



## **Legal Advisory for Utilities Calling and Messaging Customers**

*A FCC decision released this month relaxes some stringent restrictions regarding when utilities can call or text customers, giving utilities new leeway to relay important information to customers. Below is a summary of current FCC regulations, followed by a detailed outline of the most important parts of the law so utilities can stay out of trouble.*

Most utilities contact ratepayers with important information such as notification of nonpayment, outage communication, or planned service disruption. Some of the most effective means of communications, phone calls and text messages in particular, are highly regulated by the federal government. A federal law called the Telephone Consumer Protection Act (TCPA) governs how companies and other large entities (including utilities) contact customers by phone calls and text messages. It can be complex and difficult to wade through, with the FCC updating its interpretation of the law from time to time as new issues and technologies develop. This month the FCC updated regulations that concern when, how, and why utilities can contact their customers. These updated regulations will greatly improve how utilities are allowed to keep in touch with customers, to the benefit of both the utility and ratepayers.

Generally, a utility cannot call or send text messages to customers unless there is an emergency or the customer has given prior express consent. However, this month came a [FCC ruling](#) that updates its regulations to allow utilities to “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.” The FCC now permits these communications “because (utility) customers provided consent to receive these calls and texts when they gave their phone numbers to the utility company,” and because customers view them “as being critical to providing safe, efficient and reliable service.” These types of calls and text messages are now accepted because they “concern an essential utility service and can have implications for personal safety.” The outline below gives more detail as to what constitutes “closely related to utility service.”

The FCC narrowly interprets what is “closely related” to utility service in keeping with the “goal of protecting consumers from unwanted messages while still ensuring they receive essential and desired communications.” These new regulations are therefore narrowly tailored and do not apply to every call or text message from a utility to a customer.

How is all this enforced? It is rare for the FCC itself to take an action against a company or an entity, however the most worrisome outcome of not following the law is the filing of a class action lawsuit. Defending such a lawsuit can be expensive even if there is no wrong doing, so companies that have been sued grudgingly agree to out of court settlements due to the cost savings compared to the higher expense of fighting the lawsuit. The result is a utility that regularly needs to contact customers must be vigilant that it is following federal law and FCC regulations, even if it is sending communications customers nearly always see as beneficial.

Below is up to date information and guidelines for utility communications to its customers that reflect current federal law in the area of using automatic telephone dialing systems and automatic messaging systems. Phone calls, voice messages, and text messages are all regulated the same with the same requirements.

1. Generally, a utility can only use automatic telephone dialing or messaging systems under three categories.
  - a. The three types of calls or messages are:
    - i. Emergency calls or messages. These are calls and text messages that are “necessary in any situation affecting the health and safety of consumers.”
    - ii. Consented calls or messages. These are calls and text messages made with the prior express consent of the called party.
    - iii. Calls or messages related to utility service. These are calls or messages closely related to the purpose for which the telephone number was originally provided. For utilities, a number given by a customer to the utility can be used for limited purposes without further express consent from the customer that states the utility can use the number to call or text the customer.
  - b. If a call or message cannot fall into one of three above categories, a utility is prohibited from using automatic dialing or messaging systems.
2. Calls or messages closely related to utility service. A utility can call or text customers regarding matters closely related to the purpose for which the telephone number was originally provided, such as utility service. Calls or text messages closely related to utility service include:
  - a. Warnings about planned or unplanned service outages.
  - b. Updates about service outages or service restoration.
  - c. Requests for confirmation of service restoration or information about lack of service.
  - d. Notifications of meter work, tree trimming, or other field work that directly affects the customer’s utility service.
  - e. Notifications to consumers informing them that they may be eligible for subsidized or low-cost services due to certain qualifiers such as, *e.g.*, age, low income or disability.
  - f. Information about potential brown-outs due to heavy energy usage.
  - g. Warnings about the likelihood that failure to make payment will result in service curtailment.
    - i. However, routine debt collection calls or text messages by utilities to customers after utility service has been terminated are governed by more stringent regulations that require additional prior consent. Therefore, after service has been terminated the utility can contact the customer only if express prior consent was given by the customer to the utility.
3. Wireless numbers. The FCC has more stringent requirements for wireless numbers than it does for traditional landlines. Utilities may call or text a customer’s wireless number regarding matters closely related to utility service if the customer provided the number under certain conditions.
  - a. To call or text a wireless number, the customer must have done one of the the following:
    - i. Provided their wireless telephone number to the utility when the customer initially signed up to receive utility service.
    - ii. Subsequently supplied the wireless telephone number to the utility.
    - iii. Later updated their contact information.
  - b. The utility can call or send text messages to the number regarding matters closely related to utility service unless or until the customer notifies the utility it wants to stop calls or messages from the utility.

