

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

In the Matter of Rules and Regulations
Implementing the Telephone Consumer
Protection Act of 1991 (Implementation of the
Budget Act)

CG Docket No. 02-278

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Comments of Robert Biggerstaff

Robert Biggerstaff submits these comments on the request for stay of the Commission's Broadnet Declaratory Ruling¹ pending reconsideration, filed by the National Consumer Law Center² dated July 26, 2016. The stay requested by NCLC should be granted pending reconsideration of the Broadnet Order.

The Broadnet Order is not only internally inconsistent and ambiguous, but directly conflicts with the Commission's longstanding rules. The Request for a Stay filed by NCLC with its Petition should be immediately granted to allow the Commission to correct the flaws in the Broadnet Order and mitigate the unavoidable injuries to all involved if the Broadnet Order is not stayed.

While the Commission has not adopted a single standard for considering requests for stays, it generally uses the same factors used by courts in ruling on preliminary

¹ *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*, FCC 16-72 (July 5, 2016) ("Broadnet Order").

² *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").

injunction motions.³ Those factors include (1) the likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is not granted; and (4) that the issuance of the order will further the public interest.⁴ No single factor is dispositive, however, and the Commission reaches its decision on a case by case basis.⁵ In this instance, a stay is warranted.

The Broadnet Order Conflicts With the Commission’s Current TCPA Rules and the Petitions Are Likely to Succeed.

The most glaring flaw in the Broadnet Order is that it is facially inconsistent with the Commission’s longstanding rules or—on the other hand—provides no relief at all to the petitioners who brought the petitions adjudicated in the Broadnet Order.

This is due to the fact that as of the 2003 TCPA Order⁶ all of the Commission’s TCPA rules expressly apply to every “person or entity” and not simply to “persons.”⁷ So it does not matter if a federal government contractor (or the federal government itself) is or is not a “person” under Chapter 5 of the Communication Act, because they are “entities” under every possible plain meaning of the word, and thus are expressly subject to the Commission’s TCPA Rules. Those rules are fully enforceable under the statute’s private right of action. Indeed, for over 13 years the Commission has been quite diligent to use the

³ *In re AT&T Corp.*, 13 FCC Rcd 14,508 (1998).

⁴ *See Virginia Petroleum Jobbers Ass 'n v. Fed. Power Comm 'n*, 259 F.2d 921 (D.C. Cir. 1958).

⁵ *See In re AT&T Corp.*, 13 FCC Rcd 14,508 (1988).

⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014 (2003) (Report and Order).

⁷ *See, e.g.*, 47 C.F.R 64.1200 (a) “No **person or entity** may...”; (c) “No **person or entity** shall initiate any telephone solicitation to ...”; (d) “No **person or entity** shall initiate any call for telemarketing purposes ...”; (e) “The rules set forth in paragraph (c) and (d) of this section are applicable to **any person or entity** making telephone solicitations or telemarketing calls to wireless telephone numbers ...”. *See also* 47 C.F.R 64.1601(e) “Any **person or entity** that engages in telemarketing, as defined in section 64.1200(f)(10) must transmit caller identification information...”

phrase “person or entity” throughout the TCPA rules whenever referring to the party making calls, sending faxes, and using autodialers or pre-recorded messages.⁸ There is no way around this inconsistency as the Commission’s language in the rules is explicit and unambiguous. The Commission expressly expanded the scope of the rules from “person” to “person or entity” with the 2003 TCPA Order. Even under *Stinson*⁹ deference, such an explicit change cannot be cavalierly walked back by way of “interpretation”—it will take an actual change to the language of the rules.

Of course, a government contractor can assert derivative immunity¹⁰ to a violation of the Commission’s TCPA rules (as well as the statute itself) if the contractor was properly following the federal government’s instructions. This has been the law for decades and this paradigm is unaffected by the Broadnet Order. Since the Broadnet Order has no practical effect due to the conflict with the Commission’s TCPA rules, at least one of the two pending petitions for reconsideration is likely to succeed.¹¹ Success is also likely since the conflict between the Broadnet Order and the existing TCPA rules must be dealt with.¹²

⁸ See generally, 47 C.F.R. 64.1200; 47 C.F.R. 64.1601.

⁹ *Stinson v. United States*, 508 U.S. 36 (1993).

