

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

In the Matter of	)	
	)	
Consumer and Government Affairs Bureau Seeks	)	CG Docket No. 18-152
Comment on Interpretation of the Telephone	)	
Consumer Protection Act in Light of D.C. Circuit's	)	
ACA International Decision	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

To: The Commission

**COMMENTS OF BROADNET TELESERVICES, LLC**

Broadnet Teleservices LLC (“Broadnet”) hereby responds to the Commission’s public notice (“*Public Notice*”) seeking renewed comment on several issues related to the interpretation and implementation of the Telephone Consumer Protection Act (“TCPA”).<sup>1</sup> While the *Public Notice* focuses primarily on issues recently addressed by the U.S. Court of Appeals for the District of Columbia Circuit in *ACA International v. FCC*,<sup>2</sup> it also seeks to refresh the record on certain aspects of the Commission’s July 2016 *Broadnet Declaratory Ruling*, which concluded that the federal government, and contractors who work on its behalf, are not “persons” under the TCPA and therefore not subject to the statute’s restrictions.<sup>3</sup> In this regard, the *Public Notice*

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<sup>1</sup> Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision, CG Docket Nos. 18-152 & 02-278 (rel. May 14, 2018) (“*Public Notice*”).

<sup>2</sup> *ACA Int’l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (affirming in part and vacating in part *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (“*TCPA Omnibus Order*”).

<sup>3</sup> *Public Notice* at 4 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, *Broadnet Teleservices LLC Petition for Declaratory Ruling*, Declaratory Ruling, 31 FCC Rcd 7394 (2016) (“*Broadnet Declaratory Ruling*”).

specifically seeks comment on, among other things, the National Consumer Law Center’s request that the Commission avow that federal government contractors *are* “persons” under the TCPA, regardless of their status as common-law agents.<sup>4</sup> It also seeks comment on how to address state and local governments and those that act on their behalf, inquiring as to whether “all three levels of government subject to the same legal framework in determining whether they are ‘persons,’” an issue raised by Broadnet but not yet addressed by the Commission.<sup>5</sup>

In these comments, Broadnet focuses on questions related to the *Broadnet Declaratory Ruling* rather than the broader TCPA issues raised in the *Public Notice*. In particular, Broadnet emphasizes how critical the *Broadnet Declaratory Ruling* has been in expanding access to a larger portion of the population to directly engage with the government, and by enabling important conversations between citizens and federal government officials on topics of national and regional significance. Broadnet reiterates its opposition to the NCLC Petition<sup>6</sup> and urges the

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<sup>4</sup> *Public Notice* at 4 (citing 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) (“NCLC Petition”)). Importantly, no parties sought reconsideration of the Commission’s determination that the federal government is not a person under the TCPA. As Chairman (then-Commissioner) Ajit Pai noted, “all agree” that the federal government itself is not a “person” for purposes of the TCPA. Dissenting Statement of Commissioner Ajit Pai, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 31 FCC Rcd 9074, 9124 (2016).

<sup>5</sup> *Public Notice* at 5 (citing Petition of Broadnet for Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 16, 2015) (“Broadnet Petition”)); *Broadnet Declaratory Ruling* ¶ 7 n.32 (“We do not address in this Declaratory Ruling whether robocalls by or on behalf of state or local governments are subject to the TCPA’s consumer protections. We expect to address that question in a future order.”).

<sup>6</sup> See Broadnet Opposition to Petition for Reconsideration of National Consumer Law Center, CG Docket No. 02-278 (filed Aug. 31, 2016) (“Broadnet Opposition”). The *Public Notice* also seeks renewed comment on a pending petition for reconsideration of the *Broadnet Declaratory Ruling* from Professional Services Council (“PSC”). *Public Notice* at 4 (citing Professional Services Council Petition for Reconsideration, CG Docket No. 02-278 (filed Aug. 4, 2016)). As Broadnet has previously indicated, Broadnet does not oppose the PSC petition. See Broadnet Opposition at 8 n.22.

Commission to ensure that any actions it takes moving forward do not risk jeopardizing the substantial benefits for federal government officials and their constituents made possible by the *Broadnet Declaratory Ruling*. Moreover, Broadnet urges the Commission to take this opportunity to extend the *Broadnet Declaratory Ruling* to state and local governments to equally enhance the ability of citizens to engage with local and state government officials.

