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August 12, 2016

Via Electronic Filing

The Hon. Mark J. Langer, Clerk
United States Court of Appeals
for the District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

Re: *ACA International, et al. v. FCC*, Nos. 15-1211 *et al*
Citation of supplemental authorities under Rule 28(j) of the Federal Rules of
Appellate Procedure

Dear Mr. Langer:

Utility Amici bring to the Court's attention the FCC's August 4, 2016 declaratory ruling in *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278. This ruling is relevant to the above-referenced proceeding because it reinforces the conclusion that compliance with the agency's "one call safe harbor" rule (FCC Br., pp. 59-60) is impossible and therefore unlawful. *See* Joint Petitioners' Opening Brief, pp.50-54; and Utility Amici Brief, pp. 5-15.

The FCC's ruling (attached) granted a petition by two of the Utility Amici asking the agency to find that when utility customers provide their cellphone numbers to the utility they thereby expressly consent to receive automated calls "reasonably and closely related to ... utility service." Declaratory Ruling, ¶ 18. In so ruling, the FCC determined that customers generally "welcome" alerts about "extreme weather conditions approaching that might cause service outages," "utility repair work in their immediate vicinity," or "tree trimming or meter reading that may be conducted on their property or near their residence." *Id.*, ¶ 30. It also added that "*speeding* the dissemination of information regarding service interruptions or other potential public safety hazards can be critically important." *Id.*, ¶ 28. (emphasis added)

August 12, 2016

Page 2

These two conclusions – that customers want this information *and* want it disseminated quickly – reinforce the central argument Utility Amici made in our brief. The FCC has acknowledged that its own precedent requires it to interpret the TCPA “so as not to demand [] the impossible.” Order, n. 312 (JA 1193). Utility Amici had argued that it would be impossible to comply with the “one call safe harbor” rule precisely because customers want service outage and restoration updates and want them to be provided quickly. Since that might well mean multiple updates in a single day, it would be physically impossible to avoid unintentionally calling a reassigned number twice or more in a day. The FCC’s acknowledgment that “speeding” this type of information to customers via automated calls is “critically important” reinforces the conclusion that compliance with the “one call safe harbor” rule would be impossible.

Respectfully submitted,

/s/ Harvey L. Reiter

Harvey L. Reiter

*Counsel for Utility Amici
(American Gas Association,
Edison Electric Institute,
National Association of Water Companies and
National Rural Electric Cooperative Association)*

Attachment

August 12, 2016

Page 3

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), I hereby certify that I have this 12th day of August, 2016, caused the foregoing document to be served on all parties or their counsel of record through the CM/ECF system, if they are registered users or, if they are not, by U.S. Mail, as indicated below:

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August 12, 2016

Page 4

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August 12, 2016

Page 5

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August 12, 2016

Page 6

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August 12, 2016

Page 7

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August 12, 2016

Page 8

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August 12, 2016

Page 9

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/s/ Harvey L. Reiter
Harvey L. Reiter

Dated: August 12, 2016

ATTACHMENT

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
Blackboard, Inc. Petition for Expedited)	
Declaratory Ruling)	
)	
Edison Electric Institute and)	
American Gas Association)	
Petition for Expedited Declaratory Ruling)	

DECLARATORY RULING

Adopted: July 8, 2016

Released: August 4, 2016

By the Commission: Commissioner Rosenworcel approving in part, dissenting in part and issuing a statement; Commissioner O’Rielly issuing a statement.

I. INTRODUCTION

1. Today, we confirm that school callers may lawfully make robocalls and send automated texts to student family wireless phones pursuant to an “emergency purpose” exception or with prior express consent without violating the Telephone Consumer Protection Act (TCPA).¹ We similarly clarify that utility companies may make robocalls and send automated texts to their customers concerning matters closely related to the utility service, such as a service outage or warning about potential service interruptions due to severe weather conditions, because their customers provided consent to receive these calls and texts when they gave their phone numbers to the utility company. We therefore grant substantial relief to Blackboard, Inc.² and Edison Electric Institute (“EEI”) and the American Gas Association (“AGA”) (collectively “EEI/AGA”)³ albeit on more narrow grounds than the parties seek.

2. By tailoring relief to the narrow circumstances presented in these petitions, we ensure the TCPA does not thwart welcome and expected communications from schools and utilities without diluting the TCPA’s core consumer protections.

¹ The TCPA is codified as section 227 of the Communications Act of 1934, as amended. *See* 47 U.S.C. § 227. Unless otherwise indicated, the term “robocalls” includes calls made either with an automatic telephone dialing system (“autodialer”) or with a prerecorded or artificial voice. *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1831, para. 1 (2012) (*2012 TCPA Order*). We may also refer to prerecorded voice and artificial voice calls collectively as “prerecorded calls.”

² *See* Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed by Blackboard, Inc. on Feb. 24, 2015 (*Blackboard Petition*).

³ *See* Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278, filed by Edison Electric Institute and American Gas Association on Feb. 12, 2015 (*Edison Petition*).

II. BACKGROUND

A. The Telephone Consumer Protection Act

3. In 1991, Congress enacted the TCPA to address certain calling practices that invade consumer privacy and threaten public safety.⁴ In relevant part, the TCPA and the Commission's implementing rules prohibit: (1) making telemarketing calls using an artificial or prerecorded voice to *residential* telephones without prior express consent;⁵ and (2) making *any* non-emergency call using an automatic telephone dialing system ("autodialer")⁶ or an artificial or prerecorded voice to a *wireless* telephone number without prior express consent.⁷ The TCPA expressly exempts from these prohibitions calls made for "emergency purposes."⁸ If the call includes or introduces an advertisement or constitutes telemarketing, consent must be in writing. If an autodialed or prerecorded call to a wireless number is not for such purposes, consent may be oral or written.⁹ The Commission has concluded that the TCPA's protections against unwanted calls to wireless numbers encompass both voice calls and text messages, including short message service (SMS) texts, if the call is made to a telephone number assigned to such service.¹⁰

4. Most recently and in light of increasing requests for clarification of the TCPA from businesses that robocall and text, the Commission resolved more than twenty petitions on a wide variety of TCPA issues.¹¹ Particularly relevant for the instant cases, the Commission has stated that "persons who knowingly release their telephone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."¹² In the *ACA Declaratory Ruling*, the Commission clarified that a party who provides his or her wireless number to a creditor as part of a credit application "reasonably evidences prior express consent by the cell phone

⁴ See 47 U.S.C. § 227.

⁵ *Id.* § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3). Certain calls, such as those by or on behalf of a tax-exempt nonprofit organization or calls subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), may be made without the prior express written consent of the called party. 47 C.F.R. § 64.1200(a)(3).

⁶ 47 U.S.C. § 227(a)(1) (an "automatic telephone dialing system" is "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."); see also 47 C.F.R. § 64.1200(f)(2) ("The terms *automatic telephone dialing system* and *autodialer* mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.").

⁷ 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1) (emphasis added). This restriction also applies to such calls directed to emergency numbers and other specified locations.

⁸ 47 U.S.C. § 227(b)(1)(A)-(B). The Commission's rules define "emergency purposes" to mean "calls made necessary in any situation affecting the health and safety of consumers." See 47 C.F.R. § 64.1200(f)(4).

⁹ 47 C.F.R. § 64.1200(a).

¹⁰ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003) (*2003 TCPA Order*); see also *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009) (noting that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a "call"). In the *2015 Omnibus TCPA Declaratory Ruling*, the Commission added that non-SMS text messages "sent from text messaging apps that enable entities to send text messages to all or substantially all text-capable U.S. telephone numbers, including through the use of autodialer applications or otherwise installed on mobile phones" also require consumer consent under the TCPA. See *2015 Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd at 8020, para. 116.

