

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)
)
Petition of Broadnet Teleservices, LLC for)
Declaratory Ruling)

**PETITION OF BROADNET TELESERVICES LLC
FOR DECLARATORY RULING**

I. INTRODUCTION AND SUMMARY

Broadnet Teleservices LLC (“Broadnet”) hereby petitions the Federal Communications Commission (“Commission”) for declaratory ruling pursuant to Section 1.2 of the Commission’s rules.¹ Consistent with Broadnet’s July 30, 2015 filing in this proceeding,² the Commission should declare that the Telephone Consumer Protection Act (“TCPA”)³ and the TCPA rules⁴ do not apply to calls made by or on behalf of federal, state, and local governments when such calls are made for official purposes. Absent such action, citizens that rely on their wireless phones as their primary, or only, means of telephone communication will be deprived of important opportunities to engage with their government that wired citizens currently enjoy. Receiving

¹ 47 C.F.R. § 1.2.

² Written Ex Parte Communication of Broadnet Teleservices LLC, CG Docket No. 02-278 (filed June 10, 2015); *see also* Notice of Ex Parte Presentation of Broadnet Teleservices LLC, CG Docket No. 02-278 (filed July 30, 2015).

³ 47 U.S.C. § 227.

⁴ 47 C.F.R. § 64.1200 *et. seq.*

calls from the government with important information is not the type of harm from which Congress was attempting to shield consumers.⁵

As discussed further below, the plain language of the TCPA, supported by Supreme Court precedent, demonstrates that calls made by or on behalf of government entities, including legislative, judicial, and executive bodies, are not subject to the TCPA. Federal, state, and local government entities, and their officers acting on official government business, simply do not meet the definition of “person” in the Communications Act.⁶ Accordingly, the Commission should declare that for purposes of the TCPA, the term “person” does not include federal, state, and local government entities and officers acting in their official capacities.

II. TELEFORUMS FACILITATE DEMOCRATIC DIALOGUE

With one phone call, government entities and officials using Broadnet’s TeleForum™ technology platform can invite citizens – from several hundred to hundreds of thousands – to participate in a shared real-time exercise in democracy.⁷ Much more than just receiving information, citizens are able to engage in a live conversation, hearing directly from their government about issues important to the local community and providing real-time feedback. Federal, state, and local government entities have utilized TeleForum events in myriad ways to connect and communicate with citizens about a wide variety of issues⁸, including:

⁵ See, e.g., John Hendel, *Vendors Assure Capitol Hill That Tele-Town Halls Remain Unthreatened*, Communications Daily, Aug. 5, 2015.

⁶ See 47 U.S.C. § 153(39).

⁷ See Supplement to Notice of Ex Parte Presentation of Broadnet Teleservices LLC, CG Docket No. 02-278, at 1 (filed Aug. 3, 2015) (describing how a TeleForum event is initiated).

⁸ See Wireless Should Not Mean Voiceless, <http://www.wirelessnotvoiceless.com> for TeleForum examples.

- Members of Congress, often with experts from federal agencies such as the Social Security Administration and Department of Homeland Security, have used TeleForum events to help constituents understand their Social Security benefits and prepare for hurricane season.
- State education commissioners have used TeleForum events to discuss school curricula and school financing issues with parents, and state representatives have used such events to speak with constituents about key issues impacting their daily lives, such as transportation projects and access to healthcare and affordable housing.
- Mayors and other local officials have offered citizens critical information about natural disaster preparedness, described the ramifications for opting out of mandated educational testing, and explained changes in property tax assessments.

Due to ambiguities in Commission interpretations,⁹ however, citizens that rely on wireless phones as their primary, or only, means of telephone communication may be deprived of these important opportunities to engage with their government. In particular, many people of color, millennials, and individuals living in poverty are in wireless-only households, including:

- 58.6 percent of Hispanics and Latinos and 45.7 percent of African Americans (compared to 40.3 percent of non-Hispanic whites);
- Close to 70 percent of adults aged 25-29 and over 67 percent of adults aged 30-34; and
- Nearly 60 percent of persons in households below the poverty line and over half of persons in households above the poverty line but with incomes less than twice the

