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December 3, 2018

VIA ECFS

Marlene H. Dortch
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

Re: Written Ex Parte Communication
CG Docket Nos. 18-152, 02-278

Dear Ms. Dortch:

Broadnet Teleservices LLC (“Broadnet”), through its undersigned counsel, respectfully urges the Federal Communications Commission to follow through on the promise of its prior clarification¹ of the Telephone Consumer Protection Act (“TCPA”)² by declaring that government officials and agencies at *all* levels of government are beyond that Act’s scope. Such a declaration would effectuate Congress’ intent and ensure that citizens can fully engage with their government.

Products such as Broadnet’s TeleForum™ platform serve as innovative technological enablers of enhanced democratic accountability, facilitating direct conversations between citizens and their elected representatives. By clarifying that the TCPA does not apply to calls made by or on behalf of the federal government,³ the *Declaratory Ruling* helped to extend these conversations with federal government officials to those citizens that rely on their wireless phones as their primary, or only, means of telephone communication – a population that includes a disproportionate number of historically underrepresented persons.⁴ In so doing, the

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling, 31 FCC Rcd 7394 (2016) (“*Declaratory Ruling*”).

² 47 U.S.C. § 227.

³ *Declaratory Ruling* ¶ 1.

⁴ See, e.g., Reply Comments of Broadnet Teleservices LLC, CG Docket Nos. 18-152, 02-278 (filed June 28, 2018) (“Broadnet June 28, 2018 Reply Comments”).

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Declaratory Ruling also sought to effectuate Congress’ intent by clarifying that the federal government is not a “person” under the Act.⁵ The Commission should now declare that, for purposes of the TCPA’s restrictions, the term “person” does not include state and local governments and their officials, just as it does not encompass their federal counterparts. This position comports with congressional intent, advances the public interest,⁶ and is entirely unopposed in the record.⁷

The Declaratory Ruling Effectuated Congress’ Intent that the TCPA Not Impede Federal Government Communications. Ultimately, the *Declaratory Ruling* served one primary goal: to ensure that the TCPA did not inadvertently impede certain government communications, a result that Congress never intended. Prior to the *Declaratory Ruling*, uncertainty about whether or not the TCPA applied to the federal government impeded important federal government communications.⁸ In response, the Commission issued its clarification, which “comports with congressional intent and advances the public interest.”⁹ The Commission reasoned that “there is no evidence in the text or legislative history of the TCPA that Congress intended to restrict federal government communications” and therefore “agree[d] with members of Congress that ‘[t]he goal of the TCPA has never been to impede communications from the federal government....’”¹⁰ In fact, the Commission noted that “[a]lthough the TCPA’s application is not limited to commercial calls, the legislative history indicates that Congress was particularly focused on telemarketing and nowhere suggests that the TCPA was intended to apply to federal government calls.”¹¹ Moreover, as then-Commissioner Pai recognized,

⁵ See *Declaratory Ruling* ¶ 18 (“Our clarification comports with congressional intent and advances the public interest.”).

⁶ See *supra* note 4.

⁷ See Broadnet June 28, 2018 Reply Comments at 2.

⁸ See, e.g., Broadnet Teleservices LLC, Written Ex Parte Communication, CG Docket No. 02-278, at 2 (filed Jan. 29, 2016) (noting uncertainty regarding the TCPA’s application, particularly in light of the Commission’s “FAQs on Tele-Town Hall Robocalls”).

⁹ *Declaratory Ruling* ¶ 18.

¹⁰ *Id.* (quoting Letter from Reps. David Price, G.K. Butterfield, and Renee Ellmers, U.S. Congress, to Tom Wheeler, Chairman, FCC, CG Docket No. 02-278, at 1 (Jan. 8, 2015) (letter is misdated as Jan. 8, 2014)). The Commission then “also agree[d] that if tele-town hall meetings on behalf of the federal government, or other government-to-citizen communications, were subject to the TCPA’s consent requirement, wireless consumers would be less able to participate in government and make their views known to their representatives. The unfortunate upshot would be inimical to democratic participation in government.” *Id.* (footnotes omitted).

