

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 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 Expedited Declaratory Ruling	)	
	)	
RTI International	)	
Petition for Expedited Declaratory Ruling	)	

**OPPOSITION OF RTI INTERNATIONAL TO  
REQUEST FOR STAY**

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RTI International (“RTI”), through counsel, respectfully submits this opposition to the National Consumer Law Center *et al.*’s (“NCLC”) request for stay of the Federal Communications Commission’s (“FCC” or “Commission”) July 5, 2016 *Declaratory Ruling* in the above-captioned proceeding.<sup>1</sup> As explained below, NCLC has failed entirely to demonstrate any of the elements necessary to warrant the “extraordinary remedy” of staying an FCC order.<sup>2</sup>

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<sup>1</sup> See NCLC *et al.* Petition for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration, CG Docket No. 02-278 (filed July 26, 2016) (“NCLC Petition”); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; *Broadnet Teleservices LLC Petition for Declaratory Ruling*; *National Employment Network Association Petition for Expedited Declaratory Ruling*; *RTI International Petition for Declaratory Ruling*, Declaratory Ruling, FCC 16-76 (rel. July 5, 2016) (“*Declaratory Ruling*”). RTI plans to file a separate opposition to NCLC’s Petition for Reconsideration pursuant to the comment cycle established by the Commission. See *Consumer and Governmental Affairs Bureau Seeks Comment on National Consumer Law Center Petition for Reconsideration of the FCC’s Broadnet Declaratory Ruling*, Public Notice, DA 16-878 (CGB rel. Aug. 1, 2016) (“*Reconsideration PN*”) (setting August 31, 2016 as the deadline to file oppositions to NCLC’s Petition for Reconsideration).

<sup>2</sup> See, e.g., *Rates for Interstate Inmate Calling Services*, Order Denying Stay Petitions, 31 FCC Rcd 261 (WCB 2016) (denying requests to stay new inmate calling services rules); *Expanding the Economic and*

Granting a stay, on the other hand, would harm the federal government, contractors who call on its behalf, and public citizens who benefit from such calls.

## I. INTRODUCTION AND SUMMARY.

The Commission applies the four-factor test established in *Virginia Petroleum Jobbers Ass'n v. FPC*, as modified in *Washington Metropolitan Area Transit Cmm'n v. Holiday Tours, Inc.*, in determining whether to stay the effectiveness of one of its orders.<sup>3</sup> Under this standard, the party seeking a stay must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if a stay is granted; and (4) the public interest favors granting a stay.<sup>4</sup> The relative importance of the four criteria will vary depending on the circumstances of the case, but a showing of irreparable harm is a “critical element” in justifying a request for stay of an FCC order.<sup>5</sup>

NCLC has failed entirely to meet its burden under this four-factor test. In fact, not only has NCLC failed to meet its burden, but each element weighs in favor of denying NCLC’s stay request. As explained below, no party would suffer irreparable harm if the Commission denies the stay request, and NCLC’s Petition for Reconsideration is unlikely to prevail on the merits. At the same time, other interested parties would be harmed by a stay, and a stay would not be in the public interest.

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*Innovation Opportunities of Spectrum Through Incentive Auctions*, Order Denying Stay Motion, 31 FCC Rcd 1857 (MB 2016) (denying a request to stay an interpretation of a phrase in the FCC’s lifeline rules).

<sup>3</sup> See, e.g., *Connect America Fund; High-Cost Universal Service Support*, Order, 27 FCC Rcd 7158 (WCB 2012) (“*Silver Star Order*”) (denying requests to stay an order that established a new methodology for limiting reimbursable capital and operating costs within the high-cost loop support program); see also *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

<sup>4</sup> See *id.*

<sup>5</sup> See, e.g., *Silver Star Order* ¶ 5; *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (denying stay requests after finding only that the petitions would not suffer irreparable harm).