⁹ See Federal Communications Commission, FAQs – Tele-Town Halls (rel. July 31, 2015), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0731/DOC-334684A1.pdf (“FAQs”); Shawn Zeller, *Tele-Town Halls Effectively Blocked for Politicians*, Roll Call (July 28, 2015), <http://www.rollcall.com/news/tele-town-halls-effectively-blocked-for-politicians-243060-1.html>; Mario Trujillo, *Lawmakers could be violating robocall restrictions*, The Hill (July 28, 2015), <http://thehill.com/policy/technology/249496-lawmakers-could-be-violating-robocall-restrictions>. Broadnet, however, disagrees with the FAQs’ assessment that the TCPA applies to calls by government entities and officials to wireless phones. For the reasons described herein, the TCPA, by its plain language, *does not* apply to government entities. The Commission has never found otherwise, and the FAQs certainly do not carry the force of law. See, e.g., 47 C.F.R. § 0.211(c) (For actions which involve policy determinations, a Chairman must “develop proposals for presentation to the Commission.”) (emphasis added).

poverty line (compared to 42.5 percent of persons in households with incomes at least twice the poverty line).¹⁰

These individuals deserve the same access to democracy and the same engagement with policymakers that is currently only possible for individuals with access to landline phones.

Moreover, many individuals in wireless-only households would particularly benefit from greater engagement with their government. For example, the Centers for Disease Control and Prevention's National Center for Health Statistics observed that "[c]ompared with adults living in landline households, wireless-only adults were more likely to have experienced financial barriers to obtaining needed health care, and they were less likely to have a usual place to go for medical care."¹¹ These are precisely the individuals who would benefit from TeleForums focused on access to medical care and other social services, such as a recent TeleForum in which a representative from a public health insurance exchange was available to answer questions from a veteran about Medicaid options. Similarly, rural constituents often have to travel several hours to participate in a town hall meeting.¹² Such constituents particularly benefit from being able to participate in a TeleForum event.

¹⁰ Stephen Blumberg and Julian Luke, U.S. Department of Health and Human Services, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2014*, at 6 (June 2015), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201506.pdf>.

¹¹ *Id.* at 3.

¹² *See* Continued Oversight of the Federal Communications Commission: Hearing Before the Subcomm. on Commc'n & Tech. of the H. Comm. on Energy & Commerce, 114th Cong., at 165-66 (2015) (unofficial transcript), <http://docs.house.gov/meetings/IF/IF16/20150728/103819/HHRG-114-IF16-20150728-SD009.pdf>. The FAQs suggest that such wireless-only consumers can be reached by their government representatives if they provide their oral or written consent. However, it is very difficult for government entities to secure the consent of thousands of constituents, let alone track consents in order to *prove* that they obtained the necessary prior consents. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7994 ¶ 58 (2015) ("*TCPA Omnibus Order*") (emphasizing that

As described above, making it more difficult for citizens to participate in the democratic process merely because of the type of telephone service they purchase is not what Congress intended when adopting the TCPA. The Commission must not allow the TCPA to create a new digital democracy divide. Instead, by granting this petition, the Commission can ensure that citizens that rely primarily, or exclusively, on their mobile phones have the same access to their government officials that those with wireline phones enjoy.

III. THE COMMISSION SHOULD CONFIRM THAT THE TCPA DOES NOT APPLY TO GOVERNMENT-TO-CITIZEN COMMUNICATIONS WHEN SUCH CALLS ARE MADE FOR OFFICIAL PURPOSES

The Commission should confirm that the TCPA and the Commission’s TCPA rules do not apply to government-to-citizen communications. The plain language of the TCPA demonstrates that the TCPA does not apply to calls made by government entities. The Communications Act, in which the TCPA is codified, defines a “person” as an “individual, partnership, association, joint-stock company, trust or corporation.”¹³ Federal, state, and local government entities are not “individual[s], partnership[s], association[s], joint-stock compan[ies], trust[s] or corporation[s]” and therefore fall outside of this definition.¹⁴

“the burden is on the caller to prove that it obtained the necessary prior express consent if any question of consent is in dispute”). Moreover, under the terms of the FAQs, constituents may need to provide separate consents to dozens or hundreds of federal, state, and local agencies that serve them in order to participate in each of these agencies’ TeleForum events.

¹³ 47 U.S.C. § 153(39). Indeed, courts have looked to the definition of “person” in the Communications Act to determine whether certain types of entities were subject to the TCPA. *See Chapman v. Wagener Equities, Inc.*, 2014 U.S. Dist. LEXIS 16866, *14 (N.D. Ill. Feb. 11, 2014), *pet. denied by* 747 F.3d 489 (7th Cir. Ill. 2014); *Accounting Outsourcing, LLC v. Verizon Wireless Personal Communications, L.P.*, 329 F. Supp. 2d 789, 806 (M.D. La. 2004).

