Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Broadnet Teleservices LLC Petition for Declaratory Ruling	)	
	)	
National Consumer Law Center Petition for Reconsideration and Request for Stay Pending Reconsideration of Broadnet Teleservices LLC Petition for Declaratory Ruling	)	
	)	
Professional Services Council Petition for Reconsideration of Broadnet Teleservices LLC Petition for Declaratory Ruling	)	

BROADNET TELESERVICES LLC
PETITION FOR RECONSIDERATION

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EXECUTIVE SUMMARY

Americans' ability to communicate with and hear from their elected representatives at all levels is a bedrock democratic necessity—and government officials across the board, now more than ever, should be able to rely on modern technologies to serve their communities. This is true at the federal level, where our elected officials' decisions shake the world. This is true at the state level, where our elected officials' decisions serve as the laboratory of democracy. And this is true at the local level, where our elected officials' decisions shape and impact our homes, our schools, our community institutions of all shapes and sizes. Both while pandemic-mandated social distancing keeps us apart, and beyond, elected officials need every tool possible in their tool belts to help cultivate civic engagement.

In December 2020, the Federal Communications Commission ("Commission") adopted an *Order on Reconsideration* ("*Order*") further adjusting its interpretations of the Telephone Consumer Protection Act ("TCPA") and making such engagement more difficult. The Commission should reconsider one narrow aspect of that *Order*—specifically, its decision not to grant local governments the same protections under the TCPA it has now rightly granted both the federal government and state governments. Because the *Order* both ignores multiple critical judicial precedents, and incorrectly and incompletely represents the TCPA's legislative history, the Commission should reconsider the local government portion of the *Order*.

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PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Federal Communications Commission's ("Commission") rules,[1] Broadnet Teleservices LLC ("Broadnet")[2] respectfully petitions the Commission to reconsider one limited aspect of its *Order on Reconsideration* ("*Order*") in the above-captioned docket.[3] Specifically, Broadnet asks that the Commission reconsider the portion of the *Order* denying local governments the same abilities and tools to engage with their

[1] 47 C.F.R. § 1.429.

[2] A Colorado-based company founded in 2004, Broadnet enables government entities to participate in shared real-time exercises in democracy through its TeleForum™ technology platform. *See, e.g.*, Supplement to Notice of Ex Parte Presentation of Broadnet Teleservices LLC, CG Docket No. 02-278, at 1 (filed Aug. 3, 2015) (describing how a TeleForum™ event is initiated). Through Broadnet's platform, citizens are able to engage in live conversations, hearing directly from their governments about issues important to local communities, and providing real-time feedback.

[3] *See generally Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order on Reconsideration, CG Docket No. 02-278, FCC 20-182 (rel. Dec. 14, 2020) ("*Order*").

constituents under the Telephone Consumer Protection Act ("TCPA") the agency has afforded the federal government and state governments.

I. THE *ORDER*'S FAILURE TO EXTEND PROTECTIONS TO LOCAL GOVERNMENTS IGNORES CRITICAL JUDICIAL PRECEDENT

The *Order* appears to mistakenly root its determination that "local government entities, including counties, cities, and towns, are 'persons'" for purposes of the TCPA on two principals: That local governments are not "sovereign,"[4] and that the Commission must therefore apply an "interpretive presumption" which results in local governments being "persons."[5] On the first of these two points, the Commission is undoubtedly correct; the fact that local governments generally are not "sovereigns" is beyond dispute.[6] But as the record reflects, and as Broadnet again shows below, this in no way dictates that local governments are "persons" for purposes of the TCPA. Instead, judicial precedent—directly interpreting the TCPA, discussing the presumption against surplusage, and examining analogous laws—demonstrates that local governments should *not* be considered "persons" under the TCPA.

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[4] *See, e.g.*, *id.* ¶ 29 ("[W]e find that the definition of 'person' encompasses local governments because they are not sovereign entities . . . .").

[5] *Id.* ("Local governments, therefore, are not subject to an interpretive presumption that they are not a 'person.'").

