

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Professional Services Council Petition for
Reconsideration of the FCC's Broadnet
Declaratory Ruling

CG Docket No. 02-278

Reply Comments of Robert Biggerstaff

Robert Biggerstaff submits these reply comments on the Petition of Professional Services Council (“PSC”) for Reconsideration of the FCC's Broadnet Declaratory Ruling.¹ The Petition should be denied.

Violations of multiple parts of the TCPA are a real issue

In his comments² PSC refers to several types of TCPA violations it calls a “parade of horrors” and asserts that such actions are “not consistent with the practices of government agencies or entities acting on their behalf.” This statement is contrary to the evidence.

The case of *Campbell-Ewald, Co. v. Gomez*³ is a well-known example proving otherwise. The Detroit-based advertising agency Campbell-Ewald held the U.S. Navy’s recruiting contract for 15 years. Clearly TCPA compliance was not important to Campbell-

¹ *Professional Services Council Petition for Reconsideration*, CG Docket No. 02-278, filed Aug. 4, 2016 (“Petition”).

² Dated September 14, 2016.

³ 136 S. Ct. 663 (2016).

Ewald. It will be even less important to a contractor who achieves non-personhood under the Broadnet Decision so the common-law agency requirement is necessary.

Even for a contractor who may not expressly intend to call nursing homes, emergency lines, and other protected phone numbers, scrubbing their dialers to prevent such calls is a very real compliance cost. If they are exempt from the TCPA, those compliance costs become unnecessary.

The same is true of falsified callerID. The prohibition on false callerID only applies to “persons.”⁴ Many call centers are already illegally falsifying their callerID in order to “trick” recipients of the calls to answer the phone.⁵ Will government contractors do this too? Since some callers are already doing it, it seems to indicate that there are pecuniary benefits to doing so. With TCPA immunity, it seems certain that fake callerID will be implemented to achieve those same benefits for a government contractor if that contractor is exempt from the callerID requirements.

Intrusion of robocalls

Consumers hate robocalls⁶ . . . particularly to their cell phones. Cell phones are *personal* devices that people carry on their person—many carry them 24 hours a day. Unexpected calls and texts distract drivers, interrupt work, and intrude into your life. Unwanted interruptions are the scourge of modern life. But remaining connected to family, friends, customers, and to a means of emergency contact is critical so we have to respond

⁴ 47 U.S.C. § 227(e)(1).

⁵ See, e.g., *Dudley-Jenkins v ACM Group*, No.: 1:11-cv-00279 (S.D. Ohio) (debt collection calls spoofing number of local court.)

⁶ I use the term “robocall” to include all robotic calling mechanisms including autodialers, artificial voice and prerecorded message calls, and text messages.

when a call or text comes in to at least see who it is from. The intrusion is independent of whether you get 1 call or 20.... it is the officiousness and invasion of privacy. Under the Broadnet Decision, no recipients of these calls will have *any* right to stop them regardless of whether they receive one call or a hundred. Consider one case where an autodialer (allegedly) malfunctioned and a single consumer “received hundreds of phone calls” from that autodialer.⁷ Under the Broadnet Decision, that consumer would have no recourse against a “non-person.” Neither would the FCC since it’s ability to prosecute such a TCPA violation is also limited by the term “person.”

Questions of intent

The concept of a form of immunity such as described in *Yearsley v. WA. Ross Cost. Co.*, is a judicially-created doctrine.⁸ It is inappropriate for the Commission to try to define the elements of that doctrine under the guise of rulemaking or statutory interpretation. If that was the intent of the Broadnet Decision, then the Broadnet Decision itself is fatally flawed.

If it was the intent of the Commission to allow federal government contractors to be exempt from only the “prior express consent” requirements for robocalls to cell phones, then the Broadnet Decision fails to so limit the exemption.

If it was the intent of the Commission to create an exemption to any provisions of the TCPA for federal government contractors because it seems like a “good idea” for policy reasons, Congress gave clear instructions to the Commission on the elements that must be met for such an exemption, which are set out in section 227(b)(2)(C).

⁷ *Irvine v. Akron Beacon Journal*, 770 N.E.2d 1105 (Ohio App. 2002).

⁸ 309 U.S. 18,20-21 (1940).

If Commission intended to adopt, out of whole cloth, an exemption to permit agents of the federal government to “stand in the shoes” of the federal government. There are at least three things wrong with this approach.

