

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
Broadnet Teleservices LLC	)	
Petition for Declaratory Ruling	)	
	)	
National Employment Network Association	)	
Petition for Declaratory Ruling	)	
	)	
RTI International	)	
Petition for Declaratory Ruling	)	

**Comments in Support of Reconsideration**

**in furtherance of the Petition for Reconsideration**

**filed by**

**National Consumer Law Center  
on behalf of its low-income clients  
and  
fifty legal aid programs, and national, state and local public interest organizations**

**August 29, 2016**

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## Comments in Support of Reconsideration of the Broadnet Ruling

### I. Introduction.

Pursuant to the Public Notice<sup>1</sup> issued by the Consumer and Governmental Affairs Bureau, the National Consumer Law Center (NCLC)<sup>2</sup> files these comments in support of reconsideration of the Federal Communications Commission's (Commission) declaratory ruling [hereinafter Broadnet Ruling] in the above-named proceeding released July 5, 2016.<sup>3</sup> These comments are filed on behalf of our low-income clients, and in furtherance of the positions taken in our Petition for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration<sup>4</sup> [hereinafter Petition for Reconsideration] filed on July 26, 2016 on behalf of the following fifty legal aid programs, and national, state and local public interest organizations:

#### Legal Aid Programs

- National Center for Law and Economic Justice
- Housing and Economic Rights Advocates, Oakland, California
- Connecticut Legal Services, Inc., Bridgeport, Connecticut

#### Advocacy Organizations

- Americans for Financial Reform
- Center for Responsible Lending
- Consumer Action
- Consumer Federation of America
- Consumers Union
- Demand Progress

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<sup>1</sup> Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Comment on National Consumer Law Center's Petition for Reconsideration of the FCC's Broadnet Declaratory Ruling, CG Docket No. 02-278 (Rel. Aug. 1, 2016) *available at* [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db0801/DA-16-878A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0801/DA-16-878A1.pdf).

<sup>2</sup> The National Consumer Law Center (NCLC) is a nonprofit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace.

<sup>3</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petitions for Declaratory Ruling by Broadnet Teleservices LLC, National Employment Network Association, RTI International, CG Docket No. 02-278, Declaratory Ruling, FCC 16-72 2016 WL 3632439 (July 5, 2016) [hereinafter Broadnet Ruling], *available at* <https://ecfsapi.fcc.gov/file/0705087947130/FCC-16-72A1.pdf>.

<sup>4</sup> Petition of National Consumer Law Center et al. for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration, CG Docket No. 02-278 (filed July 26, 2016) [hereinafter Petition for Reconsideration], *available at* <https://www.fcc.gov/ecfs/filing/10726059270343>.

- Jacksonville Area Legal Aid, Inc., Jacksonville, Florida
- Economic Justice Clinic, Notre Dame Law School, Notre Dame, Indiana
- Public Justice Center, Baltimore, Maryland
- Michigan Poverty Law Program, Ann Arbor, Michigan
- Mississippi Center for Justice, Jackson, Mississippi
- Legal Aid Center of Southern Nevada, Inc., Las Vegas, Nevada
- Legal Services of New Jersey, Edison, New Jersey
- MFY Legal Services, Inc., New York, New York
- Community Service Society, New York, New York
- Financial Protection Law Center, Wilmington, North Carolina
- North Carolina Justice Center, Raleigh, North Carolina
- Neighborhood Housing Services of Greater Cleveland, Cleveland, Ohio
- South Carolina Appleseed Legal Justice Center, Columbia, South Carolina
- Southeast Tennessee Legal Services, Chattanooga, Tennessee
- Texas Legal Services Center, Austin, Texas
- Virginia Poverty Law Center, Richmond, Virginia
- Columbia Legal Services, Seattle, Washington
- Washington Defender Association, Seattle, Washington
- Mountain State Justice, Charleston, West Virginia
- Electronic Privacy Information Center
- Higher Ed, Not Debt
- Justice in Aging
- NAACP
- National Association of Consumer Advocates
- National Association of Consumer Bankruptcy Attorneys
- National Association of State Utility Consumer Advocates
- National Legal Aid & Defender Association
- Public Citizen, Inc.
- Public Justice
- U.S. PIRG
- Young Invincibles
- Arkansans Against Abusive Payday Lending, Sherwood, Arkansas
- Consumer Federation of California, Sacramento, California
- Elder Abuse Prevention Program, Institute on Aging, San Francisco, California
- Consumer Watchdog, Santa Monica, California
- Florida Alliance for Consumer Protection, Tampa, Florida
- Massachusetts Consumers Council, Sandwich, Massachusetts
- Long Term Care Community Coalition, New York, New York
- Virginia Citizens Consumer Council, Richmond, Virginia
- West Virginia Center on Budget and Policy, Charleston, West Virginia
- One Wisconsin Now, Madison, Wisconsin

## II. Summary.

Reconsideration is necessary because the Broadnet Ruling's determination that contractors acting on behalf of the federal government are not persons covered by section 227(b)(1) of the

Telephone Consumer Protection Act (TCPA)<sup>5</sup> is incorrectly reasoned, not supported by applicable law and contrary to the public interest, and will lead to significant harm to consumers.

The Broadnet Ruling concludes that “the term ‘person’ in section 227(b)(1) does not include a contractor acting on behalf of the federal government, as long as the contractor is acting as the government’s agent in accord with the federal common law of agency.”<sup>6</sup> This is incorrect, as the TCPA unquestionably applies to contractors of the federal government, regardless of their agency status. This is most recently illustrated in the 2015 amendments to the TCPA made by the Budget Act.<sup>7</sup>

Additionally, the Broadnet Ruling appears to have relied on a fundamental misunderstanding of the express language and holding in the *Campbell-Ewald Co. v. Gomez* case<sup>8</sup> to support its determination that contractors are not persons for purposes of coverage by the TCPA. In that case, as the Commission acknowledges in a footnote,<sup>9</sup> the Supreme Court did *not* hold that government contractors are not “persons” under the TCPA. The decision does not construe the word “person” in the TCPA at all. Nor did the Supreme Court hold that contractors acting as agents of the federal government are entitled to the immunity of the government. It did not even hold that “derivative immunity” is ever applicable to shield contractors of the federal government from liability for their violations.

