

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
Rules and Regulations Implementing the ) CG Docket No. 02-278
Telephone Consumer Protection Act of )
1991 )
Broadnet Teleservices LLC Petition for )
Declaratory Ruling )
National Consumer Law Center Petition for )
Reconsideration and Request for Stay )
Pending Reconsideration of Broadnet )
Teleservices LLC Petition for Declaratory )
Ruling )
Professional Services Council Petition for )
Reconsideration of Broadnet Teleservices )
LLC Petition for Declaratory Ruling )

ORDER ON RECONSIDERATION

Adopted: December 9, 2020

Released: December 14, 2020

By the Commission: Commissioner O’Rielly concurring; Commissioners Rosenworcel and Starks
approving in part, dissenting in part, and issuing separate statements.

I. INTRODUCTION

1. Unwanted robocalls are the top source of consumer complaints the Commission
receives.<sup>1</sup> In recent years, the Commission has taken a number of significant steps to combat unwanted
calls by empowering consumers and voice service providers to block them.<sup>2</sup> Today, we take further steps
to target unwanted robocalls by reconsidering our previous interpretations of the Telephone Consumer
Protection Act (TCPA) that allowed for certain entities to place calls without prior express consent from
the consumer.<sup>3</sup>

<sup>1</sup> See, e.g., FCC, Consumer Complaint Center, https://opendata.fcc.gov/Consumer/CGB-Unwanted-Calls-
2019YTD/vzkh-ddru (last visited Nov. 12, 2020).

<sup>2</sup> See, e.g., Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59, WC Docket No.
17-97, Declaratory Ruling and Third Further Notice of Proposed Rulemaking, 34 FCC Rcd 4876 (2019) (2019 Call
Blocking Declaratory Ruling and Third Further Notice); Advanced Methods to Target and Eliminate Unlawful
Robocalls, CG Docket No. 17-59, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9706
(2017) (2017 Call Blocking Order).

<sup>3</sup> See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Broadnet Teleservices
LLC Petition for Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 31 FCC Rcd 7394 (2016)
(Broadnet Declaratory Ruling).

2. The TCPA specifically restricts calls made by “any person.”<sup>4</sup> In 2016, the Commission interpreted the TCPA to exclude calls made by the federal government, in line with the longstanding interpretive presumption that the word “person” does not include the federal government absent a clear “affirmative showing of statutory intent to the contrary.”<sup>5</sup> The Commission also extended that presumption beyond the federal government, by interpreting the TCPA to exclude from its prior-express-consent requirements calls made by contractors acting as agents of the federal government in accord with federal common law of agency.<sup>6</sup> Thereafter, a number of parties asked the Commission to reconsider, arguing that it had misinterpreted the TCPA and that federal contractors are “persons” and thus should be required to obtain prior express consent from consumers.

3. We now address these requests as part of our ongoing work to combat unwanted robocalls by finding that federal and state contractors must obtain prior express consent to call consumers, while making clear that the TCPA does not require that step for the federal or state governments themselves. We conclude that local governments, unlike federal and state governments, are not sovereign entities entitled to the same presumption, and that they were intended to be included within the TCPA framework. We believe this interpretation best comports with longstanding legal precedent, while preserving the privacy rights of individuals as intended by Congress and allowing federal and state governments to engage in important communications with the public.

## II. BACKGROUND

4. *The TCPA and the Commission’s Work to Fight Unwanted Robocalls.* Congress enacted the TCPA in 1991, recognizing that “[i]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”<sup>7</sup> The TCPA generally requires “any person” making certain calls to get the recipient’s prior express consent before making the call. This TCPA restriction applies generally to calls made (1) using an autodialer or prerecorded voice or artificial voice to a wireless phone and (2) using an artificial or prerecorded voice to a residential phone if the call is marketing.<sup>8</sup> If a robocall includes or introduces an advertisement or constitutes telemarketing, consent generally must be in writing and contain certain disclosures.<sup>9</sup> There are some exceptions to these requirements.<sup>10</sup>

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<sup>4</sup> See 47 U.S.C. § 227(b)(1).

<sup>5</sup> *Vt. Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000).

<sup>6</sup> See *Broadnet Declaratory Ruling*, 31 FCC Rcd at 7401-02, para. 16.

<sup>7</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9); codified at 47 U.S.C. § 227.

<sup>8</sup> Specifically, a caller must get prior express consent: (1) when making a telemarketing call to a *residential* telephone line using an artificial or prerecorded voice; and (2) when making any call to a *wireless* telephone number using an autodialer or an artificial or prerecorded voice. 47 U.S.C. § 227(b)(1)(A); 47 CFR § 64.1200(a)(1)-(2). The restriction also applies to such calls directed to emergency numbers and other specified locations. An autodialer is also known as an “automatic telephone dialing system” or an ATDS. See 47 CFR § 64.1200(a)(2)-(3), (f)(8). For other robocalls, consent may be oral, written, or demonstrated by a consumer’s actions in particular circumstances. *Id.* § 64.1200(a); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1840-42, paras. 27-30 (2012) (*2012 TCPA Order*); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003) (*2003 TCPA Order*). We take no position here on whether the TCPA’s restrictions on ATDS calls encompass automatically dialed calls to any list of numbers, not just calls to random or sequential numbers, which is an issue to be heard by the Supreme Court in *Facebook, Inc. v. Duguid et al.*, No. 19-511 (cert. granted July 9, 2020).

<sup>9</sup> See 47 CFR § 64.1200(a)(2), (b).

<sup>10</sup> One exception to these general rules is calls made for emergency purposes. See, e.g., 47 U.S.C. § 227(b)(1); 47 CFR § 64.1200(a).

5. The Commission has taken a number of measures to address robocalls as a source of consumer annoyance. In 2017, the Commission adopted rules that allow voice service providers to block certain types of calls without violating the Commission’s call completion rules.<sup>11</sup> In June 2019, the Commission took action to further protect consumers from unwanted robocalls.<sup>12</sup> To resolve any uncertainty about the call-blocking tools that voice service providers may offer consumers, the Commission clarified that voice service providers may offer consumers call blocking based on reasonable analytics on an opt-out basis, giving consumers the benefit of call blocking without having to take action.<sup>13</sup> The Commission additionally clarified that voice service providers may offer, on an opt-in basis, programs that block calls from numbers not on a “white list” created by a consumer or in a consumer’s contacts list.<sup>14</sup> The Commission proposed a safe harbor for voice service providers that offer call blocking that takes into account whether a call has been properly authenticated under the STIR/SHAKEN framework and may potentially be spoofed.<sup>15</sup> In addition, the Commission sought comment on protecting critical calls by requiring voice service providers that offer call blocking to maintain a “Critical Calls List” of numbers they may not block.<sup>16</sup>

6. The Commission has strongly encouraged industry’s implementation of the STIR/SHAKEN framework, also known as Caller ID authentication, which generally promises to stop the caller ID spoofing that so often accompanies unwanted calls.<sup>17</sup> And in 2018, the Commission authorized the creation of a reassigned numbers database to enable callers to determine whether a telephone number has been permanently disconnected, and is therefore eligible for reassignment, before calling that number, thereby helping to protect consumers with reassigned numbers from receiving unwanted robocalls to which the previous subscriber consented.<sup>18</sup>

7. Finally, the Commission is implementing the TRACED Act.<sup>19</sup> Amongst other things, the new law bolsters the Commission’s ability to enforce against illegal robocalls, requires Caller ID authentication, and empowers voice service providers to block the calls most likely to annoy and defraud consumers.<sup>20</sup>

8. *Governments, Government Contractors, and the TCPA.* In 2014 and 2015, the Commission received three petitions that sought clarification of the term “person” as used in the TCPA.<sup>21</sup>

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<sup>11</sup> See *2017 Call Blocking Order*, 32 FCC Rcd 9706.

<sup>12</sup> See *2019 Call Blocking Declaratory Ruling and Third Further Notice*, 34 FCC Rcd 4876.

<sup>13</sup> *Id.* at 4884-90, paras. 26-42.

<sup>14</sup> *Id.* at 4890-91, paras. 43-46.

<sup>15</sup> *Id.* at 4892-96, paras. 49-62.

<sup>16</sup> *Id.* at 4896-98, paras. 63-70.

<sup>17</sup> See *2019 Call Blocking Declaratory Ruling and Third Further Notice; Call Authentication Trust Anchor*, WC Docket No. 17-97, Notice of Inquiry, 32 FCC Rcd 5988 (2017); Press Release, FCC, Chairman Pai Sent Letters To Voice Service Providers In November, Demanding That They Move Forward On Caller ID Authentication (Nov. 5, 2018), <https://www.fcc.gov/document/chairman-pai-demands-industry-adopt-protocols-end-illegal-spoofing> (last visited Nov. 12, 2020).

