

Legal analysis from Arent Fox LLP, attorneys, experts in FCC regulations and in particular the Telecommunications Consumer Protection Act (TCPA) Regarding "Prior Express Written Consent" (i.e., "opt-in")

Effective October 16, 2013, autodialed or prerecorded calls to both residential lines and wireless numbers will require **"prior express written consent" only** if the call "includes or introduces an advertisement or constitutes telemarketing." The FCC's regulations define an "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services." 47 C.F.R. § 64.1200(f)(1). The term "telemarketing" is defined as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(12).

In the FCC's 2012 Order implementing these rule changes, however, the FCC expressly stated that it was not changing the consent requirements applicable to informational calls, i.e., "prior express consent." See, e.g., 2012 Order ¶ 3 ("None of our actions change requirements for prerecorded messages that are non-telemarketing, informational calls ... for other noncommercial purposes, including those that deliver purely informational messages"); see also *id.* at ¶ 21 ("we conclude that requiring prior express written consent for all such calls would unnecessarily restrict consumer access to information communicated through purely informational calls. For instance, bank account balance, credit card fraud alert, package delivery, and school closing information are types of information calls that we do not want to unnecessarily impede.").

The TCPA itself does not define "prior express consent," but in 1992 the FCC stated that **"persons who knowingly release their phone number have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."** *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752, ¶ 31 (Oct. 16, 1992) (emphasis added); see also *Greene v. DirecTV, Inc.*, CIV No. 10-117, 2010 WL 4628734, *3 (N.D. Ill. Nov. 8, 2010) (call recipient who released her telephone number to credit agency deemed to have provided consent to third party to call her with prerecorded message); *Roberts v. PayPal, Inc.*, CIV No. 12-0622-PJH, 2013 WL 2384242, *5 (N.D. Cal. May 30, 2013) ("the court finds that plaintiff consented to receive text messages from PayPal simply by providing his cell phone number"); see also *Pinkard v. Wal-Mart Stores, Inc.*, CIV No. 3:12-02902-CLS, 2012 WL 5511039, *4-5 (N.D. Ala. Nov. 9, 2012) (rejecting plaintiff's argument that she only gave limited consent to be contacted under certain conditions and finding that "providing her telephone number to defendant was 'clear and unmistakable' consent to be contacted at that number.").

In the same 1992 Order implementing the TCPA in which it clarified what constituted "prior express consent," the FCC specifically addressed the concerns of public utilities, who informed the FCC that many "public utilities 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.**" 1992 Order ¶ 49. In response to these concerns, the FCC ruled that:

Each of the circumstances described by the utilities **is included within either the broad exemption for emergency calls, or the exemption for calls to which the called party has given prior express consent.** Service 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.** Similarly, public utilities providing a third party notification service do not violate the prohibition against prerecorded calls to residences where the third party has given his or her prior express consent to the notification or the call relates to a public health and safety matter. In light of the comprehensive nature of the current exemptions, a specific exemption for public utilities to the general prohibition against autodialers and artificial or prerecorded voice message calls is not required.

Id. ¶ 51.

As such, the FCC has already held that informational messages sent by utilities that we understand are of concern to NRECA either fall within the emergency exemption to the TCPA, i.e., they do not require any consent at all, or would be lawful by obtaining the customer's "prior express consent," which again, is satisfied by the utility customer simply releasing his or her telephone number to the utility during, e.g., the enrollment process. A re-opt-in that would satisfy the FCC's new "prior express written consent" requirement for telemarketing calls is therefore not necessary if we are simply dealing with service-outage or discontinuance notifications or other billing related matters.