



POLICY & ACTION FROM CONSUMER REPORTS

August 31, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 [CG Docket No. 02-278; FCC 16-878]

Dear Ms. Dortch:

Consumers Union, the policy and mobilization arm of Consumer Reports,¹ thanks you for the opportunity to comment² on the National Consumer Law Center's petition for reconsideration of the *Broadnet Declaratory Ruling*, which we joined, along with 49 other legal services and advocacy groups.³ In the decision, the FCC ruled that "the term 'person,' as used in section 227(b)(1) and our rules implementing that provision, does not include the federal government or agents acting within the scope of their agency under common-law principles of agency."⁴ This unnecessarily sweeping ruling compromises consumers' privacy and their right to protect themselves from unwanted robocalls by potentially opening a broad exemption for unwanted robocalls from federal contractors. As a result of this ruling, consumers could receive millions more robocalls without their consent, and could lose their right to opt-out of these robocalls. We respectfully ask you to grant this request for reconsideration, and reverse this broad ruling, because it unnecessarily and inappropriately undermines the compelling public interest in limiting

¹ Consumers Union is the policy and mobilization arm of Consumer Reports. Consumers Union works for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves, focusing on the areas of telecommunications, health care, food and product safety, energy, and financial services, among others. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

² Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Comment on National Consumer Law Center Petition for Reconsideration of the FCC's Broadnet Declaratory Ruling, CG Docket No. 02-278, (August 1, 2016) *available at* <https://ecfsapi.fcc.gov/file/080146206945/DA-16-878A1.pdf>.

³ Nat'l Consumer Law Ctr. et al., Petition for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration, CG Docket No. 02-278, (July 26, 2016), *available at* <https://ecfsapi.fcc.gov/file/10726059270343/NCLC%20Petition%20for%20Reconsideration%20of%20Broadnet.pdf>

⁴ In the Matter of 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, Declaratory Ruling, FCC 16-72, CG Docket No. 02-278 5 (July 5, 2016) [hereinafter BROADNET RULING], *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0706/FCC-16-72A1.pdf.

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unwanted robocalls, and because federal contractors are, in fact, persons under the Telephone Consumer Protection Act (TCPA).

1. Limiting unwanted robocalls serves a compelling public interest.

As Chairman Tom Wheeler noted in his comments before the inaugural meeting of the Robocall Strike Force at FCC's headquarters in August, "Americans are fed up" with robocalls, describing them as a "scourge," and noting that they are the source of 200,000 complaints to the FCC a year, the top subject of consumer complaints.⁵ Commissioner Mignon Clyburn, in her remarks, pointed out, "We know there is a problem. We know how much consumers dislike these calls."⁶ At a recent Senate hearing, Senator Claire McCaskill referred to unwanted robocalls as "the biggest consumer problem in the country."⁷ Call-blocking companies have also estimated that billions of unwanted robocalls are clogging up the networks. YouMail estimated that 2.42 billion robocalls were transmitted over US networks in July 2016,⁸ while Aaron Foss, creator of Nomorobo, estimated that robocalls make up about 35% of the calls Americans now receive.⁹

Consumers are vigorously protesting these calls. According to the Federal Trade Commission, which tracks complaints about violations of the Do Not Call registry, complaints about unwanted calls featuring pre-recorded messages have doubled in the past five years, hitting over 2 million in FY 2015.¹⁰ Complaints about unwanted robocalls have poured into Consumers Union as well. We have received almost 34,000 complaints about these calls, and Consumers Union's End Robocalls campaign is the fastest-growing campaign in our history.

In the *Broadnet* decision, the FCC fails to appreciate consumers' concerns about robocalls and the potential breadth of its ruling, noting that "We can discern no legal or policy rationale that would justify making it more difficult for the federal government to inform citizens of ways to leave poverty behind or

⁵ Federal Communications Commission, Remarks of FCC Chairman Tom Wheeler As Prepared for Delivery Robocall Strike Force Launch Event, Washington, D.C., (August 19, 2016), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0819/DOC-340882A1.pdf.

⁶ Federal Communications Commission, Remarks of Commissioner Mignon L. Clyburn, Robocall Strike Force, (August 19, 2016), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0819/DOC-340873A1.pdf.

⁷ *The Telephone Consumer Protection Act at 25: Effects on Consumers and Business, Hearing Before the S. Comm. on Sci., Commerce, and Transp.*, 114th Cong. (2016) (statement of Senator Claire McCaskill, approximately 1:18:30), *available at* <http://www.commerce.senate.gov/public/index.cfm/hearings?ID=7FDEF85E-BF1F-475C-BE3F-1E011EA5A909>.

⁸ YouMail, YouMail Robocall Index July 2016, Calls by the Most Active Robocallers in July, <https://www.youmail.com/phone-lookup/robocall-index/2016/july>.

⁹ *Rage Against Robocalls*, CONSUMER REPORTS, July 28, 2015, *available at* <http://www.consumerreports.org/cro/magazine/2015/07/rage-against-robocalls/index.htm>.

