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FCC Clarifies TCPA Rules for Utilities

On August 4, the Federal Communication Commission (FCC) released a Declaratory Ruling that clarifies certain liability aspects under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. 227, for utilities that use automated calling technology to provide utility service information to their customers.[1] This ruling provides that when a utility customer gives a wireless phone number to the utility (either at the outset or during the relationship), that customer is deemed to have given consent for the utility to use automated calling technology to contact the customer (at that number) about issues closely related to the utility service, unless the consumer has given contrary instructions.

Congress enacted the TCPA in 1991 to limit certain telephone solicitations and use of automated telephone dialing systems to call consumers. The law bars using automatic telephone dialing systems and artificial/prerecorded voice technology to make any call to *wireless telephones* other than for emergency purposes or with the "prior express consent" of the called party. 47 U.S.C. 227(b)(1)(A)(iii). That prohibition includes automated text messaging.[2] Each violation (i.e., each call) is subject to $500 in statutory damages, or more if there is an actual monetary loss, which may be trebled for willful violations.[3]

Although the TCPA does not specify how a consumer is to provide "prior express consent," the FCC, the agency charged by Congress to issue rules implementing the TCPA, has previously addressed the issue. It has stated that "prior *written* consent" is needed for telemarketing calls using automated technology to wireless (as well as residential) lines.[4] For non-telemarketing calls using such technology, prior express consent (oral or written) is needed for calls to wireless phones.[5] The FCC has also explained that a customer who provides a cell phone number to a creditor evidences prior express consent to be called at that number about the debt, including by third-party debt collectors.[6] Many regard those rulings as permitting businesses (including utilities) to use automated calling technology to make informational calls about the services provided to customers, but plaintiff attorneys claimed otherwise in class action suits aimed at businesses, including utilities.

Recognizing the impact of such claims on their members, the Edison Electric Institute (EEI) and the American Gas Association joined in a petition for a Declaratory Ruling by the FCC in February 2015, seeking clarification that a customer's furnishing a wireless phone number to a utility constitutes prior express consent for a utility to make non-telemarketing, informational calls on issues related to the customer's utility service. The petition noted that despite the existing FCC decisions, utilities were still being sued for TCPA violations and some of those cases survived dismissal motions. Those outcomes increase defense costs, and litigation risks caused some utilities to stop or limit the use of automated technology to provide important information to their customers. The petition also noted that the line between TCPA-exempt emergency calls and non-emergency calls is not always clear.

After receiving numerous, mostly supportive comments, the FCC issued a ruling that holds that for customers who have provided their wireless phone number to a utility at some time during the relationship, that constitutes prior express consent for the utility to make calls (using automated technology) that are closely related to the utility service, unless a customer has provided instructions to the contrary. The ruling says the closely related service issues include notification of planned or unplanned service outages, and updates about such outages; confirmation of restoration of service; notification of meter work, tree trimming and other fieldwork; eligibility for subsidies for low-income or disabled customers; and potential brownouts.[7] The FCC also found that this rule for prior express consent also applies to calls to existing utility customers "to warn about the likelihood the failure to make payment will result in service curtailment."[8]

The agency's ruling also states "utility companies should be responsible for demonstrating that the consumer provided prior express consent," and "strongly encourages" utilities to inform customers during service initiation or contact information

updates (as "an additional safeguard") that by providing a wireless number, the customer consents to receive autodialed and prerecorded message calls closely related to the utility service.[9]

The ruling does not grant the entire scope of the request. It states that routine debt collection calls by utilities to former customers are *not* included within the requested clarification, and that such calls to wireless telephones will continue to be governed by the existing rules and requirements. According to those rules, "automated" debt collection calls are not telemarketing calls. Thus, if the called party has provided oral or written consent that has not been subsequently revoked, such calls should not create TCPA liability. The EEI ruling also does not address the question of which communications sent by utility companies fall within the TCPA's emergency-purpose exception.

Impact of the FCC Ruling

This ruling provides clarity on the issue of prior express consent for calls to wireless phones, and should reduce exposure under the TCPA for a utility using automated technology to provide service notifications to its existing customers. Utilities that use automated calling technology to call customers should review their recordkeeping practices concerning receipt of customer contact information to ensure they are able to demonstrate customer consent, and also should consider whether to adopt the "additional safeguard" recommended by the FCC.

Finally, we note this ruling from the FCC is limited to liability under the TCPA. Utility companies should also evaluate their compliance with any applicable state law requirements for a calling program using automated technology. For example, under New York's General Business Law § 399-p, telephone calls placed through an automatic dialing-announcing device must state certain information at the beginning and the end of the call. Other states have consumer protection laws that limit the use of automated telephone systems. As part of its compliance practice, a utility should also review and consider the state laws appropriate for its operations.

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[1] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling,* FCC 16-88 (Aug. 4, 2016) (EEI Ruling).

[2] See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, FCC 03-153 ¶ 165 (July 3, 2003).

[3] Section (b)(1)(B) of the TCPA bars using artificial or prerecorded voice (but not autodialers) to deliver messages to *residential phones* except for emergency purposes or if there is prior express consent. The EEI Ruling does not affect the law concerning calls to residential lines.

[4] See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, FCC 12-21 ¶ 20 (Feb. 15, 2012).

[5] *Id*. ¶28.

[6] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, FCC 07-232 ¶¶ 9-10 (Jan. 4, 2008).

[7] EEI Ruling, ¶ 30.

[8] *Id*., ¶ 32.

[9] *Id*., ¶ 31.

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