[6] Broadnet notes that while "[t]he bar of the Eleventh Amendment to suit in federal courts . . . does not extend to counties and similar municipal corporations," it is also axiomatic that not "only States" but also "*arms* of the State possess immunity from suits authorized by federal law." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *N. Ins. Co. of N.Y. v. Chatham Cty., Ga.*, 547 U.S. 189, 193 (2006) (emphasis added). The determination of when an entity (*e.g.*, a local government) functions an "arm of the State" involves lengthy case-by-case factual analysis, where federal law's application is contingent on state law. *See, e.g.*, *Moor v. Cty. of Alameda*, 411 U.S. 693, 717–21 (1973); *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429–30 n.5 (1997). The ongoing rollout of the COVID-19 vaccine provides an emblematic example both of how complicated the relationship between state and local governments can be—and of why the Commission can and should provide equivalent protections to local governments, avoiding the otherwise-triggered Gordian knot of "when are local governments acting as arms of the state" in the process.

A. The *Order* Fails to Address the Necessary Implications of the Supreme Court's Decision in *Barr*

The *Order* makes only brief reference to the most significant recent Supreme Court decision addressing the meaning of "person" for purposes of the TCPA, *Barr v. American Association of Political Consultants, Inc.* ("*Barr*")[7]—and nowhere discusses *Barr*'s necessary implications specifically vis-à-vis local governments.[8]

As Broadnet has previously explained,[9] in *Barr* the Court noted that the TCPA is inapplicable to the federal government not due to any "longstanding" assumptions about what constitutes a "person" and not due to any analysis of what entity is or isn't "sovereign"—but due simply to the plain language of the definition section of the Communications Act of 1934, as amended (the "Act"). Specifically, while *Barr* focuses primarily on the 2015 debt collection amendments to the TCPA, the plurality opinion notes: "The robocall restriction applies to 'persons,' which does not include the Government itself. *See* 47 U.S.C. § 153(39)."[10] Although neither state nor local government-specific issues were before the Court in *Barr*, the Court's determination that Section 153's definition of "person" does not include the *federal* government is best read as dictating that the term "person" also does not include *other* governmental entities.

This approach is necessary because there is no TCPA-specific definition of "person" to be found in the portion of the Act embodying the TCPA (Section 227), meaning that Section

[7] 140 S. Ct. 2335 (2020) (plurality opinion).

[8] *Cf. Order* ¶ 14 & nn.32, 38 (the only mentions of *Barr* to be found in the *Order*, none addressing local governments).

[9] *See, e.g.*, Letter from Joshua M. Bercu, Counsel to Broadnet Teleservices LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 18-152, 02-278 (filed July 20, 2020) ("Broadnet July 2020 *ex parte*").

[10] *Barr*, 140 S. Ct. at 2344 n.1.

153's definition of "person" governs.[11] Section 153(39) reads in full: "The term 'person' includes an individual, partnership, association, joint-stock company, trust, or corporation."[12] Nowhere are governmental entities of any variety mentioned.[13] By contrast, Congress has affirmatively included "governmental entit[ies]" in other subpart-specific definitions of "person" *elsewhere in the Act*—including in Section 522.[14]

If the term "person" implicitly included certain "governmental entities" for purposes of the TCPA—*i.e.*, if Section 153's Act-spanning (absent specific enumeration) definition of "person" dictated *sub silentio* the inclusion of local governments—then the explicit inclusion of "governmental entit[ies]" would be surplusage in Section 522. And the Supreme Court has explicitly counseled agencies against injecting unnecessary superfluity into Congressional legislation.[15]

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[11] *See* 47 U.S.C. § 227(b)(1)(A)(iii) (No "person" may "make any call . . . using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service . . . or other radio common carrier service, or any service for which the called party is charged for the call[.]"); *id.* § 227(b)(1)(B) (No "person" may "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call . . . is exempted by rule or order by the Commission under [§ 227(b)(2)(B)]."); *id.* §§ 153 & 153(39) ("For the *purposes of this chapter*, unless the context otherwise requires . . . [t]he term 'person' includes an individual, partnership, association, joint-stock company, trust, or corporation." (emphasis added)).