¹¹ See generally *id.*

¹² *Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8769, para. 31 (1992) (*1992 TCPA Order*).

subscriber to be contacted at the number regarding the debt.”¹³ In the case of healthcare providers, the Commission clarified that the provision of a phone number constitutes prior express consent if the covered entities are making calls within the scope of the consent given, and absent instructions to the contrary.¹⁴ The Commission also clarified that as a general matter consent must come from the number’s subscriber and not, for example, the consumer the robocaller “intended” to call if those parties are different.¹⁵

B. Blackboard

5. On February 24, 2015, Blackboard, Inc. (Blackboard) filed a request for a declaratory ruling that “all automated informational messages sent by an educational organization via a recipient’s requested method of notification are calls made for an ‘emergency purpose’ and thus outside the requirements of the [TCPA].”¹⁶ Blackboard provides “an interactive web portal available to its educational organization customers (usually an individual school or larger system covering several school locations), which allows each school to draft informational messages and distribute them as the school chooses.”¹⁷ Blackboard argues that “automated calls made for non-commercial purposes are distinguishable from telemarketing or solicitation calls under the TCPA” and such calls from educational institutions are “the types of informational messages that consumers want to receive on their wireless devices.”¹⁸ Blackboard cites a number of informational calls made by educational institutions that it argues should be considered sent for emergency purposes including: (1) “attendance” messages, which alert parents to an unexcused absence; (2) “emergency” messages, which alert the school community to a variety of emergency situations (*e.g.* weather, fire, health risk, threat situations); (3) “outreach” messages, which provide education-related information to parents regarding school activities (*e.g.*, teacher conferences, back-to-school night); and (4) “simple survey” messages, which allow recipients to RSVP to events or provide input on an important issue.¹⁹ Blackboard also asks the Commission to declare that such informational messages sent to a wireless telephone number constitute a call made with “prior express consent” when “the wireless telephone number has been provided to the caller as a means of providing information” to the recipient, “even if the wireless telephone number later is in use by another consumer.”²⁰ Finally, Blackboard seeks a declaratory ruling that “called party” as used in the TCPA and Commission’s rules refers to the “intended recipient” of the informational message.”²¹

6. Blackboard’s petition indicates that it provides technologies and products to educational, government, and business customers including mass notification services.²² The “Blackboard Connect”

¹³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, 23 FCC Rcd 559, 564, para. 9 (2008) (*ACA Declaratory Ruling*).

¹⁴ *See 2015 Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd at 8028, paras. 140-41, n.474 (clarifying that by “within the scope of consent given, and absent instructions to the contrary,” means “that the call must be closely related to the purpose for which the telephone number was originally provided”).

¹⁵ *Id.* at 7999-8012, paras. 71-97.

¹⁶ *See generally Blackboard Petition*.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 5-6 (noting that “[o]nly those messages with an educational purpose (as determined by the school) are transmitted to the wireless telephone number provided, and the school does not use the wireless telephone number to transmit messages for any other non-educational or telemarketing purpose”).

¹⁹ *Id.* at 8.

²⁰ *Id.* at 12-13.

²¹ *Id.* at 14.

²² *Id.* at 2.

platform “is used primarily in the educational setting to enable schools to send mass notifications to parents, guardians, students, and faculty regarding emergency weather closures, threat situations, event scheduling, or to provide other important education-related information.”²³ These messages “can be distributed as an automated/prerecorded telephone call to either a wireline or wireless telephone number, as a text message (or SMS) to a wireless device, or as an e-mail, and can be sent via all methods simultaneously if that option is selected by the school.”²⁴

7. On March 23, 2015, the Consumer and Governmental Affairs Bureau sought comment on the *Blackboard Petition*.²⁵ Ten parties filed comments and seven parties filed reply comments, including many schools.²⁶ Several commenters support Blackboard’s petition, reiterating the arguments made therein.²⁷ In particular, these commenters note the importance of automated technologies that allow educational institutions to send mass notifications to parents, students, and faculty regarding various school events and activities.²⁸ Although many of these commenters contend they obtain prior express consent to send such messages, they note the difficulties in monitoring wireless telephone numbers that have been reassigned to other parties who may not be associated with the intended recipient.²⁹

8. A few commenters oppose certain aspects of the petition.³⁰ These commenters take issue with the broad nature of Blackboard’s request arguing it brings within the emergency-purpose exception a wide range of calls that do not constitute emergencies.³¹ Joe Shields notes that the TCPA does not treat informational calls differently from telemarketing calls in protecting wireless consumers from robocalls.³² National Consumer Law Center argues that low-income consumers who have plans with limited minutes must be protected from unwanted calls by restricting emergency calls to true emergencies.³³ Randall Snyder contends that “the emergency exemption that Blackboard is seeking provides no value whatsoever, as the company claims to have already obtained prior express consent for automated calls and text messages and there is no need to obtain consent for legitimate automated emergency calls and text

²³ *Id.* We do not adjudicate herein whether Blackboard or its client schools are the party that “make” or “initiate” the automated calls under the TCPA. We note that this issue has not been raised by Blackboard nor addressed by commenters and is a fact-specific inquiry that would have to be decided on a case-by-case basis. *See, e.g., The Joint Petition filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, CG Docket No. 11-50, Declaratory Ruling, 28 FCC Rcd 6574 (2013). For drafting simplicity, however, we refer to the calls at issue as being made by “school callers.”

²⁴ *Blackboard Petition* at 2.

²⁵ *See Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling filed by Blackboard, Inc.*, CG Docket No. 02-278, Public Notice, 30 FCC Rcd 2645 (CGB 2015) (Blackboard Public Notice).

²⁶ *See* Appendix A for a list of commenters and reply commenters.

²⁷ *See, e.g.*, DC Public Schools Comments at 1-2; COHEAO Comments at 1; Fairfax Public Schools Comments at 1; LAUSD Comments at 1; Kecia Ray Comments at 1-2; EDUCAUSE Reply Comments at 1-2; Washington University Reply Comments at 1-2.

²⁸ *See, e.g.*, DC Public School Comments at 1; COHEAO Comments at 1; LAUSD Comments at 1; Chicago Public Schools Reply Comments at 1.

²⁹ *See, e.g.*, EDUCAUSE Comments at 2; Twitter Comments at 3.

³⁰ *See generally* NCLC Comments; Joe Shields Comments (filed Apr. 22, 1015); Randall Snyder Comments.

³¹ *See, e.g.*, NCLC Comments at 9.

³² *See* Joe Shields Comments at 1-2, 5.

