Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Professional Services Council	)	
Petition for Reconsideration of the FCC's	)	CG Docket No. 02-278
Broadnet Declaratory Ruling	)	DA 16-924
	)	DA 16-878
National Consumer Law Center	)	DA 16-879
Petition for Reconsideration of the FCC's	)	
Broadnet Declaratory Ruling	)	
	)	
National Consumer Law Center	)	
Request for Stay of the FCC's	)	
Broadnet Declaratory Ruling	)	

To: Secretary, Federal Communications Commission

PROFESSIONAL SERVICES COUNCIL'S COMMENTS IN SUPPORT OF ITS PETITION FOR RECONSIDERATION

PROFESSIONAL SERVICES COUNCIL

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September 14, 2016

COMMENTS

Professional Services Council ("PSC"), by counsel, and pursuant to Sections 1.415 and 1.419 of the rules of the Federal Communications Commission ("FCC" or "Commission"), respectfully submits these comments in response to the Commission's Public Notice, DA 16-924, "Consumer and Governmental Affairs Bureau Seeks Comment on Professional Services Council Petition for Reconsideration of the FCC's Broadnet Declaratory Ruling," released by the Commission on August 15, 2016.

* * * * *

PSC's Petition for Reconsideration[1] explains why the parade of horribles envisioned in the National Consumer Law Center *et al.*'s ("NCLC") papers[2] and comments in support of NCLC's petition[3] is not consistent with the practices of government agencies or entities acting on their behalf. Nor would such anti-consumer conduct further the agencies' respective missions. PSC will not belabor the point here. Instead, PSC submits these brief comments to provide clarification on three issues.

First, as a procedural matter, the Commission should address the matters raised in the NCLC Petition and PSC Petition by issuing a ruling on those proceedings in a single docket. Administrative efficiency compels this result because both petitions are inextricably linked; they

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1 Professional Services Council Petition for Reconsideration, CG Docket No. 02-278, at 11 (filed Aug. 4, 2016) ("PSC Petition").

2 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"); NCLC Comments in Support of Reconsideration, CG Docket No. 02-278 (filed Aug. 30, 2016) ("NCLC Comments").

3 Consumers Union Comments in Support of NCLC Request for Stay of the FCC's Broadnet Declaratory Ruling, Pending Reconsideration, CG Docket No. 02-278 (filed Aug. 11, 2016); Indiana and Missouri Comments in Support of NCLC Petition for Reconsideration, CG Docket No. 02-278 (filed Aug. 31, 2016).

discuss, and seek relief from, the same subject matter—the FCC's Broadnet Declaratory Ruling.[4] Such a streamlined approach is consistent with the Commission's prior treatment of the RTI, Broadnet, and NENA petitions for declaratory ruling, which were all subject to individual public notice but adjudicated collectively.[5]

Second, in contrast to the NCLC Petition, PSC does not seek wholesale reconsideration of the Declaratory Ruling.[6] PSC supports the Commission's ruling in nearly all respects.[7] The relief the Commission provided was necessary to allow the government to avail itself of government contractors' services, including the ability of federal government agencies to use efficient and cost-effective communications technology to advance their missions and communicate with the public. PSC seeks only limited reconsideration of the ruling to confer the relief it appears the Commission intended to give—i.e., that "the TCPA does not apply to calls

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4 *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, CG Docket No. 02-278 (rel. July 5, 2016) ("Declaratory Ruling").

5 *See* Broadnet Teleservices LLC, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 16, 2015) ("Broadnet Petition"); National Employment Network Association, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Aug. 19, 2014) ("NENA Petition"); RTI International, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 29, 2014) ("RTI Petition").

6 Contrary to NCLC's characterization, PSC did not assert that the Commission's ruling provides "no relief" to government contractors or that "all federal contracts eschew any agency relationship with the contractors." NCLC Comments at 13-14, 20 n. 60 (emphasis added). Rather, PSC highlighted that the Commission's reference to common-law agency could have the seemingly unintended effect of granting less relief than envisioned, in part, because many government contracts disclaim an agency relationship between the government and the contractor. *See, e.g.*, PSC Petition at ii-iii, 12.

7 *See* PSC Petition at 16 (requesting that the Commission reconsider its decision "*only to the extent necessary* to provide TCPA relief to government contractors acting on behalf of the federal government and in accordance with a government contract and government directions, without regard to whether any common-law agency relationship exists.") (emphasis added).

made by or on behalf of the federal government in the conduct of official government business, except when a call made by a contractor does not comply with the government's instructions."[8] Indeed, the Commission's recently-issued Report and Order,[9] which adopts rules to implement the Bipartisan Budget Act amendments, again makes it appear the Commission did not knowingly intend its reference to a "common-law agency" analysis to mean anything more or less than (1) acting under a government contract and (2) consistent with the directions of the government.[10] Thus, given the exceedingly narrow scope of relief PSC seeks in its August 4, 2016 petition for reconsideration, a stay is not warranted and would not serve the public interest.

Third, NCLC failed, in any event, to make the requisite showing to warrant an emergency stay. On this basis alone, its request should be denied. Even if the Commission were inclined to do NCLC's homework, applying the four-factor stay test would not produce a different result. To qualify for the "extraordinary remedy of a stay," a petitioner must satisfy four criteria: (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.[11] None of the elements is met here.

