



September 22, 2015

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 2055

Re: September 18, 2015 Ex Parte Meeting of Consumer Groups regarding Petitions of Blackboard Inc. and Edison Electric Institute, and other pending petitions, CG Docket No. 02-278

Dear Ms. Dortch:

On Friday, September 18, 2015, several representatives of consumer groups held several meetings with FCC staff regarding interpretations of the scope of consent to be called on a cellular phone. We held three meetings during the day. The first meeting was with Maria Kirby and Gigi Sohn of Chairman Wheeler's staff. The second meeting was with Jennifer Thompson and Travis Litman of Commissioner Rosenworcel's staff. The third meeting was with Mark Stone, Robert Finley and Kurt Schroeder with the FCC's Consumer and Governmental Affairs Bureau Policy Division. In addition to myself – an attorney with the National Consumer Law Center, the consumer groups were represented by –

- Keith Keogh, an attorney member of the National Association of Consumer Advocates;
- Susan Grant, Consumer Federation of America;
- Linda Sherry, Consumer Action.

The primary purpose of the meetings was to discuss the consumer groups' filings relating to the Petitions for a Declaratory Ruling filed by Blackboard, Inc.,¹ and Edison Electric Institute and American Gas Association (Edison).² Both petitions ask the Federal Communications Commission (Commission) to allow automated and prerecorded calls and texts to cell phones without prior

¹ See, Petition for Expedited Ruling, Blackboard, Inc. <http://apps.fcc.gov/ecfs/comment/view?id=60001020430>.

² See Petition for Expedited Ruling, Edison Electric Institute and American Gas Association. <http://apps.fcc.gov/ecfs/comment/view?id=60001016327>.

express consent under the broad rubric of emergency calls.³ The petitions also raise the issue of the “scope of consent.” As articulated in Edison’s petition, its members are assuming the legality of autodialed calls and texts on any utility-related subject based only on the customer’s provision of a telephone number. In other words, once the customer has provided the phone number, Edison argues, that act is sufficient indication of the customer’s consent to receive autodialed or prerecorded call on any utility-related topic.⁴

1. Lifeline Customers and Other Low-Income Cell Phone Users Should be Protected from Too Many Calls

Allowing the relief requested in the Edison and Blackboard petitions would legalize many more automated and prerecorded phone calls to cell phones. The extent to which this relief should be granted should be analyzed through a filter which examines the impact of so many more calls on the most vulnerable wireless cell phone customers who have limited minutes, especially those low-income customers who rely on the Lifeline program.

Many low-income households rely on low-end, pay-as-you-go, limited minute prepaid wireless products. These wireless consumers are billed for incoming calls in addition to outgoing calls. As a result, these consumers are extremely sensitive to incoming calls – especially calls that they do not want.

Wireless bill shock to consumers is caused by unexpected increases in their phone bills.⁵ In a recent examination of the problem, the Commission found that one of the causes of bill shock is when the limits on their voice, text or data plans have been exceeded, which in turn causes higher charges at a per-minute rate.

Additionally, prepaid wireless plans have been growing in use,⁶ especially among low- low-income consumers and consumers with poor credit profiles.⁷ These low-end prepaid wireless products provide a set number of minutes, and often texts, for a set price. Consumers must purchase a package of new minutes periodically to maintain their service.

³ As the Consumer and Governmental Affairs Bureau noted in its Request for Comments on Blackboard’s Petition: Blackboard argues that Congress intended for the emergency purposes exception to be interpreted broadly, and that “all school-initiated informational messages should be considered sent for ‘emergency purposes.’” <https://www.fcc.gov/document/cgb-seeks-comment-petition-filed-blackboard-inc>.

⁴ See Edison’s Petition at 10-11. Additionally, Blackboard raises the question of whether the Commission will grant a good faith exception to calls made to reassigned numbers when the calls were made after the consent provided by previous owners of the number. ⁴ See Blackboard’s Petition at 4. The Commission’s Declaratory Ruling issued July 10, 2015 has addressed the reassigned number issue.

⁵ See FCC Consumer and Governmental Affairs Bureau, White Paper on Bill Shock (Oct.13, 2013).

