ORAL ARGUMENT NOT YET SCHEDULED
Nos. 15-1211, 15-1218, 15-1244, 15-1290,
15-1306, 15-1304, 15-1311, 15-1313, & 15-1314

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ACA INTERNATIONAL ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES,
Respondents.

ON PETITION FOR REVIEW FROM A DECISION OF THE FEDERAL COMMUNICATIONS COMMISSION

JOINT BRIEF FOR AMICI CURIAE AMERICAN GAS ASSOCIATION, EDISON ELECTRIC INSTITUTE, NATIONAL ASSOCIATION OF WATER COMPANIES AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION IN SUPPORT OF PETITIONERS

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RULE 26.1 DISCLOSURE STATEMENT
FOR CASE NOS. 05-1402, 06-1246 (CONSOLIDATED)

Pursuant to Rule 26.1 of the D.C. Circuit Rules and Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for Amici Curiae, American Gas Association (AGA), Edison Electric Institute (EEI), National Association of Water Companies (NAWC) and National Association of Rural Electric Cooperatives (NRECA) state as follows:

The American Gas Association (AGA) is a 501(c)(6) tax exempt nonprofit, nonstock association incorporated in Delaware. Founded in 1918, it represents more than 200 municipal and investor owned local energy companies that deliver clean natural gas throughout the United States. There are more than 71 million residential, commercial and industrial natural gas customers in the U.S., of which almost 94 percent – more than 68 million customers – receive their gas from AGA members. Today, natural gas meets almost one-fourth of the United States' energy needs. AGA does not have any parent companies, and no publicly-held company has a 10 percent or greater ownership interest in AGA. AGA does not issue stock.

The Edison Electric Institute (EEI) is the trade association of the U.S. shareholder-owned electric companies. EEI members serve 95 percent of the ultimate customers in the shareholder-owned segment of the industry, and they represent approximately 70 percent of the U.S. electric power industry.

EEI's diverse membership includes utilities operating in all regions of the U.S. EEI does not have any parent companies, and no publicly-held company has a 10 percent or greater ownership interest in EEI. EEI does not issue stock.

The National Association of Water Companies (NAWC) is a trade association of private water service companies providing essential water and wastewater services daily to about one in four Americans, nearly 73 million people. NAWC members range from companies in small towns and communities to the largest water operator in the country that serves 14 million people a day. The services that they provide are essential to the safety, health, and prosperity of every customer they serve. NAWC does not have any parent companies, and no publicly-held company has a 10 percent or greater ownership interest in NAWC. NAWC does not issue stock.

The National Rural Electric Cooperative Association (NRECA) is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to approximately 42 million people in 47 states, or approximately 12 percent of electric customers. Rural electric cooperative infrastructure covers 75% of the land mass of the United States. Rural electric cooperatives are private, non-profit entities that are owned and governed by the members to whom they deliver electricity. They were formed to provide safe,

reliable electric service to their member-owners at the lowest reasonable cost. NRECA does not have any parent companies, and no publicly-held company has a 10 percent or greater ownership interest in NRECA. NRECA does not issue stock.

/s/ Harvey L. Reiter
Harvey L. Reiter

Dated: December 2, 2015

REQUIRED RULE 29 STATEMENTS OF AMICI

Amici are the American Gas Association, Edison Electric Institute, the National Association of Water Companies and the National Rural Electric Cooperative Association, trade associations representing, respectively, natural gas, electric and water utilities throughout the United States. As public utilities, their members have been requested by their customers and required in many instances by their regulators, to provide notifications, often by text messaging, about service interruptions, status of facility repair efforts, service restoration updates and other similar information. And, because they often utilize automated dialing technologies to deliver these messages, they are directly affected by the FCC's order on review in this proceeding.

No person, other than amici curiae, their members or their counsel, have contributed money that was intended to fund preparing or submitting this brief. And no party or party's counsel have authored the brief, in whole or in part.