[12] *Id.* § 153(39).

[13] *Cf. id.*

[14] *See, e.g.*, *id.* § 522(15) (for purposes of Title VI, "the term 'person' means an individual, partnership, association, joint stock company, trust, corporation, *or governmental entity*" (emphasis added)).

[15] *See, e.g.*, *Lopez v. Gonzalez*, 549 U.S. 47, 62 (2006); *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Congress's election not to mention government entities in either Section 153 (or to define the term "person" at all in the TCPA's own self-contained definition subsection)[16] is therefore best understood as exclusionary. This is the only approach to defining "person" vis-à-vis local governments that is consistent with the Supreme Court's determination in *Barr* that the TCPA does not apply to the federal government because of Section 153's definition of "person."[17] That is, rendering Section 522's inclusion of "governmental entities" superfluous by implicitly reading the term into Section 153 does not just run afoul of the presumption against surplusage[18]—it is also inconsistent with the logic underpinning *Barr*.

Ultimately, for the same reason the Supreme Court determined that the TCPA does not apply to the federal government—a determination made with no mention of "sovereign" status, only the text of the statute—the TCPA is also best understood as not applying to any *other* levels of government in our democracy. If failure to mention "the federal government" in Section 153 means the TCPA does not apply to the federal government, failure to mention any other levels of government must have identical textual effect for local governments. For the Commission to decide otherwise would fly in the face of both basic principles of statutory interpretation and the logic underpinning *Barr*.

B. The *Order* Draws Inapt Cross-Canon Analogies Regarding the Definition of "Person" in Other Contexts

The plain-text statutory reality that Section 153's definition of "person" does not include governmental entities of any variety is also borne out by cross-canon analogies, as Broadnet has

[16] *See* 47 U.S.C. § 227(a).

[17] *Barr*, 140 S. Ct. at 2344 n.1.

[18] *See, e.g.*, Letter from Joshua M. Bercu, Counsel to Broadnet Teleservices LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 18-152, 02-278, at 5–6 (filed Dec. 3, 2018) ("Broadnet Dec. 2018 *ex parte*").

also demonstrated in the record.[19] Therefore, despite the *Order*'s analysis,[20] the correct construction of the term "person" for purposes of the TCPA should align with more persuasive precedent interpreting actually analogous statutes.

For instance, multiple federal circuit courts have determined that the Electronic Communications Privacy Act ("ECPA")—which shares the foundational privacy and consumer protection goals as the TCPA—"**clearly exclude[s] municipalities** from the definition of person[]."[21] These findings have come despite the fact that ECPA defines "person," in language broader than Section 153 of the Act, as "any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation."[22] ECPA is a privacy-focused act passed into law only five years before the TCPA, with an even broader definition of "person" than the TCPA. And ECPA has been held to "unequivocally exclude[] local governmental entities from [the statutory] definition of person."[23] The less-broad TCPA—passed into law subsequently by a contemporaneous Congress with full and recent knowledge of ECPA—should therefore also be read as not including local government entities in its statutory definition of "person."[24]

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[19] *See, e.g.*, *id*. at 4–5; Letter from Jennifer Tatel, Counsel to Broadnet Teleservices LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 6–7 (deck slides 5–6) (filed Oct. 30, 2020).

[20] *Cf. Order* ¶ 35 & n.87.

[21] *Walden v. City of Providence*, 596 F.3d 38, 60 n.29 (1st Cir. 2010) (emphasis added); *see also Abbott v. Village of Winthrop Harbor*, 205 F.3d 976, 980 (7th Cir. 2000).

[22] 18 U.S.C. § 2510(6).

[23] *Abbott*, 205 F.3d at 980 (7th Cir. 2000).

[24] *Wisc. Central Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (It "is . . . a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute.'" (quoting and citing *Perrin v. United States*, 444 U.S. 37, 42 (1979))).

