

**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)	

Reply Comments
in furtherance of the Petition for Reconsideration
filed by the
National Consumer Law Center
on behalf of its low-income clients
and
fifty legal aid programs, and national, state and local public interest organizations
September 15, 2016

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I. Summary.

Our Comments in support of our Petition for Reconsideration¹ filed August 29, 2016 set out our legal analysis supporting reconsideration. In these Reply Comments, we focus on just three points in response to the arguments raised by those opposing the Petition for Reconsideration:

- A. The real harm to consumers, especially low-income consumers, which will result from allowing the unfettered calls requested by government contractors.
- B. The danger to the future integrity of the Telephone Consumer Protection Act² (TCPA) if the Commission persists in exempting federal contractors from the consent requirements through the definition of the word “person” in section 227(b).
- C. The availability of free to end user technology as a means to facilitate limited communication from some government contractors calling on behalf of the federal government for specified purposes.

II. Introduction.

Pursuant to the Public Notice³ issued by the Consumer and Governmental Affairs Bureau, the National Consumer Law Center (NCLC)⁴ files these comments in reply to those comments opposing our request for reconsideration of the Federal Communications Commission’s

¹ Comments of National Consumer Law Center on behalf of its low-income clients, et al. in Support of Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration, CG Docket No. 02-278 (filed Aug. 29, 2016), *available at* <https://ecfsapi.fcc.gov/file/10829228610098/Final%20Broadnet%20Comments%20in%20Support%20of%20Petition%20.pdf>.

² 47 U.S.C. § 227.

³ Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Comment on National Consumer Law Center 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.

³ Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Comment on National Consumer Law Center 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.

⁴ 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.

(Commission) Declaratory Ruling [hereinafter Broadnet Ruling] in the above-named proceeding released July 5, 2016.⁵ 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 Reconsideration⁶ [hereinafter Petition for Reconsideration] filed on July 26, 2016 on behalf of the fifty legal aid programs, and national, state and local public interest organizations named in that petition.

III. Facts and Arguments in Support of Reconsideration.

A. Real Harm to Consumers, Especially Low-income Consumers, Will Result from Allowing the Unfettered Calls from Government Contractors.

If the Broadnet Ruling stands as is, consumers will be subjected to these calls on their cell phones without having the opportunity to stop them, and many of them will have to pay for the calls. Both of these consequences will be real harm.

Unwanted robocalls—whether to conduct surveys (per RTI’s petition), promote teletown halls (per Broadnet’s petition), advertise potential employment opportunities to disabled recipients (per the National Employment Network Association’s petition), seek applicants for the Navy or other branches of the armed services (as was the purpose of the calls in the U.S. Supreme Court case of *Campbell-Ewald Co. v. Gomez*⁷), or for other purposes—all invade the privacy of the called party. Often these calls come during dinner, while parents are putting babies to sleep, while people who work at night are sleeping during the day, and at other times when interruptions are particularly intrusive. Even assuming that some of these calls serve an important governmental purpose, that governmental purpose does not make the calls any less intrusive. Consumers should at least have the opportunity to turn them off and to tell these callers to stop calling. As the Broadnet Ruling now stands, consumers will not have that option.

⁵ 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>.

⁶ 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>.

⁷ 136 S. Ct. 663 (2016).

Moreover, 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, and many clients are disabled and receive Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI). A flood of unwanted calls would cause significant harm to these households struggling to afford 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. Especially for these consumers, it is only fair that these governmental calls—assuming that they serve an essential governmental function—do not cost the recipients.

Some of the commenters opposing reconsideration argue that economic loss does not, in and of itself, constitute irreparable harm, and thus the economic costs that will undoubtedly accrue to our low-income clients with limited-minute cell phones do not qualify to be addressed. However, the general rule that simple economic loss does not constitute irreparable harm “rests on the assumption that economic losses are recoverable.”⁸ It is premised on the possibility that adequate compensatory or other corrective relief will be available at a later date. Economic harm will qualify as irreparable “where a plaintiff’s alleged damages are unrecoverable.”⁹ Since the Broadnet Ruling’s method of permitting these calls provides no possibility of economic recovery for persons harmed by these unwanted calls, those costs are irreparable injuries.

When Congress enacted the TCPA, it stressed both privacy concerns and the costs imposed on cell phone users.¹⁰ The only exemption authority that might apply to the calls by government

⁸ North Carolina Growers’ Ass’n, Inc. v. Solis, 644 F. Supp. 2d 664, 671 (M.D.N.C. 2009) (granting preliminary injunction where plaintiffs’ economic losses were “unrecoverable in that suits for economic damages against the federal government and federal agencies are barred by the sovereign immunity doctrine”). See also Iowa Utils. Bd. v. F.C.C., 109 F.3d 418, 426 (8th Cir. 1996) (proposition that economic loss does not, in and of itself, constitute irreparable harm, rests “on the assumption that the economic losses are recoverable. The threat of unrecoverable economic loss, however, does qualify as irreparable harm.”; finding here that irreparable harm had been established).

