

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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)

INITIAL COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION

On September 29, 2015, the Federal Communications Commission (Commission) issued notice and requested comments on the September 16, 2015, petition of Broadnet Teleservices, LLC for a declaratory ruling that Telephone Consumer Protection Act (TCPA) does not apply to calls “for official purposes” placed by, or on behalf of, federal, state and local governments. For the reasons discussed below, the American Public Power Association (APPA) supports Broadnet’s request.

Description of the Broadnet Petition

Reduced to its core, Broadnet’s petition rests on a straightforward proposition: the TCPA’s restrictions on making automated calls apply only to “persons,” the TCPA was incorporated into the Communications Act of 1934 and that Act excludes governmental entities from the definition of “persons.” Broadnet’s interest in pursuing this issue is one it shares with the governmental entities it represents:¹ to avoid having the TCPA impose substantial burdens on governmental entities and limit their ability to make legitimate automated non-commercial calls to wireless numbers in furtherance of their governmental functions. APPA is not aware of any

¹ Although Broadnet is not a governmental entity, it sets up “teleforums” on behalf of governmental entities. Broadnet argues that if governmental entities are not “persons” under the TCPA, neither are entities acting on the government’s behalf. Broadnet Petition for Declaratory Ruling, FCC CG No. 02-278 (filed September 16, 2015) at p. 2.

Commission decisions interpreting the meaning of “persons” under the Communications Act, much less finding that the definition includes state and local governments or their political subdivisions. Broadnet makes the same point.² But what has apparently prompted Broadnet’s petition is a recently-published list of answers to frequently asked questions (FAQs) posted by the Commission in July.³ There, as Broadnet notes, the Commission opines that the TCPA does not exempt automated calls to wireless phones by governmental officials. While the Commission’s release of an FAQ sheet is not a binding Commission regulation, it does indicate the Commission’s tentative thinking on the subject. And it is this assumption underlying the Commission’s thinking that has both prompted Broadnet’s petition and these comments in support.

Description of APPA

The American Public Power Association is the national service organization representing the interests of more than 2,000 municipal and state- and locally-owned, not-for-profit electric utilities throughout the United States (all but Hawaii). Collectively, these utilities deliver electricity to one of every seven electricity customers, serving some of the nation’s largest cities. The vast majority of APPA’s members, however, serve communities with populations of 10,000 people or less. APPA was created in 1940 as a nonprofit, non-partisan organization to advance the public policy interests of its members and their consumers, and provide member services to ensure adequate, reliable electricity at a reasonable price with the proper protection of the environment.

² Broadnet Petition at n. 9.

³ “FAQs – Teletown Halls,” https://apps.fcc.gov/edocs_public/attachmatch/DOC-334684A1.pdf.

APPA's members have many reasons to make automated calls to their customers that, while not of an emergency nature, nonetheless serve important public purposes – including calls to notify customers of scheduled construction and repair operations in their neighborhoods, calls to notify customers of service outages and expected service restoration times. As discussed below, the TCPA's important purposes are not furthered by subjecting governmental entities to its restrictions. On the contrary, the exclusion of governmental entities from the definition of persons is not unique to the Communications Act, but can be found in other regulatory statutes. The exclusion, as discussed below, is an implicit recognition of the nature of these entities. As governmental units representing and serving their citizenry, they are not free from regulation, but must answer to their constituencies.⁴ This form of self-regulation is a check that does not exist on the conduct of private parties subject to the TCPA.

Are Municipal Utilities “Persons” under the TCPA?

The TCPA,⁵ in pertinent part, makes it unlawful for “any person” (1) to make automated calls (except in emergencies or with prior express consent from the called party) to (a) emergency telephone lines (like 911 lines), (b) hospitals and elder care facilities or (c) cellphone lines⁶ or (2) to make automated calls (except in emergencies or with prior express consent) to residential telephone lines, unless those calls qualify for an FCC-created exemption.⁷ As for the exemptions for calls to residential phone lines, the TCPA allows the FCC to exempt calls that are either (1) not made for commercial purposes⁸ or (2) made for commercial purposes, but that the

⁴ Some APPA members are arms of city government. They typically answer to elected city councils. Other APPA members are separate governmental units. They will often be answerable to local utility boards that are elected by the citizenry or appointed by the mayor (who is also an elected official). As arms of government, however, they must all ultimately answer to their constituents.

⁵ Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227.

