Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
Professional Services Council	)	

Comments Opposing
Professional Services Council's
Petition for Reconsideration

filed by

National Consumer Law Center
on behalf of its low-income clients

Pursuant to the Public Notice[1] issued by the Consumer and Governmental Affairs Bureau, the National Consumer Law Center (NCLC)[2] files these comments opposing the Professional Services Council's petition for reconsideration of the Federal Communications Commission's [Commission] Declaratory Ruling [hereinafter Broadnet Ruling] in the above-named proceeding released on July 5, 2016.[3] These comments are filed on behalf of our low-income clients, and in furtherance of the positions taken in our Petition for Reconsideration of Declaratory Ruling and

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[1] Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Comment on Professional Services Council Petition for Reconsideration of the FCC's Broadnet Declaratory Ruling, CG Docket No. 02-278 (Rel. Aug. 1, 2016) *available at* https://ecfsapi.fcc.gov/file/0815721428679/DA-16-924A1.pdf.

[2] The National Consumer Law Center (NCLC) is a nonprofit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace.

[3] 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, CG Docket No. 02-278, Declaratory Ruling, FCC 16-72 2016 WL 3632439 (July 5, 2016) [hereinafter Broadnet Ruling], *available at* https://ecfsapi.fcc.gov/file/0705087947130/FCC-16-72A1.pdf.

Request for Stay Pending Reconsideration[4] [hereinafter NCLC's Petition for Reconsideration] filed on July 26, 2016 on behalf of the fifty legal aid programs, and national, state and local public interest organizations named in that petition.

The Professional Services Council's Petition for Reconsideration requests that the Commission delete from the Broadnet Ruling's determination that federal contractors are not persons as used in section 227 of the Communications Act the requirement that the "contractor be acting as the government's agent in accord with the federal common law of agency."[5] We oppose this request for the reasons explained below.

The Commission's reasoning in the Broadnet Ruling is essentially that the private contractors step into the shoes of the federal government. The Commission's analysis first determines (in paragraph 13) that the federal government is not a person under section 227(b)(1) of the TCPA;[6] it then reasons that "if a statutory requirement does not expressly apply to government entities, the government generally will not be subject to the statute unless 'the inclusion of a particular activity within the meaning of the statute would not interfere with the processes of the government.'"[7] The Commission then finds that subjecting the federal government to TCPA compliance when making the calls at issue in the Ruling *would* interfere with the government.[8] Finally, the Commission points out that, if private contractors are making the calls for the

[4] 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), *available at* https://www.fcc.gov/ecfs/filing/10726059270343.

[5] Broadnet Ruling at 8, ¶ 16.

[6] *Id.* at 7, ¶ 13.

[7] *Id.* at 8, ¶ 15.

[8] *Id.*

government, then under the Commission's analysis holding principals responsible for the acts of their agents,[9] the government would be vicariously liable for the acts of its agents:

> If the TCPA applied to contractors calling on behalf of the federal government, this rule would potentially allow the government to be held *vicariously* liable for conduct in the TCPA *allows* the government to engage. That would be an untenable result.[10]

Then, to protect the government from this potential liability, the Commission concludes that, as long as the contractors with whom the government has contracted are acting as agents of the government, then they—like the government itself—are also not persons under the TCPA.[11]

As explained in NCLC's Comments in Support of our Petition for Reconsideration,[12] we disagree with this reasoning and these legal conclusions. Nevertheless, if the Commission maintains its decision that federal contractors are not persons under section 227(b) of the TCPA, the agency relationship is an essential rung in this logical ladder supporting it. If the requirement that the contractor be an agent of the government were to be withdrawn from the Commission's Ruling, the foundation of the determination that contractors are not persons under the TCPA would be irreparably undermined.

The other justification for the Commission's holding that contractors are not persons is the Commission's misplaced reliance on the U.S. Supreme Court case of *Campbell-Ewald Co. v. Gomez*:[13]

> By indicating that agents enjoy derivative immunity to the extent they act under authority "validly conferred by the federal government and in accord with the government's instructions, *Campbell-Ewald* also supports our clarification that the

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[9] *See* Dish Network, LLC, Declaratory Ruling, 28 FCC Rcd 6574, 6587 ¶ 35 (2013).

[10] *Id.* (emphasis in original).

[11] Broadnet Ruling at 11, ¶ 20.

[12] National Consumer Law Center's Comments in Support of Reconsideration in furtherance of the Petition for Reconsideration, CG Docket No. 02-278 (filed Aug. 29, 2016), *available at* https://ecfsapi.fcc.gov/file/10829228610098/Final%20Broadnet%20Comments%20in%20Support%20of%20Petition%20.pdf.

[13] 136 S. Ct. 663 (2016).

> term "person," as used in section 227(b)(1), does not include agents acting within the scope of their agency in accord with federal common law principles of agency.[14]

The primary problem with this statement is that the Supreme Court made no finding that contractors for the federal government enjoy "derivative immunity." Quite the opposite, the Court stated:

> [G]overnment contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States." . . . . That immunity, however, unlike the sovereign's, is not absolute. . . . . Campbell asserts "derivative sovereign immunity," … but can offer no authority for the notion that private persons performing Government work acquire the Government's embracive immunity. When a contractor violates both federal law and the Government's explicit instructions, as here alleged, no "derivative immunity" shields the contractor from suit by persons adversely affected by the violation.[15]

There was no determination by the Supreme Court—in this or any other case—that a contractor can ever acquire derivative sovereign immunity and avoid liability for its violations of the law just because it is under contract with the federal government. The Supreme Court held only that when a federal contractor violates the express instructions provided by the government it is not entitled to any immunity from liability under the TCPA.[16] There is no statement whatsoever in *Campbell-Ewald* that "derivative sovereign immunity" (a term asserted by Campbell-Ewald in its briefing, not by the Court) even exists, much less what elements must be met to invoke it.

While we oppose the Professional Services Council's petition, we do agree with it in one respect—that the Broadnet Ruling should be reconsidered. For the reasons that we have articulated

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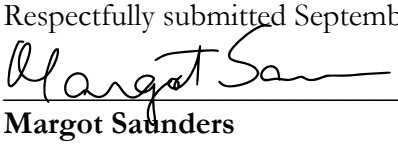
[14] Broadnet Ruling at 12, ¶ 21.

[15] Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 672 (2016) (emphasis added; internal citations omitted).

[16] *Id.* at 674.

in our comments,[17] the Broadnet Ruling is fundamentally flawed, and the relief the Commission provides—if any—significantly limited.

Respectfully submitted September 9, 2016



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[17] National Consumer Law Center's Comments in Support of Reconsideration in furtherance of the Petition for Reconsideration, CG Docket No. 02-278 (filed Aug. 29, 2016), *available at* https://ecfsapi.fcc.gov/file/10829228610098/Final%20Broadnet%20Comments%20in%20Support%20of%20Petition%20.pdf.