³³ *See* NCLC Comments at 3-4.

messages.”³⁴ Snyder contends that technologies exist for any telecommunications company to eliminate, or at least greatly reduce, the number of misdirected calls that it automatically dials.³⁵

C. Edison

9. On February 12, 2015, Edison Electric Institute and American Gas Association filed a petition for expedited declaratory ruling requesting that the Commission confirm, under the TCPA, that providing a wireless telephone number to an energy utility constitutes “prior express consent” to receive, at that number, non-telemarketing, informational calls related to the customer’s utility service, which are placed using an autodialer or an artificial or prerecorded voice.³⁶ In support of their petition, EEI/AGA note that the availability of reliable electric and gas service to the public is critically important and that interruption of these services creates enormous inconvenience and poses a risk to public safety.³⁷

10. According to EEI³⁸ and AGA,³⁹ their members often need to contact their customers, for example, to: (a) provide notification about planned or unplanned service outages; (b) provide 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) verify eligibility for special rates or services, such as medical, disability, or low-income rates, programs and services; (f) warn about payment or other problems that threaten service curtailment; and (g) provide reminders about time-of-use pricing and other demand-response events.⁴⁰ EEI/AGA state that some of these notifications are mandated by state regulation, some have been adopted at the urging of regulatory authorities, and others are viewed as critical to providing safe, efficient, and reliable service and meeting their obligations to the communities they serve.⁴¹

11. EEI/AGA also state that their members have long used autodialers and prerecorded calls to reach their customers about service or related issues.⁴² Moreover, as utility customers increasingly have transitioned to using wireless phones, EEI/AGA note that their members also have transitioned to using new technologies for notifying their customers, including using wireless-only technologies, such as text messaging.⁴³ Thus, according to EEI/AGA, their member utilities use automated texting technologies to send service-related information to customers who have provided wireless numbers.⁴⁴

12. In light of these and related developments, EEI/AGA originally requested in their petition that the Commission clarify that non-telemarketing, informational communications, placed using an

³⁴ Randall Snyder Comments at 6 (arguing “Blackboard’s actual motivation for seeking this emergency exemption appears to be rooted in shirking responsibility for making misdirected calls to individuals who did not provide prior express consent”).

³⁵ Randall Snyder Comments at 9.

³⁶ *Edison Petition* at 4.

³⁷ *Id.* at 1.

³⁸ According to EEI, it is the association that represents all United States investor-owned electric companies, and its members operate in all 50 states and the District of Columbia, providing electricity for 220 million Americans. *Id.* at 2.

³⁹ According to AGA, it represents more than 200 local energy utility companies that deliver natural gas to more than 68 million homes, businesses, and industries throughout the United States, and its members deliver 94 percent of all natural gas provided by the nation’s natural gas utilities. *Id.* at 2.

⁴⁰ *Id.* at 3.

⁴¹ *Id.* at 4.

⁴² *Id.*

⁴³ *Id.* at 5.

⁴⁴ *Id.*

autodialer or a prerecorded or artificial voice, to customers about their utility service at the number provided by the customer in connection with establishing or continuing their utility service do not violate the TCPA.⁴⁵ EEI/AGA urged the Commission to make this clarification so as to ensure that energy utility industries can employ emerging communication technologies to contact their diverse customers with time-sensitive information about their utility service.⁴⁶

13. On February 24, 2015, the Consumer and Governmental Affairs Bureau sought comment on the *Edison Petition*.⁴⁷ Twenty four parties filed comments and seven parties filed reply comments, including many electric, gas and water utility companies.⁴⁸ Most commenters -- twenty three commenters and four reply commenters -- support the requested relief. Supporting commenters stated that their customers are increasingly using only wireless phones, so it is important that, given this increasing trend, utility companies develop new methods to effectively communicate with their customers.⁴⁹ A number also noted that there could be serious public safety risks to some utility customers who do not receive certain communications from their utility.⁵⁰ Furthermore, several supporting commenters stated that most of their utility customers desire to receive notifications from their utility company,⁵¹ and many commenters pointed out that granting the requested relief is consistent with the purpose of the TCPA.⁵² Additionally, several commenters highlighted a “chilling effect” on communications with customers purportedly caused by recent class action lawsuits alleging TCPA violations by utility companies, giving rise, among other things, to the need for the requested relief.⁵³ A few commenters requested additional or further relief from the Commission, such as clarifying that the requested relief be extended to include other entities including the alarm industry or customer contact centers.⁵⁴

14. One commenter, Joe Shields, opposed the requested relief, filing both comments⁵⁵ and reply comments⁵⁶ in opposition.⁵⁷ Shields contends that petitioners are seeking a blanket exemption from

⁴⁵ *Id.* at 12.

⁴⁶ *Id.* at 14.

⁴⁷ See *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Rulemaking Filed By Edison Electric Institute and American Gas Association*, CG Docket No. 02-278, Public Notice, 30 FCC Rcd 1871 (CGB 2015). Comments were due on March 26, 2015 and reply comments were due on April 10, 2015. *Id.*

⁴⁸ See Appendix B for a list of commenters and reply commenters.

⁴⁹ See AGL at 1; AEP at 5; AWWC at 4-5; CenterPoint at 1-2; Con. Ed at 3-4; EPCOR at 1; Eversource at 1; Exelon at 5; NAWC at 2; National Grid at 5-6; NRECA at 4; NJNG at 4, 8; Oncor at 1-2; PSEG at 2-3; Puget Sound at 1-2; Southern at 5; SCEC at 2-3; Vectren at 2; WE at 3.

⁵⁰ See Southern at 6-7; Vectren at 1-2; WE at 1; EEI/AGA reply comments at 9. See also Letter dated June 8, 2015 to Marlene H. Dortch, Secretary, FCC, from Marlene Santos, Vice President, Customer Service, Florida Power and Light, CG Docket no. 02-278 at 1-2.

⁵¹ See *Edison Petition* at 4; AEP at 4; CenterPoint at 3; SCEC at 3; EEI/AGA reply comments at 2-3, 4; see also letter to Marlene H. Dortch, Secretary, FCC, from Tracy P. Marshall, counsel for NRECA, CG Docket No. 02-278, dated August 14, 2015 at 2, stating some customers have complained about *not* receiving important informational calls and texts on account of their cooperatives ceasing such communications.

⁵² See, e.g., Exelon at 9; NRECA at 5-6; NJNG at 7; PSEG at 2.

⁵³ See, e.g., AEP at 5; AWWC at 6, 8; CenterPoint at 2; SCEC at 2-3; Vectren at 2; WE at 3.

⁵⁴ Alarm Industry reply comments at 2-3; Genesys at 2-3. Other commenters requested their own unique relief as well. See, e.g., Oncor at 3 (requesting that the Commission also explicitly state that by giving the retail electric provider such consent, the customer has also given consent to receive phone calls from the transmission and distribution company that serves the customer). Because we do not have petitions and a record before us on these requests, we exercise our discretion to decline to address these requests for further relief at this time.

⁵⁵ Comments of Shields.

the TCPA without providing any evidence that a controversy or uncertainty exists that needs clarifying.⁵⁸ In addressing the purported chilling effect of recent class action lawsuits, Mr. Shields states that being sued for violating the TCPA is not a valid reason to create a blanket exemption from the consent requirement of the TCPA.⁵⁹ He also notes that the increased use of cell phones does not warrant altering the TCPA's prior express consent requirement as it is "the only protection preventing unlimited automatically dialed or prerecorded calls" to cell phone numbers.⁶⁰ In an *ex parte* filing, National Consumer Law Center urges that certain "vulnerable" wireless cell phone users who have limited minutes should be protected from too many calls.⁶¹ National Consumer Law Center also urges that the provision of a cellphone number by a consumer to a utility should only be considered consent to receive auto dialed or prerecorded calls that are closely related to the purpose for which the number was provided.⁶²

15. Three parties filed reply comments supporting the requested relief in part but also opposing it to the extent the relief sought is overly broad. Specifically, the National Association of Regulatory Utility Commissioners, Pennsylvania Public Utility Commission, and the State of New Jersey Division of Rate Counsel support the requested relief in part to the extent the communications are related to emergencies, service outage, and service restoration confirmation that fall within the emergency-purpose exception, but oppose additional relief to the extent it is overly broad in seeking to exempt, for example, the entire range of utilities' customer communications from statutory prohibition.⁶³ The State of New Jersey Division of Rate Counsel also argued that equating a customer's providing a telephone number to an energy utility company with "prior express consent" to receive calls prohibited by the TCPA would violate the TCPA requirement of express consent.⁶⁴

16. In response to those reply comments that partially support the relief it seeks on the basis of the emergency-purpose exception, EEI/AGA narrowed its request to focus on relief for a narrower subset of calls based solely on consumer consent rather than the emergency-purpose exception.⁶⁵

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⁵⁶ Reply comments of Shields.