Similarly, the relevant portion of the Endangered Species Act—which defines a "person," far more broadly than Section 153, as any "individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States"[25]—still excludes municipalities, "giv[ing] to the words of statute their plain meaning."[26] And in the Constitutional context of the Fourteenth Amendment, federal courts have established that "[m]unicipal governmental entities have *never been* held to be 'persons[.]'"[27]

Even the rare statutory circumstances where courts have interpreted the term "person" as including government entities are clearly distinguishable, and cut in favor of a different outcome vis-à-vis the TCPA. For instance, as the *Order* rightly notes,[28] the False Claims Act ("FCA") has been held to include local governments under its definition of "person."[29] But the *Order* fails to account for the fact that the Supreme Court's determination in the referenced precedent was ultimately based in part on the fact that extant judicial precedent at the time of the FCA's passage in 1826 gave the term "person" such a meaning.[30] By contrast, over 150 years later, in

[25] 16 U.S.C. § 1532(13).

[26] *United States v. Rancho Palos Verdes*, 841 F.2d 329, 331 (9th Cir. 1988).

[27] *Vill. of Arlington Heights v. Reg'l Transp. Auth.*, 653 F.2d 1149, 1152 (7th Cir. 1981) (emphasis added); *see also East St. Louis v. Circuit Court for Twentieth Judicial Circuit*, 986 F.2d 1142, 1144 (7th Cir. 1993) ("Municipalities cannot challenge state action on federal constitutional grounds because they are not 'persons' within the meaning of the Due Process Clause.").

[28] *Order* at ¶ 30 & n.74 (citing *Cook County, infra* note 29).

[29] *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 122 (2003).

[30] *Id.* at 125–26.

1991 at the time of the TCPA's enactment, the Endangered Species Act and even the Fourteenth Amendment had been interpreted (in court decisions less than a decade old at the time) as *excluding* any government entity (including local government entities) not specifically mentioned in their definition of "person"—precedent that Congress must be presumed to have been aware of at the time of the TCPA's passage.[31] And the contemporaneous-to-the-TCPA ECPA—which, once again, shares the TCPA's foundational goals—has also been determined to not include local governments in its definition of "persons."[32]

Ultimately, the *Order* appears to hinge its different treatment of (1) federal and state governments, and (2) local governments, on the fact that the latter are "non-sovereign."[33] In doing so, the *Order* unnecessarily muddies what is in reality a simple question of textual interpretation, *i.e.*, "does Section 153's 'person' cover 'governmental entities' at all, when it makes no mention of them—and when other definition-sections' use of 'person' in the Act explicitly do." The *Order* also ignores the plain-text statutory reality that Section 153's definition of "person" makes no mention of *any* governmental entities (as contrasted once again with Section 522, which explicitly mentions governmental entities). And in doing so, the *Order* implicitly reads an inconsistency into Section 153—functionally declaring, without textual support and even without attempted textual explanation, that Section 153 *does* include some

[31] *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993)) (Congress is presumed to be aware of judicial and administrative interpretations of words when it writes them into a statute).

[32] *See supra* note 24.

[33] *Compare, e.g.*, *Order* ¶ 30 ("We conclude that local governments, as non-sovereign entities, fall within [the] definition [of 'person'].")*, with id.* ¶¶ 22–23 (hinging the Commission's analysis of the TCPA's non-applicability to state governments on the fact of said state governments' sovereignty).

levels of government but not others. In this respect, the *Order* is arbitrary and capricious and should be reconsidered.[34]

II. THE *ORDER* DOES NOT ACCURATELY INTERPRET THE TCPA'S LEGISLATIVE HISTORY—AND DOES NOT OPTIMALLY IMPLEMENT THE POLICIES UNDERGIRDING THE TCPA