The Broadnet Ruling compounds its misconstruction of *Campbell-Ewald* by switching back and forth between the definition of “person” and the doctrine of governmental immunity in an

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<sup>5</sup> Broadnet Ruling at 8, ¶ 16.

<sup>6</sup> Broadnet Ruling at 8, ¶ 16.

<sup>7</sup> Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 [hereinafter Budget Act].

<sup>8</sup> 136 S. Ct. 663 (2016).

<sup>9</sup> Broadnet Ruling at 12 n.96.

inconsistent and confusing way.<sup>10</sup> These two theories are not only unfounded and incorrect, but they are also very different from each other. Whether a caller is a “person” that is subject to the provisions of the TCPA’s consumer protections is a seminal determination premised on congressional intent and the language of the statute. Whether the caller is entitled to immunity from liability for damages for its violations of the TCPA’s consumer protections is based on whether the caller’s behavior falls within the protections of the common law governing immunity. The Broadnet Ruling conflates the two issues in a confusing and dangerous way that renders all the rules governing robocalls from government contractors to cell phones very unclear.

The danger to consumers from unwanted and unstoppable robocalls<sup>11</sup> resulting from the Broadnet Ruling is potentially devastating. The Ruling should be reconsidered and the relief, if any, provided to the petitioners should be limited to that which is explicitly authorized by Congress for the Commission to make, namely relief based only on the exemption for free-to-end-user calls in 47 U.S.C. § 227(b)(2)(C), along with appropriate, strong consumer protections.

### **III. Facts and Arguments in Support of Reconsideration.**

#### **A. Unwanted Robocalls From Government Contractors Will Harm Consumers.**

NCLC’s Petition for Reconsideration<sup>12</sup> was filed on behalf of our low-income clients, twenty-two other legal aid programs that represent low-income and elder clients throughout the United States, and twenty-eight public interest groups that advocate on behalf of their members and

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<sup>10</sup> For example, the Ruling says on the one hand that in certain circumstances contractors are not persons under the TCPA (*see* Broadnet Ruling at 8-9, ¶ 16), and on the other that the Supreme Court determined that government contractors lawfully authorized to make calls on behalf of the federal government “are immune from TCPA liability” (*id.* at ¶ 20).

<sup>11</sup> We are using the term “robocalls” to refer to calls made with either an automatic telephone dialing system (“autodialer”) or with a prerecorded or artificial voice, or with both.

<sup>12</sup> Petition of National Consumer Law Center et al. for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration, CG Docket No. 02-278 (filed July 26, 2016), *available at* <https://www.fcc.gov/ecfs/filing/10726059270343>

the public to protect their economic interests and rights to privacy. The low-income clients on whose behalf NCLC filed the Petition for Reconsideration live below or only slightly above the poverty level, or are elderly. Their cell phones often have limited minutes available; many clients owe debts to the United States; and many are disabled and receive Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI). All of these groups—national, state and local legal aid programs and public interest organizations—speak on behalf of people who have significant privacy interests in not being robocalled at inconvenient times by people from whom they do not want to receive calls. All of these tens of millions of people have an interest in their ability to control and stop unwanted robocalls, whether from government contractors or from others.

Estimates indicate that approximately 76 million Americans, just over a third of U.S. cell phone owners, use limited minute prepaid plans<sup>13</sup> or maintain essential telephone service through the federal Lifeline Assistance Program,<sup>14</sup> which permits only 250 minutes a month for the entire household.<sup>15</sup> A flood of unwanted calls would be devastating for households struggling to afford

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<sup>13</sup> The research firm Ovum has stated that it expects the number of American prepaid customers to increase to twenty-nine percent of overall wireless subscribers by the year 2016. *See* Brian X. Chen, Prepaid Cellphones Are Cheaper. Why Aren't They More Popular?, *New York Times* (Aug. 2, 2012), available at <http://bits.blogs.nytimes.com/2012/08/02/prepaid-phone-plans/>. Marrying that statistic to the Pew Research Center's estimate that, as of October 2014, cell phone ownership among adults was approximately 90 percent means that roughly 218,223,738 million adults own cell phones. *See* Pew Research Center, Mobile Technology Fact Sheet, available at <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>. Twenty-nine percent of that number is 63,284,884 – which is our estimate of the number of cell phone users who have prepaid phones. Added to the estimated 13 million Americans who maintain essential telephone service through the Lifeline program, this works out to over 76 million Americans. *See* Universal Service Administrative Company, LI08 Lifeline Subscribers by State or Jurisdiction - January 2015 through December 2015, available at <http://www.usac.org/about/tools/fcc/filings/2016/q2.aspx>.

<sup>14</sup> *In re* Lifeline and Link Up Reform and Modernization, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71, WC Docket Nos. 11-42, 09-197, 10-90, ¶ 16 (Rel. June 22, 2015).

<sup>15</sup> *See* Universal Service Administrative Company, LI08 Lifeline Subscribers by State or Jurisdiction - January 2015 through December 2015, available at <http://www.usac.org/about/tools/fcc/filings/2016/q2.aspx>.

essential telephone service. Unwanted calls use up the minutes on which the entire household depends to access health care, transportation and other essential services, to find jobs or accept work assignments, to respond to family emergencies, to call police or fire departments, and to avoid social isolation.

