

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Rules and Regulations Implementing the) **CG Docket 02-278**
Telephone Consumer Protection Act of 1991)

Comments on

Petition for Declaratory Ruling of

Edison Electric Institute

by

National Consumer Law Center on behalf of its low-income clients
Consumer Action
Consumer Federation of America
Electronic Privacy Information Center
National Association of Consumer Advocates
National Consumers League
Public Knowledge
U.S. PIRG

April 10, 2025

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Comments

I. Introduction and Background

These comments are submitted by the **National Consumer Law Center** on behalf of its low-income clients, and **Consumer Action, Consumer Federation of America, Electronic Privacy Information Center, National Association of Consumer Advocates, National Consumers League, Public Knowledge, and U.S. PIRG**. These comments respond to the request for comments issued by the Consumer and Governmental Affairs Bureau¹ in relation to the Petition for a Declaratory Ruling (Petition) submitted by Edison Electric Institute (EEI).²

In 2016, the Federal Communications Commission (FCC or Commission) issued the Blackboard/Edison Declaratory Ruling,³ providing its interpretation of prior express consent when applied to automated calls to cell phones made by utility companies. In paragraph 29, the FCC stated that it was clarifying:

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.”⁴

In this petition, EEI is requesting that the FCC issue a declaratory ruling that “confirm[s] that demand response communications are ‘closely related’ to the utility service.”⁵ The petition describes demand response programs:

Demand response refers to short-term, intentional modification of electricity usage by end-user customers during system imbalances or in response to market prices.

¹ Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Comment on Petitions for Declaratory Ruling Filed by Edison Electric Institute (Rel. Mar. 11, 2025), *available at* <https://docs.fcc.gov/public/attachments/DA-25-218A1.pdf>

² *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Petition for Declaratory Ruling of Edison Electric Institute, CG Docket No. 02-278 (Mar. 7, 2025), *available at* <https://www.fcc.gov/ecfs/document/10307392011716/1> [hereinafter Petition].

³ *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Blackboard, Inc. Petition for Expedited Declaratory Ruling, Edison Elec. Inst. & Am. Gas Ass’n Petition for Expedited Declaratory Ruling, Declaratory Ruling, CG Docket No. 02-278, 31 F.C.C. Rcd. 9054 (Rel. Aug. 4, 2016), *available at* https://docs.fcc.gov/public/attachments/FCC-16-88A1_Rcd.pdf [hereinafter Blackboard/Edison].

⁴ *Id.* at ¶ 29 (emphasis added).

⁵ Petition, *supra* note 2, at 17 (emphasis added).

Demand response programs play an increasingly important role in keeping the electric grid stable and efficient and reducing the risk of blackouts; reducing the need for investment in generation, transmission and distribution systems; and delivering economic benefits to customers. All categories of utility customers (e.g., industrial, commercial, and residential) can participate in demand response programs, and residential customers can participate regardless of income or home ownership.⁶

We are in agreement with EEI that the demand response programs as described are extremely valuable for consumers, utilities, other customers, and the environment.⁷ It is our goal in these comments to assist in the facilitation of these programs. However, maintaining the rigorous interpretation of the “prior express consent” required for automated calls covered by sections (b)(1)A), and (b)(1)(B) in the Telephone Consumer Protection Act (TCPA) is imperative to ensuring that telephone subscribers have control over the calls that they receive.⁸ As the Commission quoted an individual’s comments on exactly the issue present here:

the TCPA’s prior express consent requirement . . . is ‘the only protection preventing unlimited automatically dialed or prerecorded calls’ to cell phone numbers.⁹

As we understand it, there are two different types of messages that relate to the demand response programs at issue: 1) calls and texts soliciting consumers to enroll in these programs, and 2) calls and texts to enrolled customers alerting them of necessary actions to participate in the programs. The distinction we draw between these types of calls is based on the way these programs are described in EEI’s petition, which repeatedly mentions the enrollment of customers.¹⁰ Recognizing the benefits of the programs at issue, we propose discrete ways to facilitate both types of messages without relaxing the meaning of “prior express consent.”

⁶ *Id.* at 3-4. Additionally, we understand that the term “demand-side management programs” or “DSM programs” means any of the following programs or combination of programs: (a) Energy efficiency, including weatherization and insulation; (b) Conservation; (c) Load management; (d) Beneficial electrification; and (e) Demand response programs.

⁷ *Id.* at 5.

⁸ 47 U.S.C. § 227.

⁹ Blackboard/Edison, *supra* note 3, at ¶ 14.

¹⁰ Indeed, the word “enroll” or words that include “enroll” are used in the petition seven times.

II. Messages soliciting enrollment in demand response programs should be permitted based on an exemption issued by the FCC.

A. The FCC has previously determined that calls soliciting customers for enrollment are *not* closely related to utility service, and they still are not closely related.