⁶ 47 U.S.C. § 227(b)(1).

⁷ 47 U.S.C. § 227(b)(2)

⁸ 47 U.S.C. § 227(b)(2)(B)(i)

FCC concludes won't adversely affect privacy rights.⁹ The TCPA also allows the FCC to exempt automated calls to cellphone lines where the called party does not have to pay to receive the call and the call won't harm the privacy rights of the called party.¹⁰ But absent such an exemption, all callers subject to the Act, commercial and non-commercial alike, cannot communicate with wireless phones using automated dialers for any reason except emergencies.

The TCPA, as noted above, applies to automated calls made by any "person." Relevant to Broadnet's petition, therefore, is whether a governmental entity is a "person" under the TCPA and therefore covered by it. The TCPA itself does not define "person," but it was enacted as an amendment to Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*, appearing now as section 227 of that Act. The Communications Act *does* define "person." A "person" under the Communications Act "includes an individual, partnership, association, joint-stock company, trust or corporation."¹¹

On its face, this definition excludes governmental entities. And, as Broadnet notes in its petition, courts construing similar definitions of "person" have come to the same conclusion. That the TCPA does not cover governmental entities is further reinforced by the nature of the Communications Act into which the TCPA was incorporated.

The Communications Act (FCA) of 1934, like Part II of the Federal Power Act (FPA) of 1935 and the Natural Gas Act (NGA) of 1938, were all legislation of the same era and were all modeled on the 1887 Interstate Commerce Act.¹² The interrelationship of these statutes is most evident in the extensive case law applying the familiar "filed rate doctrine" to the FCA, FPA, and

⁹ 47 U.S.C. § 227(b)(2)(B)(ii)

¹⁰ 47 U.S.C. § 227(b)(C)

¹¹ 47 U.S.C. § 153(39).

¹² Joseph D. Kearney, *Foreword: The Last Assembly of Interstate Commerce Act Lawyers*, 95 Marquette L. Rev. 1123, 1124(2012). See also Richard D. Cudahy, *The Interstate Commerce Act as a Model of Regulation*, 95 Marquette L. Rev. 1191 (2012); Lincoln L. Davies, *Power Forward: The Argument for a National RPS*, 42 Conn. L. Rev. 1339, 1348 (2011) ("the Interstate Commerce Act ("ICA") set the framework for the governance of virtually all utilities and common carriers.")

NGA. The interpretations of the filed rate doctrine under those statutes have their origins in interpretations of the analogous rate filing and posting provisions of the Interstate Commerce Act.¹³ But the close textual similarities of these statutes and their underlying interrelationship have led the courts to treat the statutes generally as in *pari materia*¹⁴ – meaning not only that the rate filing provisions of these statutes, but also other similar provisions found in the statutes should be construed in the same way.¹⁵ This has immense consequence for resolution of Broadnet’s petition. For if governmental entities are not persons under similar provisions in the NGA or the FPA, the Communications Act should be construed the same way. As discussed below, that is, in fact, the case.

The Communications Act’s definition of person, not surprisingly, is quite similar to the definition of that term as found in the Interstate Commerce Act. The ICA defines “person” as:

an individual, firm, co-partnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.¹⁶

Because the FPA and NGA were also modeled on the ICA, it is no surprise to find that these statutes, too, employ similar definitions of persons. The FPA defines “person” as “an individual or a corporation.”¹⁷ And the NGA defines “person” identically.¹⁸ The Federal Energy Regulatory Commission, which administers both the FPA and NGA, has broad authority to regulate the rates charged, respectively, by “public utilities” and by “natural gas companies” for the interstate sale for resale and transmission of electricity and natural gas. But the FPA’s and

¹³ *Id.* at 1125-26.

¹⁴ See *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956); *Ky. Util. Co. v. FERC*, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985) (“It is, of course, well settled that the comparable provisions of the Natural Gas Act and the Federal Power Act are to be construed in *pari materia*.”)

¹⁵ *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (noting that the rule that statutes in *pari materia* should be construed together “is ... a logical extension of the principle that individual sections of a single statute should be construed together”). See also *Wimberly v. Labor & Indus. Relations Comm’n*, 479 U.S. 511, 517 (1987).

¹⁶ 49 USC § 1(3).

¹⁷ 16 U.S.C. § 796(4).

¹⁸ 15 U.S.C. § 717a(1).