⁵⁷ See also Letter to Marlene H. Dortch, Secretary, FCC, from Robert Biggerstaff, CG Docket No. 02-278, at 1-2 (dated October 5, 2015) (contending that the problem lies in the medium chosen to relay the information and that calls made with a live human being, rather than a robot, would eliminate the problem for utility companies).

⁵⁸ Shields at 2-3.

⁵⁹ Reply comments of Shields at 7.

⁶⁰ *Id.* at 6-7.

⁶¹ Letter to Marlene H. Dortch, Secretary, FCC, from Margot Saunders, counsel for National Consumer Law Center, CG Docket No. 02-278, dated August 7, 2015 (*2015 NCLC August 7 Ex Parte Filing*) at 3-4, stating that the extent to which relief should be granted should be analyzed by examining 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.

⁶² Letter to Marlene H. Dortch, Secretary, FCC, from Margot Saunders, counsel for National Consumer Law Center, CG Docket No. 02-278, dated August 24, 2015 (*2015 NCLC August 24 Ex Parte Filing*) at 2-4.

⁶³ See reply comments of NARUC at 2-3; PA PUC at 3-4; Rate Counsel at 1-3, 12. More specifically, contending that wireless consumers should not have to pay for communications from utilities that they may not wish to receive, NARUC states it would not oppose a carefully conditioned grant of petitioner's requests, but only if the Commission is confident that 47 U.S.C. § 227 provides the agency with authority to condition the grant of EEI and AGA's request to exclude communications regarding energy efficiency, service disconnections, bill collection, and other potentially unwelcome programs and alerts. Reply comments of NARUC at 3.

⁶⁴ See reply comments of Rate Counsel at 9.

⁶⁵ Letter to Marlene H. Dortch, Secretary, FCC, from Scott Blake Harris, counsel for EEI, CG Docket No. 02-278, dated June 9, 2015 (*Edison June 2015 Ex Parte Filing*); see also letter to Marlene H. Dortch, Secretary, FCC, from Scott Blake Harris, counsel for EEI, CG Docket No. 02-278, dated August 10, 2015 (*Edison August 2015 Ex Parte*

(continued...)

EEI/AGA asks the Commission to declare that by providing their phone numbers to utility companies, consumers have consented to receive particular types of calls: calls that warn about planned or unplanned service outages; calls that provide updates about service outages or service restoration; calls that ask for confirmation of service restoration or information about lack of service; calls that provide notification of meter work, tree trimming, or other field work; calls that warn about payment or other problems that threaten service curtailment, but *not* post-service termination debt collection calls; calls that notify consumers they may be eligible for subsidized or low-cost services due to certain qualifiers such as, *e.g.*, age, low income or disability; and calls that provide information about potential brown-outs due to heavy energy usage.⁶⁶

III. DISCUSSION

17. We confirm that school callers may lawfully make autodialed calls and send automated texts to student family wireless phones without consent for emergencies including weather closures, fire, health risks, threats, and unexcused absences. We grant school callers additional relief for calls and messages that, while not emergencies, nevertheless are closely related to the school's mission, such as notification of an upcoming teacher conference or general school activity, by clarifying our understanding that such calls are (absent evidence to the contrary) made with the prior express consent of the called party when a telephone number has been provided to an educational institution by that called party. We similarly clarify that utility companies may make autodialed calls and send automated texts to their customers concerning matters closely related to the utility service, such as a service outage or warning about potential service interruptions due to severe weather conditions, because their customers provided consent to receive these calls and texts when they gave their phone numbers to the utility company.

18. The relief we grant here ensures consumers will get the messages they want, indeed that are often critical, without undermining the TCPA's goal of protecting consumers from unwanted messages. On the latter point, we decline to extend the TCPA's emergency purpose exception to every automated call made by an educational organization or to extend relief to all categories of utility calls, as first requested by EEI/AGA, such as post-service termination debt collection. We therefore narrowly tailor relief to calls reasonably and closely related to school missions and utility service. Our findings here are case-specific and are based in part on the unique nature of the services and messages. For example, we find that messages about parent-teacher conferences are essential to a parent's tracking of student performance and that the messages in Edison's petition concern an essential utility service and can have implications for personal safety. Future petitioners seeking similar relief should be aware that the Commission continues to interpret "closely related" narrowly, consistent with the TCPA's goal of protecting consumers from unwanted messages while still ensuring they receive essential and desired communications.

19. As a brief framework for our analysis, we start by noting that the Commission's rules define an emergency for TCPA purposes as "any situation affecting the health and safety of consumers."⁶⁷ Non-emergency robocalls and automated texts are lawful if the caller has the consumer recipient's prior express consent. The Commission determined that consent is required whether the call is telemarketing or not.⁶⁸ Neither the Commission's rules nor its orders require any specific method by which a caller must obtain such prior express consent when such calls do not introduce an advertisement or constitute

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Filing). EEI/AGA also noted in its filing that the Commission need not rule at this time on the other remaining calls for which it initially sought relief in the *Edison Petition*. See *Edison June 2015 Ex Parte Filing* at 2.

⁶⁶ *Id.* at 3.

⁶⁷ 47 C.F.R. § 64.1200(f)(4).

⁶⁸ See *2015 Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd at 8022, para. 123.

telemarketing.⁶⁹ The clearest way to obtain consent is for a caller to be explicit about the types of calls he or she wishes to have consent for, and the Commission has acknowledged that in limited cases, the mere giving of a telephone number as a contact number satisfies the consent requirement as long as the call or text is closely related to the purpose for which the consumer gave the number⁷⁰ consistent with the point that “Congress did not expect the TCPA to be a barrier to normal, expected and desired business communications.”⁷¹ The “scope of consent must be determined upon the facts of each situation.”⁷²

A. Blackboard

20. *Emergency Purpose.* We grant in part and deny in part Blackboard’s request to confirm that all robocalls made by an educational organization are calls made for an “emergency purpose” that fall outside the requirements of the TCPA.⁷³ Specifically, we confirm that autodialed calls to wireless numbers made necessary by a situation affecting the health and safety of students and faculty are made for an emergency purpose. In such situations, autodialed calls made by school callers do not require consent pursuant to the TCPA’s “emergency purpose” exception as defined in the Commission’s implementing rules.⁷⁴ Even though calls made for an emergency purpose can be made without the prior express consent of the called party, we encourage educational organizations to regularly update their emergency calling lists to ensure that emergency-purpose calls do in fact reach the parent or guardian of each affected student and are not received by consumers with no connection to the school. In this context, we are concerned not only about the privacy of persons who are mistakenly called, but also about the privacy and safety of students.

21. The record provides several examples of calls and messages from school callers that we confirm impact the health and safety of students and faculty.⁷⁵ These include, for example, calls or

⁶⁹ As stated in 2012, the TCPA and our rules require “some form of prior express consent for autodialed or prerecorded non-telemarketing calls to wireless numbers” and “leave[] it to the caller to determine, when making an autodialed or prerecorded non-telemarketing call to a wireless number, whether to rely upon oral or written consent in complying with the statutory consent requirement.” *2012 TCPA Order*, 27 FCC Rcd at 1842, para. 29.

⁷⁰ As it relates to the provision of telephone numbers given to healthcare providers, the Commission has concluded that “[T]he call must be closely related to the purpose for which the telephone number was originally provided.” *See 2015 Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd at 8029, para. 141, n.474; *see also 1992 TCPA Order*, 7 FCC Rcd at 8769, para. 31 (“[p]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”) In that order, the Commission cited the House Report as authority for that point and it characterized the House Report as “noting that in such instances the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications.” *Id.*; *see also House Report*, 102-317, 1st session, 102nd Congress, at 13 (1991).