⁶ See Sixteenth Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, WT Docket No. 11-186 (Rel. Mar.21, 2013), FCC 13-34 at para.98; See Fifteenth Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, WT Docket No. 11-186 (Rel. June 27, 2011), FCC 11-103 at para.167.

⁷ See Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Seventeenth Report, WT Docket No. 13-135 (Rel. Dec.18, 2014), at ¶¶ 67, 154 – 157.

Nearly 14 million low-income households maintain essential telephone service through the federal Lifeline Assistance program.⁸ Most of these Lifeline participants – over three-quarters -- have a prepaid wireless Lifeline program, which most commonly consists of 250 minutes a month for the entire household.⁹

Consumer advocates have argued that 250 minutes a month is not sufficient to meet the basic monthly communication needs of a household. Any policy or practice that would open the door to depletion of these scarce subsidized minutes allowing the receipt of unwanted calls which were not consented to by the consumer will further deplete the scarce minutes available for the entire Lifeline household.¹⁰ Lifeline households use their Lifeline phones to find work or a doctor or to access necessary services. Loss of subsidized minutes will also jeopardize health and safety, for example the ability to talk to a nurse or doctor.

Granting the relief requested in the Blackboard and Edison petitions would have a potentially devastating impact on low income customers: those who depend on prepaid plans, those who rely on the Lifeline program, and those who use plans with limited minutes.

2. Provision of a Cell Phone Number Should Only Be Considered Consent for Calls that are Closely Related to the Purpose for which the Number was Provided

We discussed our request that the Commission clarify its position regarding what types of calls and texts are consented to when a consumer provides her phone number to a business. Given the TCPA's requirement that consent to receive robocalls be express, we urge the Commission to clarify that a consumer's provision of a cell phone number to a business is, at most, consent to receive autodialed or prerecorded calls regarding the specific (and often time-limited) matter for which the telephone number was requested.

The need for clarification of this issue is illustrated by the Commission's July 10, 2015 Omnibus Order on the TCPA. In one place in the Omnibus Order, the Commission said:

By “within the scope of consent given, and absent instructions to the contrary,” we mean that the call must be closely related to the purpose for which the telephone number was originally provided. For example, if a patient provided his phone number upon admission to a hospital for scheduled surgery, then calls pertaining to that surgery or follow-up procedures for that surgery would be closely related to the purpose for which the telephone number was originally provided.¹¹

⁸ See 2012 Annual Report, Universal Services Administrative Company at 9.

⁹ See FCC Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71 (Rel. June 22, 2015) at ¶ 16 (“the standard Lifeline market offering for prepaid wireless service has remained largely unchanged at 250 minutes”); see also *Low Income Support Mechanism Distribution of Low Income Disbursements Between Wireless and Other ETCs January 2009 through September 2014*, Universal Service Administrative Company (Oct. 27, 2014).

¹⁰ Lifeline is limited to one-per-household. See 47 C.F.R. § 54.409(c).

¹¹ *Id.* at Note 474.

This language properly limits the scope of consent to the context in which the consumer provided the phone number. To interpret providing a cell phone number in a particular context as consent to receive robocalls for a host of other purposes would be contrary to consumers' reasonable expectations and the TCPA's express consent requirement.

However, elsewhere in the same Order, the Commission stated:

For non-telemarketing and non-advertising calls, express consent can be demonstrated by the called party giving prior express oral or written consent, or in the absence of instructions to the contrary, by giving his or her wireless number to the person initiating the autodialed or prerecorded call.¹²

This second statement could be read to imply that whenever a consumer provides a cell phone number to any business, the consumer has consented to receive robocalls on any and all topics. Indeed, the petition from Edison highlights the issue here. Edison's petition argues "what is obvious in the real world: when a customer provides a utility with a phone number, the customer is consenting to the utility using that number."¹³ However, that argument is a huge leap from the TCPA's requirement for *express* consent for robocalls, and it certainly does not comport with the first statement made by the Commission referenced above in the July 10, 2015 Order.