NGA’s definitions of “person” have been construed both by FERC and by the courts to exempt governmental entities from FERC’s broad rate-regulating authority.

The FPA defines a “public utility” as a “person” owning or operating FPA-jurisdictional facilities¹⁹ and authorizes FERC to regulate the rates of “public utilities.”²⁰ Since governmentally-owned utilities are not “persons,” the courts have held that they are unambiguously exempt from FERC rate regulation under these sections of the FPA. *Bonneville Power Administration v. FERC*, 422 F.3d 908, 922 (9th Cir. 2005); *Transmission Agency of Northern California v. FERC*, 495 F. 3d 663 (D. C. Cir. 2007).

The NGA similarly defines a “natural-gas company” (the type of entity subject to its rate regulation) as a “person” engaged in the interstate sale or transportation of natural gas.²¹ Finding that municipal utilities are not “persons” under that definition, FERC has held that they are not subject to regulation as natural-gas companies under the NGA. *See, e.g., Tennessee Gas Pipeline Co.*, 70 FERC ¶¶61,329 at 62,014 (1995).

To be sure, there are other provisions in the FPA and NGA that lend additional support to the conclusion that governmental entities are exempt from FERC rate regulation under these Acts. The definitions of “corporation” in both Acts, for example, expressly exclude municipalities.²² And the FPA (but not the NGA), adds a provision expressly providing that

¹⁹ 16 U.S.C. § 824(e).

²⁰ 16 U.S.C. §§ 824d, 824e.

²¹ 15 U.S.C. § 717a(3).

²² The NGA’s definition of “corporation” states that it “includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.” 15 U.S.C. § 717a(2). “Municipality,” in turn, is defined as “a city, county, or other political subdivision or agency of a State.” 15 U.S.C. § 717a(3).

The FPA similarly defines “corporation as any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing.” 16 U.S.C. § 796(3). It then adds that “corporation “shall not include “municipalities” as hereinafter defined. *Id.*

governmental entities are exempt from other provisions of the Act, except where provided otherwise. *Bonneville*, *supra*, 422 F.2d at 915-16 (citing FPA § 201(f)).

It bears emphasis, however, that the addition of these other provisions beyond the definition of person do not suggest that “person” itself is an ambiguous term. On the contrary, because one reads statutes as a whole to discern whether there is ambiguity, these provisions simply reinforce the plain meaning of the term’s definition. *Bonneville*, *supra*, 422 F.3d at 920.

Section 208(a) of the Communications Act,²³ leads to a similar conclusion about the meaning of person under the TCPA. That section permits “any person, any body politic or municipal organization, or State commission” to file complaints against common carriers that they have violated the Act, an FCC rule or an FCC order. By distinguishing between “person” and entities like “municipal organizations and State commissions,” section 208 reinforces that public power utilities are not “persons” within the meaning of the Act.

The Ninth Circuit’s decision in *Bonneville* also found significant the fact that governmental entities are subject to other provisions of the Federal Power Act. This, it said, further reinforces the conclusion that governmental entities were not intended to be treated as “persons” subject to the FPA’s ratemaking provisions. “When Congress wanted a provision of FPA subchapter II to apply to governmental entities, it knew how to so specify.” *Id.* at 916.

The Communications Act’s other provisions again support a similar conclusion. The Act, for example, regulates “licensees,” but does not limit licensees to “persons.”²⁴ This is similar to the Federal Power Act, which regulates governmental and privately-owned licensees of

²³ 47 USC § 208(a).

²⁴ 47 U.S.C. § 153 (24) (defining “licensee” as “the holder of a radio station license granted or continued in force under authority of this Act.”)

hydroelectric projects.²⁵ By contrast, the Communications Act defines a “common carrier” or “carrier” - the principal subjects of its rate, merger and antidiscrimination jurisdiction - as any *person* engaged as a common carrier for hire, in interstate or foreign communication by wire or radio.”²⁶ Again, this is analogous to the FPA’s regulatory scheme, which gives FERC rate, merger and antidiscrimination jurisdiction over “public utilities,” the analog to “common carriers.” And finally, just as the section 201(f) exemption of governmental entities from FERC’s rate jurisdiction²⁷ was intended to “remove all doubt” about the exemption already unambiguously carved out in the FPA’s definition of person,²⁸ the Communications Act similarly includes an express exemption for public power utilities from the Commission’s regulation of pole attachments.²⁹

²⁵ The FPA defines licensee under 16 U.S.C. § 796(5) as “any person, State, or municipality licensed under the provisions of section 797 of this title, and any assignee or successor in interest thereof.”