⁷¹ *GroupMe, Inc./Skype Communications S.A.R.L.*, CG Docket No. 02-278, Declaratory Ruling, 29 FCC Rcd 3442 at 3444, para. 8 (2014) (*GroupMe Order*); House Report, 102-317, 1st session, 102nd Congress, at 17 (1991).

⁷² *GroupMe Order*, 29 FCC Rcd at 3446, para. 11.

⁷³ *See Blackboard Petition* at 11-12.

⁷⁴ *See* 47 C.F.R. § 64.1200(f)(4). This is also consistent with the principles of the Communications Act of 1934, as amended, which include promoting “the safety of life and property through the use of wire and radio communications.” *See* 47 U.S.C. § 151.

⁷⁵ We note that this list is not meant to be an exhaustive list of emergency calls but represents those examples cited in the current record. Other types of calls may conceivably fall within the emergency-purpose exception if they can be shown to be made for health or safety reasons. As discussed in greater detail below, however, we also confirm that some calls cited in the record do not fall within this exception because they are not made for health or safety reasons.

messages relating to weather closures,⁷⁶ incidents of threats and/or imminent danger to the school due to fire, dangerous persons, health risks (*e.g.*, toxic spills), and unexcused absences.⁷⁷ We find that these types of calls fall within the emergency-purpose exception because they potentially affect the health and safety of students, faculty, and other school staff members. For example, a notification to a parent of an unexcused absence can alert them to a situation potentially implicating the health and safety of an unaccounted-for child who either did not arrive at school as expected or did not stay at school.⁷⁸ In fact, under some state and local laws, schools are required to alert parents or guardians of an unexcused absence for safety reasons.⁷⁹

22. *Non-Emergency Calls.* We decline to extend the TCPA's emergency-purpose exception to *all* robocalls made by school callers.⁸⁰ Rather, we clarify that autodialed or prerecorded calls made for purposes that do not affect health and safety concerns fail to qualify as calls made for an emergency purpose. Instead, we agree with NCLC that the mere fact that an informational message comes from a

⁷⁶ See also 47 C.F.R. § 73.1250(a) (defining broadcast emergency information in “emergency situations” to include “school closings and changes in bus schedules resulting from [weather] conditions”). We note that third parties sending emergency messages, *e.g.*, in cooperation with schools to disseminate time-sensitive alerts, are also exempt under the emergency exemption as long as the messages are limited to the emergency at issue and do not include any marketing. We emphasize that our finding will not promote the proliferation of unwanted robocalls from *any* third party to *any* person under the auspices of an emergency. First, purported emergency calls cannot be targeted to just any person. These calls must be about a *bona fide* emergency that is relevant to the called party. For example, calls about school closings, which we have already noted as a scenario that constitutes an emergency, would be relevant to parents or guardians of students or “other members of the school community.” See Letter to Marlene H. Dortch, Secretary, FCC, from Patrick R. Halley, counsel for Hubbard Broadcasting, Inc., CG Docket No. 02-278, dated Feb. 8, 2016 (*Hubbard Ex Parte Filing*) at 1-2. Second, our ruling addresses only the specific situation raised in the record concerning calls made by third parties who work in partnership with schools, such as “broadcasters who work directly with schools in order to send critical school-related public safety announcements, such as school closings.” *Id.* at 1 (emphasis added). Our ruling does not address other situations or calls made by other, unrelated third parties. Further, we note that the parents and other members of the school community who receive the messages described in the *Hubbard Ex Parte Filing* have chosen to opt in to the messaging service. *Id.* at 2. This overall approach will make it easier for parents to receive time-sensitive messages about their children’s school even where the message does not come directly from the school itself, especially since parents have expressed an interest in receiving the messages.

⁷⁷ See, *e.g.*, Blackboard Reply Comments at 4-6.

⁷⁸ See, *e.g.*, *id.* at 4-5 (citing example of a school that has adopted absence notifications following a kidnapping). Blackboard indicates that a majority of the automated messages it sends relate to attendance. *Id.*

⁷⁹ See *id.* at 5 (examples include Fairfax County Public School Board Policy 2232.4, Special Services, Admissions, Residency, and Attendance, § III.B. (revised Aug. 1, 2011), “When students are absent without prior communication between the parent or guardian and the school, school personnel will notify the parent or guardian by phone or electronic communication and take appropriate action based on the individual circumstances.”; Fairfax County Public School Regulation 2234.7, Special Services, Admissions, Residency, and Attendance, § IV (effective Aug. 16, 2011), “All schools shall establish a system for administrative follow-up of absences. In elementary schools, follow up with parents or guardians, via telephone or other communication, should occur within the first hour of the school day. Parents or guardians of secondary school students should be notified of unexcused absences or need for follow up as early in the day as possible.”; New Jersey Administrative Code § 6A:16-7.6(a)(4), requiring school districts to “[m]ake a reasonable attempt to notify the student’s parents of each unexcused absence”; Oregon Revised Statutes § 339.071, requiring each district school board to adopt “an attendance notification policy” that notifies parents or guardians “by the end of the school day on any day that the child has an unplanned absence”; and Florida Statutes § 1003.26, requiring schools “to respond in a timely manner to every unexcused absence” by “contact[ing] the student’s parent to determine the reason for the absence”;).

⁸⁰ See *Blackboard Petition* at 8; see also Chicago Public Schools Comments at 1; DC Public Schools Comments at 2; Blackboard Reply Comments at 6-8.

school caller does not make it an emergency.⁸¹ Even interpreted broadly, we find no reasonable health or safety concern implicated by a notification of an upcoming teacher conference, or general school activity that leads us to conclude these are the types of calls that Congress intended to fall within the emergency-purpose exception.⁸² In fact, Blackboard's own petition characterizes these types of messages as "outreach" messages separate from "emergency" messages.⁸³ In addition, as NCLC notes, concluding that all robocalls from school callers are made for an emergency purpose that requires no consumer consent under the TCPA would leave consumers without a clear means to stop such calls by revoking consent.⁸⁴

23. Non-emergency autodialed or prerecorded calls are permissible under the TCPA and our implementing rules when made with the prior express consent of the called party, however. Blackboard states that schools obtain prior consent to make such calls to wireless phones.⁸⁵ And schools filing comments in this matter confirm that they obtain prior consent to make such calls.⁸⁶ When prior express consent has been obtained from the called party and the call falls within the scope of consent given, absent instructions to the contrary, such calls are permissible under the TCPA and our implementing rules.⁸⁷ Although the scope of consent given by a parent/guardian or student can vary depending on individual factual circumstances,⁸⁸ we clarify, consistent with the Commission's rationale relating to the provision of telephone numbers to healthcare providers and debt collectors, that when a parent/guardian or student provides only their wireless number as a contact to a school, the scope of consent includes communications from the school closely related to the educational mission of the school or to official school activities absent instructions to the contrary from the party who provides the phone number.⁸⁹ In other words, a parent/guardian or student who provides their wireless number to a school as a contact has given permission to be called at that number for such purposes.

24. We clarify that, of the categories of non-emergency calls discussed in Blackboard's petition, all but one category of non-emergency calls are closely-related to the educational mission of the school and thus fall within the scope of consent for educational institutions when a parent/guardian or student provides only their telephone number. These calls include those that inform parents of teacher conferences and surveys that provide input on school-related issues because these are closely related to the purpose for which parents and students provide telephone numbers to schools. We note, for example, that calls relating to parent-teacher conferences are essential for parents to track their child's educational

⁸¹ See *2015 NCLC Ex Parte Filing* at 9.