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GLOSSARY

2004 TCPA Order	Declaratory Ruling and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 19 FCC Rcd 19215 (2004)
APA	Administrative Procedure Act
ATDS	Automatic telephone dialing system
Order	Declaratory Ruling and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd 7691 (2015)
O'Rielly Dissent	Statement of Commissioner Michael O'Rielly Dissenting in Part and Approving in Part, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (2015)
Pai Dissent	Dissenting Statement of Commissioner Ajit Pai, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (2015)
TCPA	Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, codified at 47 U.S.C. § 227

Introduction

The Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227 *et seq*., is aimed at protecting the privacy of telephone users, particularly users of wireless phones, from unwanted automated and prerecorded calls. The Federal Communications Commission (FCC) rightfully notes that its enforcement of the statute entails an important balancing act. It must not only guard "the vital consumer protections of the TCPA," but must do so "while at the same time encouraging pro-consumer uses of modern calling technology." Declaratory Ruling and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd 7961 (2015), ¶ 2 (*Order*). In this endeavor, however, the Commission's efforts have badly missed the mark.

The American Gas Association, Edison Electric Institute, the National Association of Water Companies and the National Rural Electric Cooperative Association (Utility Amici) represent the interests of utilities serving hundreds of millions of gas, electric and water users throughout the country. They are concerned that the Commission's actions, far from protecting utility consumers, will stifle the ability of utilities to keep them timely informed about things of critical importance to them – power outages, gas, electric and water service interruptions, the status of repair work and service restoration efforts. These are the types of information that utility customers demand and that many utility

regulators require. As companies with statutory public service obligations, Utility Amici take these demands and requirements seriously and have invested millions of dollars in communications technology that will allow them to disseminate this critical information to their customers in the most timely and efficient manner. The services they provide are essential. Gas and electric services are used to heat, cool, light and power homes, factories and offices. And a constant safe and reliable source of water is essential to life. During circumstances like hurricanes, floods or tornadoes, for example, customers may be driven from their homes. The only way to reach these customers with timely information about restoration efforts is by calling their cellphone numbers. And that also means employing equipment the Commission treats as "automatic telephone dialing systems," the use of which is regulated under the TCPA.

As discussed in more detail below, however, the *Order* places Utility Amici in an impossible dilemma. Utility Amici have a public service obligation and must serve all customers within their franchise areas — and must necessarily communicate with all of them — particularly about service interruptions, storm preparation, service cut offs and restoration efforts. They may not have the option not to call their customers. Utilities, however, are placed at risk for many millions in TCPA fines for conduct the FCC's rules now prohibit, but that Utility Amici, even with the greatest diligence, cannot feasibly avoid.

Many utility customers use only wireless phones and their numbers are steadily increasing. Consistent with their statutory obligations, Utility Amici members have obtained prior express consent from many of their wireless customers in order to communicate with them about service outages and related information. But wireless customers often relinquish their telephone numbers, which then are reassigned. By the FCC's count, this happens nearly 40 million times a year. Wireless number reassignments can be expected to be relatively higher in rural and lower-income areas, where many Utility Amici members serve. Sometimes, consenting customers who keep their phone numbers choose to revoke their consent. And sometimes Utility Amici make live, manual calls to their customers, but do so using telephone equipment possessing features that, if enabled, would allow utilities to dial customers automatically and send them prerecorded messages.

The FCC subjects Utility Amici to unwarranted liability in each of these instances. Even though the agency admits that there is no method available for callers to discover all instances where a phone number has been reassigned, it allows Utility Amici only one call or text message to the reassigned number before they become liable for steep TCPA penalties. Some Utility Amici members have been forced to discontinue important service-related calls and texts to their customers due to the threat of litigation arising out of alleged TCPA violations. By

refusing to adopt or permit standardized methods for customers to revoke consent, the Commission likewise exposes utilities to endless litigation over the meaning of "reasonable methods" of revocation. And surely no purpose is served by making utilities liable for placing live, manual calls to their wireless customers simply because they place the calls using equipment that, if enabled, would only then be capable of automated dialing. None of these outcomes is required by the text of the TCPA and, in fact, they are antithetical to the Act's central purposes.