Furthermore, while the *Order*'s citations to the TCPA's legislative history are correct,[35] they are incomplete, and paint a flawed picture as a result. As Broadnet has previously noted,[36] the TCPA—per a report authored by Senator Ernest F. Hollings (D-SC), the legislation's sponsor, in 1991—emerged as a response to "an increasing number of consumer complaints" flowing from "[t]he use of automated equipment to engage in *telemarketing*."[37] And in the words of the House Report accompanying sister-legislation which then-Representative Edward J. Markey (D-MA) described as "embod[ying]" the same "text" as the TCPA,[38] the "purpose" of Congressional efforts in 1991 leading up Section 227's enactment was "to protect residential telephone subscriber privacy rights by restricting certain *commercial solicitation and*

[34] *See, e.g., Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987) (per curiam) (finding analysis arbitrary and capricious because it was "internally inconsistent and inadequately explained"); *Nat'l Parks Conservation Ass'n v. Environmental Prot. Agency*, 788 F.3d 1134, 1141 (9th Cir. 2015) ("an internally inconsistent analysis is arbitrary and capricious"); *Chamber of Commerce of the U.S. v. Dep't of Labor*, 885 F.3d 360, 382 (5th Cir. 2018) ("Illogic and internal inconsistency are characteristic of arbitrary and unreasonable agency action.").

[35] *Order* ¶ 33 (discussing the legislative history of the TCPA specifically vis-à-vis government entities).

[36] *See, e.g.*, Broadnet Dec. 2018 *ex parte* at 6–7 & n.32.

[37] S.R. REP. NO. 102-178, at 1 (1991) (emphasis added).

[38] 137 CONG. REC. H11310 (daily ed. Nov. 26, 1991) (statement of Rep. Markey substituting in the Senate bill which was eventually enacted over the House bill, stating: "[T]oday the House will consider a substitute amendment to Senate 1462 that embodies the text of [the reported-on and already-passed House bill] H.R. 1304 . . . .").

advertising[.]"[39] As Senator Hollings said in his floor introduction of the bill that would become the TCPA in the Senate, "[e]ven more important" than other concerns, "computerized telephone calls threaten our *personal health and safety*."[40] This focus on telemarketing and solicitation illustrates that the purpose of the TCPA was not to impede communications between citizens and their governments—all levels of government—and further explains why the definition of "persons" applicable to the TCPA does not include any governmental entities.

Policy considerations also support an interpretation of "persons" that does not extend to local governments, just as the Commission has clarified that it does not extend to the federal government. Local governments have led the fight against COVID-19[41] and have fought against disinformation in the political process. Local government outreach to its constituents does the opposite of "threaten[ing] . . . personal health and safety." Their engagement efforts are different from the commercial solicitations, advertisements, and telemarketing that drove the TCPA's adoption. Instead, connectivity with our local governments promote the very public goods (*i.e.*, health and safety) that motivated Congress to act, as recent events, the ongoing pandemic in particular, have borne out.

As a result, now more than ever Americans need access to their elected officials. And as Broadnet has previously demonstrated,[42] products such as the company's TeleForum™ platform serve as technological enablers of enhanced democratic accountability, putting Americans

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[39] H.R. REP. 102-317, at 5 (1991) (emphasis added).

[40] 137 CONG. REC. S16205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) (emphasis added).

[41] *See, e.g.*, Broadnet July 2020 *ex parte* at 2–3 (detailing engagement efforts by the local governments of Albuquerque, New Mexico; Irvine, California; and Broward County, Florida using Broadnet's platform).

[42] *See, e.g.*, Petition of Broadnet Teleservices LLC for Declaratory Ruling, CG Docket No. 02-278, at 2–5 (filed Sept. 16, 2015).

directly into dialogue with their elected representatives. Such participation-augmentation can be especially meaningful for Americans on the wrong side of the digital divide.

III. CONCLUSION

Ultimately, in order to (1) construe the TCPA consistent with *Barr*'s use of the definition of "person" in Section 153 of the Act; (2) adhere to a range of additional canons of statutory construction; and (3) comport with significant persuasive precedent, the TCPA must be understood as not applying to local governments, just as it does not apply to the federal or state governments. The Commission should therefore grant reconsideration and revise the local government aspect of the *Order*.

Respectfully submitted,

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