<sup>18</sup> *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Report and Order, 33 FCC Rcd 12024 (2018) (*Reassigned Numbers Order*).

<sup>19</sup> Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act), Pub. L. 116-105 (2019).

<sup>20</sup> See *id.*

<sup>21</sup> See National Employment Network Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Aug. 19, 2014) (National Employment Petition); RTI International Petition for Expedited Declaratory

The National Employment Network Association asked the Commission to clarify that “calls can be made through a public or private intermediary or associated third party that ‘stands in the shoes’ of the federal government” without violating the TCPA.<sup>22</sup> RTI asked the Commission to clarify that the term “person” did not include the federal government and that the TCPA therefore does not restrict research survey calls made by or on behalf of the federal government.<sup>23</sup> Broadnet asked the Commission to declare that federal, state, and local governments, and their officers acting on official government business, are not “persons” for purposes of the TCPA.<sup>24</sup>

9. In 2016, the Commission responded to these requests, finding that the term “person,” as used in section 227(b)(1) and the rules implementing that provision, does not include the federal government.<sup>25</sup> The Commission noted that there is a “longstanding interpretive presumption” that “the word ‘person’ does not include the sovereign . . . [except] upon some affirmative showing of statutory intent to the contrary.”<sup>26</sup> The Commission found that “no commenter has made a showing of statutory intent to the contrary, and no such intent is articulated in the legislative history of the TCPA,” noting that “had Congress wanted to subject the federal government to the TCPA, it easily could have done so by defining ‘person’ to include the federal government.”<sup>27</sup>

10. Turning to federal government contractors, the Commission found that the term “person” does not include agents acting on behalf of the federal government, and clarified that a government contractor that places calls on behalf of the federal government may invoke the federal government’s immunity from the TCPA “when the contractor has been validly authorized to act as the government’s agent and is acting within the scope of its contractual relationship with the government, and the government has delegated to the contractor its prerogative to make autodialed or prerecorded- or artificial-voice calls to communicate with its citizens.”<sup>28</sup> The Commission in turn found that a “government contractor who places calls on behalf of the federal government will be able to invoke the federal government’s exception from the TCPA” based on “the agency-law rule that when a principal is privileged to take some action, an agent may typically exercise that privilege on the principal’s behalf.”<sup>29</sup> The Commission did not address calls made by state and local governments or contractors.<sup>30</sup>

11. National Consumer Law Center (NCLC) and Professional Services Council (PSC) sought reconsideration of the *Broadnet Declaratory Ruling*.<sup>31</sup> Among other things, NCLC raises the following arguments: The TCPA applies to federal contractors because they are “person[s]”; low-income individuals who use prepaid wireless calling plans will be adversely impacted by unlimited calling by

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Ruling, CG Docket No. 02-278 (filed Sept. 29, 2014) (RTI Petition); Petition of Broadnet Teleservices LLC for Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 16, 2015) (Broadnet Petition).

<sup>22</sup> National Employment Petition at 1.

<sup>23</sup> RTI Petition at 1.

<sup>24</sup> Broadnet Petition at 2.

<sup>25</sup> See *Broadnet Declaratory Ruling*, 31 FCC Rcd at 7398-405, paras. 10-19 (the TCPA’s prohibitions as applied to calls placed by or on behalf of state and local governments was not addressed).

<sup>26</sup> *Id.* at 7399, para. 12 (citing *Vt. Agency of Nat. Resources*, 529 U.S. at 781).

<sup>27</sup> *Id.* at 7399-400, para. 12.

<sup>28</sup> *Id.* at 7402, para. 17.

<sup>29</sup> *Id.* at 7402, para. 17 & n.79.

<sup>30</sup> *Id.* at 7399, para. 11.

<sup>31</sup> See Petition of National Consumer Law Center et al. for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration, CG Docket No. 02-278, (filed July 26, 2016) (NCLC Petition); Professional Services Council Petition for Reconsideration, CG Docket No. 02-278 (filed Aug. 4, 2016) (PSC Petition).

federal contractors; the decision is inconsistent with recently added exceptions to the TCPA;<sup>32</sup> and the decision misinterpreted the Supreme Court’s decision in *Campbell-Ewald v. Gomez*.<sup>33</sup> PSC objects to the decision to the extent that it imposes an agency requirement on federal contractors to invoke the federal government’s immunity from the TCPA.<sup>34</sup> The Consumer and Governmental Affairs Bureau (the Bureau) sought comment on each of these petitions.<sup>35</sup>

12. Following the 2018 decision of the U.S. Court of Appeals for the District of Columbia Circuit in *ACA International v. FCC*, which vacated parts of the Commission’s *2015 TCPA Declaratory Ruling and Order*, the Bureau sought renewed comment on the NCLC and PSC petitions, and how the TCPA applies to state and local government employees and contractors.<sup>36</sup>

### III. DISCUSSION

13. On reconsideration of the *Broadnet Declaratory Ruling*, we reverse the Commission’s previous order to the extent that it provided that a federal contractor making calls on behalf of the government was not a “person” subject to the restrictions in section 227(b)(1) of the TCPA. We also clarify that a state government caller making calls in the conduct of official government business is not a “person” subject to section 227(b)(1) of the TCPA, while a state or local government contractor, like a federal contractor, is a “person” and thus not exempt. Finally, we clarify that a local government is a “person” subject to the TCPA. As such, we grant in part the NCLC Petition, deny the PSC Petition, reverse the Commission’s *Broadnet Declaratory Ruling* in part, and grant in part and deny in part Broadnet’s petition for declaratory ruling.

#### A. Federal Contractors are Subject to Section 227(b)(1) of the TCPA.

14. We find that a federal contractor is a “person” under section 227(b)(1). The term “person” as used in the TCPA and defined in the Communications Act expressly includes an “individual, partnership, association, joint-stock company, trust, or corporation” “unless the context otherwise

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<sup>32</sup> In *Barr v. American Association of Political Consultants, Inc.*, 140 S.Ct. 2335 (2020) (*Barr*), the Supreme Court determined that the amendment to the TCPA that created an exception for calls made to collect a debt owed to or guaranteed by the federal government violated the First Amendment and that it must be invalidated and severed from the remainder of the TCPA. *Id.* at 2347.

<sup>33</sup> NCLC Petition at 2-3, 6-9, 7-8, 10, 11-12, 13-15; *Campbell-Ewald Company v. Gomez*, 136 S.Ct. 663, 672 (2016) (*Campbell-Ewald*).

<sup>34</sup> PSC Petition at 1.

<sup>35</sup> See *Consumer and Governmental Affairs Bureau Seeks Comment on Professional Services Council Petition for Reconsideration of FCC’s Broadnet Declaratory Ruling*, CG Docket No. 02-278, 31 FCC Rcd 8931 (2016) (*PSC Public Notice*); *Consumer and Governmental Affairs Bureau Seeks Comment on National Consumer Law Center Petition for Reconsideration of FCC’s Broadnet Declaratory Ruling*, CG Docket No. 02-278, 31 FCC Rcd 8725 (2016) (*NCLC Public Notice*).

<sup>36</sup> See *ACA Int’l et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (*ACA Int’l*) (affirming in part and vacating in part *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015)); see also *Consumer and Governmental Affairs Bureau Seeks Comments on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, CG Docket Nos. 18-152 and 02-278, Public Notice, 33 FCC Rcd 4864 (2018) (*ACA Public Notice*). The Public Notice also sought comment on various issues arising directly from *ACA Int’l*. Approximately 310,400 total comments were filed in the two relevant dockets during the comment period. In addition to the substantive comments filed by the 130 individuals and organizations listed in Appendix A, we received over 310,000 brief, non-substantive comments of which over 262,000 were duplicate filings. We consider a comment duplicative if it has the same filer, address, and comment text. The Commission is reviewing the record on the issues addressed in *ACA Int’l* and intends to address them in a future action.

requires.”<sup>37</sup> Every federal contractor, including those acting as agents, falls within one of these categories. And, unlike the federal government itself, there is no longstanding presumption that a federal contractor is not a “person.”<sup>38</sup> Nor do we find any “context that otherwise requires” us to ignore the express language of the Communications Act’s definition of the term “person” in this situation.<sup>39</sup> Absent any applicable presumption to the contrary, we find that the express definition of “person” as contained in the Communications Act is controlling. We thus agree with NCLC and those commenters that contend that section 227(b)(1) applies to federal contractors as “person[s],” even when they are acting as agents of the federal government.<sup>40</sup>

15. Federal contractors may, of course, obtain consumers’ prior express consent to make calls covered by the TCPA. Such contractors may also qualify for forms of derivative immunity when making calls on behalf of the federal government—we do not alter or impair the ability of contractors to invoke derivative immunity from liability when making calls on behalf of the federal government. Particularly in the absence of a more complete record on this issue, however, we believe that it is more appropriate for the courts to determine whether the contractor satisfies the applicable test for derivative immunity, in accordance with generally applicable federal common law principles.<sup>41</sup> Our ruling simply clarifies that a

<sup>37</sup> See 47 U.S.C. §§ 153(39), 227(b)(1). In addition, the “Dictionary Act,” enacted by Congress to provide a set of definitions applicable to all federal acts in the absence of another specific definition in a given statute, provides that “[i]n determining the meaning of any Act of Congress, unless context indicates otherwise . . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” See 1 U.S.C. § 1; see also Cunningham Comments at 2.