¹⁴ Several courts have indicated that when Congress defines “person” to include “any individual, partnership, association, joint stock company, trust, or corporation,” such language excludes municipal governments and other local governmental entities. *See, e.g., Walden v. City of Providence*, 596 F.3d 38, 60 n.29 (1st Cir. 2010) (finding that 18 U.S.C. § 2510(6) “clearly exclude[s] municipalities from the definition of persons”); *Abbot v. Village of Winthrop Harbor*,

The Supreme Court has stated that “[i]n common usage, the term ‘person’ does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.”¹⁵ The Supreme Court has specifically held that a state and state officials acting in their official capacities were not “persons” under 42 U.S.C. § 1983,¹⁶ and other courts have extended this reasoning to the federal government and other governmental entities.¹⁷ Because there is no “affirmative contrary showing” that Congress intended “person” to include the sovereign here¹⁸ – and instead a Congressional choice to define “person” in the Communications Act in a manner

205 F.3d 976, 980 (7th Cir. 2000), *cert. denied* 528 U.S. 985 (1999) (finding that 18 U.S.C. § 2510(6) “unequivocally excludes local governmental entities from [the statute’s] definition of person”); *United States v. Rancho Palos Verdes*, 841 F.2d 329, 331 (9th Cir. 1988) (holding that the definition of “person” in 16 U.S.C. § 1532(13) excludes municipal corporations). The courts’ findings in these cases did not extend to federal and state entities because the definition of “person” in 18 U.S.C. § 2510(6) and 16 U.S.C. § 1532(13) explicitly included federal and state entities, unlike the definition of “person” in the Communications Act. *Compare* 18 U.S.C. § 2510(6) (defining “person” as “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”) (emphasis added) and 16 U.S.C. § 1532(13) (defining “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, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States”) (emphasis added) with 47 U.S.C. 153(39) (defining “person” to include “an individual, partnership, association, joint-stock company, trust, or corporation”).

¹⁵ *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 64 (1989) (quoting *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941))) (alteration in original).

¹⁶ *See generally id.*

¹⁷ *See, e.g., Accardi v. United States*, 435 F.2d 1239, 1241 (3d Cir. 1970) (finding that the “United States and other governmental entities are not ‘persons’ within the meaning of” 42 U.S.C. § 1983); *Hoffman v. HUD*, 519 F.2d 1160, 1165 (5th Cir. 1975) (noting that a federal agency is excluded from the scope of liability under 42 U.S.C. § 1983).

¹⁸ *United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 874 (D.C. Cir. 1999) (citing *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 83 (1991)).

that excludes federal, state, and local government entities – the term “person” in the TCPA is best construed to exclude the government and government officials at the federal, state, and local levels when calls are made for official purposes.¹⁹

Because the plain language of the TCPA does not apply to federal, state, and local governments, the TCPA necessarily cannot apply to government officials acting in their official capacities. Not only would finding otherwise be inconsistent with Supreme Court precedent, but it also would lead to arbitrary and nonsensical results. For example, if a mayor is considered a “person” for purposes of the TCPA but the city is not, could a mayor’s deputy or staff use an autodialer to call wireless phones on behalf of the mayor’s office, but not the mayor herself? What about an agency head, serving at the pleasure of the mayor and on behalf of the agency, which ultimately may act on behalf of the mayor’s office and thus the mayor? Any such arbitrary line-drawing and distinctions cannot be what Congress intended.²⁰ Moreover, such distinctions would not serve consumers – they would impede citizen engagement with certain government officials, including the most senior government officials, based on nothing more than the status of the official communicating. Instead, consistent with the public interest and

¹⁹ Nor do the Commission’s rules implementing the TCPA, which apply to a “person or entity,” 47 C.F.R. § 64.1200, include federal, state, and local government entities. As an initial matter, as discussed above, the TCPA’s plain language demonstrates that the TCPA does not apply to government entities, and therefore nor should the Commission’s TCPA rules. Moreover, in another context, the Commission has made clear that the addition of the term “entity” in Commission rules did not demonstrate an intention to expand the scope of the application of the rule beyond the definition of “person” in Section 153 of the Communications Act. *See Rules and Regulations Implementing the Truth in Caller ID Act of 2009*, Report and Order, 26 FCC Rcd 9114, 9210 ¶ 16 n.39 (2011).