¹⁰ FED. TRADE COMM'N, NAT'L DO NOT CALL REGISTRY DATA BOOK FOR FISCAL YEAR 2010 5 (2010), *available at* <https://www.ftc.gov/sites/default/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2010/101206dncdatabook.pdf> (indicating 697,755 complaints about "Recorded Message" calls); FED. TRADE COMM'N, NAT'L DO NOT CALL REGISTRY DATA BOOK FOR FISCAL YEAR 2015 5 (2015), *available at* <https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2015/dncdatabookfy2015.pdf> (indicating 2,125,974 complaints about "Recorded Message" calls).

to otherwise contact citizens for similar benevolent purposes.”¹¹ However, unsolicited robocalls are not only a nuisance – they can put consumers in danger. Moreover, it should be left to consumers to decide whether they want to receive non-emergency robocalls or not, regardless of the purpose. It is also not fair to impose the costs of unwanted robocalls onto consumers, especially the most vulnerable ones and those on limited-minute calling plans.

Consumers are desperate for ways to limit robocalls. Not only do unwanted robocalls compromise privacy, they can also tie up consumers’ phone lines, preventing their use when needed for far more important matters. Laidily from Baltimore, Maryland wrote to Consumers Union, “My mentally ill son had to be hospitalized urgently. A lengthy robot call almost prevented a call for help in contacting a hospital emergency unit.” John from Davis, California explained how a robocall delayed him in contacting his doctor:

I started to pick up my phone one day to call my doctor's office. Just before picking up it rang. It was a robocall from I don't remember who, so I hung up and, after a few seconds, picked the handpiece up again to make my call. To my surprise the robocall was still going. I had to wait a full minute for the call to end before I could use my phone. I am 77 years old, and this wait could spell the difference between life or death for me in an emergency, which I seem to be having more and more. I have tested this several times since then with the same results. I think it is criminal that they can tie up my phone like that. After all at my age my phone is my primary safety link in an emergency.

Unwanted robocalls to cell phones also unnecessarily risk consumers’ safety, since so many of them are received while driving. Michael of Flower Mound, Texas, says:

Robo-calls are a nuisance at the very least and a potential life-threatening distraction. Usually, when I answer my cell phone and I hear a ringing phone, I immediately hang up. . . . However, when I am in my car, the call comes through my speakers and I cannot hang up. I am often startled by these calls and avert my eyes to see who is calling. This presents a danger because my eyes leave the road, if even for a few moments.

Likewise, Helen of Lawrence, Kansas, a health-care professional, wrote to us:

My client pressed her life line button; I was the emergency contact. On the way to her home, I received a robocall. I couldn't tell if it was a call in relation to the emergency or not. I had to repress my anger and refocus. The choices while driving is to ignore the call, stop and answer, or risk an accident when answering, even if it is at a stop light. Either way, it can be life endangering to myself and clients in my line of mobile health care work. I hesitate now to answer a call that I don't know. Other mobile professional health care workers won't immediately answer their phone either, making unnecessary phone tag with text or voicemail whereas taking the call and talking could be quicker.

¹¹ BROADNET RULING, *supra* note 4, at 11.

These calls can also cause consumers to turn off or disable their phones because of the robocalls – compromising the efficacy of the service for which they pay dearly. Anne of Los Angeles, California told us that her son turns off his phone during the day because of the robocalls he receives: “My 13 year old son has been getting robo-calls on his cell phone. This is very problematic, because he is in school. He turns off the phone because of the robo-calls, then I cannot get messages to him.” Bob of Beecher, Illinois had to disable the text function on his phone because of so many junk texts, and now resorts to email to communicate:

I even had to have text messages entirely blocked on my cell phone by my carrier. [My carrier] was charging me for each individual text, and did little or nothing to stop this invasion, obviously because they were making money on this abuse. My main mode of communication has become e-mails, as I can filter out most of the unwanted junk automatically, and it appears that simply asking to be removed from a mailing list still works.

Consumers Union is particularly concerned about the impact this ruling could have on low-income consumers with limited-minute cell phone plans. NCLC estimates that 76 million Americans have limited-minute cell phone plans,¹² including an estimated 13 million through the Lifeline program.¹³ For these consumers, maintaining control over the calls they receive is a serious matter. For example, Andrea of Clarkston, Georgia wrote to us: “I am a disabled veteran who is still waiting for VA. I have only a prepaid phone for emergency. I already received several calls and had to pay minutes that I now could not use to call family. I already lost my home and am stuck in this state without family. Preventing me from calling is unnecessary and inhumane.”

These calls to prepaid calling plans can be expensive for consumers. Regina of Phoenix, Arizona tells us,

Up until a few months ago when I switched plans, I had a prepaid cell phone plan which was cheap, but I got the phone mainly to keep tabs on my elderly mother so I didn't use the phone much. I used the phone mainly to call her and check up on her. **Each incoming call cost me fifty cents.** You can imagine my consternation when I started getting several robocalls on this phone! Do you even realize some people have to pay to receive these calls? [Emphasis added]

Because federal contractors have also been known to violate the TCPA, it's crucial that the law remain clear that it applies to contractors, and that consumers have the right to opt out of these calls. For example, according to the law firm Greenwald Davidson Radbil PLLC, a company collecting federal student loan debt repeatedly robocalled the cell phone of one of their clients, even though the client did not owe the debt.¹⁴ The contractor continued to robocall the client's cell phone even after the consumer had complained to the company, and even after the company had promised to remove the client's name from their database.¹⁵ This was not a unique instance, according to information revealed in discovery. The

¹² Nat'l Consumer Law Ctr., Comment Letter in Support of Reconsideration, CG Docket No. 02-278 5 (August 29, 2016), *available at* <https://www.fcc.gov/ecfs/filing/10829228610098/document/10829228610098a2d8>.