²⁶ 47 U.S.C. § 153(10).

²⁷ 16 U.S.C. § 824e(f).

²⁸ *Bonneville, supra*, 422 F.3d at 920 (section 201(f) was added to the FPA “to remove all doubt that the act is not to apply to public projects, Federal, State, or municipal.”) The NGA does not contain a provision paralleling the “bells and whistles” FPA section 201(f), but there has never been any question raised about the unambiguous exemption granted governmental entities under the NGA.

²⁹ Section 224 of the Communications Act authorizes the Commission to regulate pole attachments by cable TV and telecommunications carriers to poles “owned or controlled by a utility.” But section 224(a)(1) adds that “utility” “does not include ...any person who is cooperatively organized, or any person owned by the Federal Government or any State.” While one could argue that the use of “person” in section 224(a)(1) supports the argument that governmental entities are also persons, the better reading is the one the Supreme Court gave to a similar use of “person” in the Federal Power Act. The Federal Power Act gives FERC authority to regulate the wholesale rates charged by public utilities “to any person.” *United States v. Public Utilities Comm’n of California*, 345 U.S. 295, 312-313 (1953) involved a claim by the utility in that case that municipalities purchasing wholesale power were not entitled to the Act’s protection as “persons.” The Court found that the use of “person” in that context was surplusage not intended to limit the protections of the Act. “Congress,” the Court found, “attached no significance to the addition of the word ‘person,’ and in fact did not intend it as a limitation on Commission jurisdiction.” *Id.* Similarly, here, the addition of the word “person” to the pole attachment amendments to the Communications Act was plainly aimed at reinforcing an exemption for governmental entities. It would make no sense to read the use of “person” in that context as an effort by Congress to *expand* the Communication Act’s coverage to governmental entities.

Because the Act Is Unambiguous, There Is No Need to Resort to the Legislative History, Which, in Any Event, Is Inconclusive.

As discussed above, the definition of “person” contained in the Communications Act is nearly identical to the definition of “person” contained in analogous provisions of the ICA, FPA and NGA. And because the courts have found that term unambiguously excludes governmental entities, the principle of *para materia* binds the Commission to a similar interpretation of “person.” There is, in short, no room for *Chevron* deference on this question.³⁰ Nor therefore, is there any reason to resort to legislative history. As the Ninth Circuit said in *Bonneville*, “Legislative history cannot trump the statute.” *Bonneville Power Adm. v. FERC*, 422 F. 3d 908, 920 (9th Cir. 2005). *See also Hearn v. W. Conference of Teamsters Pension Trust Fund*, 68 F.3d 301, 304 (9th Cir.1995) (“legislative history — no matter how clear — can’t override statutory text.”)

But even if the Commission were to resort to the legislative history, it is sparse and simply inconclusive on this point. APPA found but one reference to governmental entities in the legislative history. The Senate Report accompanying the legislation contains the following statement:

The bill as introduced banned automated telephone calls unless the call was placed by “a public school or other governmental entity.” The reported bill replaces this language with an exception for “any emergency purposes.” This will allow the use of automated calls when private individuals as well as schools and other government entities call for emergency purposes.

S. Rep. 102-178, 1991 U.S.C.C.A.N. 1968, 1972 (1991). This passage does not imply that governmental entities are thereby within the TCPA’s coverage. To the contrary, it suggests that

³⁰ Once the Court has determined a statute’s clear meaning, i.e., determines that a statute is unambiguous, its interpretation trumps subsequent interpretations by administrative agencies. *Neal v. United States*, 516 U. S. 284 (1996); *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 984 (2005) (“a precedent holding a statute to be unambiguous forecloses a contrary agency construction.”)

the language substituted in the version of the TCPA that became law was aimed at *broadening*, not narrowing, exemptions from the TCPA's coverage.

The substitute language exempted emergency communications. As the Senate Report explains, this was intended to make sure that emergency communications, whether by governmental *or* private entities, would be exempt. In striking the language containing the express governmental exemption, Congress was not thereby planning to deny governmental entities an exemption. They already had one: they are not included in the definition of "persons" subject to the TCPA. Since the statute already unambiguously exempted governmental entities, there would have been no need for the redundant inclusion of an express exemption. The better reading of the legislative history is that the purpose of the substitution language was to exclude emergency communications by non-governmental entities from the Act's proscriptions on automated calls as well as communications by governmental entities.