## II. NCLC HAS NOT DEMONSTRATED IRREPARABLE HARM.

NCLC fails to demonstrate that it (or any other party) will suffer irreparable harm if a stay is not granted. To warrant injunctive relief, such as a stay, the petitioner's injury must be "both certain and great; it must be actual and not theoretical."<sup>6</sup> In addition, the petitioner must provide "proof indicating that the harm [it alleges] is certain to occur in the near future."<sup>7</sup>

NCLC has plainly not met this standard. In fact, NCLC has not even alleged irreparable harm. Instead, NCLC claims that the Commission's clarification "will undoubtedly cause an immediate increase in the number of unwanted robocalls to consumers from contractor-agents of the federal government."<sup>8</sup> NCLC also claims that "[b]ecause of the expansive language in the ruling, calls from debt collectors will likely also be increased."<sup>9</sup> Both of these claims are unsubstantiated, and neither of the claims alleges harm that is "great," "actual," or "certain to occur in the near future."<sup>10</sup>

### A. No Party Would Suffer Irreparable Harm if the Commission Denies the Stay Request.

The *Declaratory Ruling* has not "harmed" NCLC or any other party. Importantly, the *Declaratory Ruling* did not alter any legal rights or obligations under the TCPA, the Commission's TCPA rules, or any other federal law. The Commission did not modify its rules or otherwise "create exemptions from the TCPA's requirements," as NCLC suggests.<sup>11</sup> Instead, the Commission clarified the meaning of an ambiguous term in the statute. The term "person" in Section 227(b)(1) does not include the federal government or agents validly authorized to make

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<sup>6</sup> See *Silver Star Order* ¶ 7 (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

<sup>7</sup> See *id.*

<sup>8</sup> NCLC Petition at 19.

<sup>9</sup> *Id.*

<sup>10</sup> See *Silver Star Order* ¶ 7.

<sup>11</sup> See, e.g., NCLC Petition at 6, 17.

calls on its behalf, and it did not include such entities even prior to the *Declaratory Ruling*. The FCC's decision confirmed the term's meaning. It did not change it. Moreover, declining to stay the *Declaratory Ruling* would have no effect on plaintiffs' ability to litigate TCPA claims. Any future FCC declaratory ruling, like the *Declaratory Ruling* at issue, would have retroactive effect. And the *Declaratory Ruling* does not prevent parties from bringing TCPA lawsuits (or continuing to litigate existing cases) while the Commission considers NCLC's underlying petition for reconsideration.

**B. NCLC Grossly Exaggerates the *Declaratory Ruling's* Impact.**

Apart from failing to identify any irreparable harm, NCLC also substantially exaggerates the *Declaratory Ruling's* impact. For example, NCLC fails to acknowledge that the federal government itself could place the calls in question without liability. Regardless of whether federal contractors are subject to the TCPA when placing calls on behalf of the federal government, federal government employees could place the calls themselves while "conducting official government business."<sup>12</sup> As the Supreme Court has observed, "the United States and its agencies, it is not disputed, are not subject to the TCPA's restrictions."<sup>13</sup> Not even NCLC seriously contests this point, nor did it seek reconsideration of the Commission's decision on that issue.<sup>14</sup> Because the federal government uses contractors to place calls that could be placed by the federal government itself, the federal government has no incentive to increase the number of calls it places based on the *Declaratory Ruling*. Therefore, the FCC's clarification does not affect how many autodialed or prerecorded calls consumers receive.

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<sup>12</sup> See, e.g., *Declaratory Ruling* ¶ 1.

<sup>13</sup> See *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 666 (2016).

<sup>14</sup> A footnote in the NCLC Petition notes merely that NCLC does "not concede . . . that the federal government is not a 'person' under the TCPA." See NCLC Petition at 13 n.37. The deadline for filing petitions for reconsideration has now passed.

NCLC also exaggerates the *Declaratory Ruling's* impact by misconstruing the scope of the FCC's clarification. For example, NCLC claims that it will allow "[g]overnment contractors [to] make robocalls at any time of day or night" and ignore the "rules regarding technical and procedural standards for artificial voice calls [and the prohibition against caller ID spoofing]."<sup>15</sup> However, the FCC plainly stated in the *Declaratory Ruling* that its clarification of the term "person" was limited to Section 227(b)(1).<sup>16</sup> "We make no finding here with respect to the meaning of 'person' as used elsewhere in the TCPA or the Communications Act," it explained.<sup>17</sup> The time-of-day, prerecorded voice, and spoofing rules NCLC references are not grounded in Section 227(b)(1).<sup>18</sup> The Commission's clarification thus has no bearing on these requirements or on any party's obligations to comply with them.