¹³ *Id.* at 5, n.13.

¹⁴ Greenwald Davidson Radbil PLLC, Reply Comments in Favor of a Stay Pending Reconsideration, CG Docket No. 02-278 2-3 (August 16, 2016), *available at* <https://www.fcc.gov/ecfs/filing/10816887018145/document/108168870181453e6f>.

¹⁵ *Id.* at 3.

contractor had robocalled the cell phones of other consumers, even after they had made note that the number did not belong to the intended recipient.¹⁶

Moreover, consumers should be able to decide whether they want to receive a non-emergency robocall or not, regardless of whether the call serves a “benevolent purpose.” The TCPA restricts many “benevolent” robocalls to cell phones without consumers’ consent, such as informational calls.¹⁷ While the calls and texts at issue in this ruling, such as tele-town hall calls and survey calls, may serve a worthy purpose in the eyes of those who are creating them, they are by no means time-sensitive communications for which there is a compelling reason to circumvent the TCPA. Indeed, while scam robocalls are particularly noxious, consumers often complain to us about surveys and non-telemarketing robocalls as well. Consumers should be able to decide whether they want to receive the call or not, regardless of its content.

The FCC echoed these concerns earlier this month when issuing strong rules that place important limits on federal debt collection robocalls – including limiting the number of allowed robocalls to cell phones to three per month per servicer, and giving the right to opt-out of these calls at any time.¹⁸ In laying out the issue, the FCC cited the high numbers of complaints that they receive each year about robocalls.¹⁹ Ultimately, the FCC issued a ruling that “preserv[ed] consumers’ ultimate right to determine what calls they wish to receive.”²⁰

2. Federal contractors are persons under the Telephone Consumer Protection Act.

Federal contractors have long been understood to be persons under the TCPA, and they should be required to follow its stipulations and its implementing rules. Section 301 of the federal budget bill, exempting from the TCPA robocalls for the purposes of collecting federal debt,²¹ makes clear once again that federal contractors are considered persons. Indeed, that was the very premise of creating a narrow, targeted exemption. As Commissioner Ajit Pai noted in his *Broadnet* statement, approving in part and dissenting in part:

“[T]he express language of the TCPA confirms that Congress intended federal contractors to be persons under the law. . . . The debt collectors who are apt to make such calls are typically federal contractors. For why would anyone without a federal contract (if not part of the federal government itself) make calls solely to collect debt owed to the United States? But if federal contractors were not persons under the law, this exemption would be pointless (and the statutory language mere surplusage).”²²

¹⁶ *Id.* at 3-4.

¹⁷ 47 U.S.C. § 227(b)(1)(A)(iii) (2016).

¹⁸ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, FCC 16-99, CG Docket No. 02-278 2 (August 11, 2016), *available at* <https://ecfsapi.fcc.gov/file/08111407302175/FCC-16-99A1.pdf>.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 2.

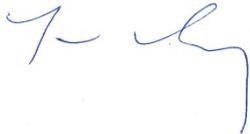
²¹ 129 Stat. 584, 588.

²² Statement of Commissioner Ajit Pai, Approving in Part and Dissenting in Part, Re: 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, Declaratory Ruling, FCC 16-72, CG Docket No. 02-278 1 (July 5, 2016), *available at* <https://ecfsapi.fcc.gov/file/0705087947130/FCC-16-72A3.pdf>.

Moreover, it is clear from *Campbell-Ewald Co. v. Gomez*²³ – which the FCC states its ruling is “supported by”²⁴ – that federal contractors are covered by the TCPA. The case involved a federal contractor, the Campbell-Ewald Company, that had failed to adhere to both the TCPA and the federal government’s instructions in carrying out its task.²⁵ Campbell asserted that federal contractors were immune from liability under the TCPA,²⁶ but the Court squarely rejected that assertion. Indeed, the Court clarified that federal contractors can be subject to the TCPA, stating, “Do federal contractors share the Government’s unqualified immunity from liability and litigation? We hold they do not.”²⁷

Consumers deserve to be able to limit the robocalls they receive. Because of the public interest in allowing consumers to protect themselves from unwanted robocalls, and because federal contractors have long been considered persons under the TCPA, Consumers Union asks that the FCC grant the requests in the NCLC’s petition for reconsideration of the *Broadnet* ruling.

Respectfully submitted,



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²³ *Campbell-Ewald v. Gomez*, 136 S. Ct. 663 (2016).

²⁴ BROADNET RULING, *supra* note 4, at 5.

²⁵ 136 S.Ct. at 667.

²⁶ *Id.* at 672.

²⁷ *Id.*