⁸² See also NCLC Comments at 9 ("the calls that Blackboard identifies include many types of calls that no reasonable consumer would consider to be school-related emergencies").

⁸³ See *Blackboard Petition* at 8.

⁸⁴ NCLC Comments at 9.

⁸⁵ See *Blackboard Petition* at 10.

⁸⁶ See Chicago Public Schools Comments at 2 (consent obtained from parents and guardians at the beginning of each school year along with request to confirm and update contact information at least twice annually); DC Public Schools Comments at 1 (message recipients give consent and designate how they prefer to be contacted); Fairfax Public Schools Comments at 5 (requires potential message recipients to provide numbers for contact purposes with ability to change this information online or by contacting the school); LAUSD Comments at 4 (requires message recipients to give consent to contact them and designate how they prefer to be contacted).

⁸⁷ The Commission has noted that "[b]y '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." See *2015 Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd at 8029, para. 141, n.474.

⁸⁸ See, e.g., *GroupMe Order*, 29 FCC Rcd 3442 at 3446, para. 11.

⁸⁹ See, e.g., *ACA Declaratory Ruling*, 23 FCC Rcd at 564, para. 9; *2015 Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd at 8029, para. 141, n.474.

progress and that surveys can serve as a key method to improving a school's performance on important educational issues.⁹⁰ For these reasons, we clarify that such calls are closely related to the purpose for which a parent/guardian or student would provide their telephone number to an educational institution. By limiting relief to the circumstance where the call is closely related to the purpose for which the telephone number was provided to a school, we believe that we have addressed the concerns of those commenters who caution that granting Blackboard's petition would erode the TCPA's protections against unwanted calls and texts to wireless consumers.⁹¹

25. One category of calls that Blackboard mentions - *non-school* events – does not necessarily qualify as closely related. While Blackboard does not provide details about such calls, it offers as an example calls about local community events. If such calls lacked any educational purpose or connection to official school activities, it would likely fall outside the scope of consent when the parent or student has only provided a number to the school without disclosure that they may receive such calls.⁹² As a result, we encourage schools to disclose the full range of all potential calls and messages that a parent/guardian or student should expect to receive when requesting consent from parents/guardians and students. Such disclosure will ensure that anticipated calls made by an educational institution fall within the scope of consent given by parents/guardians and students to be contacted by a school. We reiterate that consumers have a right to revoke prior consent, using any reasonable method including orally or in writing.⁹³ Schools, therefore, must be prepared to honor revocation requests from parents/guardians or students who no longer wish to receive non-emergency calls and texts from the school.

26. *Reassigned Numbers.* Finally, we dismiss as moot Blackboard's request to confirm that consent obtained from the original subscriber to a wireless number constitutes prior express consent when such number has been reassigned to another subscriber or when, due to inadvertence or oversight, the called party is not the intended recipient.⁹⁴ The Commission recently addressed these issues in the *2015 Omnibus TCPA Declaratory Ruling* and we decline to reconsider the *Blackboard Petition* herein.⁹⁵

B. Edison

27. We next grant in part the *Edison Petition* as modified⁹⁶ for the reasons set forth below. Because we grant in part the *Edison Petition* as modified on other grounds, we do not reach the question of whether the communications sent by utility companies to their customers would fall within the TCPA's "emergency-purpose" exception,⁹⁷ which Edison has requested that we forego, and, as requested, do not

⁹⁰ See, e.g., LAUSD Comments at 2-3; Kecia Ray Comments at 2-3.

⁹¹ See, e.g., NCLC Comments at 9; Joe Shields Comments at 1-2, 5.

⁹² While not squarely before us in this proceeding, reports of schools using platforms to call about ballot issues or marketing of any kind raise serious TCPA concerns. See, e.g., *Brevard Public Schools to Review Its Robocall Policy*, Oct. 20, 2015 available at <http://news.brevardtimes.com/2015/10/brevard-public-schools-to-review-its.html>. These types of messages appear to stray far from the educational mission of the school or specific school activities and thus likely are not encompassed by the consent consumers grant when they provide phone numbers. We strongly encourage schools and other robocallers to be clear to consumers about the type of messages they would like to send to consumers, or risk TCPA enforcement.

⁹³ See *2015 Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd at 7996, para. 64.

⁹⁴ See *Blackboard Petition* at 9-11.

⁹⁵ See *2015 Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd at 8000-10, paras. 73-92 (concluding that callers are liable for robocalls to reassigned wireless numbers when the current subscriber to or customary user of the number has not consented, subject to a limited, one-call opportunity for cases in which the caller does not have actual or constructive knowledge of the reassignment.).

⁹⁶ See *Edison June 2015 Ex Parte Filing* at 3.

⁹⁷ See 47 U.S.C. § 227(b)(1)(A); *In the Matter of the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Notice of Proposed Rulemaking, 7 FCC Rcd at 2738, para. 17 (1992).

rule at this time on the other remaining calls.⁹⁸ We emphasize that our clarification in no way alters the Commission's prior statements regarding how the TCPA's "emergency-purpose" exception applies to calls made by utility companies.

28. Turning to the petitioners' representations about the critical nature of the utility services provided by their members, we agree with many in the record who highlight the wide range of potential risks to public health and safety presented by an interruption of utility service due to extreme weather conditions that can lead to unexpected service outages, or even service outages necessitated by repair and maintenance work.⁹⁹ We also agree that speeding the dissemination of information regarding service interruptions or other potential public safety hazards can be critically important. In fact, the Commission has long recognized that "[s]ervice outages and interruptions in the supply of water, gas or electricity could in many instances pose significant risks to public health and safety, and the use of prerecorded message calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public."¹⁰⁰

29. We agree with the majority of commenters who urge us to grant the requested relief and clarify our requirements. Specifically, we clarify that consumers who provide their wireless telephone number to a utility company when they initially sign up to receive utility service, subsequently supply the wireless telephone number, or later update their contact information, have given prior express consent to be contacted by their utility company at that number with messages that are closely related to the utility service so long as the consumer has not provided "instructions to the contrary."¹⁰¹

30. Specifically, we find that calls closely related to the service include those that warn about planned or unplanned service outages; provide updates about service outages or service restoration; ask for confirmation of service restoration or information about lack of service; provide notification of meter work, tree trimming, or other field work that directly affects the customer's utility service;¹⁰² notify consumers they may be eligible for subsidized or low-cost services due to certain qualifiers such as, *e.g.*, age, low income or disability;¹⁰³ and calls that provide information about potential brown-outs due to heavy energy usage. We agree with petitioners and many commenters who described many of these

⁹⁸ See *supra* para. 16; *Edison June 2015 Ex Parte Filing* at 2.

⁹⁹ See, *e.g.*, *Edison Petition* at 1; *Southern* at 6-7; *Vectren* at 1-2; *WE* at 1; *EEL/AGA reply comments* at 9; see also *Edison August 2015 Ex Parte Filing* at 1.

¹⁰⁰ *1992 TCPA Order*, 7 FCC Rcd at 8778, para. 51.

¹⁰¹ *1992 TCPA Order*, 7 FCC Rcd at 8769, para. 31.