Statement of the Issues

1. Except for emergency calls, the TCPA requires callers placing certain types of automated calls to wireless numbers to have the prior express consent of the called party. The FCC found that there is no reliable means to discover all reassignments of consenting parties' numbers. Did the agency unlawfully then demand the impossible, when it ruled that after a single call to a reassigned number, callers would face strict liability for subsequent calls to that number?

2. The challenged order gives customers an absolute right to revoke their prior express consent at any time, using any "reasonable method" to communicate the revocation, including "orally or in writing," but leaves the definition of reasonable method to case-by-case adjudication. Did the Commission give reasoned consideration to evidence that this standard would be unworkable and burdensome?

3. The challenged order finds that equipment with the "capacity" for autodialing randomly generated number includes equipment that, if modified by software, would then be able to autodial. It further finds that calls made using equipment with that capacity would be subject to the TCPA's prior express consent requirements. Did this ruling unreasonably subject callers to liability even for manual calls placed with equipment whose autodialing capability has not been enabled?

ARGUMENT

I. The Commission's Determination That Prior Express Consent Does Not Apply Beyond One Call to Reassigned Numbers Imposes An Impossible Test, At Unexplained Odds With The FCC's TCPA Precedent.

A. It is impossible for utilities sending customers requested service-related information to comply with the FCC's one call rule.

"Many public utilities," the Commission observed a quarter century ago, "note that they communicate with their customers through prerecorded message calls and automatic telephone dialing systems to notify customers of service outages, to warn customers of discontinuance of service, and to read meters for billing purposes."[1] In the intervening years, the availability of this type of information has, if anything, expanded with the explosive growth in the use of

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

wireless phones and text messaging. Utilities now commonly provide automated notifications, increasingly by text and increasingly to the wireless phones of their customers,[2] to: (a) warn about planned or unplanned service outages; (b) provide frequent updates about outages or service restoration; (c) ask for confirmation of service restoration or information about the lack of service; (d) provide notification of meter work, tree-trimming, or other field work; (e) warn about payment or other problems that threaten service curtailment; and (f) provide notification of natural gas safety inspections.

And customers plainly want this information. J.D. Power's 2012 Electric Utility Residential Customer Satisfaction Study found that 82 percent of utility customers prefer to be proactively contacted during outages with information and updates.[3] "Customers," its spokesperson said in the press release about its report, "value being kept up to date and want to resume their lives as quickly as possible. Notifying them in a proactive manner ensures that they know the latest information and are kept apprised of their unique situation."[4] A study by the Water Research

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[2] Phil Goldstein, *Survey: More than 40% of U.S. Households Are Now Wireless-Only*, FIERCEWIRELESS (July 9, 2014) http://www fiercewireless.com/story/survey-more-40-us-households-are-now-wireless-only/2014-07-09.

[3] http://www.jdpower.com/press-releases/2012-electric-utility-residential-customer-satisfaction-study (last visited November 23, 2012).

[4] *Id*.

Foundation reached a similar conclusion. Water utility customers, it found, not only desired prompt advanced notification of service outages, they were willing to pay a monthly surcharge on their bills for these notifications.[5]

Not only are consumers increasingly demanding information services from utilities, but utility regulators are requiring utilities to deliver this information[6] and to update it "on a frequent basis."[7] The reason is obvious. Consumers are dependent on reliable gas, electric and water services and need to know promptly when those services might be affected – or if they have been affected, when service

[5] "Customer Preferences and Willingness to Pay: A Handbook for Water Utilities," Water Research Foundation (2011), available at http://www.waterrf.org/ExecutiveSummaryLibrary/4085ExecutiveSummary.pdf.

