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August 17, 2020

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: Notice of *Ex Parte* Presentation, CG Docket No. 02-278, Broadnet's Requests for Interpretations of the meaning of "person" under the Telephone Consumer Protection Act

Dear Ms. Dortch:

This *ex parte* letter, filed by the **National Consumer Law Center** on behalf of its low-income clients, and **Consumer Federation of America, Consumer Reports, EPIC, and Public Knowledge**, is in response to several *ex parte* notices filed on behalf of Broadnet Teleservices LLC (Broadnet), requesting "that the Commission . . . extend its conclusion in the Broadnet Ruling¹ that the federal government is not a 'person' under the TCPA² to state and local Governments."³

On behalf of consumers, we urge the Commission to deny this request for four reasons:

¹ See Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling, CG Docket No. 02-278, F.C.C. 16-72 (F.C.C. rel. July 5, 2016) [hereinafter Broadnet Ruling].

² Telephone Consumer Protection Act, 42 U.S.C. § 227.

³ Written *Ex Parte* Presentation on behalf of Broadnet Teleservices LLC (July 20, 2020), available at <https://ecfsapi.fcc.gov/file/10720152245789/Broadnet%20Written%20Ex%20Parte%20on%20Barr%20v%20AAPC%20-%207-20-20-.pdf> [hereinafter Broadnet *Ex Parte* Letter].

(1) The Broadnet Ruling should not be extended; it should be overturned, as it is premised on incorrect and faulty legal analysis.

(2) There is no legal authority to support defining local governments as anything other than “persons” fully covered by the TCPA’s requirements.

(3) None of the reasons cited by Broadnet in support of this interpretation actually provide a real justification for Broadnet’s request, as most of the calls described as needing to be made either can already be made under the TCPA’s emergency exception, or because the local government would have received prior consent for the calls from the recipients.

(4) If the FCC were to interpret the word “person” in the TCPA to exclude local governments, it would lead to a significant increase in unwanted and unstoppable robocalls regarding all sorts of messages, causing a gross invasion of the privacy of the residents.

I. Rather than extend the Broadnet Ruling, the Commission should overturn it.

Before the Federal Communications Commission considers *extending* the Broadnet Ruling, it should first address the legal challenges to that ruling raised in the Petition for Reconsideration that the National Consumer Law Center filed on behalf of its low-income clients, along with Consumer Federation of America, Consumer Reports, EPIC, and almost fifty other national, state, and local legal aid programs and public interest organizations.⁴

As we pointed out in the Petition and in subsequent filings,⁵ 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 TCPA is incorrectly reasoned, not supported by applicable law, contrary to the public interest, and a sure cause of significant harm to consumers. The Broadnet Ruling concluded 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.”⁶ 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.⁷

The 2015 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

⁴ National Consumer Law Center, Petition for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration (filed July 26, 2016), *available at* <https://ecfsapi.fcc.gov/file/10726059270343/NCLC%20Petition%20for%20Reconsideration%20of%20Broadnet.pdf>.

⁵ *See, e.g.*, National Consumer Law Center, Comments in Support of Reconsideration in furtherance of the Petition for Reconsideration (filed Aug. 29, 2016), *available at* <https://ecfsapi.fcc.gov/file/10829228610098/Final%20Broadnet%20Comments%20in%20Support%20of%20Petition%20.pdf>.

⁶ Broadnet Ruling, *supra* note 1, at 8 ¶ 16.

⁷ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (2015).

collect a debt owed to or guaranteed by the United States.”⁸ The purpose of the 2015 amendments was to create a narrow exception from the consent requirement for these calls to collect government debt. The only callers that would possibly be making calls to collect debts owed to or guaranteed by the United States, other than an agency of the government itself, would be 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—would have meaning only if those contractors would *not* have been permitted to make these calls without the amendment.⁹ There would have been no need for the exception created by the Budget Act amendments if calls made by federal government contractors were not covered by the TCPA.

The Budget Act amendment was struck down by the Supreme Court last month in *Barr v. American Association of Political Consultants, Inc.*,¹⁰ as violative of the First Amendment. However, the point here is not the validity or invalidity of the exception that the Budget Act sought to create, but rather that its creation demonstrates that Congress understands the TCPA to apply to government contractors.