**I. THE *BROADNET DECLARATORY RULING* HAS SIGNIFICANTLY ENHANCED THE PUBLIC’S ACCESS TO GOVERNMENT OFFICIALS AND MUST BE PRESERVED**

On September 16, 2015, Broadnet filed the Broadnet Petition to address a very serious problem: Absent Commission action, citizens that rely on their wireless phones as their primary, or only, means of telephone communication would be deprived of important opportunities to engage with their government that wired citizens long enjoyed. As Broadnet explained at the time, with one phone call, government entities and officials using Broadnet’s TeleForum™ technology platform can invite citizens – from several hundred to thousands – to participate in a shared real-time exercise in democracy.<sup>7</sup> Much more than just receiving information, citizens are able to engage in a live conversation, hearing directly from their government about issues important to them and providing real-time feedback. However, due to ambiguities in Commission interpretations at the time, citizens that relied on their wireless phone as their primary, or only, means of telephone communication, which includes a disproportionate number of historically underrepresented persons, were being deprived of important opportunities to engage with their government.<sup>8</sup>

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<sup>7</sup> See Broadnet Petition at 2.

<sup>8</sup> See *id.* at 3.

Subsequently, on July 5, 2016, the Commission took an important step to address this concern. By issuing the *Broadnet Declaratory Ruling*, the Commission helped to ensure that these wireless-only citizens benefit from the same *federal* government engagement opportunities as their peers who continue to rely on wireline phones. The *Broadnet Declaratory Ruling* has been a tremendous success. For the past two years, it has helped federal officials answer citizens' unprecedented (and yet still growing) demand for civic engagement by allowing them to reach out to constituents on their mobile phones through telephone town hall calls. Wireless-only citizens have been able to participate in conversations with their Member of Congress or federal agency leaders on topics including hurricane preparedness and response, the growing opioid epidemic, healthcare and transportation issues, immigration, and other critical issues. Prior to the *Broadnet Declaratory Ruling* such citizens would have been cut out of these important civic engagement opportunities. By way of example, recent telephone town hall calls that reached mobile users include:

- A call from a U.S. congressman and physician from California to his district to address concerns about flu season, including steps citizens can take to help reduce the flu's spread and the distribution of Tamiflu, the antiviral medicine that can help treat flu.
- A call from a U.S. congressman from Kentucky that included discussion of the opioid epidemic and current bipartisan efforts in Congress to address it.
- A call from a U.S. congresswoman from California with federal and local fire and disaster preparedness officials on wildfire and other natural disaster preparedness.
- A call from a U.S. congressman from Texas with state university officials on how constituents could seek grants, scholarships, and financial aid for higher learning opportunities.

Citizens appreciate, and want, these calls. For example, during a February call with a Congressman representing parts of upstate New York, a participant remarked,

I really appreciate this townhall style ... because I cannot possibly make town hall meetings with my work and my schedule. I so

would like to have attended and now with this phone call out of the blue, it worked very well for me, and thank you.

Without the *Broadnet Declaratory Ruling*, this participant would not have had such access to the individual representing his community's interests before Congress.

Just as importantly, Broadnet is unaware of increasing, or even any, instances of individuals or companies that have taken advantage of the *Broadnet Declaratory Ruling* over the last two years to harm consumers. As Broadnet explained nearly two years ago,

The Commission's decision does not mean that those acting on behalf of the federal government have carte blanche to make autodialed and prerecorded calls to consumers without restraint, nor does any evidence exist that suggests they will. Federal government entities have no reason, and clear incentives not to, authorize conduct that will frustrate and annoy citizens. Likewise, those making calls on behalf of the government have no incentives to initiate autodialed calls in a manner that would bring negative attention to the government.<sup>9</sup>

Indeed, in the time since the *Broadnet Declaratory Ruling* took effect, the fears about potential abusive behavior by government contractors have not been borne out.<sup>10</sup> Concerns about the *Broadnet Declaratory Ruling* always were based on theoretical, but never realized, mischief. As the Commission moves forward, it must weigh such presumptions against the unquestionable tangible benefits the *Broadnet Declaratory Ruling* has offered.

Consistent with Broadnet's previous filings, Broadnet continues to believe that in the *Broadnet Declaratory Ruling*, the Commission reasonably determined it needed to extend relief

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<sup>9</sup> Broadnet Opposition to Request for Stay, CG Docket No. 02-278, at 4-5 (filed Aug. 11, 2016).

