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
	)	
	)	
	)	

To: The Commission

OPPOSITION TO REQUEST FOR STAY

Pursuant to Section 1.45(d) of the Commission's rules, Broadnet Teleservices LLC ("Broadnet") hereby opposes the request for stay ("Petition") by the National Consumer Law Center *et al.* ("NCLC")[1] of the *Declaratory Ruling* released July 5, 2016 in the above-referenced proceeding.[2] The Petition focuses on the *Declaratory Ruling*'s application to those acting on behalf of the federal government, not its finding that the Telephone Consumer Protection Act ("TCPA") does not apply to the federal government.[3] To qualify for the "extraordinary remedy of stay," a petitioner must satisfy four separate prongs: (1) the petitioner is likely to prevail on

[1] Petition for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration of the National Consumer Law Center *et al*., CG Docket No. 02-278 (filed July 26, 2016) ("Petition").

[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 16-72 (rel. July 5, 2016) ("*Declaratory Ruling*"). This filing focuses only on NCLC's request for stay. Broadnet subsequently will submit a filing that explains in more detail why the Commission should not – and need not – reconsider the *Declaratory Ruling*.

[3] As Commissioner Ajit Pai has indicated, "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, FCC 16-99, CG Docket No. 02-278, at 51 (rel. Aug. 11, 2016) ("*Budget Act Amendments R&O*"). Although NCLC "do[es] not concede" that the Commission correctly determined in the *Declaratory Ruling* that the federal government is not a person under the TCPA, it has not sought reconsideration of "the issue of whether the federal government is covered by the TCPA…." Petition at 13 n. 37. Nor has any other party.

the merits; (2) the petitioner will suffer irreparable harm absent the grant of preliminary relief; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay.[4] Tellingly absent from the Petition is any discussion of these requirements;[5] for the reasons described herein, NCLC is unable to satisfy any of them.

The Petition Is Unlikely to Prevail on the Merits. As an initial matter, the Petition is procedurally flawed because it relies on arguments not previously presented to the Commission and does not meet the very limited criteria under which the Commission will consider a petition for reconsideration that relies on new arguments or facts.[6] The Petition admits as much – stating that "there were no comments made by public interest groups representing consumers generally or by legal aid programs representing low-income people with limited minutes on their cell phone plans" in the proceeding and thus consumer issues were neither considered nor addressed.[7] A failure to raise arguments during the Commission's consideration of an issue is not a justification for reconsideration. The facts and arguments raised in the Petition by NCLC were all known, or should have been known through ordinary diligence, by NCLC during the

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[4] *Rates for Interstate Inmate Calling Servs.*, Order Denying Stay Petitions and Petition to Hold in Abeyance, 28 FCC Rcd 15927, 15931 ¶ 7 (2013) (citing *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843, 182 U.S. App. D.C. 220 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925, 104 U.S. App. D.C. 106 (D.C. Cir. 1958)).

[5] This fact alone suggests that NCLC has failed to meet its burden to prove a stay is warranted.

[6] *See* 47 C.F.R. § 1.106(p)(2); *Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, Order on Reconsideration, 27 FCC Rcd 1972, 1974 ¶ 5 (WCB 2012).

[7] Petition at 9.

pendency of the proceeding;[8] and consideration of the new arguments is not required in the public interest as the Commission has already considered and "advance[d] the public interest" through the *Declaratory Ruling*.[9] Thus, the arguments raised by NCLC, none of which are based on a single new fact or changed circumstances, fail to meet the Commission's criteria to entertain a petition for reconsideration.

In addition to this procedural defect, which alone makes it unlikely that NCLC will prevail on the merits,[10] NCLC also is unlikely to prevail for substantive reasons. First, the Commission determined that it is necessary to interpret the term "person" to exclude certain entities acting on behalf of the federal government to effectuate Congress' intent that the TCPA not apply to the federal government.[11] Yet NCLC fails to discuss, let alone refute, the

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[8] In this regard, NCLC appears to suggest it was led astray by the Commission's public notices. *See* Petition at 6-9. But the Commission's holding in the *Declaratory Ruling* addresses exactly the matters contemplated by the public notice regarding Broadnet's petition for declaratory ruling. *See Consumer and Governmental Affairs Bureau Seeks Comment on a Petition for Declaratory Ruling Filed by Broadnet*, Public Notice, 30 FCC Rcd 10654, 10654-55 (CGB 2015) (seeking comment on "calls made *by or on behalf* of government entities … and *those working on behalf of government entities and officials*") (emphasis added). Moreover the Commission clearly – and reasonably – expected would-be commenters to review the petition itself. *See id.* at 10655 ("We seek comment on these *and any other issues raised* in the *Petition.*") (emphasis added).