The Commission's first statement quoted above limits the consent created when a patient provides his or her number to a medical facility *to the specific circumstances for which the number was requested*. In the Commission's example, the phone number is provided in relation to a specific surgery, so the consumer has consented to calls related to that specific surgery. A necessary corollary is that providing the phone number before a surgery is not consent to receive robocalls on issues which are not "closely related to the purpose for which the telephone number was originally provided."

The best interpretation of the TCPA is that, while provision of a telephone number may be consent to receive calls on a particular topic, it is not express consent to receive autodialed or prerecorded calls on any topic about which the caller might wish to call. A company can easily request express consent to receive robocalls on specific topics, but if it has not requested or obtained this specific consent it should not be allowed to infer consent. Allowing the statutorily required "express consent" to receive robocalls to be implied from the mere provision of a telephone number opens up a host of issues about the scope of that consent. These issues would be alleviated if the business were simply required to obtain true, specific, express consent. Further, since these scenarios assume some form of a relationship between the caller and the called party, it should be a simple matter for the caller to obtain written consent. This would remove uncertainty from the caller as to the scope of consent.

¹² *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135, ___ F.C.C. ___ (July 10, 2015) ¶ 52, citing 1992 TCPA Order, 7 FCC Rcd at 8769, para. 31; ACA Declaratory Ruling, 23 FCC Rcd at 564, para. 9 ("the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.").

¹³ See Edison's Reply Comments at 11, <http://apps.fcc.gov/ecfs/document/view?id=60001042899>.

If, however, that the Commission retains its previously stated position that the simple provision of a cell phone number can constitute express consent to receive autodialed or prerecorded calls at that number, we urge the Commission to clarify that that consent *is limited to the specific purpose for which the telephone number was provided*.

The clearest way for the Commission to provide direction to callers and to protect consumers is to articulate clearly that callers should *ask* their customers (or parents, in the case of schools) which type of calls they consent to receive when the phone number is initially provided. When the context is obvious, this question need not be asked—such as when a medical facility is taking a phone number for a specific event, like an operation. However, when the patient provides the phone number in response to that question in the hospital admissions office, that should not be construed to be consent to be dunned for that bill by the hospital’s debt collector or to be called for unrelated services. In this context the primary transaction involved specific medical care, while in the context of creditor and debt collector the primary transaction is credit. Of course, the best practice would be to obtain any consent in writing.

3. Provision of a Cell Phone Number to a Utility Should Not Be Treated as Express Consent Beyond the Specific Purpose for Which the Number Was Provided

The concerns expressed in the preceding section are particularly compelling in the context of utility services. In many circumstances, a consumer’s phone number is an alternative way of identifying the account, so the consumer is unable to refuse to provide his or her number. A consumer would not reasonably expect that simply providing one’s phone number under these circumstances would constitute consent to receive robocalls. Indeed, in the case referred to by Edison illustrates this very point, as the plaintiff in the case did not believe that he had consented to receive texts to his cell phone.¹⁴ Interpreting the act of providing a phone number when establishing utility service as express consent to be autodialed about best energy usage times, or meter reading times, goes far beyond the concept of *express consent*.

Allowing utility companies to make autodialed and prerecorded calls on any subject remotely related to the provision of utility service transforms the requirement for “express consent” to allowing consent to be implied from the action of providing the phone number. Yet the statute clearly says that the consent must be *express*, which is the opposite of implied.

Edison argues that there are numerous purposes for which a utility may want to contact its customers, including outages and restoration of service, service-related work and appointment reminders, natural disaster response information, billing information that can enable customers to avoid service interruptions, and information regarding utility consumption and conservation.¹⁵ Yet, Edison fails to articulate why it does not simply obtain such consent when a customer signs up for service.

Some of these contacts are clearly emergency notices, which we agree should be included in the emergency exception (natural disaster information, for example, or if there is a threatened

¹⁴ See e.g. paragraph 23 of the Complaint in the Grant v. Commonwealth Edison case, available at https://www.comedtextsettlement.com/documents/class_action_complaint.pdf.