This interpretation is not only consistent with the determinative language of the Communications Act itself (i.e., the definition of "person"), it furthers the public interest reflected in a governmental exemption. There are sound reasons why public power utilities and other governmental entities will want to communicate with their constituencies using automated calling technology – and why their citizens will *want* such communications. APPA is not suggesting that there are no circumstances in which wireless phone users might object to automated calls from governmental entities. But the recourse mechanism against unwanted calls from private parties – FCC enforcement and private causes of action – is not necessary in the case of governmental entities. The check on unwanted calls from governmental entities is that they must answer directly to their constituencies.

The Commission’s Regulations Applying the TCPA to “Any Person or Entity” Cannot Expand the Scope of Its Authority.

Although the TCPA, by its terms, subjects only “persons” to the restrictions on placing automated calls, the FCC’s implementing regulations do not strictly follow the statute’s terminology. Those regulations, found at 47 C.F.R. § 64.1200 et seq., state that “no person *or entity*” may initiate automated calls with express prior consent, except in emergencies, unless they qualify for exemptions also found in those rules. 47 C.F.R. § 64.1200(a) (emphasis added). The FCC’s regulations similarly provide that “no person *or entity*” shall “initiate any telephone solicitation” during certain hours (47 C.F.R. § 64.1200(c)) or “initiate any call for telemarketing purposes to a residential telephone subscriber [without first establishing do-not-call protocols]. 47 C.F.R. § 64.1200(d). (emphasis added).³¹ Somewhat confusingly, the FCC’s rules also say that “a person” (with no reference to “entity”) “will not be liable” for sending an automated message to a “wireless number” that was previously a wireline number. 47 C.F.R. § 64.1200(a)(iv).

APPA has reviewed the history of the agency’s regulations, including the proposed rule³² that preceded adoption of the TCPA regulations in 1992,³³ but neither contains any discussion of the agency’s decision to include the word “entity” in defining those subject to the TCPA’s autodialing restrictions. The only indirect explanation APPA has found is in the Commission’s interpretation of the Truth in Caller ID Act of 2009.

In implementing the provisions of that Act, the FCC noted that the Act (like the TCPA) was directed only at “any person,” but concluded that, because the Act “does not define the term

³¹ The latter requirement does not apply to “tax-exempt organizations.” (47 C.F.R. § 64.1200(d)(7).

³² *In the Matter of The Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 2736 (1992) (Proposed Rule).

³³ *In The Matter Of Rules And Regulations Implementing The Telephone Consumer Protection Act Of 1991*, 7 FCC Rcd. 8752 (1992)(1992 TCPA Rule). The first reference to the term “person or entity” appears at paragraph 10 of the FCC’s 1992 order, where it directs that “any person or entity engaged in telephone solicitation is required to maintain a list of residential telephone subscribers who request not to be called by the telemarketer.”

‘person,’ it would construe the term broadly to mean “person or entity.”³⁴ The answer to why, two decades earlier, the Commission likewise chose to apply the *TCPA* to “any person *or* entity” might be found in the footnote accompanying the Commission’s stated interpretation of “person” under the Truth in Caller ID Act. There, the Commission stated that, notwithstanding the absence of a definition of “person” in that Act, it nonetheless intended to apply the term “person” as it is defined in the Communications Act.³⁵ In other words, it has interpreted “person” in the Communications Act to include “persons or entities.”

To the extent the Commission might be inclined to treat governmental bodies as “entities” based on its regulations implementing the *TCPA*, APPA’s response is a simple one. While administrative agencies have broad authority to interpret their own regulations,³⁶ their regulations cannot give them authority not granted by the authorizing statute itself.³⁷

CONCLUSION

For the reasons stated above, APPA urges the Commission to grant Broadnet’s petition for declaratory order.

Respectfully submitted,

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³⁴ *Rules and Regulations Implementing the Truth in Caller ID Act of 2009*, Report and Order, 26 FCC Rcd 9114, 9210 ¶ 16 (2011).

³⁵ *Id.* n. 39.

³⁶ *Satellite Broadcasting Co., Inc. v. FCC*, 824 F. 2d 1, 3 (D.C. Cir. 1987).

³⁷ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”)