¹⁰² There is evidence in the record that maintenance and field work can be important to aid in preventing power outages. For example, tree pruning provides a necessary safety buffer between people working near high voltage lines and helps prevent power outages during storms. See, *e.g.*, Letter dated May 12, 2015 to Marlene H. Dortch, Secretary, FCC, from The Honorable Annise D. Parker, Mayor of the City of Houston, Texas, CG Docket no. 02-278 at 1-2; Letter dated May 13, 2015 to Marlene H. Dortch, Secretary, FCC, from Stephen C. Costello, Houston City Council At-Large, Position 1, Texas, CG Docket no. 02-278 at 1; Letter dated May 14, 2015 to Marlene H. Dortch, Secretary, FCC, from Jack Christie, D.C., Houston City Council Member, At-Large 5, Texas, CG Docket no. 02-278 at 1-2; Letter dated May 18, 2015 to Marlene H. Dortch, Secretary, FCC, from Michael Kubosh, Houston City Council At-Large, Position 3, Texas, CG Docket no. 02-278 at 1-2; Letter dated May 22, 2015 to Marlene H. Dortch, Secretary, FCC, from Richard A. Nguyen, Houston City Council Member, District F, Texas, CG Docket no. 02-278 at 1. Moreover, timely contact regarding field work on a customer's property can avoid unnecessary surprise or confusion on the part of the homeowner, help safeguard utility workers' safety while performing such work, and ensure the work is performed without any delay. *Id.*

¹⁰³ This category of calls is limited to notification about eligibility or qualification to participate in a particular subsidy or subsidized program. This category of calls is not intended to include calls soliciting voluntary participation in programs such as, for example, energy saving programs to reduce monthly energy bills or donations to subsidize other energy consumers.

communications as being critical to providing safe, efficient and reliable service.¹⁰⁴ Because the relief we provide is tailored more narrowly than Edison's original request and is limited to calls closely related to the service, we resolve concerns raised in the record that the relief requested is "overly broad." This relief is not, as some commenters feared,¹⁰⁵ a blanket exemption from the TCPA for utility companies; we are reasonably interpreting the scope of utility customers' consent. Further, the record indicates that many customers would welcome alerts warning them of extreme weather conditions approaching that might cause service outages, alerts about utility repair work in their immediate vicinity that might inconvenience them, or alerts notifying them of tree trimming or meter reading that may be conducted on their property or near their residence.¹⁰⁶ Additionally, there is evidence in the record that low-income households -- especially those in urban and minority communities more reliant upon wireless phones as their primary source of communications -- are particularly vulnerable to service interruptions, making it even more imperative that they receive appropriate notice, especially before, during and after emergency situations.¹⁰⁷ This evidence supports our conclusion that these communications are among those to which consumers have consented.

31. To ensure that utility companies call only those consumers who have consented to receive autodialed and prerecorded calls and that such calls are closely related to the provision of service, we conclude that the utility company should be responsible for demonstrating that the consumer provided prior express consent as it is in the best position to keep records in the usual course of business showing such consent, and the utility company will bear the burden of showing it obtained the necessary prior express consent.¹⁰⁸ In this regard, we strongly encourage utility companies, and all robocallers, to inform customers during the service initiation process or when updating contact information on the account as an additional safeguard that, by providing a wireless telephone number to them, the customer consents to receiving autodialed and prerecorded message calls at that number, to the extent such calls are closely related to the service purchased by the customer. This additional safeguard will also help ensure that certain "vulnerable" wireless cell phone customers with limited minutes are afforded opportunities at that time to limit calls to their devices if needed.¹⁰⁹

32. With regard to calls regarding payment about current utility service, we provide the following guidance. We find that, in the absence of facts supporting a contrary finding, prior to the termination of a customer's utility service, a customer who provided a wireless telephone number when he or she initially signed up to receive utility service, subsequently supplied the wireless telephone number, or later updated his or her contact information, is deemed to have given prior express consent to be contacted by their utility company for calls that are closely related to the service, calls described

¹⁰⁴ See *Edison Petition* at 1, 4, Southern at 6-7; Vectren at 1-2, WE at 1; and EEI/AGA reply comments at 9. See also Letter dated June 8, 2015 to Marlene H. Dortch, Secretary, FCC, from Marlene Santos, Vice President, Customer Service, Florida Power and Light, CG Docket no. 02-278 at 1-2.

¹⁰⁵ See, e.g., reply comments of Shields at 2-3, 7; reply comments of Rate Counsel at 6-8.

¹⁰⁶ *Edison Petition* at 4, AEP at 4, CenterPoint at 3, SCEC at 3, EEI/AGA reply comments at 2-3, 4; see also letter to Marlene H. Dortch, Secretary, FCC, from Tracy P. Marshall, counsel for NRECA, CG Docket No. 02-278, at 2 (dated August 14, 2015) (stating some customers have complained about *not* receiving important informational calls and texts on account of their cooperatives ceasing such communications); Letter to Marlene H. Dortch, Secretary, FCC, from Scott Blake Harris, counsel for EEI, CG Docket No. 02-278, at 2-3 (dated September 30, 2015) (*Edison September 2015 Ex Parte Filing*) (noting that many studies and media reports show that consumers want more, not less, contact from their utility companies).

¹⁰⁷ See Letter dated June 17, 2015 to the Honorable Tom Wheeler, Chairman, FCC, from the Reverend Jesse L. Jackson, Founder and President, Rainbow Push Coalition in CG Docket No. 02-278 at 1.

¹⁰⁸ See *2015 Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd at 7989-90, para. 47; *ACA Declaratory*, 23 FCC Rcd at 565, para. 10.

¹⁰⁹ See *2015 NCLC August 7 Ex Parte Filing* at 3-4.

above¹¹⁰ and calls to warn about the likelihood that failure to make payment will result in service curtailment. After a customer's utility service has been terminated, however, routine debt collection calls by utilities to those customers will continue to be governed by existing rules and requirements, and we leave undisturbed the existing legal and regulatory framework for those calls.¹¹¹

33. The relief we grant is limited and tailored to the set of calls before us. It does not extend to every call made by a utility company to its customer. Also as the Commission recently stated, consumers may revoke consent in any reasonable manner that clearly expresses a desire not to receive further messages, and callers may not infringe on that ability by designating an exclusive means to revoke consent.¹¹²

34. We agree with petitioners and other commenters that these certain calls by the utility company solely for the purpose of communicating with its customer about the utility services it provides and the maintenance thereof as described above are not telephone solicitations and do not constitute telemarketing.¹¹³ Therefore, we find that these certain calls by a utility company regarding the utility services it provides and the maintenance thereof as described above are not subject to the TCPA's separate restrictions on "telephone solicitations."¹¹⁴

IV. ORDERING CLAUSES

35. For the reasons stated above, IT IS ORDERED, pursuant to sections 4(i), 4(j) and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 227, and sections 1.2 and 64.1200 of the Commission's Rules, 47 C.F.R. §§ 1.2, 64.1200, Petition for Declaratory Ruling filed by Blackboard, Inc. in CG Docket No. 02-278 on February 24, 2015, IS GRANTED IN PART and IS OTHERWISE DENIED to the extent discussed herein.

36. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j) and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 227, and sections 1.2 and 64.1200 of the Commission's Rules, 47 C.F.R. §§ 1.2, 64.1200, that the Petition for Expedited Declaratory Ruling filed by Edison Electric Institute and the American Gas Association IS GRANTED IN PART and IS OTHERWISE DENIED to the extent indicated herein.

¹¹⁰ See *supra* para. 30.

¹¹¹ See *ACA Declaratory Ruling*, 23 FCC Rcd at 564-65, paras. 9-11; see also *2015 NCLC Ex Parte Filing* at 7-8 ("[w]hen a person signs up for utility service and is required to provide his or her phone number as a condition of receiving that service, it is unreasonable to assume that there was express consent to receive debt collection robocalls after the service has been disconnected"). We do not address other agencies' rules and regulations that may apply.

¹¹² See *2015 Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd at 7996, para. 63.