¹¹ *Id.* ¶ 12 n.62 (citations omitted).

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“Congress expressly defined a ‘governmental entity’ as a ‘person’ in other provisions of the Communications Act, but not for the TCPA.”¹²

Congress Never Intended the TCPA to Impede State and Local Government Communications. As the National Consumer Law Center *et al.* have explained, “[w]hether a caller is a ‘person’ subject to the provisions of the TCPA’s consumer protections is ... premised on congressional intent and the language of the TCPA.”¹³ And just as with the *Declaratory Ruling*’s findings with respect to the federal government, the language of the TCPA indicates that Congress never intended that the statute would impede state and local government communications.

Judicial Precedent. Judicial precedent supports the notion that when Congress intends to apply a statute to governmental entities, it does so explicitly.¹⁴ Congress has not done so in the case of the TCPA; in fact, it has done the opposite, as the Chairman noted in 2016.¹⁵ Indeed, numerous Supreme Court decisions addressing whether certain statutes apply to state governments make abundantly clear that, consistent with the Commission’s reasoning in the *Declaratory Ruling*, the term “person” in the TCPA *does not* include state governments and state government officials.¹⁶ Although such cases tend to focus on whether or not Congress has lifted states’ sovereign immunity, in the end, they seek to determine Congressional intent with respect to the scope of a given statute’s application.¹⁷ And accordingly, they support the notion that Congress did not intend to apply the TCPA to state governments.

¹² *Id.* at 7412 (Partial Dissent of Commissioner Pai).

¹³ National Consumer Law Center, Notice of Ex Parte Presentation, CG Docket Nos. 18-152, 02-278, at 7 (filed Aug. 20, 2018); *see also* National Consumer Law Center *et al.*, Notice of Ex Parte Presentation, CG Docket Nos. 18-152, 02-278, at 10 (filed Sept. 19, 2018).

¹⁴ *See, e.g., Accardi v. United States*, 435 F.2d 1239, 1241 (3rd Cir. 1970); *Hoffman v. HUD*, 519 F.2d 1160, 1165 (5th Cir. 1975).

¹⁵ *Declaratory Ruling* at 7412 n.4 (Partial Dissent of Commissioner Pai) (observing in part that “Congress expressly defined a ‘government entity’ as a ‘person’ in other provisions of the Communications Act, but not for the TCPA”).

¹⁶ *See* Comments of Broadnet Teleservices, LLC, CG Docket Nos. 18-152, 02-278, at 7-8 (filed June 13, 2018) (“Broadnet June 13, 2018 Comments”) (citing *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989); *Vt. Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000)).

¹⁷ *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (“[I]t is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty.”); *see also Emp. of the Dep’t of Pub. Health and Welfare v. Dep’t of Pub. Health and Welfare*, 411 U.S. 279, 285 (1973) (“It would also be surprising in the present

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Likewise, Congress did not intend to apply the TCPA to local governments. Although the term “person” is sometimes interpreted to include municipalities, such reading is not “immutable.”¹⁸ Indeed, courts have held that when Congress defines “person” in a manner akin to that in Section 153 of the Communications Act – *i.e.*, “an individual, partnership, association, joint-stock company, trust, or corporation”¹⁹ – such language excludes municipal governments and other local government entities.²⁰ For instance, multiple federal circuit courts have determined that the Electronic Communications Privacy Act (“ECPA”) “clearly exclude[s] municipalities from the definition of person,”²¹ even though ECPA’s definition of “person,” adopted five years before the TCPA, is broader than the Communications Act’s definition.²² Similarly, the relevant portion of the Endangered Species Act (“ESA”) – which like ECPA, defines a “person” far more expansively than the Communications Act²³ – also has been interpreted to exclude local governments, specifically municipal corporations, in order to “give

case to infer that Congress deprived [a state] of her constitutional immunity without ... indicating in some way by clear language that the constitutional immunity was swept away.”).

