What Electric Utilities Need To Know About TCPA Compliance

Eric T. Ray
Balch & Bingham LLP

Jonathan P. Hoffmann
Balch & Bingham LLP

Law360, New York (May 12, 2016, 11:42 AM ET) -- The Federal Communications Commission's July 10, 2015, declaratory ruling and order regarding the Telephone Consumer Protection Act unleashed a renewed wave of interest in the TCPA for plaintiffs, regulators and corporate counsel alike.[1] The commentary regarding the major implications of the ruling could fill volumes. While the impact to companies that traditionally fall under consumer-finance or consumer-protection statutes such as retailers, digital marketers, debt collectors and manufacturers is clear, with limited exceptions, the ruling is not industry specific. Therefore, despite the fact that the TCPA has been in existence for over two decades, many companies find themselves — for the first time — truly examining their compliance, or lack thereof, with the TCPA.

The general expansion of TCPA liability and increased confusion stemming from the ruling have created unique issues for many companies in many industries, but for electric utilities — an industry poised for great expansion into the text-based communication realm — the far-reaching aspects of the ruling have been unsettling.

With the continued and increased reliance by their customers on mobile communication devices, it is with good reason that electric utilities have turned their sights to text-based communications in recent years. In addition to the general needs of any service-based industry (marketing, customer service, debt collection, etc.), electric utilities have a unique need to quickly communicate with their customers regarding the continuous provision of a service that most consider a basic necessity.

Power outages create problems for all consumers of electricity, and those same outages make communication via cell phones ideal given the displacement or absence of the customer from their home during an outage and given the lack of functionality of other means of communication. Those readers familiar with the TCPA may now be thinking that texts regarding outages surely fall under the emergency exception, right?

In severe weather situations or catastrophes, common sense would indicate yes. However, true "emergencies" are often not the genesis of power outages. What about emerging initiatives that allow for scheduled outages or reduced capacity during nonpeak hours for efficiency, not necessity? What about

planed upgrades or general maintenance to infrastructures? What about nonoutage communications such as educating customers on rebates they can receive for participation in energy-saving programs or notifying customers with fixed or low incomes of alternative billing arrangements? What about simply notifying customers of their ability to receive such notifications?

Between the extremes of selling heat pumps on the one side and responding to hurricanes on the other, electric utilities have more questions than answers on what is marketing, what qualifies under the TCPA as an emergency, and which communications are permissible with an existing business relationship.

A further wrinkle for electric utilities comes from public service commissions (PSCs). Few entities are more regulated than electric utilities and that regulation can add further confusion to TCPA compliance. Tariffs in certain states require electric utilities to call customers prior to shutting off service permanently for delinquent payment or temporarily for planned service interruptions.[2] Given that such calls are mandatory, simply not communicating with certain customers in order to ensure TCPA compliance is not an option. Therefore, the necessity of complying with both the TCPA and state tariffs presents a unique impasse for electric utility companies. This impasse is highlighted by the ruling's one-call safe harbor rule for reassigned numbers which is neither clear nor well-tested in the courts.

To clarify, reassigned numbers are cell phone numbers which were once tied to a customer of the calling business, which are thereafter reassigned to someone else. The caller can make one call to the reassigned number without TCPA liability, but any subsequent call — regardless of what information as to the identity of the call recipient, if any, was gathered from the first call — violates the TCPA for lacking proper consent.[3]

The dilemma for utilities now becomes clear: they must call customers in certain circumstances, which almost always requires automated messages; these automated messages may reach reassigned numbers that give no indications of reassignment (remember, not reaching a live person or voicemail indicating reassignment makes no difference); and no law makes clear whether these calls — regardless of whether they reach reassigned numbers — are excepted from TCPA liability as emergencies. While the use of a designated rotary style phone used to make such calls could solve the problem, the inefficiency of that solution hardly makes it a viable business option (imagine attempting to quickly dial ten people on a rotary phone much less large portions of an entire city regarding outages).

The Edison Electric Institute (EEI) — "the association that represents all U.S. investor-owned electric companies" — along with the American Gas Association, has sought clarification from both the FCC and the courts on behalf of electric utilities.[4] Prior to the ruling, the EEI filed a petition with the FCC arguing that electric utilities should receive exemptions under the TCPA for certain communications.[5] While the FCC declined to take up the EEI petition in the ruling, it did recognize the elevated importance of certain types of communications when it carved out certain exceptions to its consent rules for health care providers and banks.