Thus, the exception created by the Broadnet Ruling was not grounded in the law and should be overturned.

II. There is no legal authority for the FCC to define local governments as anything other than persons, fully covered by the TCPA’s requirements.

Local governments have been repeatedly and clearly defined as “persons” subject to private lawsuits.¹¹ The Supreme Court has consistently held that local governments are fully liable for remedies that sensibly apply

⁸ *Id.* at § 301(a)(1)(A) (amending 47 U.S.C. § 227(b)(1)(A)).

⁹ 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 pre-call 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).

¹⁰ ___ U.S. ___, 140 S. Ct. 2335 (July 6, 2020).

¹¹ *See, e.g.,* Cook County, Ill. v. U.S. *ex rel.* Chandler, 538 U.S. 119, 122, 126, 123 S. Ct. 1239, 155 L. Ed. 2d 247 (2003) (holding that local governments are “persons” subject to *qui tam* actions under the False Claims Act; noting the longstanding “natural recognition” that “municipal corporations and private ones were simply two species of ‘body politic and corporate,’ treated alike in terms of their legal status as persons capable of suing and being sued” (citation omitted)).

to them.¹² Municipal corporations, like private ones, “should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.”¹³

The language of the TCPA provides no authority to undermine this long-held and clear application of the law to local governments. The FCC should not attempt to create an exception that is not grounded in the statute and judicial interpretations of that statute.

III. The important calls Broadnet cites as justification for excluding local governments from coverage under the TCPA can already be made under current law.

In various *ex parte* filings, Broadnet has described a number of types of calls, which it maintains local governments need to make, as justification for its premise that the FCC should define local governments out of TCPA coverage.

Broadnet’s *ex parte* letter dated July 20, 2020¹⁴ cites several examples of calls while *implying* (but not directly saying) that the TCPA prevents these calls. However, as is illustrated below, all of these calls are already legal under the TCPA. (Quotes from Broadnet’s letter are in italics, and our responses are underlined.)

Broadnet says:

1. *In a call with employees of the Smithfield Foods, Inc. pork-processing plant, South Dakota Governor Kristi Noem addressed a myriad of COVID-19 issues, including about testing and how vulnerable people will be protected as the state reopens.*¹⁵

Our response: This is already a legal call, for at least two reasons: (1) the call relates to health matters resulting from the COVID emergency, which was directly addressed by the Commission in its Declaratory Ruling on COVID,¹⁶ and (2) the plant was able to call its employees because the employees have previously provided their numbers to the plant, which is considered to be consent for non-telemarketing calls.

¹² *See, e.g.,* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 400, 413, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978) (“The definition of ‘person’ or ‘persons’ covered by the antitrust laws clearly includes cities, whether as municipal utility operators suing as plaintiffs seeking damages for antitrust violations or as such operators being sued as defendants”; municipalities are not beyond the reach of the antitrust laws by virtue of their status because they are not sovereign, so in order to obtain exemption they must demonstrate that their anticompetitive activities were authorized by the state “pursuant to state policy to displace competition with regulation or monopoly public service”).

¹³ Monell v. Department of Social Servs. of City of New York, 436 U.S. 658, 687–688, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) (local government units are “persons” for purposes of § 1983, the Civil Rights Act of 1871).

¹⁴ [Broadnet Ex Parte Letter, supra note 3.](#)

¹⁵ *Id.* at 2.

¹⁶ *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling, CG Docket. No. 02-278 (rel. Mar. 20, 2020), available at <https://docs.fcc.gov/public/attachments/DA-20-318A1.pdf> [hereinafter COVID Emergency Ruling].

2. *A call with officials from a state labor agency answered participants (sic) questions about accessing back payments, eligibility for benefits, and fixing incorrect information they accidentally provided in a claim, among other important concerns.*¹⁷

Our response: This is a legal call, because the labor agency apparently obtained the telephone numbers of the “participants” when they signed up for benefits, and the call directly relates to the purpose for which the numbers were provided. The Blackboard/Edison Declaratory Ruling¹⁸ explains how the content of automated telephone calls must be “closely related” to the transaction that gave rise to the consumer’s provision of a cell phone number.¹⁹

3. *A call with City of Albuquerque Mayor Tim Keller and other municipal officials discussed constituent concerns including masks on buses, the impact of the pandemic on small restaurants, and the reopening of schools, libraries, and city pools.*²⁰

Our response: This call is covered by the COVID Emergency Ruling, as the concerns about masks, closures and reopenings all directly relate to the health and safety of the city residents.