<sup>38</sup> See *Barr*, 140 S.Ct. at n.1 (“The robocall restriction applies to ‘persons,’ which does not include the Government itself.”). We note that, because the TCPA does not apply to the federal government’s actions, it cannot apply to federal government employees acting in their official capacities. Cf. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989) (“Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office.”). A conclusion otherwise would be nonsensical. Here, because the federal government can *only* act through literal persons, the context does not permit the term “person” or “individual” to include a federal employee when performing official duties or otherwise acting solely on behalf of a federal agency. See, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2090-91 (2014) (holding that definitional terms must be construed with regard to context and statutory purpose).

<sup>39</sup> Cunningham Comments at 2. In one limited instance based upon a “literal reading of the [TCPA],” the Commission concluded that it had authority under section 227(b)(2)(H) “to adopt number-and-duration limits that apply to all government debt collection calls, irrespective of whether they were made by a ‘person.’” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 31 FCC Rcd 9074, 9100, para. 64 (2016). That ruling was specifically limited to a class of calls (those to collect certain government-owed debts) that the Commission concluded were not subject to section 227(b)(1).

<sup>40</sup> See, e.g., NCLC Petition at 15; Consumer Action Comments at 2; CU Comments at 2; NCLC Comments at 41; John A. Shaw Reply Comments at 3; Robert Biggerstaff 2016 Comments at 8 (Biggerstaff); Burke Law Offices, LLC 2016 Comments at 1; CU 2016 Comments at 5; Indiana and Missouri Attorneys General 2016 Comments at 1-2 (Indiana and Missouri AG). Our decision here is consistent with the Supreme Court’s decision in *Campbell-Ewald*, which assumed that a contractor was a “person” under the TCPA. The courts may of course apply *Campbell-Ewald* to determine whether and when contractors are protected by derivative immunity.

<sup>41</sup> See, e.g., *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 643 (4th Cir 2014) (“[U]nder *Yearsley*, a government contractor is not subject to suit if (1) the government authorized the contractor’s actions and (2) the government ‘validly conferred’ that authorization . . . .”); Biggerstaff 2016 Comments at 3 (“a government contractor can assert derivative immunity”); Indiana and Missouri AG 2016 Comments at 2; *Campbell-Ewald*, 136 S.Ct. at 672 (“[G]overnment contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States.”) (citing *Brady v. Roosevelt Steamship Co.*, 371 U.S. 575, 583 (1943)). See also RTI Comments at 8 (“RTI recognizes that, despite the persuasive legal and policy reasons for upholding the Broadnet Decision, the Commission may instead decide to narrow it by reconsidering the prior finding that contractors acting within the scope of an agency relationship with the federal government are not ‘persons’ under Section 227(b)(1). Should this occur, it is critical that the Commission leave the issue of derivative immunity to the courts.”).

federal contractor is a “person” pursuant to section 227(b)(1), and therefore is covered by the TCPA’s requirements even though the federal government is not. We recognize that requiring a government contractor to establish an immunity or exemption imposes some burden on them. We find, however, that this cost is outweighed by increasing the effectiveness of TCPA privacy right protections by according the definition of “person” its plain meaning.

16. We disagree with commenters that argue that our decision is inconsistent with our precedent. The Commission incorrectly applied our precedent on agency to federal government-contractor relationships in the *Broadnet Declaratory Ruling*. Specifically, the Commission grounded its decision in the *DISH Declaratory Ruling*, which did not involve the federal government nor the definition of “person” but instead pertained to a *non-governmental* “person” subject to the TCPA and whether it is vicariously liable for the actions of its *non-governmental* agents.<sup>42</sup> As a result, that precedent does not bear on the issues before us here—which callers are TCPA “persons”—but instead involved principals and agents that were undoubtedly “persons.” Here we look to Congress’ intent as expressed in its definition of “person” and thus who should be liable for TCPA violations under statutory interpretation norms, rather than common law agency principles. Indeed, if we were to so apply the *DISH Declaratory Ruling* precedent to the federal government’s relationship with its contractors, it would nullify Congress’s definition of “person” altogether if those “individual[s], partnership[s], association[s]” and others make calls as agents of the federal government. In short, our conclusion is more consistent with legal precedent and established principles of statutory interpretation.

17. We also disagree with those commenters opposing the NCLC petition because they believe that this outcome would unduly impair robocalls made via federal contractors to promote civic engagement and inform citizens.<sup>43</sup> Congress has already weighed the balance between the privacy rights the TCPA is designed to protect and the ease and cost of robocalling. Congress could have exempted contractors of the federal government if it wished to do so. Further, we note that the language of the TCPA explicitly exempts the type of calls—those for emergency purposes—that arguably constitute the most important type of calls that governments can make to their citizens.<sup>44</sup> Finally, third-party federal contractors may avail themselves of derivative immunity and recognized exemptions to continue to make calls on behalf of the federal government.

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<sup>42</sup> See *Joint Petition filed by DISH Network*, CG Docket No. 11-50, Declaratory Ruling, 28 FCC Rcd 6574, 6584-93, paras. 29-47 (2013) (*DISH Declaratory Ruling*).

<sup>43</sup> See, e.g., Broadnet 2016 Comments at 3-4; Eliza Corp 2016 Comments at 12. Although the Department of Commerce has opposed reconsideration of the *Broadnet Declaratory Ruling* on the grounds that it would “adversely affect Federal agencies’ ability to perform their critical missions” and “increase the cost of business to the Government and taxpayers,” the Department explains that nonetheless the activities of the Census Bureau and its contractors would not violate the TCPA because they “use a live agent to call specific numbers provided by respondents to the Census Bureau staff.” Letter from William Ross, Secretary of Commerce, U.S. Dept. of Commerce to Ajit Pai, Chairman, FCC (April 4, 2019). We agree that where live agents are used to make calls only to numbers provided by called parties as part of their prior express consent to receive calls about the census, such calls would not violate the TCPA.

<sup>44</sup> See 47 U.S.C. § 227(b)(1); 47 CFR § 64.1200(a)(1); see also 47 CFR § 64.1200(f)(4) (defining an “emergency purpose” as “calls made necessary in any situation affecting the health and safety of consumers”); *Blackboard, Inc. Petition for Expedited Declaratory Ruling, Edison Electric Institute and American Gas Association Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 31 FCC Rcd 9054 (2016) (setting forth types of school and utility calls that qualify as “emergency purpose” calls) (*Blackboard Declaratory Ruling*); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling, 35 FCC Rcd 2840 (CGB 2020) (confirming that “the COVID-19 pandemic constitutes an ‘emergency’ under the [TCPA] and that consequently . . . government officials may lawfully communicate information about the novel coronavirus as well as mitigation measures without violating federal law”) (*COVID-19 Declaratory Ruling*).

18. *Maker of the Call.* Broadnet avers that, as a contractor, it facilitates “telephone town hall” calls on behalf of government callers, and asserts that it is not the maker of the calls.<sup>45</sup> We agree that a federal contractor may be able to avoid liability under the TCPA if it is not the “maker of the call.”