**B. The 2015 Budget Act Amendments Make It Unquestionably Clear That Federal Contractors Are Persons under the TCPA.**

There is an extensive analysis in the Broadnet Ruling regarding the question of whether the federal government is a “person” for purposes of section 227(b)(1). We do not necessarily agree with the conclusion reached by the Commission that the federal government is not a “person” for these purposes.<sup>16</sup> But the issue of whether the federal government is a “person” for TCPA purposes is not particularly relevant to the question whether the private entities that contract with the government are “persons” under the TCPA.

The recent passage by Congress of section 301 of the Budget Act amendments to the TCPA specifically created an exception from the consent requirement for robocalls to cell phones that are “made solely to collect a debt owed to or guaranteed by the United States.”<sup>17</sup> These amendments

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<sup>16</sup> As the Commission points out in ¶ 13 of the Broadnet Ruling: “Indeed, some uses of the word ‘person’ within the original text of the Communications Act of 1934 have been construed to include the federal government, and we do not question those interpretations here.” In addition, even before the 2015 Budget Act amendments, the TCPA carved out federal law enforcement agencies from the caller ID provisions of the statute. *See* 47 U.S.C. § 227(e)(7). If those agencies were not “persons” subject to the caller ID provisions, there would have been no need for this provision.

<sup>17</sup> Budget Act § 301(a)(1)(A) (amending 47 U.S.C. § 227(b)(1)(A)); *see also id.* at § 301(a)(1)(B) (amending 47 U.S.C. § 227(b)(1)(B) to read, in part, that artificial- or prerecorded-voice calls cannot be made to a residential telephone line without the consent of the called party unless the call is “made solely pursuant to the collection of a debt owed to or guaranteed by the United States”). The Commission has interpreted the TCPA to apply both to voice calls and to text messages. 2015 TCPA Declaratory Ruling and Order at 8016-17, ¶ 107.



were a direct response to requests from the student loan servicing industry that it be allowed to make these calls without the consent of borrowers.<sup>18</sup>

The purpose of the 2015 amendments was only to create an exception from the consent requirement for these calls to collect government debt. The only callers who would possibly be making calls to collect debts owed to or guaranteed by the United States would either be the agencies of the government or its contractors. The Budget Act's creation of an exception to the consent requirement for certain government contractors—those calling to collect debts owed to or guaranteed by the federal government—makes sense only if those contractors would not have been able to make these calls without the amendment.<sup>19</sup> There would have been no need for the exception created by the Budget Act amendments if calls made by government contractors were not already covered by the TCPA.

The Commission's Order for the Budget Act Amendments Rules<sup>20</sup> takes the position that the Budget Act amendments merely conferred *new authority* on the FCC to regulate robocalls by government contractors. It is true that section 227(H) gives the FCC *rulemaking* authority that it did not previously have. The addition of rulemaking authority in section 227(b)(2)(H) was to impose a

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<sup>18</sup> See, e.g. U.S. Department of Education, Report to the White House, *Strengthening the Student Loan System to Better Protect All Borrowers*, Oct. 1, 2015 at 16. (“Allow Servicers to Contact Federal Student Loan Borrowers via their Cell Phones”). Available at <http://www2.ed.gov/documents/press-releases/strengthening-student-loan-system.pdf>.

<sup>19</sup> Senator Markey's remarks about the Budget Amendments made to the TCPA illustrate this fact: “Section 301 of this legislation before this body today removes that precall consent requirement if someone is collecting debt owed to the Federal Government. The provision opens the door to potentially unwanted robocalls and texts to the cell phones of anyone with a student loan or a mortgage, calls to the cell phones of delinquent taxpayers, calls to farmers, to veterans, or to anyone with debt backed by the Federal Government.” 161 Cong. Rec. S7636 (daily ed. Oct. 29, 2015) (statement of Sen. Markey).

<sup>20</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, FCC 16-99 (Rel. Aug. 11, 2016) [hereinafter Budget Act Amendments Rules] available at <https://ecfsapi.fcc.gov/file/08111407302175/FCC-16-99A1.pdf>.

limit on these new calls permitted to be made without consent, not as a stand-alone provision to provide new authority to the Commission to regulate debt collection calls made to collect government debt. However, the Budget Act amendments' carve-out of calls to collect federal government debts without consent in section 227(b)(1) has a purpose only if those collecting federal government debts would otherwise be subject to that section.

In other words, if Congress had sought only to *add* the authority to the Commission to regulate the number and duration of these calls, it would have only needed to add the new subsection (H), providing this authority. But common rules of statutory construction require that all words in a statute must have real meaning.<sup>21</sup> And there is simply no meaning to be given to the new language providing an exception from the consent requirement if the Broadnet Ruling is correct. This issue is well-articulated in the Statements of both Commissioners Rosenworcel and Pai.<sup>22</sup>

### **C. The Broadnet Ruling Is Premised on Flawed Logic.**

Another fundamental flaw in the Broadnet Ruling is its attempt to limit its determination that government contractors are not “persons” to section 227(b)(1), and to require compliance with all other requirements of the TCPA by these same contractors while they are conducting the government calls at issue.<sup>23</sup> But there is simply no logical basis for such a distinction. Either these government contractors are “persons” or they are not; either the TCPA applies to these government contractors or it does not.

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<sup>21</sup> See *Potter v. United States*, 155 U.S. 438, 446 (1894) (the presence of statutory language “cannot be regarded as mere surplusage; it means something”).

<sup>22</sup> See Concurring Statement of Commissioner Jessica Rosenworcel, *Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Aug. 11, 2016); Dissenting Statement of Commissioner Ajit Pai, *Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Aug. 11, 2016).

<sup>23</sup> See, e.g., Broadnet Ruling at 7, ¶ 13: “We emphasize that our interpretation of ‘person’ as excluding the federal government is limited to the specific statutory provision before us: section 227(b)(1) of the Communications Act. We make no finding here with respect to the meaning of ‘person’ as used elsewhere in the TCPA or the Communications Act.”

