Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 NCLC Petition for Reconsideration of Declaratory Ruling	CG Docket No. 02-278

Reply Comments of Robert Biggerstaff

Robert Biggerstaff submits these comments on the Petition for Reconsideration filed by the National Consumer Law Center[1] dated July 26, 2016. The petition should be granted.

I have serious reservations about the viability of the Broadnet Decision absent significant revisions. However, recognizing that some may wish the Broadnet Decision to remain in place, I am writing to set out some unintended consequences and ambiguities in that decision. There is some merit in a limited exemption for federal government contractors. But doing so with a blunt axe of redefining the term "person" as the Broadnet decision currently does is not the way to accomplish it.

It seems that what was intended by the Broadnet Decision is that an agent of the federal government that violates the TCPA by taking an act directed by the federal government to be taken should be exempt from TCPA liability, but an agent who violates the TCPA ***without*** an instruction from the federal government to take that act ***is*** subject to TCPA liability. This is consistent with the Supreme Court's opinion in *Campbell-Ewald Co. v.*

[1] 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").

Gomez[2] that held "there is no liability on the part of the contractor who simply performed as the Government directed"[3]

I also presume that the TCP's requirement for prior express consent to make robocalls (and texts) to cell phones is the only element of the TCPA that Broadnet and similar petitioners want relief from, and that the don't also seek relief from other provisions of the TCPA such as restrictions on calls to emergency numbers, falsified callerID, time of day limitations, identity disclosures in recorded messages, etc. If they seek relief from any other provision of the TCPA, they should expressly say so rather than planning *sub silentio* to exploit it as an unintended consequence.

Some commentors have mentioned the ability of tax-exempt nonprofits ("TENP") to use agents to make calls, to make an analogy to allowing the federal government to use agents to make calls. In the case of the TENP, those agents "stand in the shoes" of the non-profit and can use the exemption in the TCPA for certain activities by a TENP. But the analogy fails when applied to the federal government because the exemption for the TENP is only a small portion of the TCPA. The exemption for the federal government is total immunity, even to the use of robocalls to indiscriminately call emergency numbers and hospital rooms.[4]

Unfortunately, the Broadnet Decision can be confusing and easily misinterpreted.

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[2] 136 S. Ct. 663 (Jan. 20, 2016).

[3] *Id*. at 673, citing *Yearsley v. W. A. Ross Constr. Co*., 309 U. S. 18, 20-21 (1940). Thee is a great deal of context involved in applying this snippit from the Court's decision, such as whether such an instruction validly confers authority, but that will remain for the time being for a separate discussion. What some term *Yearsly* immunity or derivative immunity is actually the same as qualified immunity by a different name.

[4] While some may claim there is no reason for contractors to call those numbers, there is a cost savings by dispensing with the overhead necessary to prevent calling those numbers—particularly when someone is generating random numbers to call, such as for surveys.

Under some interpretations of the Broadnet Decision, any "contractor" of the federal government is automatically freed from compliance with the entirety of the TCPA. Careless use of the ambiguous term "contractor" (which could be construed to mean independent contractors as well as legal agents and employees) adds to the confusion. This cannot be what was intended. The Commission should stay the Broadnet Decision and clarify with clear examples of how the intent of the Broadnet Decision is to be implemented.

The touchstone should not be merely the relationship to the federal government but include what "direction" was provided to the agent. In the example of robocalls, the question should be "did the government instruct the agent to make robocalls to cell phones without consent" and not merely "did the government leave it up to the contractor whether or not to make robocalls without consent." *Campbell-Ewald* requires that there be a directive from the government, not merely silence. Unfortunately, some readings of the Broadnet Decision (and the press accounts) have touted just the opposite.

What really matters is what happens in actual practice and not theoretical legal arguments. What is the real result in the field of the Broadnet Decision and is that what was intended? Indeed, what is actually intended? Has the Commission clearly stated not just the legal theory, but what was intended as a result?

From a practical perspective, there are only four scenarios where the actions of a federal government contractor interplay with the TCPA:

1) The federal government directs the agent to comply with the TCPA.
2) The federal government directs the agent to take some particular act that violates the TCPA, but directs the agent to otherwise comply with the TCPA.
3) The federal government is silent in its instructions to the agent regarding the TCPA.

4) The federal government directs the agent to take some particular act that violates the TCPA, but is silent with regard to other acts subject to the TCPA.