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8 Declaratory Ruling ¶ 1.

9 *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 16-99, CG Docket No. 02-278 (rel. Aug. 11, 2016) ("Budget Act Order").

10 *See id.* at n.21 (explaining that entities exempt from the TCPA include the government *and its contractors*, without reference to any limiting language regarding common-law agency); *see also id.* ¶ 27 (explaining that the rules recognize the "practicality that owners of debts might use the services of contractors to make covered calls in a manner that reduces the potential for abuse or causing debtors undue hardship.").

11 *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 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

As to the first prong, NCLC is unlikely to prevail on the merits. Relief for contractors acting "on behalf of" the U.S. government and in accordance with the terms of a government contract and the government's directions is consistent with the Supreme Court's *Campbell-Ewald* decision on derivative sovereign immunity, which the Commission discussed in the Declaratory Ruling.[12] There, the Court suggested that a contractor that complies with the government's instructions and acts within the scope of validly conferred congressional authority would be immune from TCPA liability, without any requirement for common-law agency.[13] NCLC tries to dismiss this authority as "dicta,"[14] but it is well-established that the "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative."[15] In any event, there is no denying that in *Yearsley v. W.A. Ross Cost. Co.*,[16] the Court stated expressly what it implied in *Campbell-Ewald*.[17] Furthermore, NCLC does not

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12 Declaratory Ruling ¶ 20.

13 *See Campbell-Ewald v. Gomez*, 136 S. Ct. 663, 672-74 & n.7 (2016).

14 NCLC Petition at 14.

15 *United States v. Fields*, 699 F.3d 518, 522 (D.C. Cir. 2012) (citation omitted).

16 309 U.S. 18, 20-21 (1940) (holding, without reference to common-law agency principles, that a government contractor could not be held liable for work which "was all authorized and directed by the Government of the United States.").

17 In light of *Yearsley* and its progeny, including *Campbell-Ewald*, NCLC's claim that derivative sovereign immunity does not apply to government contractors, NCLC Petition at 13, is untenable. *See, e.g.*, *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 344 (4th Cir. 2014) (explaining that derivative sovereign immunity under *Yearsley* renders "government contractors immune from suit when they act within the scope of their validly conferred authority"); *Butters v. Vance International, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (upholding district court summary judgment decision based on derivative sovereign immunity and noting that derivative sovereign immunity applies to both "contractors <u>and</u> common law agents" that are "acting within the scope of their employment for the United States") (emphasis added); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 205 (5th Cir. 2009) (upholding the district court's dismissal of a class action suit based on derivative sovereign immunity and explaining that "The Supreme Court's decision in *Yearsley* does not require a public-works contractor defendant to establish a traditional agency

(and cannot) refute that immunity for contractors acting "on behalf of" the U.S. government and in accordance with the terms of a government contract also "comports with congressional intent."[18] As the Commission explained, "there is no evidence in the text or legislative history of the TCPA that Congress intended to restrict government communications."[19]

As to the second prong, NCLC cannot demonstrate that it will suffer *any* harm, let alone *irreparable* injury, if the stay is not granted. As explained in the PSC Petition, NCLC enumerates much hypothetical harm, but offers nothing in the way of proof. Speculation as to what *might* happen is not a sufficient basis upon which to grant a stay.[20] Indeed, NCLC's speculation that government contractors will be making calls to emergency rooms and police stations and "at any time of day or night" is even more far-fetched considering that the Commission's ruling is limited to contractors acting at the government's direction within the scope of their contracts.[21]

As to the third prong, all the record evidence demonstrates that other interested parties will be harmed if a stay *is* granted. Because government communications foster "democratic participation"[22] and "public safety,"[23] among other governmental objectives, the Commission

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relationship with the government.").

18 Declaratory Ruling ¶ 18.

19 *Id.*

20 *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Order Denying Stay Motion, 30 FCC Rcd 14384, 14386-87, ¶ 6 n.19 (2015) ("Incentive Auction Stay Denial").

21 NCLC Petition at 11.

22 Declaratory Ruling ¶ 18.

23 *Id.* ¶ 19.

correctly concluded that if government contractors "were subject to the TCPA's consent requirement, . . . it would be difficult (and in some cases impossible) for the government to engage in important activities on behalf of the public."[24] A stay would halt those "important activities."

Finally, and for substantially the same reasons, NCLC also fails to show that the public interest favors a stay. In addition to the detrimental effect on the government's ability to perform its missions, the Commission has already concluded that, without the Declaratory Ruling, "wireless consumers would be less able to participate in government and make their views known to their representatives."[25]

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For the foregoing reasons, the Commission should grant PSC's request for reconsideration of the Declaratory Ruling and deny both NCLC's petition for reconsideration and its request for a stay.

Respectfully submitted,

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24 *Id.* ¶¶ 18-19.

25 *Id.*

CERTIFICATE OF SERVICE

I, Alan L. Chvotkin, hereby certify that on this 14th day of September, 2016, I caused a copy of the foregoing to be served on the parties listed below via first-class, postage prepaid mail.

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