

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

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Petition of Broadnet Teleservices LLC for
Declaratory Ruling

CG Docket No. 02-278

Reply Comments of Robert Biggerstaff

The Broadnet Petition¹ follows the same misplaced logic as a similar petition by RTI International.² To protect both the national telecommunication's infrastructure and individual consumers, the term "person" should be construed broadly to include all government entities to the limits of sovereign immunity and the Eleventh Amendment. The Commission should combine these two petitions for purposes of comments and a consolidated resolution. The *Petition* should be denied, along with the petition of RTI International.

The Petition mixes different interpretations and different definitions.

The *Petition* deceptively claims that the Communications Act "defines a 'person' as an 'individual, partnership, association, joint-stock company, trust or corporation.'"³ This is false. Broadnet is attempting to rewrite the statute to imply that the definition is closed—so that *only* those listed terms constitute a "person." Although that is how some

¹ *Petition of Broadnet Teleservices LLC for Declaratory Ruling*, CG Docket No. 02-278 (filed Sept. 16, 2015) (*Petition*).

² *See, e.g. Reply Comments of Robert Biggerstaff on the RTI Petition* (Dated Jan. 12, 2015)

³ *Petition* at 5, citing 47 U.S.C. § 153(39).

statutes word a definition of “person” the Communications Act is very different—it sets out not a closed definition, but an open one, which reads “[t]he term ‘person’ *includes* an individual, partnership, association, joint-stock company, trust, or corporation.”⁴ It is not limited to those terms. It therefore serves as a floor, not a ceiling, on construction.

Section 153 does not statutorily foreclose the United States (and individual states) from being within the term “person.” Indeed, Congress did see a need to exempt the federal government from two portions of the 1934 Communications Act that only apply to “persons”—but not the TCPA. That exemption, codified at 47 U.S.C. § 305. notes that “[r]adio stations belonging to and operated by the United States shall not be subject to the provisions of sections 301 and 303 of this title.” It is a well established rule of construction that Congress does not do a useless thing. Ergo Congress anticipated that sections 301 and 303 (which apply to “persons” as defined in §153) applied to the federal government (or at least to contractors the federal government employed to operate stations on the government’s behalf). It is incongruous, at best, to apply a different interpretation of “person” to §227 than is used in §301.⁵

The Commission has the latitude and obligation to interpret the TCPA to effectuate sound policy—and the Commission has done so.⁶ Sound policy is served by interpreting

⁴ 47 U.S.C. § 153(39).

⁵ As a matter of law, the Commission is not required to adopt a court’s interpretation of “person” in § 153 or to adopt an interpretation it anticipates a court would adopt. An agency’s interpretation need only be a “permissible” reading of the statutory text, and not the “best” or “most likely” interpretation intended by Congress. The existence of the exemption in § 305 means inclusion of the federal government within the term “person” in § 153. Who is subject to sovereign (or qualified) immunity, however, presents a constitutional question solely for the Court to decide, and not an agency interpretation question.

⁶ *See, e.g.*, 10 FCC Rcd. 12391 ¶30 (finding that fax modem boards are subject to the TCPA after noting ambiguity in the statutory definition of “telephone facsimile machine” in the TCPA and

“person” in the TCPA context to include state and federal government and any agents and contractors, and any limitation will then follow the contours of sovereign immunity.

Therefore the Commission should adopt the interpretation that furthers the best policy for consumer protection and protection of the national telecommunications infrastructure.

Even if the term “person” were construed to exclude the Federal Government itself, it should only exclude the federal government acting directly itself, and not indirectly through contractors. Even if the United States is excluded, the term “person” in the Communications Act should include non-sovereign contractors. This is consistent with the paradigm that rights imbued to the sovereign do not flow to agents.⁷ One could also consider who actually decided to make robocalls—the government or the contractor? If the government expressly wants to make prerecorded calls to cell phones, it should do so in house. Particularly if a contractor like petitioners made the choice to use robocalls to cell phones, that agent can’t hide under the skirt of the federal government. A contrary rule would both enable and invite wide-ranging abuse.

Anyone not a “person” under Broadnet’s Petition is also not a Person under the Communications Act.

Whoever is held not to be a “person” as a result of Commission action on this Petition, would also not be a “person” under the entirety of Section V of the Communications Act, and also not a person under any other portions of the Act that define “person” similarly to section 153.

that a contrary interpretation would not further public policy.)

⁷ 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).

As a policy, the Communications Act must be construed as broadly as possible because the public airwaves impact every single member of the public. Our vast national telecommunications infrastructure must not be rendered defenseless against *any* actors. Nor should the Commission be without power to sanction any actor. Consider the long list of parties the Petition seeks to have declared not to be “persons” under the Communications Act.⁸ Those parties would not be a “person” under a myriad of FCC rules and provisions of the Communications Act regarding radio transmitters, licensing, and other standards. It is not hard to imagine the chaos that would result if any contractor working on a federal or state government project was not a “person” and suddenly immune to FCC regulations and provisions of the Communications Act (such as §333⁹) applying to “persons.” All manner of devices and practices prohibited by the 1934 Communications Act and Commission rules would proliferate with any contractors on a government contract. State bureaus of prisons and school districts would be free to install cell phone jammers. Road construction crews on government projects could use high-powered unlicensed radios. Employees on a government contract who use a GPS jammer to prevent their

⁸ The *Petition* itself identifies: “federal, state, and local government entities and officers” (p.2); “members of congress” (p.3); “state education commissioners” (p.3); “mayors and other local officials” (p.3); “hundreds of federal, state, and local agencies” (p.5, n.12); both elected and appointed “officials” (p.7 n.20); “a mayor and other similarly situated officials” (p.8); “legislative officers” (p.8 n.21, including “members of Congress and of the several state legislatures”): “service providers working on behalf of government entities and officials” (p.8); “federal, state, and local governments, including legislative, judicial, and executive bodies and officers and those who act on behalf of such government entities” (p. 10).