19. The Commission previously clarified that a caller may be found to have made or initiated a call in one of two ways: first, by “tak[ing] the steps necessary to physically place a telephone call”; and second, by being “so involved in the placing of a specific telephone call as to be directly liable for making it.”<sup>46</sup> The Commission stated that, in determining the maker of the call, it would consider “the totality of the facts and circumstances surrounding the placing of a particular call to determine: (1) who took the steps necessary to physically place the call; and (2) whether another person or entity was so involved in placing the call as to be deemed to have initiated it, considering the goals and purposes of the TCPA.”<sup>47</sup> The Commission has pointed to several relevant factors in conducting these “totality of the facts and circumstances” analyses to determine the maker of the call—e.g., who determines the content of the message, who determines the recipients of the message, who determines the timing of when the message is sent, the extent to which a person willfully enables fraudulent spoofing, and whether a calling platform knowingly allows clients to use the platform for unlawful purposes.<sup>48</sup>

20. We will continue to apply this analysis to assess TCPA liability of parties, including government contractors, on a case-by-case basis, and we take this opportunity to provide additional guidance. Based on these fact-specific criteria, Broadnet states that its “government customers, and not Broadnet, make all decisions regarding whether to make a call, the timing of the call, the call recipients, and the content of the call.”<sup>49</sup> It further states that its “government customer takes the steps physically necessary to initiate a telephone town [hall] call,” while Broadnet’s role is to “manage the technical aspects of the service and to ensure that its customers do not use the platform unlawfully.”<sup>50</sup>

21. Based on our analysis of the specific facts before us, and in the absence of any other contrary evidence in the record with respect to Broadnet’s operations, we find Broadnet’s argument persuasive. These facts, taken together, lead us to find that Broadnet is not the maker of the call, but rather that Broadnet’s government client is the maker of the call because that government client is so involved in placing the call as to be deemed to have initiated it.

## **B. State Governments and State Government Contractors**

22. Consistent with our findings on federal calls above, we clarify that state government callers in the conduct of official business likewise do not fall within the meaning of “person” in section 227(b)(1), while state contractors, like their federal counterparts, are “person[s]” under that provision.<sup>51</sup>

<sup>45</sup> According to Broadnet, these calls use a technology platform that enables members of government to engage in conversations with large numbers of citizens. See Letter from Joshua M. Bercu, Wilkinson Barker Knauer, LLP to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket Nos. 18-152, 02-278 at 2 (filed July 26, 2018).

<sup>46</sup> *DISH Declaratory Ruling*, 28 FCC Rcd at 6583, para. 26. The multi-factor analysis for determining liability of third parties under the TCPA is set forth in the *DISH Declaratory Ruling*, the *2015 TCPA Order*, and the *Dialing Services Forfeiture Order*. See *DISH Declaratory Ruling*, 28 FCC Rcd at 6583-84, paras. 26-27; *2015 TCPA Order*, 30 FCC Rcd at 7980-84, paras. 30-37; *Dialing Services, LLC*, Forfeiture Order, 32 FCC Rcd 6192, 6195-99, paras. 9-18 (2017).

<sup>47</sup> *2015 TCPA Order*, 30 FCC Rcd. at 7980-81, para. 30.

<sup>48</sup> *Id.* at 7980, 7982, paras. 30, 33.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Broadnet Declaratory Ruling*, 31 FCC Rcd at 7399-401, paras. 12-15; Broadnet Petition at 2; see also 47 U.S.C. § 153(47) (defining the term “State” to include “the District of Columbia and the Territories and possessions”). The issue of whether the TCPA applies to calls placed by or on behalf of state and local governments was included in

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The Commission declined to address state government calls in the *Broadnet Declaratory Ruling*,<sup>52</sup> but the *ACA Public Notice* sought comment on how the TCPA applies to state and local government employees and contractors. As the Commission has noted, there is a “longstanding interpretive presumption” that the word ‘person’ does not include the sovereign . . . [except] upon some affirmative showing of statutory intent to the contrary.”<sup>53</sup> The Supreme Court has confirmed that this presumption is applicable to state governments.<sup>54</sup> Moreover, neither the TCPA nor the Communications Act defines “person” to include state governmental entities. As a result, we conclude that there is a presumption that the term “person” as used in section 227(b)(1) does not include state governments, and that there is no affirmative showing of statutory intent to the contrary.<sup>55</sup>

23. When Congress enacted the TCPA, the Supreme Court had long applied the modern presumption that the word “person” excludes the sovereign unless articulated otherwise.<sup>56</sup> We believe that Congress enacted the TCPA in 1991 understanding that its use of the word “person” in that statute would not be presumed to include the federal or state governments. If Congress had wanted to subject state governments to the TCPA, it could have done so by expressly defining “person” to include state governments. That it did not is strong evidence that Congress did not intend state governments to be covered by the prohibitions in section 227(b)(1).

24. We note only one instance in the legislative history of the TCPA that could be construed to the contrary. As introduced, the TCPA banned automated telephone calls unless the call was placed by a “public school or other governmental entity,” which could arguably imply that the drafters of the bill otherwise viewed governments as “persons” under the statute whose calls would be under the purview of the TCPA unless expressly exempted.<sup>57</sup> This language was later amended and replaced with an exception for calls made for “any emergency purposes,” and the legislative history explains that the purpose of the change was to “allow the use of automated calls when private individuals as well as schools and other government entities call for emergency purposes.”<sup>58</sup> We do not believe this portion of the legislative history so clearly covers state (as opposed to local) government entities as to overcome in the absence of statutory language to the contrary the established presumption set forth above with respect to state governments as sovereigns.<sup>59</sup>

25. Our precedent also countenances that we take into account whether “the inclusion of a particular activity within the meaning of the statute would not interfere with the processes of

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Broadnet’s original petition for declaratory ruling. The Commission did not address the issue in the *Broadnet Declaratory Ruling*, but stated it expected to do so in a future order. *Broadnet Declaratory Ruling*, 31 FCC Rcd at 7397, para. 7 n.32.

<sup>52</sup> *Broadnet Declaratory Ruling*, 31 FCC Rcd at 7399, para. 11.

<sup>53</sup> *Id.* at 7399, para. 12 (citing *Vt. Agency of Nat. Resources*, 529 U.S. at 781); see also *Return Mail, Inc. v. U.S. Postal Service*, 139 S. Ct. 1853 (2019).

<sup>54</sup> See, e.g., *Vt. Agency of Nat. Resources*, 529 U.S. at 781.

<sup>55</sup> For similar reasons, tribes also are sovereign entities and thus not “person[s]” under the TCPA. “Indian tribes are ‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories.” *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (citing *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)).

<sup>56</sup> See, e.g., *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989); *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979).

<sup>57</sup> See S. Rep. 102-178 at 5 (Oct. 8, 1991).

<sup>58</sup> *Id.* (emphasis added).

<sup>59</sup> See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 575 (1964).

government.”<sup>60</sup> As with the federal government, we conclude that subjecting state governments to the TCPA’s prohibitions when conducting official business would significantly constrain their ability to communicate with their citizens. The record shows ample support for this interpretation, and there is no record evidence to the contrary.<sup>61</sup>

26. We disagree with commenters that suggest our clarification will cause an increase in unwanted calls from state governments.<sup>62</sup> Our clarification is limited to calls made by state government callers in the conduct of official business and does not exempt other types of calls made by state officials, such as those related to campaigns for re-election.<sup>63</sup> Nevertheless, we encourage state governments to make efforts to honor consumer requests to opt out of such exempted calls to minimize any consumer privacy implications.

27. We limit our interpretation of “person” as excluding state governments to the specific statutory provision before us: section 227(b)(1) of the TCPA. As in the *Broadnet Declaratory Ruling*, we make no finding here with respect to the meaning of “person” as used elsewhere in the Communications Act.<sup>64</sup> Indeed, some uses of the word “person” within the original text of the Communications Act of 1934 have been construed to include state governments, and we do not modify those interpretations here.<sup>65</sup>

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<sup>60</sup> See *Graphnet Systems*, Memorandum Opinion and Order, 73 F.C.C.2d 283, 292, para. 26 (1979) (citing 3 J.G. Sutherland, *Statutes and Statutory Construction* § 62.02, at 72 (4<sup>th</sup> ed. 1974)).

<sup>61</sup> See Broadnet Teleservices, LLC Comments at 3 (Broadnet) (“[a]bsent Commission action, citizens . . . would be deprived of important opportunities to engage with their government”); RTI Comments at 6-7 (“[s]tate and local governments have equally valid and urgent reasons to contact their citizens”); SLSA et al. Reply Comments at 10.

<sup>62</sup> See, e.g., Consumer Action Comments at 2; Andrew R. Perrong Reply Comments at 3 (Perrong); Biggerstaff 2016 Comments at 4; NCLC 2016 Reply Comments at 6-7.