²⁰ Beyond these issues regarding acting on behalf of the executive, drawing the line at whether an official is elected or not poses other challenges. For example, school boards are appointed in some jurisdictions, but elected in others. It would make no sense for it to be lawful for school board superintendents in the former jurisdictions to use autodialing equipment to reach parents, but unlawful in others.

judicial precedent, the Commission should confirm that a mayor and other similarly situated officials, acting in their official capacities on behalf of the agency or office, are not “person[s]” for purposes of the TCPA.²¹

Consistent with Commission precedent, the Commission also must confirm that the TCPA does not apply to service providers working on behalf of government entities and officials.²² Government agencies do not have the specialists on staff and technology necessary

²¹ Similarly, for purposes of the TCPA, the term “person” cannot include legislative officers when they are acting in their official capacities, *i.e.*, on behalf of their respective offices. Notably, members of Congress, like mayors and agency staff, are employees of the federal government. *See Operation Rescue Nat’l v. United States*, 147 F.3d 68, 70 & n.5 (1st Cir. 1998) (“[I]t would ... disregard common meanings given in all dictionaries” to find that “Congressmen are neither ‘officers’ nor ‘employees’ of the federal government.”); *see also* Black’s Law Dictionary 900 (6th ed. 1990) (defining “legislative officer” as including “members of Congress and of the several state legislatures”). This differs, however, from elected officials acting in their personal capacity, including, for example, in an effort to be re-elected. Clear legal lines generally exist between official duties and campaign/re-election activities. *See, e.g.*, 39 U.S.C. § 3210 (setting forth franked mail privilege and limitations); *Common Cause v. Bolger*, 574 F. Supp. 672, 683 (D.D.C. 1982) (“It is clear from the record that Congress has recognized the basic principle that government funds should not be spent to help incumbents gain reelection.”), *affirmed* by 461 U.S. 911 (1983).

²² The Commission has consistently recognized that exceptions or exemptions from the TCPA should apply to third parties acting on behalf of a party to which the exception or exemption applies. *See* 47 C.F.R. §§ 64.1200(a)(2), (a)(3)(iv), (a)(3)(v) (among other things, setting forth exceptions to calling restrictions for calls “made by *or on behalf of*” tax-exempt nonprofit organizations and for “health care” messages “made by *or on behalf of*” certain health providers) (emphases added); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397 ¶ 13 (1995) (“1995 TCPA Order”) (deciding that “telephone solicitations made by *or on behalf of* tax-exempt nonprofit organizations are not subject” to the Commission’s rules governing telephone solicitations because “[c]alls placed by an agent of the telemarketer are treated as if the telemarketer itself placed the call”) (emphasis added); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14083 ¶ 118 (2003) (“2003 TCPA Order”) (stating that third-party telemarketers “may rely on the seller’s [established business relationship (“EBR”)] to call an individual consumer to market the seller’s services and products”); *see also TCPA Omnibus Order*, 30 FCC Rcd at 8031-32 ¶ 147 (2015) (setting forth conditions for an exemption for certain calls and text messages to wireless numbers made by *or on behalf of* a healthcare provider).

to make telephone town hall calls without assistance.²³ As a practical matter, *any* uncertainty with respect to the TCPA’s application to those that act on behalf of government entities and officials making telephone town hall and other constituent calls to wireless numbers would effectively prohibit the making of such calls.²⁴ Thus, in addition to confirming that the TCPA does not apply to government-to-citizen calls, the Commission also should confirm that service providers acting on behalf of government entities and officials are not subject to the TCPA.²⁵

²³ Cf. *2003 TCPA Order* at 14089 ¶ 128 (noting that “charitable and nonprofit entities with limited expertise, resources and infrastructure, might find it advantageous to contract out [their] fundraising efforts” and reaffirming “that calls made by a for-profit telemarketer hired to solicit the purchase of goods or services or donations *on behalf of* a tax-exempt nonprofit organization are exempted from the rules on telephone solicitation.”) (emphasis added).

²⁴ Moreover, by not extending the ruling to those that act on behalf of government entities and officials, the Commission could create an absurd result – government officials and entities would not be subject to the TCPA when they make calls by themselves, but they could potentially be held liable as principals for the acts of their agents when a third party makes the same calls on their behalf. See *The Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, Declaratory Ruling, 28 FCC Rcd 6574, 6574 ¶ 1 (2013) (holding that sellers can be held vicariously liable under federal common law principles of agency for certain TCPA violations). In fact, before holding in the *1995 TCPA Order* that telephone solicitations made by or on behalf of tax-exempt nonprofit organizations are not subject to the Commission’s rules governing telephone solicitations, the Commission noted one commenter’s argument that disparate treatment between calls placed by tax-exempt nonprofit organizations themselves and those placed by independent contractors on behalf of tax-exempt nonprofit organization “would lead to absurd results: tax-exempt nonprofit organizations would be subject to liability as principals for the acts of their agents, even though they would not be liable if they performed the same acts themselves.” *1995 TCPA Order*, 10 FCC Rcd at 12397 ¶ 12.

²⁵ This ruling would not open any loopholes for such service providers to make otherwise unlawful calls to consumers – it would only apply to service providers and other entities *when acting within the scope of authorization* of the government entity or official.