¹⁸ *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 127 (2003) (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 688 (1978)). Even *Monell*, the seminal case establishing that “person” extends to municipal corporations for purposes of the Civil Rights Act of 1871, includes a consideration and analysis of congressional intent of the statute at hand. See *Monell*, 436 U.S. at 690 (“Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.”).

¹⁹ 47 U.S.C. § 153(39).

²⁰ See Broadnet June 13, 2018 Comments at 8 (citing *United States v. Rancho Palos Verdes*, 841 F.2d 329, 331 (9th Cir. 1988); *Walden v. City of Providence*, 596 F.3d 38, 60 n.29 (1st Cir. 2010); *Abbott v. Village of Winthrop Harbor*, 205 F.3d 976, 980 (7th Cir. 2000); *Village of Arlington Heights v. Reg’l Transp. Auth.*, 653 F.2d 1149, 1152 (7th Cir. 1981); *City of Chicago v. Lindley*, 66 F.3d 819, 823 n.6 (7th Cir. 1995)).

²¹ *Walden*, 596 F.3d at 60 n.29; see also *Abbott*, 205 F.3d at 980 (ECPA “unequivocally excludes local governmental entities from [the statutory] definition of person”).

²² Compare 18 U.S.C. § 2510(6) (“any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation”) with 47 U.S.C. § 153(39) (“an individual, partnership, association, joint-stock company, trust, or corporation”).

²³ Compare *Rancho Palos Verdes*, 841 F.2d at 330 (the ESA defines person as “an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government”) with 47 U.S.C. § 153(39) (“an individual, partnership, association, joint-stock company, trust, or corporation”). Congress subsequently revised the ESA to explicitly cover municipalities. See Endangered Species Act Amendments of 1998, 102 Stat. 2306 (1988).

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to the words of the statute their plain meaning.”²⁴ Moreover, in a case assessing the undefined term “person” under the Fourteenth Amendment, the U.S. Court of Appeals for the Seventh Circuit observed that “[m]unicipal governmental entities have never been held to be ‘persons.’”²⁵ Ultimately, Section 153 “[a]s written ... does not include a municipality within its definition of ‘person.’ Absent a clearly expressed legislative intent to the contrary, the statutory language must be regarded as conclusive.”²⁶

Principles of Statutory Construction. A canon of statutory construction calls for the avoidance of an interpretation of a provision that would render other provisions of the same Act superfluous or unnecessary.²⁷ Whereas Congress explicitly included a “governmental entity” in the separate, section-specific definition of “person” in Section 522,²⁸ it declined to do so in Section 153. Reading an implied inclusion of a “governmental entity” into the meaning of “person” in Section 153 would render the same term’s explicit inclusion in Section 522 superfluous.²⁹ Further, elsewhere in the Communications Act, Congress specified that “[a]ny person, any body politic or municipal organization, or State commission” could file a petition complaining with the Commission about a common carrier.³⁰ If the term “person” under the Communications Act generally included governmental entities, including local governments, “any body politic or municipal organization, or State commission” in Section 208 would be redundant. Accordingly, Congress’ inclusion of a “governmental entity” in Section 522 and “any body politic or municipal organization, or State commission” in Section 208 shows that

²⁴ *Rancho Palos Verdes*, 841 F.2d at 331.

²⁵ *Vill. of Arlington Heights v. Reg’l Transp. Auth.*, 653 F.2d 1149, 1152 (7th Cir. 1981) (quoting *People v. Valentine*, 50 Ill. App.3d 447, 452 (1977)); see also *East St. Louis v. Circuit Court for Twentieth Judicial Circuit*, 986 F.2d 1142, 1144 (7th Cir. 1992) (“Municipalities cannot challenge state action on federal constitutional grounds because they are not ‘persons’ within the meaning of the Due Process Clause.”).

²⁶ *Abbott v. Vill. of Winthrop Harbor*, 205 F.3d 976, 980 (7th Cir. 2000) (citing *Milwaukee Gun Club v. Schulz*, 979 F.2d 1252, 1255 (7th Cir. 1992)). As described further below, there is no “clearly expressed legislative intent” to apply Section 153 or the TCPA to local governments.