The Commission found—and there is no dispute—that the Budget Act amendments give the Commission the authority to regulate calls made by both the government and its contractors when collecting debts owed to the government.<sup>24</sup> Yet the Budget Act amendments added no new language to the TCPA describing who is a “person” for which purposes. The word “person” does not appear in the Budget Act amendments. And both the Budget Act amendments and the Broadnet Ruling deal with exactly the same limitations on robocalls in the TCPA: those found in section 227(b)(1). The word “person” applicable to both Commission orders is not just the same word, but it is the *exact same* reference in the same place in the statute: “It shall be unlawful for any person . . . .” This is *not* a case of the same word being used in a different way in different places within a statute. The “person” referenced in the prefatory language of subsection (b)(1) is both the one that the Commission finds not to include the government or its contractors in the Broadnet Ruling and the same one that the Commission determines to include both the government and its contractors that it can require to fully comply with the provisions of the Budget Act Amendments Rules issued pursuant to subsection (b)(1).<sup>25</sup>

Moreover, in the Budget Act Amendments Rules, the Commission explicitly requires that the same “persons” required to comply with the new regulations are also required to comply with, for example, “the identification requirements of section 64.1200(b)(1)-(2).”<sup>26</sup> There is simply no logical

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<sup>24</sup> See, e.g., Budget Act Amendments Rules at ¶ 31 n.102.

<sup>25</sup> See new 47 C.F.R. § 64.1200(j)(9) (added by Budget Act Amendments Rules): “(9) Notwithstanding anything to the contrary, the number and duration rules in this paragraph apply to all autodialed, artificial-voice, and prerecorded-voice calls made to a wireless number to collect a debt owed to or guaranteed by the United States, including, for example, calls by any governmental entity or its agent.” (emphasis added)).

<sup>26</sup> “The Budget Act amendments apply to the consent requirement of Section (b)(1), but other sections of the TCPA are left unaffected. For example, the identification requirements of section 64.1200(b)(1)-(2) apply to both excepted calls and other calls made using an autodialer, a prerecorded voice, and an artificial voice. The exception Congress created in the Budget Act amendments is not an exception to compliance with the TCPA as a whole, but only with the

justification for treating government contractors as “persons” who are required to comply with some requirements of the TCPA, and simultaneously not treating them as “persons” for purposes of other TCPA requirements. And the Commission acknowledgement that it reserves the right to interpret the term “person” differently for different parts of the TCPA does not make it logical to do so.

**D. The Broadnet Ruling is Based on a Misreading of *Campbell-Ewald Co. v. Gomez*.**

The Broadnet Ruling is also based on a misreading of the U.S. Supreme Court’s opinion in the *Campbell-Ewald Co. v. Gomez* case.<sup>27</sup>

The Broadnet Ruling’s reasoning—which we submit is unambiguously flawed---appears to be: 1) the federal government is not a “person” under the TCPA;<sup>28</sup> 2) the governmental activity of making the three types of robocalls identified in the ruling would be severely constrained by the TCPA;<sup>29</sup> and 3) therefore when this governmental activity is conducted by private contractors acting as agents of the government, those contractors are not covered “persons,” either.<sup>30</sup>

We do not contest whether the first prong is correct, because the question has no practical effect: since the Supreme Court held in *Campbell-Ewald* that the federal government is immune from suit for TCPA violations, it does not particularly matter whether the statute applies to the government. However, the second prong of this analysis has enormous practical significance, and it is faulty. Paragraph 15 of the Broadnet Ruling states:

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requirement to obtain the consent of the called party to make the call. Budget Act Amendments Rules at 24, ¶ 56.

<sup>27</sup> 136 S. Ct. 663 (2016).

<sup>28</sup> Broadnet Ruling at 6-8, ¶¶ 12, 13, 14.

<sup>29</sup> *Id.* at 8, ¶15.

<sup>30</sup> *Id.* at 8-9, ¶¶ 16, 17.

if a statutory requirement does not expressly apply to government entities, the government generally will not be subject to the statute unless “the inclusion of a particular activity within the meaning of the statute would not interfere with the processes of government.”<sup>31</sup>

The Ruling then appears to leap to the broad conclusion that if application of the TCPA to the activity, even when that activity is conducted by a private entity, would interfere with the government, then therefore the activity is not covered by the TCPA.<sup>32</sup> This is a completely unfounded and illogical progression, supposedly justified by a 34-year old Commission decision, which actually found that the Communications Act *did* apply to the government.<sup>33</sup> The test propounded in paragraph 15 of the Broadnet Ruling was used in this old Commission analysis to determine that application of the Communications Act would *not* interfere with the activity. That finding does not provide justification for the complete opposite—that a governmental activity that will be interfered with by application of the TCPA should be completely exempted from the TCPA. And it certainly does not provide any logical basis for the further extension made in the next paragraphs—specifically, paragraph 17—that if the governmental activity is conducted by a non-governmental entity then it is not covered by the TCPA.

Then the Ruling posits in paragraph 16 that the doctrine of vicarious liability as propounded in the *DISH Declaratory Ruling*<sup>34</sup> might cause the government to be responsible for the TCPA violations of the private contractor. But one point on which all parties agree is that the government

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<sup>31</sup> *Id.* at 8, ¶15 (emphasis added).

<sup>32</sup> This seems to be the point of the argument articulated in paragraph 15, preceding the conclusion in paragraph 17 that the federal contractor acting for the government is entitled to “invoke the federal government’s exception from the TCPA . . . “*Id.* at 9, ¶ 17.

<sup>33</sup> In the Matter of Request for Declaratory Ruling and Investigation by Graphnet Systems, Inc., 73 F.C.C.2d 283, 292 ¶¶ 24-25 (1979).

