed calls that *use* the same equipment where the equipment's autodialing function has not been enabled, is disabled or has not been used to place the call. In other words, the Commission readily could – and should – construe the phrase "*using* any automatic telephone dialing system," to mean *using* the automatic dialing *capability* of a telephone system so that manually placed calls would fall outside the statute's prohibitions.

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as an autodialer would not matter unless the relevant software in fact were loaded onto the phone and were used to initiate calls or send messages.

Petitioners, however, raise no challenge to the Commission's understanding of the statutory words, "make any call using" an ATDS, and the parties therefore have not presented arguments on the issue in their briefing before us. Our consistent practice in such a situation is to decline to address (much less resolve) the issue. *See, e.g., U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 697 (D.C. Cir. 2016). We "sit to resolve only legal questions presented and argued by the parties." Id. (internal quotation marks omitted). We nonetheless note the issue in light of its potential interplay with the distinct challenges petitioners do raise. The agency could choose to revisit the issue in a future rulemaking or declaratory order, and a party might then raise the issue on judicial review.

885 F.3d at 704.

[4] 47 U.S.C. § 227(b)(1)(A)

[5] 47 U.S.C. § 227(a)(1)(A) and (B).

NCLC's Safe Harbor Proposal Would Violate the Commission's Own "Impossibility" Test, Particularly as Applied to Public Utilities.

In their initial comments, EEI and NRECA urged the Commission to maintain its "reasonable reliance" approach and use of a safe harbor in addressing the issue of reassigned wireless numbers. They also explained why the Commission had the authority to employ both a reasonable reliance standard and safe harbor. Utilizing the reasonable reliance standard, they stated, the Commission should conclude that "a caller does not violate the TCPA when it places a call using an ATDS [automatic telephone dialing system] to a number that has been reassigned to a new subscriber without the caller's knowledge if: (1) the caller received prior express consent from the previous caller who it intended to call and (2) the caller had a process in place for ascertaining whether a number had been reassigned and nevertheless inadvertently placed a call to a subscriber who did not consent to receive it." EEI/NRECA Comments, pp. 8-9.

As for a safe harbor, EEI and NRECA urged the Commission not only to develop a reassigned number data base, but replace the one-call safe harbor with a safe harbor that allows callers an affirmative defense from TCPA liability if they access the reassigned numbers data base "with a specified frequency, such as every quarter" or make use of "other TCPA compliance solutions" or "take other reasonable steps to prevent calls to reassigned numbers." *Id*. at 11.[6]

While NCLC appears to have conceded that the Commission has authority to continue use of both a "reasonable reliance" approach and implement a safe harbor, it nonetheless argues for a "narrow" safe harbor that only excuses wrong number calls "made in reliance on errors in

[6] The Court's opinion in *ACA Int'l* has already implicitly endorsed this approach as a test for establishing reasonable reliance. The Commission, it noted, was "considering whether to provide a safe harbor for callers that inadvertently reach reassigned numbers after consulting the most recently updated information." 885 F.3d at 708. Along this line, the Commission has asked for comment on "potential methods for "requir[ing] service providers to report information about number reassignments for the purposes of reducing unwanted robocalls." *ACA Int'l, supra*, 885 F.3d at 709, citing *In re Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Notice of Inquiry*, 32 FCC Rcd. 6007, 6010 ¶ 9 (2017).

the data base." NCLC Comments, p. 24. More specifically, among its other conditions, NCLC would only grant safe harbor status where the caller has "checked the data base before making the call to the reassigned number" and has made that call within "days" of checking the database. *Id*. This is unreasonable and unworkable, particularly as such an approach would apply to utilities.

Just as "no cognizable conception of 'reasonable reliance' supports the Commission's blanket, one-call-only allowance," *ACA Int'l, supra*, 885 F.3d at 707, no reasonable reliance standard would subject callers to TCPA liability for calls placed to numbers that have been reassigned where it would be impossible to discover the reassignment before placing the call. The Commission's own precedent requires it to interpret the TCPA "so as not 'to demand the impossible.'" Order n.312 (JA 1193)(citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 19 FCC Rcd 19215 (2004)(2004 TCPA Order). Rules implementing the TCPA "must allow callers to come into compliance." 2004 TCPA Order, ¶ 9 (citing *McNeil v. Time Ins. Co*., 205 F.3d 179, 187 (5th Cir. 2000)).