I believe any commenter on the Broadnet decision and the NCLC Petition should be able to answer what the proper result for each of these four scenarios is and how the Broadnet Decision (or any suggested change or alternative) will treat each of the four scenarios.

1) The federal government directs the agent to comply with the TCPA.

Consider if the federal government retained an agent to survey consumers on home affordability but also instructed the contractor not to violate the TCPA. In this case, there should be no liability shield to the agent as the government has not authorized acts that would be contrary to the TCPA and Commission rules.

2) The federal government directs the agent to take some particular act that violates the TCPA, but directs the agent to otherwise comply with the TCPA.

For example, suppose the federal government wishes to use an agent to make prerecorded outreach calls and to make them to cell-phone-only households without first obtaining express consent. But knowing that the TCPA imposes many other consumer protections (such as prohibitions on calls to emergency lines, abiding by opt-out requests, etc.) the federal government directs that all other provisions of law are to be followed. In this case the liability shield only applies to the provisions of the TCPA that cover to the acts the federal government expressly directed be taken.

3) The federal government is silent in its instructions to the agent regarding the TCPA.

If the government retains a contractor to make outreach calls, but does not expressly direct the contractor to make robocalls to cell phones without first obtaining express consent, then the decision to make such calls was made by the contractor, not the

federal government. This is more closely akin to an *independent* contractor, and not an actual agent. In such an instance, the liability shield of the federal government should not extend to the contractor who makes the decision to engage in an act that violates the TCPA.

Importantly, if the converse were true, mere silence in a government contract would free a contractor from the entirety of the TCPA, including calls to emergency lines, calls at any time of the day or night, unlimited calls per day, falsified callerID, ignoring identification requirements for prerecorded messages, etc. This cannot be what the Commission intended.

4) The federal government directs the agent to take some particular act that violates the TCPA, but is silent with regard to other acts subject to the TCPA.

As with the immediately prior example, silence can not be interpreted as *carte blanche*. Only acts expressly directed by the federal government to be taken can receive a liability shield. Furthermore this paradigm cannot be construed to place any burden on the industry since it is well aware of the TCPA requirements (more so than many federal contacting offices) and can place into the contract appropriate wording authorizing precisely which TCPA-covered acts that are contemplated. This would also serve to alert the federal government to exactly what acts the government is authorizing and shielding from liability.

There is also the issue of "mission creep" to contend with, as a long list of entities will line up to also have themselves excluded from the term "person" from states, state prison contractors, state agencies, municipalities, all the way down to the local dogcatcher. Some of these may have good arguments that they are not a person, but at the same time not be deserving of a TCPA exemption. Some may have good arguments for the exemption, but clearly not be able to make a colorable argument to be excluded from the definition of

"person." Furthermore, if these entities are not "persons" not only will consumers have no recourse, but the Commission will be unable to take enforcement actions against them.

Consider the consequences if a court interpreting the TCPA holds that states and state agencies (and their contractors) are not "persons" under the TCPA. If so, the additional "conditions" of the Broadnet decision will not apply to them.

In addition, the Commission made no mention of the burden of proof with regard to establishing a particular entity is entitled to the liability shield or not. Prior Commission orders placed the burden on advertisers and callers to produce evidence supporting defenses such as an established business relationship or prior express consent, which is consistent with the legal principle that one who seeks the benefit of an exception to a general prohibition bears the burden of proving they are within the class of persons entitled to it.[5] The Commission should likewise declare explicitly that the caller bears the burden of proof to demonstrate it qualifies for any liability shield flowing from the Broadnet Decision.

Finally, we have heard from Broadnet and other contractors that they want to be exempted from the TCPA. But we have not heard from the federal agencies that Broadnet and others purport to contract for, much less have we heard from any agency that needs, or desires, to make calls that would conflict with the TCPA or Commission regulations. The only concrete example I am aware of is the one of the Navy's retention of Campbel-Ewald, and in that case, the Navy's instructions were to comply with the TCPA.[6] The Commission

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[5] *See, e.g., FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) and cases cited therein.

[6] In fact, the Navy canceled the recruiting contract with Campbell-Ewald after its TCPA violations were brought to light.

should not presume there is a need for this exemption without evidence from the federal agencies which purportedly need it.

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

Sincerely

/s/ Robert Biggerstaff

Robert Biggerstaff
September 9, 2016