¹⁵ See Edison’s Reply Comments at 13, <http://apps.fcc.gov/ecfs/document/view?id=60001042899>.

disconnection in the middle of winter or during a heat wave). Others however, are clearly *not* emergencies, such as information related to appointments, billing, consumption and conservation, or calls for past due bills on a terminated account. The broad interpretation that Edison seeks would render meaningless any limitation on the concept of what types of communications were consented to, undermining the interpretation of the word “express” in the consent requirement in the statute.¹⁶

Many of the non-emergency calls utility companies make are debt collection calls. Failure to pay utility bills is usually a result of a lack of sufficient funds, or unforeseen financial hardship. It is almost never a matter of choice. It makes little sense to burden these consumers with robocalls, escalating other utility costs for the household, in an attempt to harass them into paying a bill they cannot afford. This is an especially important issue for low-income consumers who may have trouble paying their utility bills, and for whom federal assistance may be available if the bill is unpaid.¹⁷

We discussed the various types of calls listed in the Edison petition¹⁸ and provided our recommendations regarding how these different types of calls should be treated:

- a) *Warnings about planned or unplanned service outages.* To the extent that service outages create an emergency situation for some households, then they could be viewed as emergencies. To the extent these are not emergencies, they should not be permitted absent express consent.
- b) *Updates on outages or service restoration.* Consumers who have called the utility to report a service outage and have provided their phone numbers in order to receive updates will have provided consent. To the extent that this consent has not been provided, these calls should not be permitted absent express consent.
- c) *Confirmation of service restoration or information about the lack of service.* Like the calls in # b, these calls are not emergencies. If the customer has called the utility to report the outage and provided his or her cell phone number as part of that call, it might be reasonable to infer consent for call-backs about that specific matter. If consent was not provided, these calls should not be permitted
- d) *Notification of meter work, tree-trimming, or other field work.* There is no emergency presented in these scenarios, and absent consent, these calls should not be permitted.
- e) *Verification of eligibility for special rates or services.* These are not emergency calls. If the consumer provides a cell phone number as a call-back number when applying for special rates or services, it might be reasonable to construe that as consent to receive autodialed or prerecorded return calls about the application at that number, but otherwise prior express consent should be required.
- f) *Warnings about payment or other problems that threaten service curtailment.* This scenario is discussed in the mandated call section, below. These calls should not be considered emergency calls except possibly where i) extreme weather conditions exist such that the health of the household’s occupants would be endangered if the service were to be turned off, or ii) the

¹⁶ 47 U.S.C. § 227(b)(1)(A).

¹⁷ LIHEAP Emergency Assistance is designed to help low-income households facing emergency situations that threaten the health and safety of the family, such as a threatened disconnection in the middle of winter. 42 USC §8623 (c).

¹⁸ Petition for Expedited Ruling, Edison Electric Institute and American Gas Association at 3.

<http://apps.fcc.gov/ecfs/comment/view?id=60001016327>.

utility has reason to know that someone in the household relies upon electricity to operate equipment required for their health or safety.

- g) *Reminders about time-of-use pricing and other demand response events.* These calls should not be permitted absent express consent.

4. The Commission Should Not Revisit the “Established Business Relationship” Loophole Closed in the 2012 Order

A close reading of Edison’s petition indicates that these petitioners appear to be asking the Commission to reconsider its abolition of the established business relationship test as a method of determining consent for autodialed or artificial voice calls to cell phones. In its 2012 Order, the Commission explicitly rejected this as a test for consent, and instead established the requirement of express written consent for artificial voice or autodialed telemarketing calls to cell phones.¹⁹ The Commission should reject any attempts to reconsider or reestablish the established business relationship as a means of determining consent for either telemarketing calls or non-telemarketing calls.

The TCPA unequivocally requires “express” consent for autodialed or prerecorded calls to cell phones. Allowing consent to be implied from behavior contravenes to specific language of the TCPA. Allowing any kind of test that boils down to whether the parties have an established business relationship weakens the TCPA and undermines the reasoning behind the 2012 Order, which is that consumers are entitled to informed consent.