<sup>10</sup> See NCLC Petition at 2-3 ("tens of millions of Americans will find their cell phones flooded with unwanted robocalls from federal contractors").

to those acting on behalf of government entities to effectuate congressional intent.<sup>11</sup> To the extent the Commission feels the need to reassess the legal underpinning of the *Broadnet Declaratory Ruling*, the Commission must ensure that any actions it takes do not risk reducing or eliminating the ability of federal officials to reach *all* citizens via telephone town hall due to fears of potential TCPA liability.<sup>12</sup>

## **II. THE COMMISSION SHOULD EXTEND THE *BROADNET DECLARATORY RULING* TO STATE AND LOCAL GOVERNMENTS**

The *Broadnet Declaratory Ruling* has helped federal officials answer citizens' unprecedented demand for civic engagement by allowing them to reach out to constituents on their mobile phones through telephone town hall calls. While calls with federal entities and officials are important, the civic engagement opportunities for citizens to communicate with state and local governments are equally, if not more critical, given the localized nature of the issues that directly impact individual communities and the more targeted audience. For example, recent state and local telephone town calls include:

- A call from Pennsylvania state senator with a county commissioner on both practical and legislative initiatives to combat the opioid crisis.
- A call from the Colorado Department of Transportation regarding a proposal to improve the "gap," a major, long-term traffic frustration for local commuters.

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<sup>11</sup> See Broadnet Opposition at 10-15; Broadnet Reply to Comments on Petition for Reconsideration of National Consumer Law Center, CG Docket No. 02-278, at 4-6 (filed Sept. 15, 2016).

<sup>12</sup> As Broadnet has previously explained, Broadnet is the service provider and offers the platform for telephone town hall calls, but is not the maker of the calls, in accordance with Commission precedent. See Notice of Ex Parte Presentation of Broadnet Teleservices LLC, CG Docket No. 02-278, at 2 (filed Mar. 14, 2017) ("Broadnet Mar. 14, 2017 Ex Parte") (noting, for example, that Broadnet's government customers, and not Broadnet, decide whether to make a telephone town hall call, the timing of the call, the call recipients, and the content of the call); Notice of Ex Parte Presentation of Broadnet Teleservices LLC, CG Docket No. 02-278, at 2 (filed Feb. 21, 2017) (same); see also, e.g., *TCPA Omnibus Order* ¶¶ 30, 40.

- A call from a Colorado state representative including a panel of city officials, including a mayor, to speak to residents on issues including taxes, the opening of a new rec center, infrastructure and traffic improvements, and clean-up efforts around the city.

But today, due to uncertainty about the TCPA's application, citizens that rely primarily, or exclusively, on their wireless phones had to miss all of these calls. The Commission should act promptly to rectify this asymmetry.

In addition to the public policy benefits of extending the *Broadnet Declaratory Ruling* to telephone town hall calls made by state and local governments, the Commission has ample legal authority to support such a determination. As Broadnet has previously explained, the primary case the Commission relied on to declare that the federal government is not a "person" for TCPA purposes also addressed states and state officials.<sup>13</sup> Indeed, numerous Supreme Court cases make abundantly clear that, consistent with the Commission's reasoning in the *Broadnet Declaratory Ruling*, the term "person" in the TCPA *does not* include state governments and state government officials:

- In *Wilson v. Omaha Indian Tribe*, the Court recognized the longstanding precedent that "[in] common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it" in deciding that a burden-shifting law did not apply to the state of Iowa in a tribal land dispute.<sup>14</sup>
- In *Michigan Dep't of State Police*, the Court noted the presumption that the term "person" excludes the sovereign "is particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before," and that the "common usage of the term 'person' provides a strong indication that 'person' as used in § 1983," like the statute in the *Wilson v. Omaha Indian Tribe* decision, "does not include a State."<sup>15</sup>

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<sup>13</sup> Broadnet Mar. 14, 2017 Ex Parte at 2 & n.4 (citing *Broadnet Declaratory Ruling* ¶ 12 n.61 (citing *Vt. Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000))).

<sup>14</sup> *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941)).

<sup>15</sup> *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989).

- In *Vt. Agency of Nat. Resources v. United States ex rel. Stevens*, which was the primary case cited by the Commission in the *Broadnet Declaratory Ruling*,<sup>16</sup> the Court found that the False Claims Act did not “provid[e] the requisite affirmative indications that the term ‘person’ included States” but rather “indicate[d] quite the contrary.”<sup>17</sup>

With respect to local governments and local officials, several courts have indicated that when Congress defines “person” in a manner akin to that in the Communications Act, such language excludes municipal governments and other local governmental entities. For example:

- In *United States v. Rancho Palos Verdes*, the Ninth Circuit concluded the Endangered Species Conversation Act’s definition of “person” excludes municipal corporations because “the legislative history does not give any clear indication that municipal corporations were either included in or excluded from the definition of ‘person.’”<sup>18</sup> Likewise, the legislative history of the TCPA offers no clear indication that municipalities were intended “persons” subject to the statute.
- In *Walden v. City of Providence*, the First Circuit found that the Federal Wiretap Act, which defines “person” to include “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,” “clearly exclude[s] municipalities from the definition of persons.”<sup>19</sup>
- In *Abbot v. Village of Winthrop Harbor*, the Seventh Circuit concluded that the Federal Wiretap Act “unequivocally excludes local governmental entities from [the statute’s] definition of person.”<sup>20</sup>

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<sup>16</sup> *Broadnet Declaratory Ruling* ¶ 12 n. 61.