¹⁰ The assertion by a contractor could be limited qualified immunity (*i.e. Filarsky v. Delia*, 132 S.Ct. 1657 (2012)) or “Yearsley immunity” (*Yearsley v. W.A. Ross Constr. Co.*, 309 U. S. 18 (1940)) but because the Commission limited its consideration of immunity to “derivative immunity” in the Broadnet Order (e.g. ¶9 and note 80) I am using the same language, but the argument is the same regardless of the label placed on the immunity doctrine available to the contractor.

¹¹ Success in this context does not require that either petition be “granted” but rather that the Broadnet Order is modified. Whether that modification is done by granting one or both of the petitions, done on the Commission’s volition (*i.e. sua sponte*), or is prompted by the filings related to the petitions, the petitions would be “successful” by precipitating the change.

¹² Given the interrelated nature of the definition of “person” and the complex interplay of the Commission’s rules, it seems impossible to excise the word “entity” from the Commission’s TCPA rules without significant unintended consequences. The better course would be to withdraw the Broadnet Order in its entirety, and recognize that letting contractors rely on invocation of derivative sovereign immunity or qualified immunity has worked for decades and is the best way to fix this mess.

Furthermore as there is little to no practical effect of the Broadnet Order due to the conflict with the language of the Commission's rules. Federal government contractors who are not "persons" under Chapter 5 and the Broadnet Order are still "entities" subject to the Commission's TCPA rules, so the *status quo* from a legal perspective was essentially unaffected by the Broadnet Order so there is no harm in a stay.

Implementing the Broadnet Order is Harmful to Consumers and Petitioners

On the other hand, there is great harm in leaving the Broadnet Order in place—particularly due to misinterpretation and misunderstanding of that Order. First, the industry believes that substantial relief from the TCPA was granted by the Broadnet Order and members of the industry will obviously proceed with initiating calls and text messages consistent with that belief; yet they do so at their own peril.

Second, millions of consumers will be recipients of those calls that are improvidently made based on flawed understandings of the Broadnet Order. Their injury is self evident as well as identified in NCLC's Petition.¹³ As NCLC's filings demonstrate, such calls disproportionately impose real out-of-pocket costs on economically disadvantaged people who are the least able to afford it.¹⁴

Additional evidence of inconsistency and ambiguity in the Broadnet Order was brought into focus by the filing of yet another reconsideration petition by Personal Services Council.¹⁵ PSC has interpreted the Broadnet Order to incorporate agency law and provide relief only where a principle-agent relationship exists between the federal government and

¹³ *See, e.g.*, NCLC Petition at 5-6.

¹⁴ The nature of NCLC's client base, as well as the people represented by the extensive list of organizations that joined NCLC's Petition, make it self evident that the public interest is fully congruent with both NCLC's Petition and the Request for Stay.

¹⁵ Petition of Professional Services Council et al. for Reconsideration of Declaratory Ruling, CG Docket No. 02-278, (filed August 4, 2016) ("PSC Petition").

a contractor. PSC's interpretation of the Broadnet Order is not an implausible reading of that Order, once again demonstrating the ability of the Order to cause confusion and misinterpretation. PSC's Petition also shows that nearly all (if not all) contracts between the federal government and its contractors expressly disclaim an agency relationship. PSC correctly notes this will largely vitiate the relief it believes was intended to be granted by the Broadnet Order.

A Stay is in the Public Interest.

Implementing a flawed and confusing order only to modify it later and then delay its effective date even further, is categorically against the public's best interests.

The Commission's TCPA governance has seen two other recent examples of orders that were misleading or ambiguous to the point of having to be clarified, compliance deadlines extended, and where waivers were granted to people who acted based on their interpretations of a misleading or ambiguous order.¹⁶ If the Broadnet Order is not stayed, the same result will happen yet again. Such a result serves no one, and it injures both the public and petitioners.

Thank you very much for your time considering my comments. I remain,

Sincerely

/s/ Robert Biggerstaff

Robert Biggerstaff
August 11, 2016

¹⁶ *Report and Order and Third Order On Reconsideration*, 21 FCC Rcd 3787 (2016) ("JFPA Order") as clarified by 29 FCC Rcd 13998 (2014) ("Anda Order") (see, e.g. ¶15 acknowledging "confusion") and *2012 TCPA Order*, 27 FCC Rcd 1830 (2012) as clarified by *TCPA Omnibus Declaratory Ruling and Order*, 30 FCC Rcd 7961 (2015) (see ¶101 acknowledging "confusion").