[6] *See* O'Rielly dissent at p. 125 ("Some agencies even require companies to make a certain number of calls to consumers. Additionally, companies can be obligated under state law to contact their customers.") See also, IOWA ADMIN. CODE 199-19.4(1)(c)(2015) and 199-20.4(1)(c)(2014); ILL. ADMIN. CODE tit. 83, Part 280.130(j)(2014); and S.D. ADMIN. R. 20:10:20:03(3)(2015) (requiring warning calls before service disconnection); WIS. ADMIN. CODE, PSC § 113.0502; IOWA ADMIN. CODE, 199-20.7(11)(2015), IOWA ADMIN. CODE, 199-19.7(7)(b)(2014) (notification of planned service interruptions).

[7] *See, e.g., In The Matter of the Board's Review of the Utilities' Response To Hurricane Sandy*, NJ BPU Docket No. EO12111050 (Jan. 23, 2013) ("Hurricane Sandy Order"). There, New Jersey's utility regulator observed that utilities needed to provide customers "timely and accurate restoration information" and that updates would be "expected on a frequent basis." *Id*. at p. 15. Most importantly, it ordered utilities to provide this information via "SMS text messaging through mobile app and/or through another push or messaging Notification." *In The Matter of the Board's Review of the Utilities' Response To Hurricane Sandy*, NJ BPU Docket No. EO12111050, at 3 (May 29, 2013).

might be restored. After major storms that may force utility customers from their homes, the *only* way to contact them may be through their wireless phones.

The Commission's rules interpreting the TCPA have previously required utilities to get prior express consent from their customers before they send out non-emergency automated messages of this type.[8] But the challenged order now says that when, unbeknownst to the utility, the phone number of its consenting customer has been assigned to someone else, the utility gets one call to that number. After that, the utility faces TCPA fines for any subsequent call to that number. This places utilities faced with the demands of their customers and the requirements of their regulators in an impossible bind. And the Commission admits as much.

"Even where the caller is taking ongoing steps reasonably designed to discover reassignments and to cease calls," the FCC says, "we recognize that these steps may not solve the problem in its entirety." *Id.* ¶ 85. Indeed, it acknowledges, "we do not presume that a single call to a reassigned number will always be sufficient for callers to gain actual knowledge of the reassignment, nor do we

[8] Some of the information disclosed to customers, like notifications about service outages, would fall into the category of "emergency" communications exempt from the TCPA. But as EEI noted below, without a definitive Commission ruling, utilities will be an are reluctant to make such calls. This is particularly true where the calls may not be considered emergency communications because they are, for instance, about service restoration, non-payment, energy usage or conservation. EEI and AGA Petition for Declaratory Order, FCC Docket No. 02-278 (filed Feb. 12, 2015).

somehow 'expect callers to divine from [the called consumer's] mere silence the current status of a telephone number.'" *Id.* ¶ 90, n.312.

So, it says, the *Order* therefore strikes a "middle ground where the caller would have an opportunity to take reasonable steps to discover reassignments and cease such calling before liability attaches." *Id.* ¶ 89. That middle ground, it concludes, is giving callers "an opportunity to avoid liability for the first call to a wireless number following reassignment…." *Id*. But, by the agency's own account, "[t]he record provides little guidance regarding the length of time following the first call to a reassigned number that would reasonably enable a caller to discover the reassignment…." *Id.* ¶ 88. The FCC's best case for its "middle ground," therefore, is admittedly guesswork. "Callers," it postulates, "have a number of options available that, *over time*, *may* permit them to learn of reassigned numbers." *Id.* ¶ 86. (emphasis added).