⁹ Clarke v. Office of Fed. Hous. Enter. Oversight, 355 F. Supp. 2d 56, 65 (D.D.C. 2004) (finding irreparable harm where the entity receiving funds would be immune from a suit to recover them).

¹⁰ S. Rep. 102-178, at 5 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1969 (“unsolicited calls placed to fax machines, and cellular or paging telephone numbers often impose a cost on the called party (fax messages require the called party to pay for the paper used, cellular users must pay for each

contractors that are at issue here--that found in § 227(b)(2)(C)—incorporates both of these mandates, allowing the Commission to exempt calls to cell phones *only if* they are not charged to the called party *and* are subject to conditions as the Commission may prescribe to protect privacy. To allow cell phone calls without any protections either against costs or against invasion of privacy flies in the face of these requirements.

Opponents of reconsideration argue that political and governmental restraints will be sufficient to protect consumers from excess calls. However, none of the petitioners' filings make any commitment to limits that would provide even moderately reasonable protections against invasions of privacy and imposition of costs on called parties. And, even if the petitioners had made such commitments, they would be entirely unenforceable, and subject to change at the discretion of the caller, if § 227(b)(1) is inapplicable to these callers. Moreover, the TCPA requires that the Commission itself limit these calls: if the calls are so important that they should be permitted to be made to cell phones without consent, then Congress has already provided a safety valve from that requirement, namely allowing the calls through free to end user technology, subject to conditions as the Commission may prescribe to protect privacy. Free to end user calls with limits on the number of calls permitted, as well as the right to stop the calls, would at least ensure that the invasion of privacy from these calls is minimized and that consumers do not have to pay for the calls.

B. The “Person” Exemption May Spread Through Judicial Interpretation.

One of the dangers of the Broadnet Ruling is that courts may apply its logic beyond its specified scope. In particular, while the Ruling states that it is only interpreting the word “person” in section 227(b)(1)(A) and applying that interpretation to federal contractors, the Ruling provides no logical distinction between that use of “person” in that section, and the use of the word in other sections of the TCPA.¹¹ Additionally, even though the Commission deliberately reserved for the future the issue of whether the exemption should be applied to state contractors, there is nothing to stop courts from using the logic of the Ruling to extend the exemption. This result would be particularly dangerous when applied to calls collecting state debt, because while the Commission has

incoming call, and paging customers must pay to return the call to the person who originated the call”), 1972-1973 (automated calls “can be an invasion of privacy”).

¹¹ In particular, the preliminary language “It shall be unlawful for any person” in section 227(b)(1) applies to the prohibition on prerecorded calls to residential lines, junk faxes, and tying up more than one line of a multi-line business. In addition, the technical and procedural standards in section 227(d)(1) and the caller ID spoofing prohibition in section 227(e) apply to “any person.”

promulgated vitally important restrictions on robocalls to collect federal government debts, it has promulgated no such standards for robocalls to collect state debts. And if state governments and their contractors or agents are not “persons” under the TCPA, it would not have any authority to promulgate such protections.

The danger that courts will extend the Broadnet ruling beyond section 227(b)(1)(A) and beyond the federal government and its contractors is all too real. Courts have often looked to the logic of Commission declaratory rulings and applied them in new contexts. A prime example is the *DISH Network* ruling.¹² Although *DISH Network* dealt only with vicarious liability for violations of the TCPA’s telemarketing restrictions, courts immediately began applying it to junk faxes.¹³ These courts held that the *DISH Network* ruling displaced the strict liability standard set forth in the TCPA regulation for entities on whose behalf junk faxes are sent, and that liability could now be based only on common law agency principles. The Commission had to file a letter brief in the Eleventh Circuit in order to try to clear up this unwarranted extension of the Commission’s ruling in *DISH Network*.¹⁴ Thus, despite the Commission’s efforts in the Broadnet Ruling to limit its interpretation of the definition of “person” to § 227(b)(1)(A) and to federal contractors, if courts do not see a logical basis for these distinctions they are likely to apply the ruling more broadly.

C. Free To End User Technology Is Available.

If 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.

¹² *In re* The Joint Petition filed by DISH Network, L.L.C., the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules, CG Docket No. 11-50, 2013 WL 1934349, F.C.C. 13-54 (Rel. May 9, 2013).

¹³ *See* *Siding & Insulation Co. v. Alco Vending, Inc.*, 2015 WL 1858935 (N.D. Ohio Apr. 22, 2015), *rev’d and remanded*, 822 F.3d 886 (6th Cir. 2016); *Savanna Group, Inc. v. Trynex, Inc.*, 2013 WL 4734004, at *5 (N.D. Ill. Sept. 3, 2013) (“Given the substantial similarity between the definitions of ‘seller’ and ‘sender’ and the broad language of the ruling concerning violations of § 227(b), the [DISH Network] ruling is controlling in this case.”).