As EEI and NRECA have already noted, NCLC's formulation would not work because utilities "may send more than one alert a day, week or month, for example to notify about a service outage and subsequent restoration efforts or to notify about a payment issue that may lead to service curtailment." EEI/NRECA Comments at p. 10. "Many public utilities," the Commission itself observed a quarter century ago, "note that they communicate with their customers through prerecorded message calls and automatic telephone dialing systems to notify customers of service outages, to warn customers of discontinuance of service, and to read meters for billing purposes." [7] In the intervening years, the availability of this type of information has, if

[7] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 92-443, 7 FCC Rcd 8752, ¶ 49 (1992) ("*1992 TCPA Order*").

anything, expanded with the explosive growth in the use of wireless phones and text messaging. Utilities now commonly provide automated notifications, increasingly to their customers' wireless phones by either voice or text,[8] to: (a) warn about planned or unplanned service outages; (b) provide frequent updates about outages or service restoration; (c) ask for confirmation of service restoration or information about the lack of service; (d) provide notification of meter work, tree-trimming, or other field work; (e) warn about payment or other problems that threaten service curtailment; and (f) provide notification of natural gas safety inspections.

And customers plainly want this information. For example, according to the J.D. Power 2017 Electric Utility Residential Customer Satisfaction Study, overall satisfaction among customers who receive outage information is much higher than among those who do not receive such information.[9] "Customers," its spokesperson said in the press release about its similar 2012 report, "value being kept up to date and want to resume their lives as quickly as possible. Notifying them in a proactive manner ensures that they know the latest information and are kept apprised of their unique situation."[10]

Not only are consumers increasingly demanding information services from utilities, but utility regulators are requiring utilities to deliver this information[11] and update it "*on a frequent basis*." (emphasis added) [12] The reason is obvious. Consumers are dependent on reliable gas,

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[8] Phil Goldstein, *Survey: More than 40% of U.S. Households Are Now Wireless-Only*, FIERCEWIRELESS (July 9, 2014) http://www fiercewireless.com/story/survey-more-40-us-households-are-now-wireless-only/2014-07-09.
[9] http://www.jdpower.com/press-releases/jd-power-2017-electric-utility-residential-customer-satisfaction-study..
[10] *http://www.jdpower.com/press-releases/2012-electric-utility-residential-customer-satisfaction-study*.
[11] *See* O'Rielly dissent at p. 125 (JA 1268). ("Some agencies even require companies to make a certain number of calls to consumers. Additionally, companies can be obligated under state law to contact their customers.") See also, IOWA ADMIN. CODE 199-19.4(1)(c)(2015) and 199-20.4(1)(c)(2014); ILL. ADMIN. CODE tit. 83, Part 280.130(j)(2014); and S.D. ADMIN. R. 20:10:20:03(3)(2015) (requiring warning calls before service disconnection); WIS. ADMIN. CODE, PSC § 113.0502; IOWA ADMIN. CODE, 199-20.7(11)(2015), IOWA ADMIN. CODE, 199-19.7(7)(b)(2014) (notification of planned service interruptions).
[12] *See, e.g., In The Matter of the Board's Review of the Utilities' Response To Hurricane Sandy*, NJ BPU Docket No. EO12111050 (Jan. 23, 2013) ("Hurricane Sandy Order"). There, New Jersey's utility regulator observed that utilities needed to provide customers "timely and accurate restoration information" and that updates would be "expected on a frequent basis." *Id*. at p. 15. Most importantly, it ordered utilities to provide this information via

electric, and water services and need to know promptly when those services might be affected – or if they have been affected, when service might be restored. After major storms that may force utility customers from their homes, the *only* way to contact them may be through their wireless phones. Making utilities liable for TCPA violations in such instances, when it would be impossible to comply with the safe harbor proposal outlined by NCLC, would be unreasonable and inconsistent with the Commission's own stated goal not only to guard "the vital consumer protections of the TCPA," but must do so "while at the same time encouraging pro-consumer uses of modern calling technology." Declaratory Ruling and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd 7961 (2015), ¶ 2. The safe harbor proposed by EEI and NRECA, one based on a caller's reasonable reliance on information about reassigned numbers, minimizes the instances of unwanted robocalls while also encouraging utilities to continue providing important information to their customers about service outages – a classic example of the type of "pro-consumer uses of modern calling technology" the Commission should be facilitating.

Respectfully submitted,

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"SMS text messaging through mobile app and/or through another push or messaging Notification." *In The Matter of the Board's Review of the Utilities' Response To Hurricane Sandy*, NJ BPU Docket No. EO12111050, at 3 (May 29, 2013).

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