[9] *See Declaratory Ruling* ¶ 18 ("Our clarification … advances the public interest.").

[10] *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Order Denying Stay Motion, 30 FCC Rcd 14384, 14386-87 ¶¶ 7-9 (MB 2015) ("*Incentive Auction Stay Denial*") (dismissing a motion for stay in part because the procedural defects in the stay request's underlying petition for reconsideration, per section 1.429(b), meant the movant was not "likely to prevail on the merits").

[11] *Declaratory Ruling* ¶ 19 ("If the TCPA were interpreted to forbid third-party contractors from making autodialed or artificial- or prerecorded-voice calls on behalf of the government, then, as a practical matter, it would be difficult (and in some cases impossible) for the government to engage in important activities on behalf of the public."); *see also id.* n. 79 ("[I]n order to make meaningful our finding that the federal government is not subject to section 227(b)(1), we find it necessary also to find that the definition of 'person' under section 227(b)(1) does not include a

Commission's judgment. Instead, NCLC claims that the Commission misinterpreted *Campbell-Ewald*. NCLC is mistaken: *Campbell-Ewald* supports – and as importantly, in no way precludes – the *Declaratory Ruling*'s findings.[12] Likewise, the Commission's interpretation in no way conflicts with the language and structure of the TCPA,[13] nor does it conflict with the Budget Act amendments.[14] The Commission has clear authority to interpret the definitions of Section 153 of the Communications Act as the context requires,[15] and here reasonably interpreted the definition of "person" to effectuate Congress' intent.

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contractor acting as an agent to the federal government."). Nor does the Petition respond to the Commission's reasoned finding that "subjecting contractors operating on behalf of the government to liability under the TCPA, even though the federal government itself would not be liable, would be difficult to reconcile with the *DISH Declaratory Ruling*" because the "rule would potentially allow the government to be held *vicariously* liable for conduct in which the TCPA *allows* the government to engage," which "would be an untenable result." *Id.* ¶ 16.

[12] *See id.* ¶ 20 (The *Declaratory Ruling* "finds strong support in the Supreme Court's recent decision indicating that both the federal government, *as well as contractors lawfully authorized to make calls on behalf of the federal government*, are immune from TCPA liability and hence are not subject to its prohibitions.") (citing *Campbell-Ewald*, 136 S. Ct. at 673-74) (emphasis added). Although NCLC is correct that *Campbell-Ewald* addressed derivative sovereign immunity and qualified immunity, rather than the scope of the term "person" under the TCPA, *see* Petition at 13, nothing in the decision suggests that the Commission cannot interpret the term "person" to include those acting on behalf of the federal government.

[13] In this regard, as noted above, the Commission reasonably determined that applying relief to those acting on behalf of federal government entities was necessary to effectuate Congress' intent that the TCPA not apply to the federal government; the Commission never indicated that the language of the statute itself excluded government contractors or agents.

[14] *See Budget Act Amendments R&O* ¶ 61 (finding the Commission's approach in implementing the Budget Act amendments, "which focuses on the type of 'calls made' to a cellular number and not the identity of the caller", is consistent with the Budget Act amendments and the *Declaratory Ruling*).

[15] *See Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, 20 FCC Rcd 14242, 14246 ¶ 9 (2005) (relying on the Commission's authority under Section 153 to contextually interpret the word "state" in a discrete fashion for purposes of Section 338(a)(4)).

Moreover, NCLC is mistaken regarding the practical implications of the *Declaratory Ruling*. 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. Doing so would jeopardize the contracts under which they operate. Further, if concerns are raised, the relevant federal government bodies themselves, rather than the Commission and the TCPA, can address how their agencies utilize autodialing technology, as well as those entities acting on their behalf to provide such capabilities, to engage with citizens.[16] As politically accountable actors, there is little doubt they will act responsibly.

For all of these reasons, NCLC is unlikely to prevail on the merits.