5. Express Consent Should Be Required for All Non-Emergency School-Related Robocalls

Despite the request made in Blackboard’s petition, the requirement of express consent should not be vitiated for school-related calls. It would be particularly inappropriate to treat the mere provision of a telephone number as express consent for non-emergency calls in the school context. Parents will always give a school a telephone number if they have one—because they want to receive emergency calls regarding their child’s health or safety. To construe that act as consent to receive non-emergency robocalls about band practice or PTA meetings would eviscerate both the exception for emergency calls and the requirement of express consent. Schools would always be able to robocall parents on all topics. It appears, from reading Blackboard’s petition, that parents who want to avoid non-emergency robocalls would have to refuse to give their cell phone numbers to schools, and as result, would not receive the emergency calls that they would clearly want to receive.

The problem is compounded in households with more than one adult who has a cell phone. All of the household’s phones will receive the same robocall within seconds or minutes of each other—for example, once on the residence phone, and then on both parents’ cell phones—on the same subject. When a child is in danger, these duplicate calls are appropriate warnings that parents want and need. However, when there are three phone calls simultaneously announcing a change in the band club benefit party or cancellation of a football game, these calls become invasive and offensive. More importantly, when those calls or texts come in to cell phones with strict limits on

¹⁹ 47 C.F.R. § 64.1200(f)(8). The abolition of the established business relationship test brought the FCC in conformance with the FTC.

calls and texts, the costs of each repeated notice doubles or triples. The multiplicity of these calls can leave the family without access to their cell phone for other, important calls or texts, or cause an expensive spike in the family's cell phone bill.

6. The Commission Should Not Treat All Education-Related Calls As Emergency Calls

Blackboard's petition asks the Commission to treat "all education-related informational messages distributed by Blackboard's educational customers as messages made for "emergency purposes."²⁰ Blackboard uses the example of an overdue library book for which a parent "may be unable to pay the fine" as one example of many of the types of contacts which it claims should be included under the rubric of emergency, and not subject to any prior express consent requirement at all. We urge the Commission to reject this position.

First, the calls that Blackboard identifies include many types of calls that no reasonable consumer would consider to be school-related emergencies. To define an overdue library book as an emergency would completely undermine the true concept of an emergency. If parents want to receive autodialed or artificial voice calls about overdue library books (or band practice or PTA meetings), they can easily provide express consent for these calls.

Second, defining non-emergency calls as emergencies would leave consumers with no clear means to stop the calls. In contrast to calls for which express consent is required, there is no established method to withdraw consent to receive emergency calls in either the statute or the Commission's regulations or rulings. A parent who provides a cell phone number in order to receive notices about personal emergencies affecting his or her child should not have to accept being bombarded with multiple automated notices about band practice. Providing consent to be called about non-emergency school matters must require a different method than simply providing one's phone number. Otherwise, the statute would make no sense. If mere possession of a parent's cell phone number meant that a school could make robocalls about PTA meetings and homework tips, the exception for emergency calls would be meaningless.

We discussed the types of messages that the Blackboard seeks to have included as emergency calls:²¹

- 1) *Attendance calls*. In most situations, it is not an emergency that a student does not come to school one day. However, we have proposed in the Mandated Call section below that the Commission could take a state law or local regulation requiring attendance calls into account in determining whether these calls should be considered an emergency.
- 2) *Emergency*. This name speaks for itself. Emergency calls are exempted from the requirement for express consent.
- 3) *Outreach*. These are not emergencies, and should only be permitted if the parent has provided express consent. In any event, truly effective outreach calls are most likely to be those that are made by a person, not a machine.
- 4) *Simple Survey*. These are not emergencies, and should be treated the same as other survey calls are under the TCPA: express consent is required for autodialed or pre-recorded calls.

²⁰ See Reply Comments of Blackboard, Inc. <http://apps.fcc.gov/ecfs/comment/view?id=60001031076>.

²¹ *Id.* at 4.

7. To the Extent that Any Exception Is Allowed for Mandated Calls, It Should Be Very Limited and Should Be Tied to a Determination that the Type of Call is an Emergency.