<sup>63</sup> See Letter from Joseph B. Scarnati, III, President Pro Tempore, Senate of Pennsylvania, to Ajit Pai, Chairman, Federal Communications Commission, CG Docket Nos. 18-152 and 02-278 (filed Aug. 6, 2018) (Scarnati Letter).

<sup>64</sup> Although there is a canon of statutory construction that a term should be given the same meaning throughout a statute, the canon itself has an important exception where the term refers to different subject matters in each part of the statute at issue. This exception was discussed in some detail in *United States ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870, 881 n.15 (D.C. Cir. 1999). At issue in that case was the meaning of the term “person” as it is used in two different provisions of the False Claims Act, 31 U.S.C. §§ 3729(a) and 3730(b)(1). The court explained that giving the same meaning to “person” in these two provisions would raise “potentially insurmountable difficulties,” given the different contexts in which the term is used, and given that the provisions were adopted at different times by different Congresses, in 1863 and 1986, respectively. Furthermore, while section 3 of the Communications Act defines “person” to “include[] an individual, partnership, association, joint-stock company, trust, or corporation,” 47 U.S.C. § 153(39), it is silent as to whether federal and state governments also are subsumed within that definition. And even if section 3’s definition were somehow construed to generally include federal and state governments, that construction would be subject to the first sentence of section 3, which states that the ensuing definitions govern “unless the context otherwise requires[.]” We thus conclude that we must look to the context when considering whether the term “person” includes, or does not include, federal and state governments in any given provision of the Communications Act.

<sup>65</sup> The radio licensing requirements of Section 301 of the Act (“No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.”) and rules enacted under the administration requirements of section 303 of the Act (*inter alia*, allowing the Commission to classify radio stations, assign bands and frequencies, and regulate to prevent interference among stations) clearly apply to state and local governments. Title III gave the Commission exclusive authority to regulate all use of spectrum, with only one exception: “[r]adio stations belonging to and operated by the United States.” 47 U.S.C. § 305(a). This principle has been firmly established since at least the Radio Act of 1927. See generally *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-14 (1943). Thus, Section 301 provides “clearly exclusive” federal control over frequency allocation. *Head v. New Mexico Bd. of Examiners*, 374 U.S. 424, 430 n.6 (1963); *Allan B. Dumont Labs. v. Carroll*,

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28. For the same reasons we found federal contractors are “persons” under section 227(b)(1) of the TCPA, we find that contractors acting on behalf of state governments are likewise “persons.” Such contractors fall within the express language of the Communications Act’s definition of “person” and we find no compelling argument to the contrary. To the extent that parties raised objections to a finding that federal contractors are “persons” that are also relevant to state contractors, we reject those arguments for the same reasons set forth above.<sup>66</sup> As with federal contractors, we leave it to the courts to apply the body of existing immunity law to state contractors and to make determinations of derivative immunity on a case-by-case basis.<sup>67</sup>

### C. Local Governments and Local Government Contractors

29. We clarify that local government entities, including counties, cities, and towns, are “persons” within the meaning of section 227(b)(1) and are, therefore, subject to the TCPA. As an initial matter, we note that, unlike the federal and state governments, local governments are not sovereign.<sup>68</sup> The scope of the antitrust laws, for example, reflects this distinction, based on “the federalism principle that we are a Nation of *States*, a principle that makes no accommodation for sovereign subdivisions of States.”<sup>69</sup> Hence, in contrast to states, “[m]unicipalities . . . are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign.”<sup>70</sup> Local governments, therefore, are not subject to an interpretive presumption that they are not a “person.”<sup>71</sup> Absent a clear indication that Congress intended the TCPA to exclude local government entities, and given the TCPA’s goal of protecting consumers from unwanted robocalls, we believe that the best interpretation of the TCPA is one that finds that local government entities are “persons” subject to TCPA restrictions. Specifically, we find that the definition of “person” encompasses local governments because they are not sovereign entities and have generally been treated as persons subject to suit. In addition, we find that, even if the definition of “person” is ambiguous as applied to local governments, the underlying policy goals and legislative history of the TCPA support a finding that TCPA restrictions apply to local government entities.

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184 F.2d 153, 155 (3d Cir. 1950). Similarly, section 302 provides the Commission with broad authority to regulate the interference potential of devices, again subject to an exclusion for “systems for use by the Government of the United States”—but not for those used by state and local governments. 47 U.S.C. § 302a(c).

<sup>66</sup> See, e.g., Broadnet Petition at 8-9.

<sup>67</sup> As noted above, many calls from governmental contractors may qualify as emergency calls or calls made with the “prior express consent” of the called party if the called party has provided a telephone number to the government or its contractor for the purpose of being contacted at that number and has not given instructions to the contrary. Such calls are permissible under the TCPA and our implementing rules.

<sup>68</sup> The United States Constitution establishes a system of dual sovereignty between the states and the federal government, such that sovereignty rests concurrently with both the federal government and the states. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (citing *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). Municipalities are “created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . in [its] absolute discretion.” *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991) (quoting *Sailors v. Board of Ed. of Kent Cty.*, 387 U.S. 105, 108 (1967)).

<sup>69</sup> *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 50 (1982) (italics in original).

<sup>70</sup> *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985). Although the courts have construed both to be “persons” under the antitrust laws, they have nevertheless accorded antitrust immunity only to states, not municipalities, except in certain circumstances.

<sup>71</sup> *Reynolds v. Sims*, 377 U.S. 533, 575 (“Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities.”); see also *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989) (noting that this presumption applies to “the sovereign”). Cf. *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 659 (1978) (finding that municipalities and other local government units are “persons” for purposes of the Civil Rights Act of 1871).

30. First, we turn to the Communications Act’s definition of “person” to determine whether a local government is a “person.” “Person” expressly includes an “individual, partnership, association, joint-stock company, trust, or corporation.”<sup>72</sup> We conclude that local governments, as non-sovereign entities, fall within this definition. The law has long recognized that a municipal corporation is a local political entity, such as a city or town, formed by charter from the state.<sup>73</sup> Municipal corporations, like private corporations, have been “treated alike in terms of their legal status as *persons* capable of suing and being sued.”<sup>74</sup> “The archetypal American corporation of the eighteenth century [was] the municipality,”<sup>75</sup> and local governments generally are incorporated under state law and operate pursuant to a charter outlining their incorporation.<sup>76</sup> Local government entities have been treated as corporations unless the state provides otherwise.<sup>77</sup> We further note that all states have adopted some form of municipal corporate structure and that the federal government often treats incorporated and non-incorporated areas similarly.<sup>78</sup>

31. Furthermore, the TCPA’s definition of “person” does not explicitly exclude local governments, nor is there any indication in the text or legislative history of the TCPA that evinces Congress’ intent to exclude them from the TCPA’s restrictions. Quite the contrary: The legislative history suggests that Congress considered a special exemption for a “public school or other governmental entity.” In any event, unlike with sovereign entities, we find that the lack of any clear indication that Congress intended to exclude local governments from the TCPA is evidence that Congress intended such government entities to fall under its purview. Given the common understanding of local government entities as corporations and not sovereign entities, Congress would have known to explicitly exclude local governments from the definition of “person” had that been its intent.<sup>79</sup>

<sup>72</sup> See 47 U.S.C. § 153(39).

<sup>73</sup> See, e.g., Black’s Law Dictionary (11th ed. 2019) (defining “municipal corporation” as “[a] city, town, or other local political entity formed by charter from the state and having the autonomous authority to administer the state’s local affairs; esp., a public corporation created for political purposes and endowed with political powers to be exercised for the public good in the administration of local civil government”). According to the U.S. Census Bureau, there were 19,519 municipalities in 2012. See U.S. Census Bureau, Government Organization Summary Report: 2012 (rel. Sept. 26, 2013), <https://www.census.gov/content/dam/Census/library/publications/2013/econ/g12-cg-org.pdf> (last visited Nov. 12, 2020).

<sup>74</sup> See *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 126 (2003) (noting that municipal corporations and private ones are simply two species of “body politic and corporate,” treated alike in terms of their legal status) (emphasis added); see also *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 663 (1978) (finding that municipalities and other local government units are “persons” for purposes of the Civil Rights Act of 1871).

<sup>75</sup> *Cook County*, 538 U.S. at 127 (citing M. Horwitz, *The Transformation of American Law, 1780–1860*, p. 112 (1977)).

<sup>76</sup> *Id.*

<sup>77</sup> See, e.g., *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819) (defining governments of towns, cities, and other local governments as corporations); *Laramie County Commissioners v. Albany County Commissioners*, 92 U.S. 307, 308 (1875) (concluding broadly that counties, cities, and towns are municipal corporations).