Demand response programs, while valuable, are not sufficiently integral to the delivery of electricity to be considered “closely related.” When customers sign up for electricity service, that does not necessarily mean that they are expecting—or agreeing—to receive automated messages soliciting them to enroll in a demand response program—even if, by doing so, they would save money. It is not a reasonable interpretation of the TCPA’s requirement for prior express consent to include any solicitations for enrollment in these programs that are not identified when consent is provided. Certainly, it is not reasonable to allow automated messages soliciting enrollment simply based on the customer’s provision of their telephone number.

The Commission has twice before addressed the issue in this petition, and both times has articulated that messages soliciting customers for enrollment in energy savings programs are *not* closely related to the provision of utility service. In the Blackboard/Edison Declaratory Ruling, the Commission said that the category of calls that it had determined to be closely related “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.”¹¹ The Commission repeated this exact language in its 2022 Order on Reconsideration and Declaratory Ruling on statutory exemptions.¹² No new information has been presented that supports undermining these previous determinations that calls to solicit enrollment in energy savings programs are not closely related to utility service. These calls were not determined to be closely related in 2016 and 2022, and they are still not closely related.

We agree with EEI that messages soliciting customers to enroll in the demand response programs are not telemarketing messages because they are not attempting to sell any product or

¹¹ Blackboard/Edison, *supra* note 3, at ¶ 30 n.103.

¹² *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, ACA Int’l, the Edison Elec. Inst., the Cargo Airline Ass’n, & the Am. Ass’n of Healthcare Admin. Mgmt. Petition for Partial Reconsideration, Enter. Comm’n’s Advoc. Coal. Petition for Reconsideration, Order on Reconsideration and Declaratory Ruling, CG Docket No. 02-278, 37 F.C.C. Rcd. 15472, 15495 n.165 (Rel. Dec. 27, 2022), *available at* <https://docs.fcc.gov/public/attachments/FCC-22-100A1.pdf>.

service. Rather, they are attempting to sell less of their own service, but that does not change whether they are closely related to that service.

B. Utilities can easily obtain prior express consent for calls soliciting enrollment for energy savings programs.

Prior express consent can easily be obtained for these calls going forward. New customers who are asked to provide their phone number when they sign up for service can be explicitly informed that, by providing their number, they are agreeing to receive automated calls soliciting them to enroll in energy savings programs. Existing customers can be requested on a regular basis to update their telephone numbers in the process of paying their bills for service and, in doing so, they can be informed of this same thing. Indeed, given the frequency that people change their telephone numbers to avoid wrong number calls, regularly requesting updates of telephone numbers seems a prudent business practice for utilities.

C. To ensure that a moderate number of calls to cell phones soliciting enrollment in energy savings programs can be made, the FCC should issue an exemption.

Given the importance of facilitating the enrollment of customers in demand response programs, we also suggest that the Commission create an exemption for these messages when sent to a cell phone, as allowed by 47 U.S.C. § 227(b)(2)(C). To qualify for such an exemption, the messages must be “not charged to the called party, [and] subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights” of subscribers.¹³

We recommend that an exemption with analogous conditions to those calls and texts sent by financial institutions for fraud alerts, breaches of security, and identity theft¹⁴ be established for these calls. However, the allowed number of these calls should be limited to no more than two messages for every six-month period. Applying the conditions applicable to calls from financial institutions to calls soliciting enrollment in demand response calls would require that—

- the messages must be sent only to the wireless telephone number provided by the customer to the utility;
- the messages must state the name and contact information of the utility (for voice calls, these disclosures must be made at the beginning of the call);
- the messages must not include any telemarketing, cross marketing, or debt collection;

¹³ 47 U.S.C. § 227(b)(2)(C).

¹⁴ 47 C.F.R. § 64.1200(a)(9)(iii).

- the messages must be concise, generally one minute or less in length for voice calls or 160 characters or less in length for text messages;
- the messages must include with each message an easy way to opt out of future such messages, as required by 47 C.F.R. § 64.1200(a)(9)(iii);
- the utility would be permitted to initiate no more than two messages in any six-month period; and
- the utility would be required to honor opt-out requests immediately.

If these messages are calls using a prerecorded or artificial voice to residential lines, they are already exempted from the requirement for prior express consent, so long as they comply with the requirements of 47 C.F.R. §64.1200(a)(3)(iii).

D. Messages to enrolled customers about demand response issues are “closely related” to the utility service for customers enrolled in those programs.

Once customers have enrolled in a demand response program, then those customers have signed up for utility service *with a demand response component*. As a result, all messages sent to those customers regarding compliance with program requirements, necessary actions, or other information about the program would be directly related to the utility service they signed up for. Therefore, if customers sign up for these programs, they have provided prior express consent for messages related to participation in these programs.

Conclusion

We would be happy to answer any questions.

Respectfully submitted, this the 10th day of April, 2025.

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