<sup>34</sup> *DISH Network, LLC, Declaratory Ruling*, 28 FCC Rcd 6574, 6587 ¶35 (2013), *pet. for review dismissed*, *DISH Network, LLC v. FCC*, 552 Fed. App’x 1 (D.C. Cir. 2014).

is protected from liability for damages under the TCPA because of its sovereign immunity.<sup>35</sup> So the supposed need to shield the contractors to protect the government from liability for their conduct is completely non-existent.

The Broadnet Ruling appears to have relied on a fundamental misunderstanding of the express language and holding in the *Campbell-Ewald Co. v. Gomez* case.<sup>36</sup> Contrary to what is implied throughout the Broadnet Ruling,<sup>37</sup> the Supreme Court did *not* hold that the government is not a person covered by the TCPA; it merely held that the doctrine of sovereign immunity protects the government—and only the government—from a suit for damages for violating the TCPA.<sup>38</sup>

Moreover, the statement in paragraph 20 of the Broadnet Ruling that “[t]he Court further indicated that a government contractor may be eligible for ‘derivative immunity’ when it acts under authority validly conferred on it by the federal government” is simply not correct. The Court made no finding that contractors for the federal government enjoy “derivative immunity.” Quite the opposite, the Court stated:

[G]overnment contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States.” . . . .  
That immunity, however, unlike the sovereign's, is not absolute. . . . Campbell asserts “derivative sovereign immunity,” . . . but can offer no authority for the notion that private persons performing Government work acquire the Government's embracive immunity. When a contractor violates both federal law and the

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<sup>35</sup> *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016).

<sup>36</sup> 136 S. Ct. 663 (2016).

<sup>37</sup> The fact that the Supreme Court did not hold that federal contractors are persons is acknowledged in note 96 of the Ruling: “The Court in *Campbell-Ewald* was not presented with the question, and thus did not decide, whether such contractors are ‘persons’ within the meaning of the TCPA. Instead, the Court granted certiorari and ruled only on the question of whether and when government contractors share in the government’s sovereign immunity.” Broadnet Ruling at 12 n.96 (emphasis added). This conclusory sentence following the acknowledgement is disingenuous at best. The Court explicitly found that the government contractors do not share in the government’s sovereign immunity.

<sup>38</sup> The Court stated: “Do federal contractors share the Government’s unqualified immunity from liability and litigation? We hold they do not.” *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) (emphasis added).

Government's explicit instructions, as here alleged, no “derivative immunity” shields the contractor from suit by persons adversely affected by the violation.<sup>39</sup>

There was no determination by the Supreme Court—in this or any other case—that a contractor can ever acquire derivative sovereign immunity and avoid liability for its violations of the law just because it is under contract with the federal government. The Supreme Court held only that when a federal contractor violates the express instructions provided by the government it is not entitled to any immunity from liability under the TCPA.<sup>40</sup> There is no statement whatsoever in *Campbell-Ewald* of whether “derivative sovereign immunity” (a term asserted by Campbell-Ewald in its briefing, not by the Court) exists, much less what elements must be met to invoke it.

**E. There is a Fundamental Distinction between Excluding Contractors from Coverage and Allowing Immunity from Liability.**

In the Broadnet Ruling, the Commission has conflated the issue of whether contractors are covered as “persons” under the TCPA with the issue of whether they can escape liability for their violations of the TCPA under an immunity theory. These are quite separate questions, with very important ramifications.

The Broadnet Ruling allows a government contractor to make robocalls calls without consent when a) the contractor has been validly authorized to act as the government’s agent; b) the contractor is acting within the scope of its contractual relationship with the government; and c) the government has delegated to the contractor its prerogative to make autodialed or pre-recorded calls.<sup>41</sup> Whether federal government contractors qualify under the first prong of this test is subject to serious question, as pointed out by the Professional Services Council in its Petition for

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<sup>39</sup> *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) (emphasis added; internal citations omitted).

<sup>40</sup> *Id.* at 674.

<sup>41</sup> Broadnet Ruling at 9-10, ¶ 17.

Reconsideration.<sup>42</sup> Assuming the first prong can be satisfied, in order for a contractor to escape liability for making robocalls to cell phones without the consent of the called party, the second and third prongs presumably require the government to enter into a contract that requires these robocalls without consent, or allows these calls to be made regardless of whether there was consent.

This raises two questions: 1) whether the federal government has the legal authority to issue a contract that explicitly instructs a contractor to violate a federal law passed by Congress; and 2) whether a contractor has the authority to ignore a “clearly established right”<sup>43</sup> when implementing a contract that is silent on compliance with the federal law (in this case, the TCPA). We posit that the answer to both questions is “no.” When the issue is evaluated from the perspective of the TCPA (a law passed by Congress that is clearly applicable to entities such as federal contractors), the law automatically applies to the contract.

**1) If a government contract is silent regarding compliance with the TCPA, the contractor is still liable for TCPA violations.**

It is a general rule that the law applicable to the situation is automatically incorporated into a contract.<sup>44</sup> So, but for confusion that will grow out of the Commission’s misguided Broadnet Ruling,

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<sup>42</sup> Petition of Professional Services Council et al. for Reconsideration of Declaratory Ruling, CG Docket No. 02-278 (filed August 4, 2016).

<sup>43</sup> 136 S. Ct. 663, 673 (2016) (citing *Filarsky v. Delia*, 132 S. Ct. 1657, 1668 (Ginsburg, J., concurring)).

<sup>44</sup> *See, e.g., In re Doctors Hosp. of Hyde Park*, 337 F.3d 951, 959 (7th Cir. 2003) (“We do not have the situation in which a statute is so far afield of matters of normal interest to contracting parties that they would not have thought it would affect the terms of their contract... It is conceivable that such statutes would not be deemed to create implied contractual terms, though unlikely in view of such commonplace judicial remarks as that ‘as a general principle of contract law, statutes and laws in existence at the time a contract is executed are considered part of the contract. It is presumed that parties contract with knowledge of the existing law.’”) (citations omitted)); *Alpha Beta Food Markets v. Retail Clerks Union Local 770*, 291 P.2d 433, 437 (Cal. 1955) (citing the “general rule that ‘all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated.’”(citation omitted)). *Cf. Bank of America, N.A. v. Moglia*, 330 F.3d 942, 948 (7th Cir. 2003); *Schiro v. W.E. Gould & Co.*, 165 N.E.2d 286, 290 (Ill. 1960).



the TCPA would automatically apply to every contract between the United States government and its contractors relating to calls covered by the TCPA.