First, while that agency principle may apply in some contexts, it should not apply to exemptions available to the federal government unless those exemption were expressly approved and considered by Congress to be available to agents of the federal government. Allowing a private entity to be a “non-person” is not the same thing as letting a contractor working for a non-profit avail themselves of the limited exemption in the TCPA for calls for non-profits. The shoes of the non-profit are small. The shoes of the federal government are huge, unstoppable, and much more intrusive. The non-profit exemption was limited and expressly considered by Congress. The analogy simply fails when applied to the federal government. The shoes of the sovereign simply can’t be worn by a private party.⁹

A large part of the modern argument for excluding the federal government from the scope of “person” is based on its sovereign status. It is well settled that sovereign immunity does not flow to government employees or contractors¹⁰—at best they have very limited qualified immunity.¹¹ The Broadnet Decision takes a result (non-personhood of the

⁹ I do not mean to imply that *Yearsly* immunity does not exist. But such immunity is not based on an agent standing in the shoes of the federal government in a common-law agency relationship.

¹⁰ See, e.g., *Richardson v. McKnight*, 521 US 399 (1997) (qualified immunity applied to government prison employees, but not to employees of private company performing prison functions for government); *Nardone v. United States*, 302 U. S. 383 (1937).

¹¹ Indeed, the Ninth Circuit in *Campbell-Ewald* denied the defendants *Yearsly* immunity defense because that defense had only ever been applied in the context of property damage resulting from public works projects and there was an adequate remedy to he plaintiff in *Yearsley*. (“*Yearsley* established a narrow rule regarding claims arising out of property damage caused by public works projects.... As a consequence, there was an adequate remedy available and no need for action against the private contractor.”)

federal government) that was based in large part on the federal government’s sovereign status, and seeks to let private entities “inherit” a status (non-personhood) that was originally based on sovereignty.¹² This is a novel concept and contrary to precedent.¹³ “The rule of exclusion of the sovereign is less stringently applied where the operation of the law is upon the agents or servants of the government, rather than on the sovereign itself.”¹⁴

Congress understood this. Even with a purported “modern view” that the sovereign is not a “person” under federal law unless Congress intended such a result, this does not extend to contractors. Congress intended—and currently understands—the TCPA to apply to federal government contractors. The perfect example of this principle in operation is by Congress recognizing the need to act to create an exemption in the TCPA for federal contractors collecting government debts.

Second, adopting a non-personhood approach is much broader than necessary. “Non-personhood” is an all or nothing exercise. The Commission is unable to restrict cell phone calls by a non-person, and thus unable to place reasonable limits or opt-out rules on those calls.¹⁵ PSC ignores the example of Campbel-Ewald’s TCPA violations and opines that

¹² I suggest that since the argument today is that the sovereign should be excluded from the scope of federal laws unless expressly included, the converse is also true by operation of the principle that sovereign immunity is not inheritable—private parties must be included in the scope of federal laws unless expressly excluded.

¹³ See, e.g., *Richardson v. McKnight*, 521 US 399 (1997).

¹⁴ *Nardone v. United States*, 302 U. S. 383 (1937) (holding that 47 U.S.C. § 605 applies to federal agents).

¹⁵ Obviously, the Budget Act is the exception that proves the rule since Congress expressly granted the Commission additional authority over the federal government for government debt collection calls. But even Congress recognized that contractors calling for the government need limits.

government contractors will not violate other provisions of the TCPA. If that is so, then why grant them an exemption from acts that which they profess to never engage in? I am reminded of the maxim “if you build it, he will come” but in this context it is “if you exempt it, they will do it.”

Third, there is no rational or objective basis for limiting the Commission’s definition of “person” to one subsection of the TCPA. Even if there was, the silence as to all the other uses of “person” both in the TCPA and in other sections of Chapter 5 will leave a gap that the courts *will* fill. It will be filled by looking to the Broadnet Decision. This will be a source of circuit splits and chaos for decades.

Imagine that you were to collect together all the provisions of the Communications Act that relied on the term “person” under section 153 as the TCPA does. Now imagine that you are tasked with writing a legal brief to address each such usage, and declare for each one whether 1) the federal government is a “person” in that context, and 2) whether federal contractors are “persons” in that context and with what conditions, and 3) why the answer is different in different contexts. I get whiplash merely contemplating that task.

The requirement of an agency relationship is necessary

The Commission attempted to attenuate the impact of the Broadnet Decision by requiring that for an agent to stand in the shoes of the federal government, they must be an actual agent, and not an independent contractor. This would place some level of accountability on the government by requiring the federal government to be the decision-maker, so the government has to be the one to make the decision to engage in calls that otherwise would violate the TCPA. Letting an independent contractor make that decision is one of the problems with letting profit motives of the contractor stand in such large

shoes. Hence, the requirement that the actor must be a common-law agent and not an independent contractor is not only appropriate, it is absolutely necessary.