Both the Edison and the Blackboard petitions raise the question of how their providers should handle calls that they are mandated to make by state law or local regulation. Many of these calls could be deemed emergencies, but other calls do not easily fall within the definition of emergency, and we have serious doubts that all of the calls that state law or local regulation requires schools or utilities to make qualify as emergency calls. Further, many of these “mandated” disclosures are not required to be made via a call at all and certainly are not required to be made via robocall.

The fact that a state or local authority has mandated contact shows that it probably considers the call to be very important. Yet an important call is not necessarily an emergency. The purpose of this mandated call exception is to clarify which calls might truly fit within the emergency exception. Both of the petitioners are requesting a content-based exception, which the TCPA does not allow unless the calls are free to end-user. Unlike other past petitions, neither Edison nor Blackboard has suggested that it would employ calling technology to make the calls free to end-user. We are *not* advocating that the Commission allow a content-based exception. Instead, we are proposing an additional tool that the Commission can use to determine whether certain calls should be considered emergency calls.

The fact that certain types of calls are required by a legislative mandates should be one, but not the sole, determining factor in the question of whether the Commission allows these calls to be made under the emergency exception. Another core issue is whether there is a *one-time* emergency. An ongoing issue cannot, by definition, be considered an emergency.

For example, the one-time, unexplained absence of a student from school might be an emergency, if the school board has determined it to be. But this should be contrasted with the situation of a local school district that has said it is critically important for the fiscal integrity of the school district’s bottom line that every unpaid school cafeteria bill is paid, and so it mandates that every parent owing an overdue bill be called daily until the bill is paid. While the collection call may be important, and even considered an emergency by the school board, that does not – and should not – provide the basis for the Commission to consider that debt collection activity an emergency, justifying ongoing, unconsented-to robocalls.

If the Commission provides an exception for any “mandated emergency calls,” it should be *limited to calls made by public entities or providers of essential services*. In addition, as it would be contrary to the TCPA and its goals of protecting consumers to treat all mandated calls as emergencies, the calls allowed should be limited to *certain very specific subject matters spelled out by the Commission* that involve urgent matters that are at least arguably emergencies. The Commission should not provide *carte blanche* permission for these entities to robodial on any issue that a state or local government requires it to make. Instead, the Commission should specifically describe the types of calls that it approves as falling within this exception, and should permit only calls that fall within the described categories.

Simply allowing all calls that are mandated by law or regulation would open too large an exception through which the Commission could open the door to debt collection calls, telemarketing sales calls, unwanted reminder calls, and calls about non-essential matters such as pep

rallies. In other words, calls which are important and mandated by law or regulation, which might not otherwise be considered only borderline emergencies, should only be permitted when the Commission has approved the subject matter of the calls.

To the extent that the Commission considers *certain* mandated calls to be emergencies, because these calls a) involve exigent circumstances, b) are made by public entities or providers of essential services, and c) are mandated by law or regulation. However, these calls *must be limited in time and duration*. One call, possibly two, should be permitted under this mandated call exception.

At this juncture, we offer two types of calls which – when otherwise mandated by law or regulation to be made by public entities or providers of essential services – could reasonably be considered for this “mandated call” definition of emergency call. We note this list does *not* include calls that are quite obviously emergencies (such as utility outages or school schedule weather alerts or information about the health or safety of a student):

1. Calls during extreme weather months (cold winter or hot summer) that utility service will be terminated unless arrangements are made;
2. Calls regarding a student’s unexplained absence.

To ensure that Lifeline and other low-income consumers are protected, the Commission should also closely limit both the *number and length of these calls*. For example, for “mandated calls” that the Commission agrees are emergencies, the Commission might allow one such autodialed or prerecorded call or text to be made without the prior express consent of the called party.

If the Commission takes this approach and denies the request for a *carte blanche* exemption from the TCPA, the petitioners’ members can still comply with any legislative mandates simply by making these calls without using autodialing or prerecorded voices. Calls to cell phones from public entities or providers of essential services, relating to subject matters which have not been specifically identified as emergencies by the Commission, even if mandated by law or regulation, would be permitted if a) there was express consent for the calls, b) the calls were actually related to an emergency, or c) the calls were manually dialed and not prerecorded.