Neither NCLC Nor Consumers Will Suffer Irreparable Harm Absent the Grant of Preliminary Relief. NCLC fails to demonstrate "irreparable harm" and instead perfunctorily concludes there may be "immediate harm to consumers' privacy interests" and "economic costs … imposed on low-income consumers."[17] NCLC's request fails to meet the "[s]everal general principles [that] govern the irreparable injury inquiry":

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[16] Indeed, the House and Senate already self-police how they conduct mass communications with citizens. *See* Franking FAQ, Committee on House Administration, https://cha.house.gov/franking-commission/franking-faq; Franking Privilege and Radio and Television Studios, Committee on Rules & Administration, http://www.rules.senate.gov/public/index.cfm?p=RuleXL.

[17] Petition at 20.

> First, the injury must be both certain and great; it must be actual and not theoretical. A movant must also substantiate the claim that the irreparable injury is 'likely' to occur…. Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur. Further, it is well settled that economic loss does not, in and of itself, constitute irreparable harm.[18]

NCLC has failed to "substantiate the claim that irreparable injury is 'likely' to occur." Instead, NCLC claims, without support, that consumers suddenly will be inundated on their wireless phones with unwanted calls on behalf of the federal government. NCLC, however, fails to explain why the checks on such calls imposed by the *Declaratory Ruling* and government entities themselves are insufficient, or why government entities would permit calls that frustrate or annoy consumers to be made on their behalf. NCLC likewise fails to explain why consumers have not received such calls on their wireline phones even though such residential calls have long been understood to be permitted. In other words, NCLC's claimed harms to consumers are nothing more than theoretical, and certainly are not "likely."

NCLC also fails to demonstrate that any impact of the *Declaratory Ruling* would constitute "irreparable harm." Even assuming *arguendo* NCLC's claim that certain consumers will face some new economic costs in light of the *Declaratory Ruling* is true,[19] "economic loss does not, in and of itself, constitute irreparable harm."[20] And while NCLC claims there will be an "immediate harm to consumers' privacy interests," NCLC fails to demonstrate why any such purported harm would be "irreparable."

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[18] *Incentive Auction Stay Denial*, 31 FCC Rcd at 1932 ¶ 6 n. 19 (citations and internal quotations omitted).

[19] Petition at 20.

[20] *Incentive Auction Stay Denial*, 31 FCC Rcd at 1932 ¶ 6 n. 19 (citations and internal quotations omitted).

Other Interested Parties Will Be Harmed if the Stay is Granted. NCLC has failed to address the negative impact a stay would have on federal agencies that rely on contactors to place calls to their constituents and the entities that facilitate such calls for federal government agencies. As a result, they have failed to demonstrate that other interested parties will *not* be harmed if the stay is granted. As the Commission recognized, the *Declaratory Ruling* allows the federal government to "save resources by allowing the government to use the most cost-efficient method of communicating with the public."[21] Thus, federal government agencies and those acting on their behalf, will be harmed if the stay is granted, along with citizens relying on mobile phones who will not benefit from the direct interaction with their government made possible by the *Declaratory Ruling*.

The Public Interest Does Not Favor Grant of the Stay. The public interest does not favor grant of the stay of the *Declaratory Ruling.* The *Declaratory Ruling* presents a tremendous opportunity to ensure that federal government entities can utilize modern technologies to engage, communicate with, and reach *all* citizens. Indeed, as the Commission observed, without the *Declaratory Ruling*, "wireless consumers would be less able to participate in government and make their views known to their representatives."[22] At a time of growing division and distrust of government by citizens, effective engagement between the government and its citizens is only becoming more vital. The *Declaratory Ruling*'s clarification itself, as the Commission recognized, "advances the public interest" at it enables "wireless consumers … to participate in

[21] *Declaratory Ruling* ¶ 19.

[22] *Id.* ¶ 18. The Commission also found that allowing the federal government to use autodialers without consent will foster public safety. *See id.* ¶ 19.

government and make their views known to their representatives."[23] The Commission should not – and cannot – ignore such a benefit to consumers and democracy for merely theoretical, unsubstantiated, and counterintuitive concerns. Accordingly, the public interest clearly does not favor grant of the stay, which would result in wireless-only citizens, including a growing number of people of color, millennials, and individuals living in poverty, once again deprived of important opportunities to engage with their government.

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NCLC has failed to meet the requirements for the "extraordinary remedy of stay" of a Commission order. Therefore, pursuant to Commission precedent, the stay request must be denied.

Respectfully submitted,

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[23] *Id.* ¶ 18.