¹⁴ *Bridgeview Health Care Center, Ltd. v. Clark*, 816 F.3d 935, 938 (7th Cir. 2016); *Imhoff Inv., L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627 (6th Cir. 2015); *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1254–1255 (11th Cir. 2015).

There are numerous Commission rulings permitting FTEU calls and texts for specific purposes that assume the viability of this technology.¹⁵ Nevertheless, there appears to be some question about whether the technology currently exists to make FTEU voice calls, as opposed to FTEU texts.

1. The Technology for FTEU Calls May Already Exist.

It is likely that there are FTEU calling technologies already in existence. We know, for example, that cell phone providers already have and use a mechanism that allows calls between the provider and the consumer to be free to the consumer. Additionally, there is at least one technology already available that is free to end users and produces calls: “Ringless Direct To Voicemail Broadcasting allows you to send one voicemail to thousands of customers quickly.”¹⁶

2. Even If FTEU Technology Were Not Already Available, It Would Be Readily Brought to Market Once Demand for It Exists.

Even if FTEU technology for voice calls were not already available on the market, there is little doubt that it will become available once there was a market for it. As explained in some detail in comments by Randall A. Snyder, an expert in wireless engineering,¹⁷ FTEU call technology is already accessible. Just as FTEU text capacity was developed after the Commission authorized more FTEU texts, FTEU calling capacity will be available once there is a clear market for it. The Commission will create such a market by rewriting the authorization of the calls intended to be permitted by the Broadnet Ruling only through a FTEU technology.

¹⁵ See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961, 8023, 8068 (Rel. July 1, 2015) (providing limited free to end user call exemptions “in the cases of exigent notifications regarding financial services and healthcare matters”). An example of this technology in use, as authorized by the Commission’s 2015 Order, can be found at <https://www.cfbank.com/News-and-information/ID/33/New-Fraud-Prevention-Service> (last visited Sept. 14, 2016).

¹⁶ Do-Not-Call Protection, Ringless Voicemail Broadcasting for Business, *available at* <http://www.donotcallprotection.com/direct-to-voicemail-cell-messaging-b2c?hsCtaTracking=07836beb-227e-4827-a77c-c3db3b993d5d%7C06b632bc-b4f2-460e-9ebf-d16d55bf8a4e> (last visited Sept. 14, 2016). Note that this same provider touts 94% accuracy in avoiding reassigned numbers.

¹⁷ See Letter from Randall A. Snyder to Marlene H. Dortch (Sept. 13, 2016) (supporting NCLC’s comments in support of reconsideration of the FCC’s Broadnet Ruling), *available at* <https://ecfsapi.fcc.gov/file/1091328205199/Snyder%20FCC%20Broadnet%20Comments%20091316.pdf>.

3. Communication by FTEU Texts Is a Viable Alternative.

Assuming, *arguendo*, that the technology currently exists only for FTEU texts, not FTEU voice calls, texts are a truly viable alternative for the Broadnet petitioners. There are several companies offering technologies that provide automated calls and text messages to subscribers that are, in fact, free to the end users, and regardless of whether the end user has an unlimited plan.¹⁸ These callers rely on clearinghouses to tell them which providers own which numbers, and they have the capacity to identify affirmatively which few numbers cannot be called using the FTEU technology. If some of the numbers the government requests to be called are not on the list of numbers whose providers have agreed to accept FTEU calls, alternative-dialing arrangements can be made for those numbers.

Federal contractors could provide the necessary information by text (such as information on how to sign in to a teletown hall or where to find information on employment opportunities). Contractors could also use the texts to obtain consent for survey and similar calls, or could send texts asking the consumer to call a number to take the survey.

4. Necessary Protections to be Applied to any FTEU Calls or Texts Authorized for Broadnet Callers.

We still 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. However, if the Commission proceeds with authorizing these calls, then the Commission, at a minimum, 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).¹⁹

¹⁸ 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; Intelligent Contacts, Free to End User-FTEU, *available at* <http://intelligentcontacts.com/solutions/free-to-end-user-fteu/> (last visited Sept. 14, 2016); 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> (last visited Sept. 14, 2016).

¹⁹ 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

2. Require callers to offer consumers the right to opt out of future calls via an 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.
6. Require calls and messages to accurately identify the contractor and the federal agency on whose behalf the calls or messages were made.
7. Strictly prohibit any telemarketing, solicitation, or advertising content.
8. Prohibit call abandonment.

IV. 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 to protect consumers from invasions of privacy and from the economic costs of 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, 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 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 and significant 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

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>.

contractors with no means of stopping these calls and no remedies to enforce their requests to stop these calls.

Respectfully submitted, September 15, 2016

A handwritten signature in cursive script, reading "Margot Saunders", positioned above a horizontal line.

Margot Saunders

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