<sup>78</sup> See, e.g., Census Bureau definition of a “place” either as “legally incorporated under the laws of its respective State, or a statistical equivalent that the Census Bureau treats as a census designated place (CDP).” See U.S. Census Bureau, <https://www2.census.gov/geo/pdfs/reference/GARM/Ch9GARM.pdf> (last visited Nov. 12, 2020).

<sup>79</sup> Nothing in the text of either the TCPA or its legislative history demonstrates that “corporations” must be limited to entities understood as private corporations—and as a policy matter, whatever differences might exist between “municipal corporations” and other local government entities does not appear material to whether the TCPA should apply. Our conclusion reflects the “natural recognition of an understanding . . . that municipal corporations and private ones were simply two species of ‘body politic and corporate,’ treated alike in terms of their legal status as

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32. We further find that, to the extent that the definition of “person” is ambiguous or the case law on the matter leaves any doubt that all local governments are corporations or otherwise persons under the TCPA, the underlying goals and legislative history of the TCPA separately show that Congress intended local governments to be subject to the law’s restrictions. Congress’ intent to prohibit nuisance calls to consumers is instructive in our interpretation of any ambiguity within the statute. Because of Congress’ clear intent to protect consumers, we interpret any ambiguity to the benefit of the consumer.<sup>80</sup> While there is no ambiguity as to the sovereign status of federal and state government entities, we recognize that there could be some uncertainty about the status of local governments. To the extent there is any doubt of a local government’s status as a corporation or quasi-corporation, we interpret the Act’s definition of “person” as expansive and find that it encompasses a broader range of entities than just corporations including, for example, “individuals,” “associations,” and “trusts.”<sup>81</sup> We believe this upholds Congress’ intent to encompass a broad range of entities within the Act’s definition of “person,” absent some hoary statutory interpretation principle, such as sovereign immunity, that would support a different conclusion.

33. The legislative history of the TCPA further supports this finding. As noted above, the TCPA as originally introduced banned automated telephone calls unless the call was placed by a “public school or other governmental entity.”<sup>82</sup> Congress chose not to adopt this provision, opting instead for an exemption only for “emergency purposes,” to “allow the use of automated calls when private individuals as well as schools and other government entities call for emergency purposes.”<sup>83</sup> Congress’ decision to strike a blanket exception for public schools, and its justification therefor, makes clear it considered that local government entities (of which public schools are a part) are persons. By contrast, the striking of “other governmental entity” in the statutory language does not disturb our conclusion on federal and state governments because they, in contrast to local governments, are sovereigns and thus subject to the longstanding interpretive presumption they are not persons, something we expect Congress understood as it considered the TCPA. In the absence of such a presumption, we conclude that local government entities fall within the Communication Act’s definition of a “person.” We therefore disagree with commenters who suggest that local governments are not subject to the TCPA.<sup>84</sup>

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 persons capable of suing and being sued.” Thus, “it has not been regarded as anomalous to require compliance by municipalities with the standards of other federal laws which impose such sanctions upon ‘persons.’” *Cook County*, 538 U.S. at 126. We believe this conclusion is bolstered by precedent that does not characterize local government entities only as “municipal corporations” but makes reference to them acting more broadly as “corporations” or “quasi corporations.” *See, e.g., Levy Court v. Coroner of Washington Cty.*, 69 U.S. 501, 507-08 (1864) (describing the local government entity at issue as, “for all financial and ministerial purposes the County of Washington,” and explaining that even “[i]f not a corporation in the full sense of the term, it is a *quasi* corporation”); *Town of East Hartford v. Hartford Bridge Co.*, 51 U.S. 511, 536 (1850) (discussing characterizations of towns, cities, and counties as corporations for public government); *see also, e.g.,* Black’s Law Dictionary (11th ed. 2019) (defining a “quasi-corporation” as “[a]n entity that exercises some of the functions of a corporation but that has not been granted corporate status by statute; esp., a public corporation with limited authority and powers (such as a county or school district),” which is “[a]lso sometimes termed [a] *quasi-municipal corporation*”).

<sup>80</sup> Indeed, some commenters argue that local governments would make some unwanted non-emergency calls if they were not subject to the TCPA. Perrong Reply Comments at 3; NCLC 2016 Reply Comments at 4-6.

<sup>81</sup> *See* 47 U.S.C. § 153(39).

<sup>82</sup> *See* S. Rep. 102-178, at 5 (Oct. 8, 1991).

<sup>83</sup> *Id.*

<sup>84</sup> *See* Broadnet Comments at 3, 7-9; RTI Comments at 6-7; SLSA et al. Comments at 10 (“There is no evidence in the TCPA’s text or legislative history that Congress intended to restrict the calling activities of any level of government.”).

34. Our conclusion is also consistent with the Commission’s own prior interpretation of the TCPA. In the *Blackboard Declaratory Ruling*, one month after the *Broadnet Declaratory Ruling*, the Commission determined that school callers that make autodialed calls to parents about matters “closely related to the school’s mission,” e.g., school absences, can qualify for the TCPA’s “emergency purposes” exception, but must otherwise obtain prior express consent to make non-emergency autodialed or prerecorded or artificial voice calls to wireless telephone numbers.<sup>85</sup> Had the Commission understood that local governments were not subject to the TCPA, the ruling would have been unnecessary as to calls made by public schools—the Commission would have simply said the TCPA does not apply to these callers in the first place and thus there is no need to decide if the calls fit into the emergency call exception.

35. We disagree with Broadnet and other commenters that argue that various cases support a contrary conclusion “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.”<sup>86</sup> Rather, we believe those cases are better understood as turning on unique aspects of those statutory schemes that are not present here.<sup>87</sup> For example, while APPA cites cases that purportedly support the conclusion that municipalities are not considered “corporations,” the two statutes at issue in these cited cases, the Federal Power Act and the Natural Gas Act, expressly exclude municipalities from their definition of “corporation,” which is not the case with the Communications Act.<sup>88</sup> As a result, we believe these cases bear on our interpretation of the Communications Act by demonstrating a recognition by Congress of a need to exclude municipalities from the prevailing view that they would otherwise fall within the scope of federal regulatory schemes. They also illustrate that a range of outcomes is possible under differing statutes, leaving us free to apply the relevant interpretative considerations, including the statutory text, context, legislative history, and the purposes of the TCPA and Communications Act, in determining whether local government entities are covered by the definition of “person” in the Communications Act.

36. We also reject APPA’s argument that, because other sections of the Communications Act may distinguish “person” from entities like “municipal organizations,” we are compelled to reach a conclusion that local governments are not “persons” within the meaning of the Act.<sup>89</sup> We must look to

<sup>85</sup> *Blackboard Declaratory Ruling*, 31 FCC Rcd at 9062-65, paras. 20-25.

<sup>86</sup> Broadnet Petition at 5-6 (citing *Walden v. City of Providence*, 596 F.3d 38, 60 n.29 (1st Cir. 2010); *Abbot v. Village of Winthrop Harbor*, 205 F.3d 976, 980 (7th Cir. 2000); *United States v. Rancho Palos Verdes*, 841 F.2d 329, 331 (9th Cir. 1988)).

<sup>87</sup> For example, those cases involved the federal Wiretap Act and the Endangered Species Act (ESA), which both have definitions of “person” that expressly include certain officers or employees of the federal government, state government, and political subdivisions of state governments—and not to those governmental entities themselves—that supports an inference that only the employees, officers, etc. are covered. See *Walden*, 596 F.3d at 59, 60 n.29 (explaining that similar language in the Rhode Island wiretap statute “makes clear that only ‘officer[s], agent[s], or employee[s]’ of municipal governments are ‘persons’ who may be sued, not municipalities themselves,” and stating that although the language of the federal Wiretap Act “varies slightly from that of” the Rhode Island act, “we conclude that both clearly exclude municipalities from the definition of persons”).