8. Pending Petitions Requesting Retroactive Relief from Liability Should be Rejected.

We also discussed other petitions pending before the Commission, including those by F-19 (filed July 29, 2015), Kale Realty (filed July 23, 2015) and Mammoth Mountain Ski Area (filed February 23, 2015). All three of these petitions request retroactive relief from liability for their previous violations of the TCPA relating to telemarketing calls.

The rules requiring express written consent for telemarketing calls to cell phones have been perfectly plain since the Commission’s issuance of its 2012 order.²² Callers were provided twelve months to implement the rules and ensure they were in compliance for future calls. In October, it will have been three years since the 2012 order came out. There is no justification for providing

²² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 2012 (specifying the type of consent needed for autodialed and prerecorded-voice calls to wireless and wireline numbers, requiring in-call opt-out mechanisms for prerecorded telemarketing calls, and exempting from TCPA requirements prerecorded calls to residential lines made by health care-related entities governed by HIPAA).

callers who have continued to ignore the requirements for telemarketing calls to cell phones with relief from these mandates. Allowing such retroactive relief harms the consumers who received these illegal calls, and sends the wrong message to the calling community. It implies that the Commission will continue to provide “get out of jail free” cards for callers who brazenly disobey the Commission’s pronouncements on the requirements for making telemarketing calls to cell phones. This undermines the Commission’s authority and it unfairly harms those callers who went to the expense and trouble to comply with the rules.

Recommendations

This analysis leads to the need for a clear set of guidelines interpreting these issues:

- 1. The requirement for callers to obtain “express consent” means that consent must have been provided for the type of information contained in the call or text.**
 - a. Express consent for non-telemarketing calls can be provided orally or in writing, but it must be provided for calls or texts about certain, specific transactions, or certain, specific types of information or notices.
 - b. If express consent can be implied at all, it must be implied from the circumstances of the specific transaction, so must be limited in time and the content of any calls must relate closely to the specific transaction.
 - c. Express consent to be called about a wide variety of issues tangentially related to the service or product that was the subject of the transaction must be specifically obtained by the caller relating to different subject matters.

- 2. The Commission could reasonably treat the fact that a call was mandated as a factor in determining whether it is an emergency call, but only under these narrow circumstances:**
 - a. The Commission should specifically identify the types of calls that will be considered emergency calls under the TCPA if the calls are required by law.
 - b. Permission to treat these calls as emergency calls should apply only to public entities (i.e. public schools), or providers of essential services (i.e. utility providers).
 - c. The Commission should allow these calls only after approving the general subject matter of these calls.
 - d. The allowed types of calls should not include calls for telemarketing or debt collection purposes. Along this line, any such calls should not be dual purpose such as an emergency call that service will be terminated coupled with a message to contact the company to pay the bill or the same call coupled with new rate offers.
 - e. Because of the potential cost of these calls to consumers with Lifeline or other limited minutes on their cell phone plans, the length and number of the calls included within this delineated emergency definition for mandated calls should be

closely restricted, such as by allowing only one autodialed or prerecorded call pursuant to this exception.

3. **All requests for retroactive relief from liability for non-compliance with the Commission's 2012 Order regarding telemarketing calls should be denied.**

Thank you for your attention to our concerns. If you have any questions, please contact me.

Sincerely,

Margot Saunders
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Descriptions of National Organizations On Behalf of Which Our Comments Were Filed

Consumer Action has been a champion of underrepresented consumers nationwide since 1971. Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change.

The **Consumer Federation of America** is an association of nearly 300 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy and education.

The **National Association of Consumer Advocates** (NACA) is a non-profit association of consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

National Consumer Law Center (NCLC) is a non-profit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. NCLC has expertise in protecting low-income customer access to telecommunications, energy and water services in proceedings at the FCC and state utility commissions and publishes *Access to Utility Service* (5th edition, 2011) as well as NCLC's *Guide to the Rights of Utility Consumers* and *Guide to Surviving Debt*.

National Consumers League provides government, businesses, and other organizations with the consumer's perspective on concerns including child labor, privacy, food safety, and medication information. The mission of the National Consumers League is to protect and promote social and economic justice for consumers and workers in the United States and abroad.