In *Campbell-Ewald*, the Court, citing the case of *Filarsky v. Delia*,<sup>45</sup> notes that “[q]ualified immunity may be overcome, however, if the defendant knew or should have known that his conduct violated a right ‘clearly established’ at the time of the episode in suit.”<sup>46</sup> Applying the words from the *Filarsky* case and previous decisions, the Court observed that the government contractor in *Campbell-Ewald* did not “contend that the TCPA’s requirements or the Navy’s instructions failed to qualify as ‘clearly established.’”<sup>47</sup>

The Court’s observation demonstrates, first, that the TCPA’s requirements apply to government contractors. If the TCPA’s requirements did not apply to government contractors, it would not matter whether those requirements were clearly established or not.

Second, the Court’s observation shows that where a contractor knows or should have known that its conduct violated “clearly established” statutory rights, derivative or qualified immunity will not rescue the contractor from liability. This rule applies even where a contract does not explicitly direct compliance with a given statute, such as the TCPA, because a contractor in the business of making calls or sending text messages to consumers surely knows, or should know, the bounds and strictures of the TCPA.<sup>48</sup>

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<sup>45</sup> *Filarsky v. Delia*, 132 S. Ct. 1657 (2012). This statement in *Filarsky* was derived from another United States Supreme Court case, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), in which the Court held that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” 475 U.S. at 818.

<sup>46</sup> *Campbell-Ewald v. Gomez*, 136 S. Ct. 663, 673 (2016) (citing *Filarsky v. Delia*, 132 S. Ct. 1657, 1668 (Ginsburg, J., concurring)).

<sup>47</sup> 136 S. Ct. 663, 676 (2016).

<sup>48</sup> After all, the TCPA, enacted in 1991, sets forth the governing rules and regulations that permit and proscribe conduct relating to robocalls and text messages. An entity in the business of making

It is also important that in *Campbell-Ewald* the Court employs the disjunctive conjunction “or” in this observation: “Campbell does not here contend that the TCPA's requirements *or* the Navy's instructions failed to qualify as ‘clearly established.’”<sup>49</sup> This usage makes clear that the “clearly established” statutory rights need not be explicitly set out in the instructions contained in the contract between the contractor and the government as well as the statute. The fact that the rights are contained in the TCPA itself is enough to qualify them as “clearly established.” Thus the *Campbell-Ewald* case clearly shows that a governmental contractor that violates the TCPA, even if the contract does not specifically require compliance, is not entitled to immunity, and instead is liable for its TCPA violations.<sup>50</sup>

**2) If a government contract includes in its contract instructions for the contractor to violate the TCPA, the contractor is still liable for TCPA violations.**

The second scenario is a contract that is silent on its face regarding compliance with the TCPA. Here, too, the *Campbell-Ewald* decision is instructive. The Court notes that there is a two-prong test for a contractor to escape liability under qualified immunity. When it performs as instructed by the government, the authority must be “validly conferred” in order for the contractor

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these kinds of contacts could hardly remain in business without some familiarity with or basic awareness of the statute's contents.

<sup>49</sup> 136 S. Ct. at 673 (emphasis added).

<sup>50</sup> Similarly, where a contract sets forth the general directive for a contractor to make calls, but does not contain a specific directive to adhere to the TCPA's requirements, the contractor may not claim immunity if, through exercising discretion and independence, the contractor devises a program of making calls that turns out to violate the TCPA. Under this scenario, the contractor would be committing independent and negligent acts, outside any directives from the government, that cause injury to the consumer. *See, e.g., Anchorage v. Integrated Concepts & Research Corp.*, 1 F. Supp. 3d 1001 (D. Alaska 2014) (where contract contained a Statement of Work describing broadly the project responsibilities, and the contractor's independent and negligent acts (*i.e.*, not any government agency directives) caused the damages complained of, dismissal of derivative sovereign immunity defense was appropriate). *See also Contango Operators v. U.S.*, 965 F. Supp. 2d 791 (S.D. Tex. 2013) (no immunity where contractor was alleged to have acted negligently in performing the dredging activities, the subject of the government contract).

to obtain immunity.<sup>51</sup> The Court explicitly notes that when the contractor has “exceeded his authority” or the authority was not “validly conferred,” the contractor will be liable for conduct that caused the injury.<sup>52</sup> A government contract that instructs an agent to violate an applicable federal law, such as the TCPA, would not provide authority that was “validly conferred.”<sup>53</sup>

Both of these examples show that, under the Supreme Court’s analysis, government contractors are responsible for complying with the TCPA. The Commission’s Broadnet Ruling however, significantly muddies this clear set of rules.

#### **IV. Consumers Will Suffer Irreparable Harm If the Broadnet Ruling is Not Stayed in the Short Term and Withdrawn in the Long Term.**

The Commission’s Budget Act Rules, announced in mid-August 2016,<sup>54</sup> provide significant protections for consumers from robocalls made by government contractors collecting debts owed to or guaranteed by the federal government (for example by limiting those calls to 3 per month and providing a right to stop the calls). However, these rules have prospective effect only, and do not take effect until 60 days after they appear in the Federal Register.<sup>55</sup> It will be at least five or six months before these rules are effective.<sup>56</sup> The Commission found that the need for these consumer

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<sup>51</sup> 136 S. Ct. at 673 (quoting *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940)).