4. *City of Irvine Vice Mayor Mike Carrol discussed with participants an emerging testing program, including the location of testing centers and what privacy measures testing companies will follow.*²¹

Our response: Clearly, “emergency testing” information in a call is covered by the COVID Emergency Ruling.

5. *Broward County’s Sheriff Gregory Tony addressed food shortages, with participating constituents asking about the locations for food distribution as well ways to donate.*²²

Our response: As this call discussed providing food to people who were in danger of being hungry because of the COVID pandemic, these calls directly deal with the health and safety of the recipients and appear to be covered by the COVID Emergency Ruling. To the extent that the call was to area residents who were interested in donating food, those residents likely provided their numbers to the sheriff. Moreover, in a global pandemic, calls about giving food, as well as receiving food, to stave off hunger also fall under the emergency exception.

¹⁷ [Broadnet Ex Parte Letter, supra note 3, at 2.](#)

¹⁸ *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Blackboard, Inc., Petition for Expedited Declaratory Ruling, Edison Electric Institute and American Gas Association Petition for Expedited Declaratory Ruling, Declaratory Ruling, CG Docket No. 02-278, 31 F.C.C. Rcd. 9054 (F.C.C. Aug. 4, 2016), available at <https://ecfsapi.fcc.gov/file/0804720522141/FCC-16-88A1.pdf>.

¹⁹ *Id.* at 9064 ¶ 23.

²⁰ [Broadnet Ex Parte Letter, supra note 3, at 2.](#)

²¹ *Id.*

²² *Id.* at 3.

In its March 24, 2020 *ex parte* letter,²³ Broadnet made broad nonspecific reference to calls that it said need to be made but cannot be made unless local governments are excluded from the TCPA:

6. *The COVID-19 Ruling, however, does not adequately cover state and local officials' outreach that may be necessary to address the many issues arising in the wake of the COVID-19 pandemic, such as its impact on local economies and employment.*²⁴

Our response: The impact on local economies and employment are issues of importance, but they are not emergencies. Calls regarding the economy and employment would be of significant interest to some businesses, but certainly not to the general populace of a town or an entire county. Businesses that *are* interested in this type of information could easily sign up for robocalls on this or related topics with the town, thereby providing consent for calls to their numbers on these topics.

But this is exactly the kind of robocall that would be considered a substantial nuisance to many people. It certainly does not support a reasonable rationale to exclude units of local governments from coverage under the TCPA. Many people would have no interest in this information, and they would find these calls annoying and an invasion of privacy.

Local governments can broadcast information to their residents through local news media (local television news stations are always hungry for news), on their publicly accessible website, by sending out emails to interested residents who sign up to receive them, and by making robocalls to residents who want to receive these calls and so provide their telephone numbers for that purpose.

Issues that relate to the health and safety of residents are quite appropriate for *en masse* robocalls to the residents of a city or county – and can already be legally made under the emergency exception to the requirement for consent in the TCPA. Indeed, the Commission explicitly included local government officials in its COVID Emergency Ruling, giving these officials broad authority to provide information to residents about the imminent health and safety risks caused by the COVID-19 outbreak.²⁵ If the Commission, now that we are four months farther in to the pandemic, has determined that this ruling should address additional types of COVID-related calls, it should supplement the COVID Emergency Ruling, not open the floodgates to a sea of unwanted calls by ruling that local governments are exempt. No new interpretation of the meaning of covered “persons” under the Act is necessary to enable these types of calls.

²³ Notice of *Ex Parte* Presentation on behalf of Broadnet Teleservices LLC (Mar. 24, 2020, available at <https://ecfsapi.fcc.gov/file/1032416091477/Broadnet%20Ex%20Parte%20for%203-20-20%20Call%20with%20Zenji%20Nakazawa.pdf>).

²⁴ *Id.* at 2.