Additionally, NCLC exaggerates the *Declaratory Ruling's* impact by assuming that the protections afforded by it are fundamentally different than those enjoyed by contractors under derivative sovereign immunity. Derivative sovereign immunity is different, NCLC argues, because it allows federal contractors to "be ordered to comply with the TCPA going forward."<sup>19</sup> However, the same can be said about the FCC's clarification. Only those contractors who act within the scope of agency relationships with the federal government are not "persons," and the federal government can at any time require its contractors to comply with the TCPA by tailoring the scope of its agency relationships.

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<sup>15</sup> *Id.* at 4, 11.

<sup>16</sup> *See Declaratory Ruling* ¶ 13 ("We emphasize that our interpretation of 'person' as excluding the federal government is limited to the specific statutory provision before us: section 227(b)(1) of the Communications Act.").

<sup>17</sup> *Id.*

<sup>18</sup> *See, e.g.*, 47 U.S.C. 227(d)(3) (prescribing restrictions that apply to "all artificial or prerecorded telephone messages"); 47 C.F.R. § 64.1604 (prohibiting spoofing).

<sup>19</sup> *See* NCLC Petition at 14.

### **III. NCLC IS UNLIKELY TO PREVAIL ON THE MERITS.**

NCLC also fails to demonstrate that it is likely to prevail on the merits. The Commission’s clarification in the *Declaratory Ruling* is within its authority and is amply supported by a comprehensive record developed through multiple requests for comment over nearly two years, as RTI and undoubtedly others will explain in more detail in oppositions to NCLC’s Petition for Reconsideration.<sup>20</sup>

#### **A. The FCC’s Clarification is Supported by the Statute’s Plain Language, the Agency’s Longstanding Administrative Precedent, and Decades of Supreme Court Precedent.**

First, the TCPA’s plain language confirms that it does not apply to calls made by or on behalf of the federal government. Section 227(b)(1) states that it is unlawful for a “person” to make a call to a wireless number using an automatic telephone dialing system (“autodialer”) or prerecorded voice in certain situations.<sup>21</sup> The federal government is not a “person” as the term is defined in the Communications Act (in which the TCPA is codified). Similarly, federal contractors who place calls on behalf of the United States also are not “persons” in certain circumstances because of their relationship with the federal government. Such contractors “step into the shoes” of the federal government in these circumstances, including when they act “as the government’s agent in accord with the federal common law of agency.”<sup>22</sup> Because the calls are effectively “made” by the federal government, the contractors who are hired to assist are exempt from liability to the same extent that the federal government would have been if it had physically dialed the calls.

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<sup>20</sup> See NCLC Petition; *Reconsideration PN*.

<sup>21</sup> See 47 U.S.C. § 227(b)(1).

<sup>22</sup> See *Declaratory Ruling* ¶ 16.

Second, the *Declaratory Ruling* is consistent with the Commission’s “longstanding administrative precedent” of interpreting the TCPA to exempt from liability calls on behalf of a principal that would not have been liable if it had placed the calls itself.<sup>23</sup> For example, in the *1995 TCPA Order*, the FCC concluded that the statutory exemption from the term “telephone solicitation” for calls and messages “by a tax-exempt nonprofit organization” should include calls and messages made by or on behalf of tax-exempt nonprofit organizations.<sup>24</sup> In the *2003 TCPA Order* and the *2005 State Farm Declaratory Ruling*, the FCC reached similar conclusions in the context of the statutory exemption from the term “telephone solicitation” for calls and messages to persons with whom the caller has an established business relationship.<sup>25</sup>

Similarly, in the *2013 Dish Declaratory Ruling*, the FCC found that sellers could be held vicariously liable under the TCPA for calls placed on their behalf by third-parties.<sup>26</sup> If a seller can be liable for calls that third parties place on its behalf, why could it not similarly delegate special benefits or privileges to the same third parties?