<sup>52</sup> *Id.*

<sup>53</sup> The Court in *Yearsley* defines the phrase “validly conferred” as “done was within the constitutional power of Congress.” 309 U.S. at 20-21. It would appear that requiring a contractor to violate the TCPA could hardly be “within the constitutional power of Congress.”

<sup>54</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, FCC 16-99, 2016 WL 4250379 (Aug. 11, 2016) [hereinafter Budget Act Rules], available at <https://ecfsapi.fcc.gov/file/08111407302175/FCC-16-99A1.pdf>.

<sup>55</sup> Budget Act Amendments Rules at 24, ¶¶ 59, 60.

<sup>56</sup> Once OMB has the rules to review, the review can take as much as another 120 days. Adding the 60 days after the regulation appears in the Federal Register brings the likely period before the rules are fully effective to approximately 180 days. See Office of Information and Regulatory Affairs, Regulations and the Rulemaking Process: “**Q. How long can OIRA take to review a draft**

protections from debt collectors was clear: “We determine, based on consumer complaints and on support from the record, that restrictions on the number and duration of federal debt collection calls are appropriate and necessary.”<sup>57</sup>

Yet the Broadnet Ruling, unless changed, even in combination with the steadfast consumer protections required by the Budget Act Rules, will leave consumers unprotected from these calls for the next half year, and could lead to a get-out-of-jail-free card for federal contractors who have blatantly violated the TCPA rights of consumers while collecting federal debt in the past. This means that there are three categories of *immediate and irreparable* harm to consumers if the Broadnet Ruling stands:

- 1) Federal contractors collecting federal debt will believe that, during the interim period before the Budget Act Amendments Rules become effective, they are not required to abide by the constraints of the TCPA;
- 2) Pending litigation challenging past transgressions of the TCPA by federal contractors will be affected by arguments that the Broadnet Ruling has retroactive application.
- 3) Federal contractors making non-debt collection calls will also believe their calls to be unconstrained.

**1. Federal Debt Collector Calls.** At this moment, and until the Broadnet Ruling is either stayed or reconsidered, the combined effect of the Budget Act Rules and the Broadnet Ruling is that only the Broadnet Ruling is applicable—possibly denying the protections of the TCPA for all calls by government contractors, including calls from debt collectors.<sup>58</sup> Yet it would be inconsistent with

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**regulation? A.** The period for OIRA review is limited by Executive Order 12866 to 90 days. There is no minimum period for review. Under the Executive Order, the review period may be extended indefinitely by the head of the rulemaking agency; alternatively, the OMB Director may extend the review period on a one-time basis for no more than 30 days.” *Available at* <http://www.reginfo.gov/public/jsp/Utilities/faq.jsp>.

<sup>57</sup> “The [Consumer Financial Protection] Bureau’s examinations of debt collectors have also revealed excessive calling and consequent consumer harm.” Budget Act Amendments Rules at ¶ 32, n.102 (citing CFPB Comments).

<sup>58</sup> If faced with these arguments in court, we will argue that the Broadnet Ruling is incorrect, that a petition for reconsideration is pending, and that the Ruling should not be followed.

the basis for the Budget Act Rules to leave consumers unprotected from exactly those harms intended to be avoided by the Rules. All of the reasons for the Commission's strong protections against too many robocalls by debt collectors upon which the Rules are based are equally applicable to the next six months.

**2. Pending Litigation.** We have already learned of cases in which government contractors, accused of gross past violations of the TCPA, are likely to argue that the Broadnet Ruling stands for the proposition that they should not be held liable for these violations. Courts could apply the Broadnet Ruling to these pending cases to allow these contractors to escape liability for past transgressions, thereby undermining the important enforcement mechanisms of the private right of action in the TCPA, and leaving many individuals, who received dozens, or sometimes hundreds, of unwanted calls, without redress. Some examples of the types of serious TCPA violations that could go unredressed if the Broadnet Ruling were applied to pending cases include:

- In a case brought by a client of the law firm of Greenwald Davidson Radbil PLLC of Boca Raton, Florida and Austin, Texas,<sup>59</sup> a large collector of federal student loan debt placed numerous autodialed phone calls to the client looking for another person, the debtor on the loan it was trying to collect. The client notified the collector on numerous occasions that his cellular telephone number did not belong to the debtor. Although the collector recorded these explanations and the collector said it marked the number as a "wrong number," the calls continued. Discovery revealed that this collector placed scores of calls to the cellular telephones of consumers throughout the country after dates on which it knew that the numbers called were the wrong number.
- According to another consumer rights lawyer, Client Jane Doe (a pseudonym), a resident of a southern state, received hundreds of unconsented robocalls from a federal contractor for her defaulted student loan debts. Despite the fact that Doe repeatedly told the debt collector to stop calling her personal cell phone, the calls continued unabated and invaded Doe's privacy and interfered with her personal life. After the contractor was sued in federal court, the debt collector has now threatened to invoke the supposed protections of the FCC's Broadnet Ruling, as well as argue that the Ruling has retroactive application to the beginning of time, in order to try and escape TCPA liability

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<sup>59</sup> These facts are described more fully in the firm's Reply Comments in Favor of a Stay Pending Reconsideration, CG Docket No. 02-278 (filed Aug. 16, 2016), *available at* <https://ecfsapi.fcc.gov/file/10816887018145/GDR%20Reply%20Comments%20in%20Favor%20of%20A%20Stay%20Pending%20Reconsideration%20.pdf>.

for these robocalls. Doe's attorneys expect soon to face motions to dismiss this case based upon the Broadnet Ruling.