¹¹³ See *ACA Declaratory Ruling*, 23 FCC Rcd at 565, para. 11; 47 C.F.R. § 64.1200 (e).

¹¹⁴ Accordingly for those reasons and others more fully described above regarding prior Commission precedent, we disagree with the State of New Jersey's argument that equating a customer's provision of a telephone number to an energy utility company with "prior express consent" violates the TCPA's requirement of express consent. See reply comments of Rate Counsel at 9. We find that these certain calls by a utility company regarding the utility services it provides and the maintenance thereof are reasonable normal business communications that a consumer expects to receive.

37. IT IS FURTHER ORDERED that this Declaratory Ruling shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A**List of Commenters on the Blackboard Petition****Commenter**

Coalition of Higher Education Assistance Organization
 District of Columbia Public Schools
 Education Finance Council
 Fairfax County Public Schools
 Los Angeles Unified School District
 National Consumer Law Center et al.
 Kecia Ray
 Joe Shields
 Randall Snyder
 Twitter, Inc.

Abbreviation

COHEAO
 DC Public Schools
 EFC
 Fairfax Public Schools
 LAUSD
 NCLC
 Kecia Ray
 Joe Shields
 Randall Snyder
 Twitter

Reply Commenters

Blackboard, Inc.
 Board of Education of the City of Chicago
 Campus Safety Health and Environmental Management Assoc.
 EDUCAUSE
 National Association of College and University Business Officers
 National Association of Chain Drug Stores
 Washington University in St. Louis

Blackboard
 Chicago Public Schools
 CSHEMA
 EDUCAUSE
 NACUBO
 NACDS
 Washington University

APPENDIX B**List of Commenters on the Edison Petition**

<u>Commenter</u>	<u>Abbreviation</u>
AGL Resources	AGL
Alliant Energy	Alliant
American Electric Power	AEP
American Water Works Company, Inc.	AWWC
Brian Moore	Moore
CenterPoint Energy Houston Electric LLC & CenterPoint Energy Resources Corporation	CenterPoint
Consolidated Edison Company of New York, Inc. & Orange and Rockland Utilities, Inc.	Con. Ed.
EPCOR Water (USA) Inc.	EPCOR
Eversource Energy	Eversource
Exelon Corporation	Exelon
Genesys Telecommunications Laboratories, Inc.	Genesys
Joe Shields	Shields
MidAmerican Energy Company	MidAmerican
National Association of Water Companies	NAWC
National Grid USA, Inc.	National Grid
National Rural Electric Cooperative Association	NRECA
New Jersey Natural Gas Company	NJNG
Oncor Electric Delivery Company, LLC	Oncor
Public Service Electric and Gas Company	PSEG
Puget Sound Energy, Inc.	Puget Sound
Southern Company	Southern
Southern California Edison Company	SCEC
Vectren Corporation	Vectren
We Energies	WE
 <u>Reply Commenters</u>	
Alarm Industry Communications Industry	Alarm Industry
Edison Electric Institute & American Gas Association	EEI/AGA
Genesys Telecommunications Laboratories, Inc.	Genesys
Joe Shields	Shields
National Association of Regulatory Utility Commissioners	NARUC
Pennsylvania Public Utility Commission	PA PUC
State of New Jersey Division of Rate Counsel	Rate Counsel

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
APPROVING IN PART, DISSENTING IN PART**

Re: *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Blackboard, Inc. Petition for Expedited Declaratory Ruling; and Edison Electric Institute and American Gas Association Petition for Expedited Declaratory Ruling, Declaratory Ruling, CG Docket No. 02-278*

It is no secret that consumers detest robocalls. Every month we receive thousands of complaints about them here at the Commission. Across town, our friends at the Federal Trade Commission log even more. It is no wonder these complaints keep rolling in—Consumer Reports estimates that robocalls now make up 35 percent of all phone calls placed in the United States.

Twenty-five years ago Congress passed the Telephone Consumer Protection Act to protect consumers from what was then a small but growing scourge of unwanted calls. While this law is showing its age, the Commission still has the power to use it to help consumers receive the calls they want and avoid the ones they do not want to receive.

To this end, here we address two petitions before the Commission under this law. First, we make clear that if you have provided energy and utility companies with your number, they can reach out to you when the power goes out, when service is being restored, and when dangerous work is being done on electrical facilities near your home. In other words, they have the ability to reach out to you when safety is at stake. Second, we make clear that schools, which act *in loco parentis*, can reach out to a student's family or guardian in emergency situations.

As these petitions demonstrate, the Commission has the power to call balls and strikes when it comes to the Telephone Consumer Protection Act. Doing so to promote safety and prevent emergencies strikes me as an appropriate use of this authority. But I believe this is a power we need to use carefully—and sparingly. So I regretfully dissent to a small component of today's decision. The Commission goes a step too far when it deduces from its conclusion that schools may make certain calls in emergency situations—that *any* third party can also make a robocall or send a text message to *any* person under the auspices of an emergency. Nothing in the petitions before us sought such a sweeping conclusion. No rulemaking was started. No comment was sought from the public. Instead, the Commission takes the unorthodox approach of creating a third party carve-out and burying it in a footnote without proper notice or a full examination of its likely result. The Commission simply does not know what the consequences will be of inviting any third party to place a robocall or send a text. But given the number of complaints we receive on this subject, it is the Commission's responsibility to thoroughly vet any potential changes to our robocall policies. While perhaps unintended, this overbroad conclusion has the potential to become a gaping loophole that multiplies the number of unwanted robocalls consumers receive. If it does, that would be a shame. It is certainly not the outcome consumers complaining to this Commission want.

For the above reasons, I approve in part and dissent in part.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Blackboard, Inc. Petition for Expedited Declaratory Ruling; Edison Electric Institute and American Gas Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278

I support the relief provided in this Declaratory Ruling, which should help schools and utilities provide information that their respective audiences want and need. The fact that the Commission must continually grant exemptions or clarifications to its TCPA framework for these and other valuable purposes, however, highlights that its interpretations of the law are overly restrictive, unrealistic, and unworkable.

The petitions at issue here are a perfect illustration. Parents and kids can benefit greatly when schools call or text parents to let them know that their child did not arrive at school. Think about a parent's worst nightmare: the instances of the thousands of children abducted annually or other horrible events. Under the Commission's TCPA approach, the parents may not learn for hours or a full school day of their missing child unless the administrator had the chance that day to manually call each and every absentee child's parent. Autodialing or texting can be a lifesaver. Similarly, homeowners and renters of all make-ups, including the elderly, can benefit when utilities call or text residents to let them know it is safe to return home after an outage. Just imagine those citizens who await the all clear signal after a gas leak in a neighborhood, their daily lives disrupted as they find shelter at neighbors, friends, community centers or otherwise. And the only legal option for the company to pursue, absent this item, is to manually dial each and every subscriber, all to the detriment of resources to assist those in need or detect and solve the problem at hand.

If parties have to spend resources to come before the Commission to ensure that they won't face needless liability for such vital messages, then the Commission's framework has missed the mark by a very wide margin indeed. It is disappointing, but not surprising, that these practices were caught up in the Commission's misapplication of the TCPA law last year.

These experiences, and many others, are not the types of calls that the statute was intended to cover. Instead of focusing on protecting Americans from abusive telemarketing calls, the Commission is curtailing critical communications between companies and consumers. Moreover, even when the Commission claims to provide relief, it leaves petitioners subject to the reassigned number liability trap, which I do not support and is in woeful need of reform. While I am glad that the Commission is providing some modicum of relief for some of those that are forced to pursue it, I remain hopeful that the Commission's general framework will be overturned in court (assuming the Commission does not see the error of its ways beforehand) and the Commission will chart a more rational course in the future.