Third, the *Declaratory Ruling* is consistent with decades of Supreme Court precedent, including the Court’s recent decision in *Campbell-Ewald Co. v. Gomez*. As explained by RTI and others many times in this proceeding, the Supreme Court has consistently held that statutes using the term “person” are “ordinarily construed to exclude” the federal government absent

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<sup>23</sup> *See id.* ¶ 17.

<sup>24</sup> *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391 ¶¶ 12-13 (1995).

<sup>25</sup> *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 118 (2003); *Request of State Farm Mut. Auto. Ins. Co. for Clarification & Declaratory Ruling*, Declaratory Ruling, 20 FCC Rcd 13664 ¶¶ 1, 6 (CGB 2005); *see also Declaratory Ruling* ¶ 16 n.77.

<sup>26</sup> *DISH Network, LLC*, Declaratory Ruling, 28 FCC Rcd 6574 ¶ 35 (2013).

“some affirmative showing of statutory intent to the contrary.”<sup>27</sup> The TCPA is devoid of such “intent to the contrary.”<sup>28</sup> In fact, the Commission and members of Congress have both emphasized that the opposite is the case: “the goal of the TCPA has never been to impede communications from the federal government.”<sup>29</sup> The Court’s decision in *Gomez* reflects these realities. There, the Court confirmed that federal contractors who perform “as directed” are, like the federal government and its agencies, not subject to the TCPA’s prohibitions.<sup>30</sup>

**B. NCLC Wrongly Asserts that the *Declaratory Ruling* is Inconsistent with the Bipartisan Budget Act’s TCPA Amendments.**

Contrary to NCLC’s claims, the FCC’s clarification in the *Declaratory Ruling* can easily be squared with last year’s amendments to the TCPA.<sup>31</sup> In a Report and Order released on August 11, 2016, the Commission adopted rules to implement the Bipartisan Budget Act amendments.<sup>32</sup> In that decision, the Commission expressly rejected NCLC’s position that the *Declaratory Ruling* limited its ability to adopt rules to implement the Bipartisan Budget Act amendments.<sup>33</sup>

Indeed, as the Commission has explained, the *Declaratory Ruling* does not mean that Congress’ decision to exempt calls “to collect a debt owed to or guaranteed by the United States”

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<sup>27</sup> See, e.g., *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 64 (1989); *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941)); Letter from Mark W. Brennan, Counsel, RTI, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (July 18, 2016).

<sup>28</sup> See *id.*

<sup>29</sup> *Declaratory Ruling* ¶12; Letter from Reps. David Price, G.K. Butterfield, and Renee Ellmers, U.S. Congress, to Chairman Tom Wheeler, FCC, CG Docket No. 02-278, at 1 (Jan. 8, 2015) (“Congressional Letter”).

<sup>30</sup> *Gomez*, 136 S. Ct. at 666, 672.

<sup>31</sup> See, e.g., NCLC Petition at 4.

<sup>32</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 16-99 (rel. Aug. 11, 2016).

<sup>33</sup> See *id.* ¶¶ 61-66; NCLC Petition at 16.

was unnecessary.”<sup>34</sup> For example, the clarification applies based on the relationship between the caller and the federal government, whereas the Bipartisan Budget Act exemptions apply based on the purpose of the call. A party who calls to collect a debt “owed to or guaranteed by” the U.S. may or may not be a federal contractor. Even if the party is a federal contractor, it may not be acting within the scope of an agency relationship with the federal government.

A petition for reconsideration recently filed by the Professional Services Council (“PSC”) underscores this point. According to PSC, the principal-agent relationship “is not common in the federal market.”<sup>35</sup> If this is true, then Congress’ recent exemptions (and the rules the FCC had adopted to implement them) would be highly relevant to a wide variety of actors.

Additionally, Congress passed the Bipartisan Budget Act before the FCC released the *Declaratory Ruling*. As the Commission has explained, this means that Congress’ amendment to the TCPA was not “redundant or pointless.”<sup>36</sup> Rather, Congress’ efforts “guarantee[d] that callers covered by the amendment would be excepted from the [TCPA’s] consent requirement no matter how the Commission eventually resolved the question.”<sup>37</sup>

#### **IV. MANY OTHER INTERESTED PARTIES WOULD BE HARMED BY A STAY.**

NCLC also fails to show that a stay would not harm other interested parties. In fact, granting a stay would substantially harm many other interested parties because it would introduce uncertainty about whether calls by or on behalf of the federal government are subject to the TCPA’s technology-based restrictions.