The problem for electric, gas and water utilities, of course, is that this "middle ground" is nothing of the sort. Where a party expressly consents to receive outage restoration information, it may get more than one update in a day. These notifications are often given by a series of text messages throughout the duration of the outage. Getting "one free pass," as Commissioner O'Rielly calls it in his dissent, is therefore of little consolation to a utility. In other words, because of the

very nature of the updates the consenting customer anticipates, a text mistakenly sent to a reassigned number will be followed with another such text.

The FCC's assertion that "the first call to a wireless number after reassignment … may act as an opportunity for the caller to obtain constructive or actual knowledge of reassignment," *Id.* ¶ 82, is thus demonstrably inaccurate.[9] There is no such opportunity when a utility has made several automated calls in succession to the same number. As the agency itself notes, "callers lack guaranteed methods to discover all reassignments immediately after they occur." *Id.* ¶ 85.[10] In other words, the "one strike and you're out" rule will be impossible for utilities

[9] Nor, as dissenting Commissioner Pai observes, should this Court take seriously the FCC's suggestion that callers, otherwise unable to timely discover all number reassignments, condition service to a customer on its agreement to be sued if it fails to notify the caller when its phone number has been reassigned. "[N]othing in the TCPA or our rules," he aptly observes, "suggests that Congress intended the TCPA as a weapon to be used against consumers that forget to inform a business when they switch numbers." Pai Dissent at p. 121. It bears emphasis, moreover, that even this unpalatable option may not be available to utilities. The terms and conditions of their service to customers are regulated by state public service commissions that may not tolerate such restrictions.

[10] Exacerbating the problem for utilities is that the FCC's rules allow only a "single caller"-- which it defines to include the caller and its affiliates — to get the one free pass. Take the unlikely case where, before the text alert goes out, the utility actually gets timely notice that a number had been reassigned. If the utility's affiliate is the party tasked with sending service status updates to the utility's customers, that information may never get to the affiliate on time or at all. Indeed, under New Jersey law, public utilities are *barred* from sharing customer information with their affiliates. See N.J. ADMIN. CODE §§ 14:4-3.4 and 3.5 (2015).

to follow and will expose them to liability for mistakes they will not feasibly be able to avoid. If, as the FCC says, it chose the "one strike" rule because "the record … offers little on how to balance the interests of called parties who might receive unwanted calls," *Id.* ¶ 88, it fell down on the job. The Commission's obligation was not to punt, but to develop the necessary record on its own. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965) (as "representative of the public interest" an agency is not permitted to "act as an umpire blandly calling balls and strikes," but "must see to it that the record is complete").

B. The FCC's one call rule departs arbitrarily from its own impossibility standard.

As discussed above, the Commission acknowledges that there is no foolproof method by which even the most diligent caller could discover every instance in which the number of a consenting party has been reassigned to someone else. The Commission also acknowledges that its own precedent requires it to interpret the TCPA "so as not 'to demand [] the impossible.'" *Order* n.312. Nevertheless, the Commission claims there is "no basis in the statute or the record before us to conclude that callers can reasonably rely on prior express consent beyond one call to reassigned numbers." *Id*. "Subject to this one-call threshold," it adds, "the caller — and not the wireless recipient of the call" bears the statute's

prior consent risk. *Id*. "For these and other reasons," it concludes, its ruling "is not undercut by prior Commission precedent in other contexts implementing the TCPA so as not to demand the impossible." *Id*.

The Commission's conclusion simply makes no sense. It does not explain why its own precedent is inapplicable. Nor does it explain why implying consent "beyond one call to reassigned numbers" has "no basis in the statute." It also does not explain why the statute requires the caller to bear the risk beyond one call to reassigned numbers. And it never gets around to explaining (or even listing) the "other reasons" its ruling "is not undercut by prior Commission precedent."

