

January 29, 2016

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St. SW
Washington, D.C. 20554

Re: Written Ex Parte Communication
Petition for Declaratory Ruling of Broadnet Teleservices LLC
CG Docket No. 02-278

Dear Ms. Dortch:

In light of the recent Supreme Court decision in *Campbell-Ewald v. Gomez*,¹ the Commission should act now to provide more certainty regarding calls made by or on behalf of government officials by granting the petition of Broadnet Teleservices LLC (“Broadnet”) for declaratory ruling (“Petition”).² In *Campbell-Ewald*, the Supreme Court acknowledged that the Telephone Consumer Protection Act’s (“TCPA’s”) prohibitions do not apply to the United States and its agencies³ and that, although they do not enjoy absolute immunity, contractors that “simply perform[] as directed by the Government may be shielded from liability....”⁴ Consistent with the decision, the Commission should grant the Petition, specifically confirming that the TCPA and the Commission’s TCPA rules do not apply to federal, state, and local governments, including legislative, judicial, and executive bodies and officers, and those who act on behalf of such government entities.⁵ Prompt action is needed to remove any remaining uncertainty that

¹ *Campbell-Ewald Co. v. Gomez*, No. 14-85 14-857, slip op. at (S. Ct. Jan. 20, 2016).

² Petition of Broadnet Teleservices LLC for Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 16, 2015) (“Petition”).

³ *Campbell-Ewald Co.*, slip op. at 12 (“The United States and its agencies, it is undisputed, are not subject to the TCPA’s prohibitions because no statute lifts their immunity.”).

⁴ *Id.* at 2.

⁵ See Petition at 10. The TCPA’s prohibitions apply to “any person,” see 47 U.S.C. § 227(b), and, as the Petition notes, federal, state, and local government entities, and their officers acting on official government business do not meet the definition of “person” in the Communications Act, in which the TCPA is codified. See Petition at 2.

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could deprive citizens of important opportunities to engage with their government simply because they rely on their wireless phones as their primary, or only, means of communication.⁶

The Commission Should Confirm that the TCPA Does Not Apply to Any Type of Government Entity or Official. While the Supreme Court acknowledged that the TCPA's prohibitions do not apply to the United States and its agencies, the Commission still should take action in light of the "FAQs on Tele-Town Hall Robocalls" ("FAQs"), which suggest otherwise.⁷ As the Petition makes clear, because the TCPA does not apply to the government, it necessarily cannot apply to government officials acting in their official capacities, including legislative officers.⁸ Thus, consistent with the Court's observation, the TCPA's prohibitions also do not apply to members of Congress. The Commission should make this fact clear so that any lingering uncertainty due to the FAQs⁹ does not persist.

Commission action is also necessary to make clear that the TCPA and the Commission's TCPA rules also do not apply to state and local governments, agencies, and officials. 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, and other courts have noted that when Congress defines "person" in the manner it did in the Communications Act, such language excludes municipal governments and other local governmental entities.¹⁰ No statute – not the TCPA, the Communications Act, nor any other – applies the TCPA to state and local governments and officials. Therefore, the Commission should confirm that, in addition to the federal government and officials, the TCPA also does not apply to state and local governments and officials.

The Commission Should Confirm that the TCPA Does Not Apply to Those that Work On Behalf of Government Entities and Officials. Finally, the Commission should make clear that the TCPA does not apply to those who work with federal, state, and local governments and

⁶ In particular, an accelerating number of people of color, millennials, and individuals living in poverty are in wireless-only households. See Notice of Ex Parte Presentation of Broadnet Teleservices LLC, CG Docket No. 02-278, at 1-2 (filed Dec. 17, 2015); see also Petition at 3-5.

⁷ 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"); see also 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-robocallrestrictions>.

⁸ See Petition at 7-8.

⁹ As Broadnet noted in the Petition, the FAQs do not carry the force of law. See *id.* at 3 n. 9.

¹⁰ See *id.* at 5-6.

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officials to make telephone town hall calls to wireless phones.¹¹ In *Campbell-Ewald Co.*, the Supreme Court stated that contractors will not enjoy governmental immunity when “the contractor has ‘exceeded [its] authority’ or ‘violate[d] both federal law and the Government’s explicit instructions.’”¹² However, consistent with the Supreme Court’s decision, a contractor or other third party should be able to enjoy the TCPA immunity of a government client when the contractor or third party has not “exceeded [its] authority” or “violate[d] the Government’s explicit instructions,” and indeed, in this regard, the Court stated that a “contractor who simply performs as directed by the Government may be shielded from liability for injuries caused by its conduct.”¹³ Accordingly, consistent with the Supreme Court’s decision and Commission precedent,¹⁴ the TCPA does not apply to those working on behalf of government entities as long as they act consistently with the government entities’ instructions.

* * *

For the reasons described above and in the Petition, the Commission should take action consistent with the Supreme Court’s decision in *Campbell-Ewald Co.* and promptly declare that the TCPA and the Commission’s TCPA rules do not apply to calls made by or on behalf of federal, state, and local governments when such calls are made for official purposes.

Sincerely,

/s/ Joshua M. Bercu/

Joshua M. Bercu
Patrick R. Halley
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¹¹ One commenter suggests that the Petition is “now less viable given the Court’s decision.” Supplemental Reply Comments of Robert Biggerstaff, CG Docket No. 02-278, at 1 (filed Jan. 20, 2016). However, as described herein, the Petition seeks confirmations that are entirely consistent with the Supreme Court’s decision.

¹² *Campbell-Ewald Co.*, slip op. at 12-13.

¹³ *Id.* at 2.

¹⁴ See Petition at 8 n. 22 (noting that 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).