²⁵ COVID Emergency Ruling, *supra* note 16, at 2 ¶7 (“the caller must be from a hospital, or be a health care provider, state or local health official, or other government official as well as a person under the express direction of such an organization and acting on its behalf”).

IV. Excluding local governments from coverage under the TCPA would mean that potentially vast numbers of new types of unwanted calls would be unstoppable.

Local governments collect a lot of debts. These debts include fines, water bills, criminal penalties, and more. If local governments were excluded from coverage under the TCPA, these debt collection calls would be unstoppable. The Fair Debt Collection Practices Act does not apply to the collection of government debts by the government itself, so its protections would not be applicable. Local governments would have no incentive to ensure that their debt collection robocalls are aimed at the actual debtor, and could foreseeably bombard anyone whose number might be have potentially been associated at some point with the debtor.

Moreover, *other than calls related to emergencies*, many of the automated calls a local government might make if permitted to do so without consent are of no interest to the majority of people who would be receiving them. The type of calls cited by Broadnet as one of its reasons for excluding local governments from the consent requirement (*see* example 6, above) illustrate this point. Information about local business conditions and the general unemployment rate would be of little interest to many potential recipients, yet everyone in the area could be bombarded with these calls. And with no limits on the automated calls, cities could use them to make announcements about the following, as just a few examples:

- parades;
- changes in trash pickup;
- shred days;
- new hours for city personnel;
- public meetings of local officials; and
- many other issues that would be of interest only to a small subgroup of the residents who would receive the calls.

The TCPA provides a ready answer for how to handle this situation: the local government can make automated calls about issues to residents who have provided their consent for these calls. If the local government is concerned that it may be inadvertently calling a number for which it does not have consent, because the number may have been reassigned, the FCC has provided a brilliant solution: use of the reassigned number database.²⁶

Finally, we wish to point out that, because of the plethora of robocalls, the result is that true emergency calls and other important calls from local governments are not reaching residents. People have become so inured to the unwanted calls ringing their lines that they do not pick up—even when the calls are important.²⁷ This

²⁶ See Public Notice, Federal Communications Commission, Consumer And Governmental Affairs Bureau Establishes Guidelines for Operation of the Reassigned Numbers Database, CG Docket No.17-59, 35 F.C.C. Rcd 3559 (F.C.C. Apr. 16, 2020), *available at* https://docs.fcc.gov/public/attachments/DA-20-423A1_Rcd.pdf.

²⁷ See, e.g., Benjamin Siegel, Dr. Mark Abdelmalek, & Jay Bhatt, *Coronavirus contact tracers' nemeses: People who don't answer their phones*, ABC News (May 15, 2020), *available at* <https://abcnews.go.com/Health/coronavirus-contact-tracers-nemeses-people-answer-phones/story?id=70693586> (across the country coronavirus **contact tracers** are struggling to reach residents, but the tracing program “is running **into** a problem: people aren't picking up their phones”).

problem is a direct result of the prevalence of robocalls.²⁸ The Commission needs to continue its efforts to reduce the number of unwanted robocalls, not open a new door that will increase them.

Conclusion

In sum, on behalf of this nation's consumers, we urge the Commission *not* to entertain the idea of defining local governments out of coverage under the TCPA. Not only is there no legal basis for such a move, but it would be counterproductive to achieving better communications for essential messages between local governments and their citizens.

If there are any questions, please contact Margot Saunders at the National Consumer Law Center (NCLC), msaunders@nclc.org (202 452 6252, extension 104).

This disclosure is made pursuant to 47 C.F.R. § 1.1206.

Thank you very much.

Sincerely,

National Consumer Law Center on behalf of its low-income clients
Consumer Federation of America
Consumer Reports
EPIC
Public Knowledge

Submitted by:

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²⁸ See, e.g., Stephen Simpson, *Few picking up phone in Arkansas when virus tracers call*, Arkansas Democrat Gazette, July 10, 2020, available at <https://www.arkansasonline.com/news/2020/jul/10/few-picking-up-phone-when-virus-tracers-call/> (“The problem the Health Department faces is that many of those close contacts aren't answering the contact tracers' calls. [The state epidemiologist] believes that can be attributed in part to the prevalence of robocalls and telephone scams.”).