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<sup>34</sup> See *Declaratory Ruling* ¶ 21 n.96.

<sup>35</sup> Petition for Reconsideration of Professional Services Council, CG Docket No. 02-278, at 12, 15 (filed Aug. 4, 2016)

<sup>36</sup> See *Declaratory Ruling* ¶ 21 n.96.

<sup>37</sup> See *id.*

Such uncertainty would harm public citizens, who benefit in many ways from the calls. For example, if the federal government and contractors calling on its behalf are unable to efficiently call wireless numbers, they would be unable to reach an increasingly large number of households.<sup>38</sup> They also would have less contact with certain demographics, such as low-income and minority citizens, who are significantly more likely to be wireless-only.<sup>39</sup> Without appropriate input from such citizens, government-funded research – and the policies it shapes – may not be able to adequately address the issues that affect them.

The uncertainty would raise the specter of additional lawsuits under the TCPA, including lawsuits against both the federal government and federal contractors validly authorized to make calls on its behalf. It would also increase the burdens imposed on such entities by existing TCPA lawsuits. For example, federal agencies and contractors validly authorized to make calls on their behalves, such as RTI, may be forced to participate in lengthy and costly discovery in cases that could otherwise be avoided once the FCC addresses NCLC’s Petition for Reconsideration.

#### **V. A STAY WOULD BE CONTRARY TO THE PUBLIC INTEREST.**

Finally, NCLC fails to demonstrate that a stay would be in the public interest. The federal government, federal contractors, and consumers alike have a strong interest in the greater certainty that the Commission’s clarification provides. Additionally, the Commission has already determined that this particular clarification – that calls by or on behalf of the federal government are not subject to the TCPA – “advances the public interest” in a number of

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<sup>38</sup> See, e.g., Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2015*, NAT’L CTR. FOR HEALTH STATISTICS (May 2016), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201605.pdf> (finding that the percentage of U.S. households with only mobile phones grew to 48.3 percent in the second half of 2015).

<sup>39</sup> See *id.*

important respects.<sup>40</sup> For example, it will help ensure that wireless consumers are equally able “to participate in government and make their views known to their representatives.”<sup>41</sup> The clarification will also “foster public safety and save resources by allowing government to use the most cost-efficient method of communicating with the public.”<sup>42</sup> As an example, if contractors working on behalf of the Social Security Administration were subject to the TCPA’s “prior express consent” requirement, it would be “more difficult and costly to inform disabled or injured Americans of incentives that allow them to attempt to return to work without risking benefits.”<sup>43</sup>

Meanwhile, NCLC’s claims concerning how a stay would be in the public interest are dubious at best. As explained above, NCLC grossly exaggerates the *Declaratory Ruling*’s impact because it fails to acknowledge that the federal government could make the calls in question itself and misconstrues the scope of the FCC’s clarification. We do not expect the FCC’s clarification to cause consumers to receive any additional autodialed calls from contractors that could not otherwise be made by the federal government itself, and the clarification expressly does not affect a number of other calling requirements (*e.g.*, those that restrict call spoofing) – despite NCLC’s claims to the contrary.<sup>44</sup>

In addition, the FCC’s clarification does not provide federal contractors with a “get-out-of-jail free card,” as NCLC suggests.<sup>45</sup> Instead, the clarification is limited to those situations

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<sup>40</sup> See *Declaratory Ruling* ¶ 18.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*; see also, *e.g.*, Congressional Letter at 1.

<sup>43</sup> *Declaratory Ruling* ¶ 19.

<sup>44</sup> See, *e.g.*, NCLC Petition at 4, 11.

<sup>45</sup> See NCLC Petition at 17.

where a contractor calls with authority validly conferred by the federal government.<sup>46</sup> Federal agencies can control the scope of this authority and, with it, the calls that contractors can place.

## VI. CONCLUSION.

For the reasons discussed above, the Commission should deny NCLC's request to stay the *Declaratory Ruling*.

Respectfully submitted,

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<sup>46</sup> See *Declaratory Ruling* ¶¶ 12-19.