The "prior Commission precedent" to which the agency refers was a 2004 decision interpreting the "prior express consent" provision of the TCPA in instances where the called party was taking wireline service (not subject to the prior consent requirement) but switched its number to wireless service. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 19 FCC Rcd 19215 (2004) (*2004 TCPA Order*). Even if callers had "immediate access" to the information, it said, *some* time period, which the agency set at 15 days, was still "necessary to allow callers to come into compliance with the rules." Citing *McNeil v. Time Ins. Co.*, 205 F.3d 179, 187 (5th Cir. 2000), it concluded that without such a "safe harbor" the statute would impermissibly "demand the impossible." *Id.* ¶ 9.

Many utilities, as noted earlier, are under an obligation to provide consenting customers frequent updates about service restoration conditions, perhaps several times during a day. Requiring that they come into compliance after a single call to a reassigned number — even if they have no reason to think the number was reassigned — will no less "demand the impossible" of them. Yet the FCC fails to distinguish their circumstances from those of the callers granted a safe harbor in the *2004 TCPA Order*. Having itself already found that compliance with the one-call threshold was indeed impossible,[11] the Commission was obliged here — as it was in the *2004 TCPA Order* — to explain how that "one-call threshold" could possibly "allow callers to come into compliance with the rules." On the contrary, its order is arbitrary and capricious; it reflects a complete disconnect "between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

The Commission's actions are not only arbitrary, they are ultra vires. Even where a statutory term admits of some ambiguity, the agency's discretion under *Chevron* is limited to the "gray area." *Cellco Partnership v. FCC*, 700 F.3d 534, 547 (D.C. Cir. 2012). The gray area, for example, in FCC enforcement of common carriage obligations is "the space between *per se* common carriage and *per se*

[11] That finding itself is inconsistent with the agency's claim that there was "no basis in the record" to conclude "that callers can reasonably rely on prior express consent beyond one call to reassigned numbers." *Order* n.312.

private carriage." *Id*. Similarly here, what constitutes express prior consent is bounded by what is impossible to achieve and by actions knowingly made after consent has been expressly withheld. Whatever "prior express consent" requires, it cannot lawfully require the impossible. The one-call threshold demands the impossible.

But even where the issue falls within the "gray area," to constitute a permissible interpretation under *Chevron* the agency's ruling must also satisfy the arbitrary and capricious standard. *Nat. Ass'n of Regulatory Utility Commissioners v. ICC*, 41 F.3d 721, 726-27 (D.C. Cir. 1994) (recognizing that *Chevron* step two "overlaps analytically" with arbitrary and capricious review under the APA). "A 'reasonable' explanation of how an agency's interpretation serves the statute's objectives," therefore, "is the stuff of which a 'permissible' construction is made" under *Chevron*.[12] *Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145, 156 (D.C. Cir. 2005). "A statutory interpretation ... that results from an unexplained departure from prior [agency] policy and practice is not a reasonable one." *Goldstein v. SEC*, 451 F.3d 873, 883 (D.C. Cir. 2006). Thus, assuming ambiguity in the statutory term "prior express consent," the FCC's arbitrary and unexplained departure from its own precedent — the *2004 TCPA Order* — also renders its new interpretation of

[12] *Chevron USA v. Natural Resources Defense Council*, 467 US 837, 842-43 (1984).

the express consent requirement unreasonable under *Chevron*.

II. Leaving For Case-By-Case Adjudication What Constitutes A "Reasonable Method" For Customers To Revoke Their Express Consent Produces An Unworkable Scheme.

The challenged order states that when customers give their consent they inherently retain the right to revoke it. *Order* ¶ 58. And, it adds, they "have a right to revoke consent, using any reasonable method including orally or in writing," *Id.* ¶ 64, but may not unduly burden the caller. *Id*. n.233. But the agency left resolution of what constitutes a "reasonable method" to individual cases. *Id.* ¶ 64. In so doing, however, it turned a deaf ear, as the Chamber of Commerce and other petitioners observed, to pleas from commenters that it standardize the methods by which customers could revoke consent. See Petitioner Br. at 15, 52-53.