²⁷ See *Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994); *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986).

²⁸ 47 U.S.C. § 522(15) (for purposes of Title VI, “the term ‘person’ means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity”) (emphasis added).

²⁹ See, e.g., *Lopez v. Gonzalez*, 549 U.S. 47, 62 (2006) (Thomas, J., dissenting) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) (counseling against rendering words insignificant or superfluous).

³⁰ 47 U.S.C. § 208(a).

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Congress *did not* intend for Section 153, and the TCPA in turn, to apply to governmental entities, whether federal, state, or local.³¹

Legislative History. Moreover, “[a]lthough the TCPA’s application is not limited to commercial calls, the legislative history indicates that Congress was particularly focused on telemarketing[.]”³² In other words, the purpose of the TCPA primarily was to prevent telemarketing calls. But calls made by state and local governments by their very nature are not telemarketing, commercial solicitation, or advertising.³³ Further, in enacting the TCPA, Congress was particularly concerned that “computerized telephone calls threaten our personal health and safety,”³⁴ whereas government outreach and engagement do the precise *opposite*.

³¹ Section 153 specifically contemplates that the definitions apply “unless the context otherwise requires[.]” 47 U.S.C. § 153. Accordingly, finding that for purposes of the TCPA the term “person” does not include governmental entities does not inherently impact other provisions of the Communications Act in which the context requires that “person” includes local, state, and/or federal governmental entities.

³² *Declaratory Ruling* ¶ 12 n.62 (citations omitted). In the *Declaratory Ruling*, the Commission concludes without explanation that “the TCPA’s legislative history suggests a perceived need to expressly carve out calls made by certain government entities,” but that “in context the focus seems to be limited to state or local entities and not the federal government.” *Id.* However, it is attenuated, at best, to read the legislative history as an indication that Congress intended to apply the TCPA to any government entities, whether federal, state, or local, particularly as Congress could have, but did not, explicitly apply the law to governmental entities. In order to prevent the blocking of calls for emergency purposes, the bill as introduced banned automated telephone calls unless the call was placed by a “public school or other governmental entity.” The bill, as passed, replaced this language with an explicit exception for “any emergency purposes.” The bill was changed to “allow the use of automated calls when private individuals as well as schools and other government entities call for emergency purposes.” S.R. REP. 102-178 (1991); *see also* H. REP. 102-317 (1991) (“The Committee does not intend to extend the prohibition on use of automatic dialers to unsolicited telephone calls made for the purposes of providing a public safety message or warning. The Committee finds that governmental and non-governmental entities should be permitted to use automated telephone dialing systems to provide public health and safety warnings.”). In other words, Congress *expanded the exception* through this change; the change was never intended to expand the scope of the TCPA to apply to the government. In fact, at the time, the Congressional Budget Office (“CBO”) found that no costs would be incurred by state or local governments as a result of enactment of the bill. H. REP. 102-317, at 11 (1991). If Congress had intended to expand the bill to apply to state or local governments, however, the CBO necessarily would have identified state and local governments’ costs to comply with the TCPA, as well as the potential liability if they did not. It follows that the CBO did not believe – consistent with Congress’ intent – that the TCPA would apply to state and local governments.

³³ H.R. REP. 102-317, at 6 (1991) (the “purpose” of Congressional efforts in 1991 leading up Section 227’s enactment was “to protect residential telephone subscriber privacy rights by restricting certain *commercial solicitation and advertising*”) (emphasis added).

³⁴ 137 CONG. REC. S16205 (daily ed. Nov. 7, 1991) (Statement of Sen. Hollings).

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Instead, calls from state and local governments can, for instance, offer life-saving emergency preparedness tips in anticipation of hurricane season, provide information about helping loved ones combat opioid addictions, address environmental safety concerns about clean water, and deliver advice related to mosquito-borne illnesses.³⁵ Because government engagement efforts – whether federal, state, or local – are by definition wildly different from the commercial solicitations, advertisements, and telemarketing that drove the TCPA’s adoption, and because government calls *promote* the public interests (*i.e.*, health and safety) that motivated Congress to act, Commission confirmation that *all* governments are not “persons” for purposes of the TCPA represents the best possible effectuation of legislative intent.