**3. Other Federal Contractor Calls.** Moreover, regardless of the effective date of the Budget Act Amendments Rules, the Broadnet Ruling is likely to lead all *other* government contractors making calls for the federal government, other than for debt collection, to believe themselves to be completely unlimited by the protections of the TCPA.<sup>60</sup>

The robocalls that the Broadnet petitioners seek to make will harm the consumers on whose behalf NCLC has filed the Petition for Reconsideration. Many, many consumers will view robocalls to announce town hall meetings and other political matters as unwanted, invasive, and aggravating. The Commission's Broadnet Ruling appears to mean that there will be no way for consumers to stop these calls, and that there will be no limits on the number, duration, or time of these calls. Similarly, disabled consumers should have the right to consent or decline to receive robocalls about services claimed to enable them to return to work. Indeed, these consumers are particularly likely to be low-income and to be relying on prepaid cell phones or plans with limited minutes that they need for all their communications, including emergency calls, calls to medical providers and social service agencies, and calls to meet all their other daily needs. Force-feeding them with robocalls that may be duplicative or even entirely irrelevant to them and that they must pay for will more likely harm these consumers than help them. And as for surveys, many consumers find survey calls aggravating and intrusive. The Commission should recognize the invasion of privacy caused by these calls to all cell phone users, and the not insignificant costs to those users who pay for their minutes and texts.

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<sup>60</sup> The Broadnet Ruling possibly provides some limitations on these calls based on its requirement that the contractor actually be acting in an agency capacity for the federal government. Petition of Professional Services Council et al. for Reconsideration of Declaratory Ruling, CG Docket No. 02-278 (filed August 4, 2016) (arguing that no relief was actually provided by Broadnet because all federal contracts eschew any agency relationship with the contractors).

## V. Requests for Changes to the Broadnet Ruling.

We urge the Commission to reject the three petitions that prompted this proceeding. The petitioners have not made a case for abandoning the TCPA's protections for these non-emergency calls, and the petitioners have an array of other ways to reach people. Indeed, the ruling that the petitioners seek would be, in the long term, a disservice to the interests of the federal government. Robocalls by contractors for government agencies to persons who do not want to receive them, and cannot stop them, risk causing anger and disenchantment with the government. For low-income consumers who have limited-minute or prepaid plans, these calls will amount to an additional (and highly regressive) federal tax.

If, however, the Commission believes that it is necessary to allow the types of calls described in these three petitions to be made to cell phones without consent, the Commission has the power, pursuant to 47 U.S.C. § 227(b)(2)(C), to allow these calls only if they are free to the end user (FTEU) and subject to provisions to protect the called party's privacy rights.

The FTEU technology is a truly viable alternative for the Broadnet petitioners. There are several companies offering technologies that provide automated calls and texts messages to subscribers that are, in fact, free to the end users, regardless of whether the end user has an unlimited plan.<sup>61</sup> These callers rely on clearinghouses to tell them which providers own which numbers, and they have the capacity to affirmatively identify which few numbers cannot be called using the FTEU technology. If some of the numbers the government requests to be called are not

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<sup>61</sup> See, e.g., Soundbite Communications, Free to End User Text Messaging: A Game Changing Business Model 5 ("FTEU text messaging can be used across any industry and at any stage of the customer lifecycle."), *available at* [http://www.soundbite.com/sites/default/files/file/Whitepapers/FTEU\\_Text\\_Messaging\\_June\\_21\\_2011.pdf](http://www.soundbite.com/sites/default/files/file/Whitepapers/FTEU_Text_Messaging_June_21_2011.pdf); Intelligent Contacts, Free to End User-FTEU, *available at* <http://intelligentcontacts.com/solutions/free-to-end-user-fteu/>; ivVisionMobile, Free To End User (FTEU) Text Messaging For Businesses, *available at* <http://www.ivisionmobile.com/text-messaging-software/free-to-end-user-fteu.asp>.

on the list of numbers whose providers have agreed to accept FTEU calls, alternative dialing arrangements can be made for those numbers.

Additionally, at a minimum, the Commission should add the following essential consumer privacy protections before such a determination could conceivably be appropriate:

1. Limit the number of calls per month (or per year).<sup>62</sup>
2. Require callers to offer consumers the right to opt out of future calls via automated method in the call or any other reasonable method, and to stop calling consumers who request the calls to stop.
3. Permit calls only between 8 a.m. and 9 p.m., using the called party's time zone.
4. Limit the duration of voice mail messages and the length of text messages.
5. Allow no more than one mistaken call to a reassigned number.

Again, we strongly urge the Commission to completely reverse its Ruling in Broadnet. We suggest the limitations above only in the event that the Commission is determined to preserve the exemptions in some fashion.

## **VI. Conclusion.**

The error and danger in the Commission's Ruling is made plain by the far-reaching negative effects it will have, which are unquestionably at odds with Congress's intent of protecting consumers from violations of their privacy rights and from the economic costs imposed by unwanted calls and faxes. Relying on the Broadnet Ruling, government contractors will be free to make robocalls to consumers' cell phones, even in the absence of or after revocation of consumer consent. They can target consumers by calling randomly-generated numbers or numbers obtained from database vendors. Government contractors could even make robocalls to emergency rooms, police and fire departments, poison control centers, and the like. And the Ruling calls into question whether the

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<sup>62</sup> For example, the National Employment Network Association "asserts that the maximum number of contacts to each beneficiary should be limited to four per year, unless the beneficiary opts out first." Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Request for Comment on National Employment Network Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 2 (Rel. Sept. 19, 2014) *available at* <https://www.fcc.gov/ecfs/filing/6019372713/document/7522902874>.



Commission's rules regarding technical and procedural standards for artificial voice calls, and the prohibition against caller ID spoofing, apply to government contractors.

We urge the Commission to enter a stay of the Broadnet Ruling in light of the rapid, devastating impact it will have on consumers in the United States. We also urge the Commission to reverse its order that government contractors acting as agents for the federal government are not "person[s]" subject to the TCPA.

If the Commission does not reconsider and change its Ruling in this proceeding, tens of millions of Americans will find their cell phones flooded with unwanted robocalls from federal contractors with no means of stopping these calls and no remedies to enforce their requests to stop these calls.

Respectfully submitted August 29, 2016

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