But the larger problem of limits on such an agent remain unaddressed. Without a requirement to respect opt-out request, without a limit on quantity or timing of calls, without a requirement to provide proper CallerID and many other provisions of the TCPA and Commission's rules, letting a contractor achieve "non-personhood" is terribly unwise.

One of my clients keeps a cell phone with a number he gives to customers to call him about last-minute changes to printing orders. When he is running his screen printing press and gets a call on that phone, he has to stop the press to take the call in case it is a last-minute change to the printing run he is working on, causing loss of both time and materials.

Congress didn't write the TCPA to say one robocall without consent a week is ok, or one robocall without consent a month is ok. The statute says the first one is unlawful. The Commission should not substitute its judgement for that of Congress. The only path Congress established for the Commission to create an exemption is in subsection (b)(2)(C). The Commission is evading the intent of Congress by creating a back-door exemption rather than using the mechanism Congress intended.

The common-law agent requirement provides additional accountability

PSC's petition is an attempt at evading Congressional accountability. Some special interest groups chafe at the consumer protections in the TCPA. The experience of the ill-fated Mobile Informational Call Act of 2011¹⁶ demonstrated how consumers feel about Congress allowing more robocalls. Since then, Congress has (rightfully) told special interests that they will not change the TCPA to permit robocalls as there is too much public

¹⁶ H.R. 3035 (2011).

opposition to such a move for any legislator to touch it.¹⁷ If exempting robocalls by Broadnet and similar entities is to be done, it should be done by Congress so Congress is accountable to the voters. This also demonstrates the necessity of an agent relationship between the contractor and the federal agency, so that the agent cannot make the decision to make non-consensual robocalls— there must be a clear directive from the federal agency to the contractor to make such calls without express consent. That places public accountability where it should be—on the federal agency.

The Common-law Agency Requirement Should Be in a (b)(2)(C) Exemption.

The better way to achieve the end result is not through a complex definition of “person” but to use the vehicle Congress expressly provided—subsection (b)(2)(C) and include the common-law agency requirement. Modeled on the exemption for package delivery calls, and requiring government contractors to still be common-law agents and also to respect DNC requests made by any reasonable means, would give those contractors what they need to make such calls, while also protecting consumer privacy and consumers’ cell phones from intrusion and unwanted expense. The banks, package delivery services, and others have been quite satisfied with exemptions under subsection (b)(2)(C). Furthermore the limits on the number of calls or texts by those entities were imposed regardless of a showing that those entities would make large numbers of calls to any one person. Why would there not be similar limits on calls from federal contractors or, more importantly, why should consumers have to make a different showing to have the Commission adopt appropriate limits on calls from federal contractors than was needed for the Commission to adopt appropriate limits on package delivery calls?

¹⁷ Which explains why the only way the debt collection exemption could pass was by burying it in the Omnibus Budget bill.

Finally, PSC has not identified how it's Petition squares with the existing Commission rules, codified at 47 C.F.R. § 64.1200(a) which expressly applies not only to "persons" but to every "person or entity." Regardless of whether PSC or its members are "persons" under the Communications Act, they are still "entities" and thus fall under the CFR's explicit language.

Further Reply to the Reply Comments of PSC

The Reply Comments of PSC¹⁸ are not persuasive. There is no liability of the federal government for TCPA violations be it "vicarious" or otherwise. The federal government has not waived its immunity to suit under the TCPA.

PSC continues to improvidently rely on *Yearsley*, for the concept of "derivative sovereign immunity." As the Ninth Circuit pointed out, *Yearsley* only applies to a very narrow set of facts, where the injury is property damages and where there is another avenue of recovery for that property damage:

Yearsley established a narrow rule regarding claims arising out of property damage caused by public works projects.... As a consequence, there was an adequate remedy available and no need for action against the private contractor.

...

Congress has expressly created a federal cause of action affording individuals like Gomez standing to seek compensation for violations of the TCPA. In the seventy-year history of the *Yearsley* doctrine, it has apparently never been invoked to preclude litigation of a dispute like the one before us. This Court, in particular, has rarely allowed use of the defense, and only in the context of property damage resulting from public works projects.¹⁹

On appeal, the Supreme Court, like the Ninth Circuit, denied Campbell-Ewald's claim of "derivative sovereign immunity." Because that defense was denied, it is not possible to

¹⁸ Dated September 29, 2016.

¹⁹ *Gomez v. Campbell-Ewald, Co.*, No. 13-55486 (9th Cir. Sep. 19, 2014).

properly ascertain what additional elements are necessary for that defense to prevail. The Commission should not guess at them and then enshrine them into Commission policy.

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

Sincerely

/s/ Robert Biggerstaff

Robert Biggerstaff
September 29, 2016