The agency's failure to consider these comments was not only arbitrary,[13] its resulting case-by-case approach creates an unworkable system of particular concern to utilities. As EEI and AGA noted in their own petition for declaratory order submitted to the agency, without clear standards, utilities, in particular, face substantial litigation risk from even frivolous law suits.[14]

It bears emphasis that nearly everyone in the United States is a utility

[13] *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1990) (agency has fundamental duty to engage the arguments before it).

[14] EEI and AGA Petition for Declaratory Order, FCC Docket No. 02-278, at 10-11, 13.

customer. So, when statistics show that nearly forty percent of all telephone users rely on wireless phones, it is safe to assume that the same percentage of utility customers do likewise. Because the reasonableness of a revocation is left to case-by-case determinations, utility customers who claim to have revoked consent, but thereafter have received automated calls, can still file TCPA lawsuits — for big money[15] — while the reasonableness of their revocation notices are adjudicated by the courts. Suits filed in court may also linger for long periods while the courts, deferring to the primary jurisdiction of the FCC, await its guidance on the reasonableness of an individual customer's revocation method. Such a system for ascertaining customer revocation subjects callers to an intolerable risk. And utility

[15] Consider for example, a recent lawsuit filed against Commonwealth Edison Company in Illinois. There, the utility, hoping to improve the speed and efficiency of its communications with customers, adopted a "Power Outage Alert Program," a two-way text-messaging program designed to allow ComEd to inform customers of power outages by text message, and to allow customers to report an outage to the utility by text message. ComEd rolled this program out to all customers who provided a wireless telephone number as their contact number. The first message ComEd sent to enrollees informed them of the program and gave instructions on how to opt out, in case any of those customers did not want to receive the informational text messages. Proving that no good deed goes unpunished, that initial message landed ComEd in federal district court, facing a class action suit and potential liabilities of millions of dollars. See EEI and AGA Petition for Declaratory Order, *supra* at 10 (citing *Grant v. Commonwealth Edison*, No. 1:13-cv-08310 (N.D. Ill.). The case was later settled. *See* https://www.comedtextsettlement.com (last visited December 1, 2015). Similarly situated utilities face comparable reliability risks simply for providing their customers outage alerts.

consumers, the intended beneficiaries of the TCPA, are worse off, as utilities, facing the risk of lawsuits, may cut back on non-emergency, but critical communications – construction alerts, drought conservation updates, seasonal maintenance reminders, etc.

III. The FCC's Order Unreasonably Subjects Callers To TCPA Liability For Placing Manual Calls With Equipment That, Only If Enabled, Would Have Autodialing Capabilities.

The challenged order finds that equipment with the "capacity" for autodialing randomly generated numbers includes equipment that, if modified by software, would then be able to autodial. Of particular concern to utilities is that, as dissenting Commissioner Pai observes, "dialing a number by hand still violates the TCPA if the equipment is an automatic telephone dialing system (which almost all equipment is under the *Order*)." Pai Dissenting Opinion at p. 121 citing *Order* ¶ 84. Commissioner O'Rielly explains the caller's dilemma plainly:

> The order states that nothing in the TCPA prevents callers from manually dialing; for example, to discover reassigned numbers. However, the order also implies that calls that are manually dialed from equipment that could be used as an autodialer would still count as autodialed calls. Therefore, manual dialing may not actually be a viable option for those seeking to avoid liability.[16]

What then is the practical effect of the *Order* on utilities? It may not have been the Commission's intent to treat manually dialed phone calls as autodialed

[16] O'Rielly Dissent, *Order* at p. 130, n.31.

simply because they were made from equipment that, only if enabled, could then make autodialed calls. But as the dissenting Commissioners note, the *Order* can plainly be read that way, leaving unexplained and undefined what the FCC means by references to manual intervention. The result, as explained below, is that the *Order* will have a chilling effect on legitimate communications by utilities and other callers. If they own equipment that can be enabled for autodialing, irrespective of whether that function has been enabled when they place manual calls, they face the risk of TCPA liability.