At the risk of over-simplifying, the FCC determined that in certain circumstances such as identity theft or lab test results, regulations regarding prior express written consent should not get in the way of expedient communication.[6] As mentioned above, outages create problems that cell phones and text messages are

uniquely qualified to solve. While it is expected that the FCC will ultimately rule on the EEI petition, absent well-defined parameters by the FCC in that ruling, electric utilities will remain in a state of uncertainty and continue to face liability for communications that the vast majority of customers would prefer to receive.

Immediately upon issuance of the ruling, appeals ensued.[7] An army of entities and industries have chimed in on the D.C. Circuit's review of the ruling, among them, the EEI. In its amicus brief, the EEI notes the conflict discussed above between state PSCs and the TCPA.[8] The brief also discusses the lack of clarity regarding how the emergency exception interacts with the strict liability one-call rule for reassigned numbers described above. Currently, all briefing has concluded, but the matter is not yet set for oral argument. Along with the EEI's petition before the FCC, electric utilities should closely monitor the outcome of the appeal before the D.C. Circuit.

In recent years, electric utilities have also become the target of traditional TCPA lawsuits, with the watershed moment occurring when Michael Grant filed a TCPA class action against Commonwealth Edison (ComEd) based on ComEd sending the following text, allegedly without proper consent:
"You are now subscribed to ComEd outage alerts. Up to 21 msgs/mo. Visit ComEd.com/text for details. T&C:agent511/tandc. STOP to unsubscribe."[9]

At some point in the proceedings a potential jury award of $100 million was sought and despite what ComEd reasonably contended were meritorious defenses, the parties resolved the suit through a court-approved settlement of nearly $5 million.[10] Plaintiffs continue to file TCPA class actions against electric utilities and just over a month ago a putative class survived a motion to dismiss, forcing continued litigation over debt collection activities that involved allegedly wrongful prerecorded calls.[11] Notably, the court that denied the motion to dismiss, declined to stay the case pending the outcome of the D.C. Circuit appeal.[12]

The ComEd case highlights two issues. First, the uncertainty mentioned above about the permissibility of outage tests is real and can have potentially high dollar consequences. Second, even meritorious defenses to the TCPA have procedural issues. Given the near limitless expansion of the meaning of "autodialer" in the ruling, most businesses' best defense to TCPA allegations is that the calling party had the proper consent from the recipient.

However, consent is almost always an affirmative defense which places the burden of proof onto the defendant to prove that the plaintiff provided the proper consent. As a result, the granting of a motion to dismiss is often difficult to obtain when the TCPA allegations are properly pled, and thus, regardless of the merits of the case, the cost of defense has the potential to be large. What the ComEd case further shows is that even a somewhat innocuous and well intentioned text message, when held under the bright light of the TCPA, can have expensive ramifications.

As technologies progress, the laws and regulations surrounding the technology will try to keep pace. As a result, it seems safe to say that the TCPA will remain fluid as new communication technologies emerge. What was once a law that many considered to be applicable only to calls from numbers that most people block has now been recognized to apply to those companies that consumers routinely invite into their homes. While the TCPA presents unique challenges to electric utilities, every company in every industry

needs to have strong TCPA compliance procedures in place for communicating with customers.

—By Eric T. Ray and Jonathan P. Hoffmann, Balch & Bingham LLP

Eric Ray is a partner and Jonathan Hoffmann is an associate in Balch & Bingham's Birmingham, Alabama, office. Ray counsels and advises utilities and businesses on issues involving the TCPA including analyzing current compliance with the TCPA, creating TCPA policies and procedures and defending claims of TCPA violations. Hoffmann counsels and advises utilities and businesses on consumer finance issues, particularly those involving the TCPA and the Fair Debt Collection Practices Act.

[1] See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd 7961 (2015).

[2] 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).

[3] See 30 FCC Rcd 7961, ¶ 72.

[4] See About EEI, < http://www.eei.org/about/Pages/default.aspx>, accessed May 5, 2016.

[5] See Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Feb. 12, 2015).

[6] See 30 FCC Rcd 7961, ¶¶ 129, 146.

[7] See ACA, Int'l v. FCC, et al., Case No. 15-1211 (D.C. Cir. July 10, 2015).

[8] See id., Doc. 1600642, p. 7–10.

[9] See Grant v. Commonwealth Edison Co., Case No. 1:13-cv-8310, Doc. 1, ¶ 21.

[10] See id., Doc. 68.

[11] See Jenkins v. Nat'l Grid USA, 2016 LEXIS 46095 (E.D.N.Y. March 31, 2016).

[12] See id., at *2.