<sup>88</sup> See APPA Sept. 28, 2015 Comments at 6-7 (citing *Bonneville Power Administration v. FERC*, 442 F.3d 908, 922 (9th Cir. 2005); *Transmission Agency of Northern California v. FERC*, 495 F.3d 663 (D.C. Cir. 2007)). These decisions involved the Federal Power Act (FPA) and the Natural Gas Act (NGA), but as APPA itself observes “there are other provisions in the FPA and NGA that lend additional support to the conclusion that government entities are exempt from FERC rate regulation under these Acts. The definitions of ‘corporation’ in both Acts, for example, expressly excluded municipalities.” *Id.*

<sup>89</sup> See APPA Sept. 28, 2015 Comments at 7 (noting that section 208(a) of the Act “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,” and arguing that “by distinguishing between ‘person’ and entities like ‘municipal organizations and State commissions,’ section 208 reinforces that public power utilities are not

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the context when considering whether the term “person” includes, or does not include, federal, state, and local governments in any given provision of the Communications Act. In this context, we note that the TCPA was enacted after the development of modern case law regarding the scope of “person,” including cases that addressed whether that term includes municipalities.<sup>90</sup> In contrast, the relevant language of section 208(a) cited by APPA in support of its argument was in the original Communications Act enacted in 1934 and was drawn from the still-older Interstate Commerce Act.<sup>91</sup> In addition, we note that the definitions APPA cites for support of its interpretation of “person,” apply by their own terms solely to another section of the Act.<sup>92</sup> Thus, we conclude that these provisions of the Communications Act are distinguishable and not controlling of the issue before us here (i.e., mainly whether local governments are encompassed within the Communications Act’s definition of “person” for purposes of TCPA compliance).

37. Consistent with this clarification, we also clarify that a local government contractor is a “person,” as that term is used in section 227(b)(1) of the TCPA. Because local governments and their contractors are “persons,” they are subject to section 227(b)(1) of the TCPA and must abide by the requirements contained therein, including obtaining prior express consent when making autodialed or artificial or prerecorded voice calls to certain types of telephone numbers such as wireless numbers.<sup>93</sup>

38. As with other “persons” subject to the TCPA, local governments and their contractors may, of course, avail themselves of the TCPA’s exemptions to the prior express consent requirement, such as calls made for “emergency purposes.”<sup>94</sup> Nothing in our decision impedes the ability of local governments or contractors to make emergency calls to wireless telephone numbers when such calls are necessary to protect the health and safety of citizens.<sup>95</sup> The Commission has recently confirmed, for example, that government officials and public health care authorities, as well as a person under the express direction of such organizations and acting on its behalf, can make automated calls directly related to the imminent health or safety risks arising out of the COVID-19 pandemic without the prior express consent of the called party.<sup>96</sup>

#### IV. PROCEDURAL MATTERS

39. *Materials in Accessible Formats.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice).

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‘persons’ within the meaning of the Act”); *see also id.* at 10 (suggesting that the exclusion for municipal utilities from the pole attachment authority of section 224 was intended to “remove all doubt” that such entities are excluded from the Act”).

<sup>90</sup> *See, e.g., Will v. Mich. Dep’t of State Police*, 491 U.S. 58 (1989).

<sup>91</sup> *See* Pub. L. 73-416 § 208 (1934).

<sup>92</sup> *See* 47 U.S.C. § 224(a) (“As used in this section: . . .” and specifying definitions to be used in that section.).

<sup>93</sup> *Id.* § 227(b)(1).

<sup>94</sup> As previously noted, autodialed and prerecorded voice calls made for an “emergency purpose” do not require the prior express consent of the called party. Thus, nothing herein precludes or hinders local governments from calling citizens regarding matters of health and safety. *See* 47 U.S.C. § 227(b)(1); 47 CFR § 64.1200(a)(1); *see also* 47 CFR § 64.1200(f)(4) (defining “emergency purposes” as “calls made necessary in any situation affecting the health and safety of consumers”).

<sup>95</sup> 47 U.S.C. § 227(b)(1).

<sup>96</sup> *See COVID-19 Declaratory Ruling* at para. 2 (confirming that “the COVID-19 pandemic constitutes an ‘emergency’ under the [TCPA] and that consequently . . . state and local health officials, and other government officials may lawfully communicate information about the novel coronavirus as well as mitigation measures without violating federal law”).

**V. ORDERING CLAUSES**

40. **IT IS ORDERED**, pursuant to the authority contained in Sections 1-4, 227, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, 405, that this *Order on Reconsideration* **IS ADOPTED**.

41. **IT IS FURTHER ORDERED** that this *Order on Reconsideration* shall be effective upon release.

42. **IT IS FURTHER ORDERED** that the *Broadnet Declaratory Ruling* adopted in CG Docket No. 02-78 on June 8, 2016, **IS REVERSED** to the extent indicated herein.

43. **IT IS FURTHER ORDERED** that the Petition for Reconsideration filed by the National Consumer Law Center in CG Docket No. 02-278 on July 26, 2016, **IS GRANTED** to the extent indicated herein and the Request for Stay **IS DISMISSED** as moot.

44. **IT IS FURTHER ORDERED** that the Petition for Reconsideration filed by the Professional Services Counsel in CG Docket No. 02-78 on August 4, 2016, **IS DENIED** to the extent indicated herein.

45. **IT IS FURTHER ORDERED** that the Petition for Declaratory Ruling filed in CG Docket No. 02-278 by Broadnet Teleservices LLC on September 16, 2015, **IS GRANTED IN PART and DENIED IN PART** to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary



## APPENDIX A

## List of Commenters

The following parties have filed comments in response to the Public Notices issued in this matter (CG Docket Nos. 18-152, 02-278):

<u>Commenter</u>	<u>Abbreviation</u>
<b>33 SMS Industry Participants</b>	<b>SMS Industry Participants</b>
<b>A Place for Mom, Inc.</b>	<b>Place for Mom</b>
A to Z Communications Coalition and Insights Association	A to Z
Aaron D. Radbil	Radbil
<b>Aaron M. Swift, Esq.</b>	<b>Swift</b>
<b>ACA International</b>	<b>ACA</b>
<b>ACT   The App Association</b>	<b>ACT</b>
ADT LLC d/b/a ADT Security Services*	ADT
<b>Alarm Industry Communications Committee</b>	<b>AICC</b>
<b>Alexander H. Burke</b>	<b>Burke</b>
<b>Allstate Insurance Company</b>	<b>Allstate</b>
<b>Amanda Allen</b>	<b>Allen</b>
American Association of Healthcare Administrative Management	AAHAM
<b>American Bankers Association</b>	<b>ABA</b>
<b>American Council of Life Insurers</b>	<b>ACLI</b>
<b>American Dental Association</b>	<b>ADA</b>
American Financial Services Association	AFSA
<b>American Gas Association, American Public Power Association, Edison Electric Institute and the National Rural Electric Cooperative Association</b>	<b>Utility Associations</b>
Americollect Inc.	Americollect
<b>Andrew R. Perrong</b>	<b>Perrong</b>
Anthem, Inc.	Anthem
<b>Ari Marcus</b>	<b>Marcus</b>
Bellco Credit Union	Bellco
Blackboard Inc.	Blackboard
<b>Bill Clanton</b>	<b>Clanton</b>
<b>Brett Freeman</b>	<b>Freeman</b>
Broadnet Teleservices, LLC*	Broadnet
<b>Bryan Anthony Reo</b>	<b>Reo</b>
Bureau of Consumer Financial Protection	CFPB
Charles R. Messer*	Messer
<b>Chris R. Miltenberger</b>	<b>Miltenberger</b>
Christine Bannan	Bannan
Cisco Systems, Inc.	Cisco
<b>Clay Morrow</b>	<b>Morrow</b>
Coalition of Higher Education Assistance Organizations	COHEAO
<b>College Foundation, Inc.</b>	<b>CFI</b>
Consumer Action	Consumer Action
Consumer Bankers Association	CBA
Consumer Mortgage Coalition, Housing Policy Council	CMC and HPC
Consumers Union*	CU
<b>Craig B. Friedberg</b>	<b>Friedberg</b>
<b>Craig Chatterton</b>	<b>Chatterton</b>