<sup>17</sup> *Vt. Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000).

<sup>18</sup> *United States v. Rancho Palos Verdes*, 841 F.2d 329, 331 (9th Cir. 1988). “Municipal corporations” can include cities, towns, counties, and other local governments. *See, e.g.*, Ballentine’s Law Dictionary, “Municipal Corporation” (2010).

<sup>19</sup> *Walden v. City of Providence*, 596 F.3d 38, 60 n.29 (1st Cir. 2010). Municipalities include “[a]n incorporated city, village, or town.” Ballentine’s Law Dictionary, “Municipality” (2010). The court also found that Rhode Island’s Wiretap Law, which defines a “person” as an “individual, partnership, association, joint stock company, trust, or corporation, whether or not any of the foregoing is an officer, agent, or employee of the United States, a state, or a political subdivision of a state” did not apply to municipalities. *Walden*, 596 F.3d at 59-60 (citing in part R.I. Gen. L. § 12-5.1-1(11)).

<sup>20</sup> *Abbot v. Village of Winthrop Harbor*, 205 F.3d 976, 980 (7th Cir. 2000); *see also Village of Arlington Heights v. Reg’l Transp. Auth.*, 653 F.2d 1149, 1152 (7th Cir. 1981) (municipal



Moreover, in the Communications Act, when Congress intends for a statute to clearly include state and local governments, it does so explicitly. For example, Congress drafted Section 208 of the Communications Act to allow “[a]ny person, any body politic or municipal organization, or State commission” to complain to the FCC about common carrier activity.<sup>21</sup> Similarly, Section 202 states that “[i]t shall be unlawful for any common carrier to ... make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.”<sup>22</sup>

Ultimately, the plain language of the TCPA and the Communications Act offers no evidence that Congress intended to apply the TCPA to the government – whether federal, state, or local. Nor does the context require that “person,” for purposes of the TCPA, includes state and local governments. Accordingly, the Commission can and should find that state and local governments are not “persons” for purposes of the TCPA’s restriction on autodialed and prerecorded calls – a finding entirely consistent with the Commission’s reasoning in the *Broadnet Declaratory Ruling* – and should ensure that the TCPA does not apply to the service providers working on their behalf.<sup>23</sup>

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governmental entities have never been held to be “persons” within the meaning of the Fourteenth Amendment, which was intended to guard the liberty and property of natural persons and corporations); *see also City of Chicago v. Lindley*, 66 F.3d 819, 823 n.6 (7th Cir. 1995) (same).

<sup>21</sup> 47 U.S.C. § 208(a).

<sup>22</sup> *Id.* § 202(a).

<sup>23</sup> As noted above, the Commission reasonably determined it needed to extend relief to those acting on behalf of government entities to effectuate congressional intent. *See supra* note 11 and accompanying text.

The state and local telephone town hall calls that wireless-only citizens currently cannot enjoy are far too important to sacrifice for a theoretical and otherwise addressable concern of state and local governments overzealously contacting their citizens. In fact, given the closer proximity to those they serve, local and state governments are likely to be even more vigilant about ensuring their constituents do not receive harassing calls.<sup>24</sup> Instead, the Commission should grant the Broadnet Petition in its entirety to ensure that state and local governments, with ever-shrinking budgets, can effectively and efficiently communicate with *all* of their citizens.

### **III. CONCLUSION**

Broadnet appreciates this opportunity to comment on issues related to the *Broadnet Declaratory Ruling* that remain pending before the Commission. As the Commission moves forward, one thing is abundantly clear: The Commission should not risk jeopardizing the important communications that the ruling has enabled. Moreover, the Commission should use this opportunity to finally ensure that citizens can have the same engagement opportunities with their state and local governments that they currently can have with the federal government.

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<sup>24</sup> See, e.g., Notice of Ex Parte Presentation of Broadnet Teleservices LLC, CG Docket No. 02-278, at 2 (filed Feb. 29, 2016) (“[S]tate and local governments have strong incentives not to contact their citizens with unwanted autodialed calls, as state and local governments are responsive to and elected by the constituents they serve.”).

Respectfully submitted,

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