* * *

Ultimately, while the Commission has rightly taken much-needed steps to assure *federal* governmental entities of their freedom to engage with citizens without running afoul of the TCPA,³⁶ the Commission’s work on this matter is unfinished. The agency should confirm that these entities share the same freedom and ensure that state and local governments are not subject to the whims of “predatory TCPA lawsuits that divert tax dollars away from serving the public.”³⁷

Please do not hesitate to contact the undersigned with any questions.

Sincerely,

/s/ Joshua M. Bercu
Joshua M. Bercu

³⁵ See, e.g., Broadnet Teleservices LLC Opposition to Petition for Reconsideration of National Consumer Law Center, CG Docket No. 02-278, at 4-6 (filed Aug. 31, 2016).

³⁶ *Declaratory Ruling* ¶ 18 (“[I]f tele-town hall meetings on behalf of the federal government, or other government-to-citizen communications, were subject to the TCPA’s consent requirement, wireless consumers would be less able to participate in government and make their views known to their representatives. The unfortunate upshot would be *inimical to democratic participation in government*.” (emphasis added)).

³⁷ *Declaratory Ruling* at 7415 (Statement of Commissioner O’Rielly).

Attachment:
Examples of Courts Interpreting “Person” to Exclude Certain Governmental Entities

Case	Relevant Definition of “Person” and Relevant Holding
<i>Vt. Agency of Nat. Resources v. United States ex rel. Stevens</i> , 529 U.S. 765 (2000)	<p><i>Definition:</i> “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals” (1 U.S.C. § 1)</p> <p><i>Holding:</i> “both as originally enacted and as amended, far from providing the requisite affirmative indications that the term ‘person’ included States ... [the features of the statute] indicate quite the contrary” (<i>Vt. Agency</i>, 529 U.S. at 787)</p>
<i>United States v. Rancho Palos Verdes</i> , 841 F.2d 329 (9th Cir. 1988)	<p><i>Definition:</i> “an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government” (16 U.S.C. § 1532(13) prior to 1988 amendment)</p> <p><i>Holding:</i> “giv[ing] to the words of the statute their plain meaning” did not include city as “person” (<i>Rancho Palos Verdes</i>, 841 F.2d at 331)</p>
<i>Walden v. City of Providence</i> , 596 F.3d 38 (1st Cir. 2010)	<p><i>Definition:</i> “any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation” (18 U.S.C. § 2510(6))</p> <p><i>Holding:</i> “clearly exclude[s] municipalities from the definition of persons” (<i>Walden</i>, 596 F.3d at 60 n.29)</p>
<i>Abbott v. Village of Winthrop Harbor</i> , 205 F.3d 976 (7th Cir. 2000)	<p><i>Definition:</i> “any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation” (18 U.S.C. § 2510(6))</p> <p><i>Holding:</i> “As written, the statute does not include a municipality within its definition of ‘person’” (<i>Abbott</i>, 205 F.3d at 980)</p>
<i>Vill. of Arlington Heights v. Reg’l Transp. Auth.</i> , 653 F.2d 1149 (7th Cir. 1981)	<p><i>Definition:</i> none</p> <p><i>Holding:</i> “Municipal governmental entities have never been held to be ‘persons’ within the meaning of the [fourteenth] amendment” (<i>Vill. of Arlington Heights</i>, 653 F.2d at 1152 (quoting <i>People v. Valentine</i>, 50 Ill. App. 3d 447, 452 (1977))</p>
<i>East St. Louis v. Circuit Court for Twentieth Judicial Circuit</i> , 986 F.2d 1142 (7th Cir. 1992)	<p><i>Definition:</i> none</p> <p><i>Holding:</i> “Municipalities cannot challenge state action on federal constitutional grounds because they are not ‘persons’ within the meaning of the Due Process Clause” (<i>East St. Louis</i>, 986 F.2d at 1144)</p>