It is safe to presume that no utility companies still use rotary phones. So, under the FCC's *Order*, every phone call made by a utility is being made on an autodialer. If these calls are placed to a residential line, there is no violation. But if these calls, even ones manually placed – and even if autodialing mode features are disabled (or have not been enabled) —are made to any wireless number of a person who has not given prior express consent, then there is a potential TCPA violation. This is a huge problem for utilities in several ways.

First, it impedes the ability of a utility (or its contractor) to place calls manually to non-customers for non-telemarketing, informational purposes. For example, utility companies routinely conduct customer satisfaction surveys that involve calls both to their customers and, for benchmarking, to persons outside of their service territories—i.e., to non-customers, who have not consented. These

calls have been made manually. But because the FCC's order can be read to find that all modern phone systems are autodialers, utilities cannot afford to include wireless phone numbers in their surveys without risking TCPA liability.

Second, and more importantly, the *Order* will cripple the utility industry's ability to alert customers to the status of service outages, the presence of repair crews and other current information customers themselves consider important, if not critical and time-sensitive. Now utilities would face potential TCPA liability even if they contact customers through manually-placed live calls because every manually-placed call will have been placed from a phone that could, if reconfigured, place automated calls to wireless phones.

Finally, the Commission's interpretation of calls placed using autodialing equipment exacerbates the problem utilities face under the Commission's one-call rule. The Commission claims that utilities can minimize the risk that they will have autodialed a wireless number that has been reassigned to a party that has not given express consent to be called. "Callers," it says, "could remove doubt by making a single call to the consumer to confirm identity." *Order* ¶ 84. But if that "single call" is made using equipment that is *not* capable of autodialing at the time of the call — because the autodialing feature is disabled (or has not been enabled) — the call to "remove doubt" would itself constitute a violation of the TCPA.

The dilemma the *Order*'s definition of autodialer poses for utilities is wholly unnecessary. The obvious purpose of the TCPA is to prevent companies from placing random, automated or prerecorded calls to cellphone users without their prior consent. That purpose is not furthered by barring companies from placing live calls manually simply because the callers use phones that, if enabled, could autodial. The TCPA bars persons from making calls to wireless numbers (other than for emergency purposes or with the prior express consent of the called party) "using any automatic telephone dialing system,"[17] which it defines as equipment with "the capacity… (A) to store or produce telephone numbers to be called, using a random or sequential generator" and (B) "to dial such numbers."[18] It is more than plausible to read that language to bar only nonconsensual automated (or prerecorded) calls made from telephone systems with enabled autodialing functions, not manually-placed calls which use the same equipment, but where the equipment's autodialing function has not been enabled (or is disabled). In other words, the Commission could readily construe the term "using any automatic telephone dialing system," to mean using the automatic dialing *capability* of a telephone system.

[17] 47 U.S.C. § 227(b)(1)(A)

[18] 47 U.S.C. § 227(a)(1)(A) and (B).

But more important for *Chevron* purposes, eschewing this construction is antithetical to the goals of the TCPA and therefore unreasonable. The Commission claims that its *Order* serves to "affirm the vital consumer protections of the TCPA while at the same time encouraging pro-consumer uses of modern calling technology." *Order* ¶ 2. Its interpretation of autodialing equipment under the TCPA, however, does the opposite.

Conclusion

For the reasons stated above, those portions of the *Order* challenged by Petitioners should be vacated as inconsistent with the TCPA.

Respectfully submitted,

/s/ Harvey L. Reiter
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of content and authorities, certificates of service and compliance, but including footnotes) contains 4,993 words as determined by the word-counting feature of Microsoft Word 2000.

/s/ Harvey L. Reiter
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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), I hereby certify that I have this 2nd day of December, 2015, 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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