Craig Cunningham, Craig Moskowitz*	Cunningham
Credit Union National Association*	CUNA
CTIA*	CTIA
<b>Daniel A. Edelman</b>	<b>Edelman</b>
DialAmerica Marketing, Inc.	DialAmerica
<b>Diana Mey</b>	<b>Mey</b>
<b>Discover Financial Services</b>	<b>Discover</b>
Edison Electric Institute, National Rural Electric Cooperative Association	EEI and NRECA
<b>Electronic Privacy Information Center</b>	<b>EPIC</b>
Electronic Transactions Association	ETA
<b>Gabriel S. Sanchez</b>	<b>Sanchez</b>
<b>Hassan A. Zavareei</b>	<b>Zavareei</b>
Heartland Credit Union Association	HCUA
INCOMPAS	INCOMPAS
Independent Community Bankers of America	ICBA
International Pharmaceutical & Medical Device Privacy Consortium	IPMPC
<b>Jarred D Johnson</b>	<b>Johnson</b>
Jason A. Ibey	Ibey
<b>Jay Connor</b>	<b>Connor</b>
Jeffrey A Hansen	Hansen
<b>Jeremy Glapion</b>	<b>Glapion</b>
<b>Jimmy Sutton</b>	<b>Sutton</b>
Joe Shields*	Shields
John A. Shaw*	Shaw
John Couvillon	Couvillon
John Herrick	Herrick
John Mabie	Mabie
Justin T. Holcombe	Holcombe
<b>Ladavone Roncal</b>	<b>Roncal</b>
Leah Dempsey	Dempsey
<b>Linda Medelus</b>	<b>Medelus</b>
<b>Luis Ugaz</b>	<b>Ugaz</b>
<b>Mark C. Hoffman</b>	<b>Hoffman</b>
Marketing Systems Group	Marketing Systems
<b>Matis Abarbanel, Esq.</b>	<b>Abarbanel</b>
<b>MG LLC d/b/a TRANZACT</b>	<b>TRANZACT</b>
<b>Michael Worsham</b>	<b>Worsham</b>
Mississippi Attorney General's Office	Mississippi
<b>Mortgage Bankers Association</b>	<b>MBA</b>
National Association of Chain Drug Stores	NACDS
National Association of Federally-Insured Credit Unions	NAFCU
<b>National Association of State Utility Consumer Advocates</b>	<b>NASUCA</b>
National Automobile Dealers Association	NADA
National Consumer Law Center et al.*	NCLC
National Council of Higher Education Resources*	NCHER
National Mortgage Servicing Association	NMSA
<b>National Student Loan Program, Inc.</b>	<b>NSLP</b>
NCTA - The Internet & Television Association	NCTA
News Media Alliance	NMA
Noble Systems Corporation*	Noble Systems

Ohio Credit Union League	Ohio Credit
PRA Group, Inc.	PRA Group
Professional Association for Customer Engagement	PACE
Professional Services Council	PSC
Quicken Loans	Quicken
Randolph-Brooks Federal Credit Union	RBFCU
Research Triangle Institute d/b/a RTI International	RTI
Restaurant Law Center	RLC
Retail Industry Leaders Association	RILA
RingCentral, Inc.	RingCentral
<b>Ronald Wilcox</b>	<b>Wilcox</b>
Rushmore Loan Management Services LLC	Rushmore
<b>SELCO Community Credit Union</b>	<b>SELCO</b>
Selene Finance LP	Selene
Sen. Edward J. Markey et al.*	Sen. Markey
<b>Sen. John Thune et al.</b>	<b>Sen. Thune</b>
Sherry Tunender	Tunender
Sirius XM Radio Inc.*	Sirius XM
<b>Stewart N. Abramson</b>	<b>Abramson</b>
<b>SUE THE COLLECTOR</b>	<b>SUE</b>
<b>Suncoast Credit Union</b>	<b>Suncoast</b>
<b>Syed Ali Saeed</b>	<b>Saeed</b>
Syniverse Technologies	Syniverse
Tatango, Inc.	Tatango
TCN Inc.	TCN
TechFreedom*	TechFreedom
The Insurance Coalition	Insurance
The National Opinion Research Center	NORC
The Retail Energy Supply Association	RESA
The Student Loan Servicing Alliance, Navient Corp., Nelnet Servicing, LLC, The Pennsylvania Higher Education Assistance Agency*	SLSA et al.
<b>Todd C. Bank</b>	<b>Bank</b>
U.S. Chamber Institute for Legal Reform, U.S. Chamber Technology Engagement Center*	U.S. Chamber
UnitedHealth Group	UHG
<b>Vibes Media, LLC</b>	<b>Vibes</b>
<b>Vincent Lucas</b>	<b>Lucas</b>
West Interactive Services Corporation, West Telecom Services, LLC	West
<b>Wolters Kluwer</b>	<b>Wolters Kluwer</b>
<b>Yitzchak Zelman, Esq.</b>	<b>Zelman</b>

\* filing both comments and reply comment (bold - reply comments only).

In addition to the commenters listed above, we received over 310,000 individual consumer comments. Those comments are available for review on ECFS.

**APPENDIX B****List of Commenters—Broadnet**

The following parties have filed comments in response to the Broadnet Public Notices issued in this matter (CG Docket No. 02-278):

<u>Commenter</u>	<u>Abbreviation</u>
Robert Biggerstaff	Biggerstaff
Broadnet Teleservices LLC	Broadnet
Burke Law Offices, LLC	Burke
Consumers Union	CU
Craig Cunningham	Cunningham
Eliza Corporation	Eliza Corp.
Greenwald Davidson Radbil PLLC	GDR
Gerald Roylance	Roylance
Indiana and Missouri Attorneys General	Indiana and Missouri AG
National Consumer Law Center	NCLC
National Opinion Research Center	NORC
Professional Services Council	PSC
RTI International	RTI
Randall A. Snyder	Snyder

**STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL,  
APPROVING IN PART AND DISSENTING IN PART**

Re: *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278; Broadnet Teleservices LLC Petition for Declaratory Ruling; National Consumer Law Center Petition for Reconsideration and Request for Stay Pending Reconsideration of Broadnet Teleservices LLC Petition for Declaratory Ruling; Professional Services Council Petition for Reconsideration of Broadnet Teleservices LLC Petition for Declaratory Ruling*

We're all tired of robocalls. But these annoying calls are more than just a nuisance. They are degrading communications and destroying trust in our networks.

We have tools to address them, including the Telephone Consumer Protection Act. I think it is incumbent on the Federal Communications Commission to use them—every way we can—to reduce the number of these irritating calls.

In this decision we interpret the Telephone Consumer Protection Act and determine how it applies to calls made by federal, state, and local governments—and their contractors. This is a matter that has a thorny history because it's an issue that has been taken up by both Congress and the courts. In light of these prior efforts, today we determine that the Telephone Consumer Protection Act does not apply to calls from federal authorities, but that federal government contractors, state government contractors, local governments, and local government contractors are all subject to its prohibitions on robocalls. So far, so good. But we also determine that state authorities are beyond the reach of this law, meaning robocall restrictions do not apply to the calls they make. It's this last piece that I think is a mistake. Because where the law is at all ambiguous, and even if it may be a close call, I think this agency should side with consumers and their cry to cut down the number of robocalls they receive. For this reason, I approve in part and dissent in part.

**STATEMENT OF  
COMMISSIONER GEOFFREY STARKS  
APPROVING IN PART AND DISSENTING IN PART**

Re: *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278; Broadnet Teleservices LLC Petition for Declaratory Ruling; National Consumer Law Center Petition for Reconsideration and Request for Stay Pending Reconsideration of Broadnet Teleservices LLC Petition for Declaratory Ruling; Professional Services Council Petition for Reconsideration of Broadnet Teleservices LLC Petition for Declaratory Ruling*

Earlier this year, the Federal Trade Commission reported that robocalls had significantly declined; specifically, robocall complaints were down 68% in April 2020 compared to April 2019 and down 60% in May 2020 compared to May 2019. However, more recent information suggests they are once again on the rise—Americans reportedly received over 4.25 billion robocalls this October, an increase over the previous month of approximately 12%.<sup>1</sup> It is no surprise, then, that robocalls remain the primary source of consumer complaints received at the FCC.

This Order finds that state governments do not fall within the meaning of “person” under the Telephone Consumers Protection Act (TCPA) and thus are not subject to its restrictions against placing unauthorized calls to consumers. Notably, nothing in the language of the TCPA or its legislative history compels this conclusion. In fact, the Order acknowledges as much, relying instead on a presumption that the term “person” as used in section 227(b)(1) does not include state governments because there is no affirmative showing of statutory intent to the contrary. In the absence of clear statutory language or intent, however, the Commission has discretion to interpret the Communications Act’s provisions in a manner consistent with its public policy goals. With regard to state authorities, we should have used that discretion here given the TCPA’s primary goal of protecting consumers from unwanted robocalls, and for this reason, I dissent. In all other respects, I approve. My thanks to the staff for their work on this item.

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<sup>1</sup> PR Newswire, *Over 4.25 Billion Robocalls in October Mark Nearly 12% Monthly Increase, Says YouMail Robocall Index* (Nov. 10, 2020), at <https://www.prnewswire.com/news-releases/over-4-25-billion-robocalls-in-october-mark-nearly-12-monthly-increase-says-youmail-robocall-index-301169783.html>.