4. Calls and messages that require additional prior express consent from the customer.
  - a. These are calls and messages that are:
    - i. Non-emergency related.
    - ii. Not closely related to utility service.
  - b. Obtaining consent.
    - i. Can be given orally or in writing
    - ii. In writing is the safest option, and includes email, website form submission, text message, telephone key press, or voice recording. The best practice is to clearly ask for consent and to not embed it as a condition of service in fine print.
    - iii. If the call or text message includes or introduces an advertisement or constitutes telemarketing, consent must be in writing.
  - c. Revoking consent or opting-out
    - i. Customer can revoke consent at any time by any “reasonable” method, including orally or in writing.
    - ii. A utility cannot designate an exclusive means to revoke consent or opt-out.
    - iii. A utility should document revocation of consent or opting-out.
    - iv. Best practices for utilities regarding opting out include using a preference center to collect preferences and permissions, or including a method of opting-out with each message.
5. Text messages. To send these to customers requires more confirmation from the customer.
  - a. These are text messages that are:
    - i. Non-emergency related
    - ii. Not closely related to utility service.
  - b. Since customers can be charged per text message by their mobile phone carrier, federal law requires utilities to make sure customers are aware of potential charges before they sign up to receive text messages or before customers send a text message to a service a utility provides.
  - c. The best practice is to provide a second confirmation step (often called a double opt-in) to ensure the customer’s intent to enroll.
6. Wrong numbers or reassigned numbers.
  - a. Utilities are only exempt from liability under the TCPA for one call to a mobile phone number that has been reassigned. After one call, a utility can be liable for any further calls or text messages.
  - b. A utility may need to have multiple ways to check for reassigned numbers or to ensure that opt-outs are performed after the first call to a reassigned number. Suggestions made by the FCC include:
    - i. Using an autodialer that detects the triple tones for a disconnected number since numbers are usually disconnected for a period of time before they are reassigned.
    - ii. Periodically asking customers to confirm their contact information and completing opt-outs for any unconfirmed contacts.
    - iii. Including a requirement in the terms and conditions saying customers agree when signing up for messages that the customer must notify you when they stop using a phone number.
    - iv. Including an opt-out option on all messages sent to customers.

**Steps one municipal electric utility has taken *before* this month's FCC decision:**

1. Ceased calling cell phone numbers without an expressed consent. Consent can't be embedded as a condition of service in the fine print of the rule and regulations. It must be clear. We clearly asked permission.
2. We contract with a third party to scrub our phone numbers every three month to be sure we have cell phone numbers coded as cell phone numbers and landline numbers coded as landlines. Often a landline is ported to a cell phone. We have no way to know this other than to use this service. We export our landline numbers to them and they send back a file with coding that lets us know which numbers are now cell phones.
3. Each time we sign up a new customer we get consent on any number they give us.
4. On landlines we call the customer absent the customer telling us not to call them.
5. Our auto dialer has an opt-out option. If the customer selects this we code our database as such and they will not be called again.

**Articles and information on this month's FCC decision:**

Latest FCC Ruling and Related Documents: <https://www.fcc.gov/document/blackboardedison-tcpa-declaratory-ruling>

Latest FCC Ruling in PDF: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db0804/FCC-16-88A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0804/FCC-16-88A1.pdf)

<http://www.eei.org/resourcesandmedia/newsroom/Pages/Press%20Releases/FCC%20Decision.aspx>

<http://www.natlawreview.com/article/fcc-grants-significant-tcpa-relief-to-energy-utilities-and-schools>

<http://www.lexology.com/library/detail.aspx?g=45c8dc8f-4d2d-439c-ad72-96aaaaafbbf70>

<http://www.dataprotectionreport.com/2016/08/fcc-rules-on-tcpa-consent-requirements-and-emergency-purpose-exception/>

<http://www.mondaq.com/unitedstates/x/517604/Utilities/FCC+Clarifies+TCPA+Rules+for+Utilities>

**Articles and information on FCC regulations prior to this month's FCC decision:**

<https://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-unwanted-calls-and-texts>

<http://www.commlawgroup.com/news/829-energy-utilities-seek-clarification-that-customer-provided-phone-numbers-satisfy>

<http://www.energybiz.com/magazine/article/420301/100-million-text-message>

<http://ihatetele marketers.com/100-million-dollar-text-gray-area-tcpa/>

<http://www.bna.com/tcpa-dos-donts-n17179929013/>

<http://www.infolawgroup.com/2015/07/articles/privacy-law/the-fcc-tcpa-order-what-does-my-business-need-to-know/>

<http://www.ifactorinc.com/tcpa-compliance-5-questions/>

<http://www.law360.com/articles/795093/what-electric-utilities-need-to-know-about-tcpa-compliance>

<http://abovethelaw.com/2015/07/a-first-look-at-the-fccs-2015-tcpa-declaratory-ruling-and-order/>