⁹ “No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this chapter or operated by the United States Government.”

employer from tracking them will be free to do so.¹⁰ A local city council member could run a cell phone jammer in city council meetings. In sum, to define “person” the way Petitioner asks, results in wireless anarchy.

The Commission’s Power Should Extend to the Limits of Sovereign Immunity.

The Commission should start from the position that the Communications Act’s definition of “person” should extend to the fullest limits of sovereign immunity. This position is appropriate and defensible. Under such a position:

- Actions could not be brought against the Federal Government, but could be brought against individuals acting on behalf of the federal government absent qualified immunity.
- The Eleventh Amendment prohibits suits by citizens against a state, but permits actions by the FCC against states and state agencies. Actions against individual agents or employees of a state are permitted absent qualified immunity.

A table setting out the consequences of alternative interpretations of “person” is included at these of these comments. When preparing this table, I found Broadnet’s invocation of 42 U.S.C. § 1983 is puzzling because the Supreme Court expressly held that municipalities and local governments are considered “persons” under § 1983.¹¹ This shows that Broadnet’s selection of caselaw, like its arguments, has not be thoroughly thought through.

Conclusion

In reviewing the euphemistic Broadnet Petition, I am repeatedly impressed with the level of obfuscation employed. For example, the text of the Petition reads at one point:

¹⁰ See “No Jam Tomorrow” *ECONOMIST*, available at <http://www.economist.com/node/18304246> (last visited Nov. 13, 2015).

¹¹ *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

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.¹²

Translated, this text resolves to:

Currently we can indiscriminately robocall land lines as much as we want, but not cell phones. We should be allowed to indiscriminately robocall cell phones too

No one is “deprived” of anything. Broadnet—and anyone else—can make non-solicitation calls to any phone they want by making live calls rather than robot calls. They can also, as the Commission recognized, obtain express consent for the calls as is done by organizations all over the country.

The underlying goal of Broadnet (and many of its clients) is for politicians to be allowed broadcast political messages (labeled as “constituent service”) via autodialers, robocalls, and robotexts where the recipients pay for the calls. That goal is realized by extending an exemption for robocalls to each appointed or elected official—a modern franking privilege to use other peoples’ cell phones without consent.

Petitioners and their clients have ample solutions at hand. They can call with live humans or they can simply ask for express consent before making the calls. There is no cause for wholesale exemptions that these petitions ask for under the guise of interpreting the term “person.”

/s/ Robert Biggerstaff

Robert Biggerstaff

November 13, 2015

¹² *Petition at 1.*

	If Entity is NOT a “Person” under § 153		If Entity is a “Person” under § 153	
Entity	Action by FCC	Action by Citizen	Action by FCC	Action by Citizen
State government	Not Permitted	Not Permitted	Permitted in some circumstances ¹³	Blocked by 11 th Amendment
Employee/agent of State government	Not Permitted	Not Permitted	Subject to qualified immunity	Permitted ¹⁴ but subject to qualified immunity.
State government agency	Not Permitted	Not Permitted	Permitted	Depends ¹⁵
Employee/agent of State government agency	Not Permitted	Not Permitted	Permitted	Permitted ⁸ but subject to qualified immunity.
Municipality, county, or other subdivision of a state	Not Permitted	Not Permitted	Permitted ¹⁶	Permitted ¹⁶
Federal government	Not Permitted	Not Permitted	Blocked by sovereign immunity	Blocked by sovereign immunity
Employee/agent of Federal government	Not Permitted	Not Permitted	Subject to qualified immunity	Subject to qualified immunity ¹⁷

¹³ *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965).

¹⁴ *Ex parte Young*, 209 U.S. 123 (1908). Private parties can sue state officials in their *official capacity* to enforce federal laws and regulations, but only for prospective injunctive and declaratory relief. Suits for money damages against state officials in their *individual capacity* are permitted, but subject to qualified immunity. *See, also, 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).

¹⁵ In determining whether an agency is entitled to Eleventh Amendment immunity, the courts consider various factors, including whether payment of a judgment resulting from the suit would come from the state treasury, the status of the agency under state law, and the agency’s degree of autonomy. *Savage v. Glendale Union High School*, 343 F.3d 1036, 1040-41 (9th Cir. 2003); *Belanger v. Madera Unified School Dist.*, 963 F.2d 248 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993). An important factor, at least in close cases, is whether, considering the source of the entity’s funding, the payment of the judgment would come from the state. *Febres v. Camden Board of Ed.*, 445 F.3d 227, 229 (3d Cir. 2006).

¹⁶ No immunity. *Mt. Healthy City School District Board of Ed. v. Doyle*, 429 U.S. 274 (1977); *see also Monell v. New York v. City Dept. of Social Servs.*, 436 U.S. 658 (1978).

¹⁷ *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Butz v. Economou*, 438 U.S. 478 (1978).