

June 10, 2022

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: Notice of *Ex Parte* Presentation, CG Docket 02-278

Dear Ms. Dortch:

This *ex parte* Notice relates to one meeting and two emails. The meeting was held on June 9, 2022, between Priscilla Delgado Argeris and David Strickland of Chairwoman Rosenworcel's staff, and Margot Saunders of the National Consumer Law Center (NCLC) and Chris Frascella of the Electronic Privacy Information Center (EPIC). The two emails are described at the end of this Notice.

During the meeting with Chairwoman Rosenworcel's staff, we discussed the issues initiated by a letter from the Secretary of Health and Human Services (HHS) seeking clarification of the requirements for consent for automated calls and texts made by various governmental entities and their private contractors to encourage renewals and re-enrollment in Medicaid, the Children's Health Insurance Programs (CHIP), the Basic Health Programs (BHP), and the Health Insurance Marketplace programs (Marketplace).¹ The HHS letter expresses the concern that the potential for TCPA liability will prevent these important calls from being made.

1. The necessity for the FCC to deal with scam calls relating to health insurance. First, we described the serious problems associated with the approximately 96 million monthly scam calls relating to health insurance made every month to U.S. telephone subscribers.² We emphasized that **unless the scam calls**

¹ Letter from Xavier Becerra, Secretary of Health and Human Services, to Jessica Rosenworcel, Chairwoman of the Federal Commc'ns Comm'n (Apr. 28, 2022), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10429695829926> [hereinafter HHS Letter].

The docket was initiated by Public Notice, Federal Commc'ns Comm'n, Consumer & Governmental Affairs Bureau Seeks Comment on Request Relating to Enrollment In Medicaid And Other Governmental Health Coverage Programs, CG Docket No. 02-278 (Rel. May 3, 2022), *available at* <https://docs.fcc.gov/public/attachments/DA-22-487A1.pdf> (inviting comments on the request filed by the U.S. Department of Health and Human Services).

² This issue was also discussed in our original and reply comments filed on behalf of multiple national and state consumer, privacy and health advocates. *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, **Comments** of National Consumer Law Center et al. Relating to the Request for Clarification Regarding TCPA Application to Robocalls and Automated Text Messages to Encourage Continuation in Governmental Health Coverage Programs, CG Docket No. 02-278 (filed May 17, 2022), (hereinafter Comments of NCLC) *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10517963105996>; *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, **Reply Comments** of National Consumer Law Center et al. Relating to the Request for Clarification Regarding TCPA Application to Robocalls and Automated Text Messages to Encourage

are significantly reduced, it is highly likely that many of the intended recipients of the HHS calls will be victimized by these scam calls. Past experience suggests fraudsters will capitalize on a timely crisis (e.g. Medicaid enrollment, as with COVID-19) in an attempt to exploit vulnerable Americans.³ Further, these scam calls threaten to drown out the important calls facilitated by the HHS letter, undermining the benefits of these efforts.

To illustrate the way that scam calls will interfere with the real calls, we discussed recordings of two calls relating to Medicaid (supplied to us by YouMail). One appears to be legitimate, and the other appears to be a scam. [The first call](#)⁴ is not a scam call, because it appears to have been legitimately from the Louisiana Medicaid program. We believe that the [second call](#)⁵—which sounds very similar to the first call—is a scam call as it directs the recipient to a dangerous identity-theft virus website. The goal of this type of scam call is identity theft; other scam calls simply seek payments for non-existent services (often in exorbitant amounts) for worthless health insurance. This issue is consistent with the problems and recommendations we made in our recent report [Scam Robocalls: Telecom Providers Profit](#).⁶

We explained our understanding that the Social Security Administration, working with service providers to the telecommunications industry, has been successful at dramatically reducing the number of scam calls associated with Social Security. We urged the FCC as it develops a methodology to facilitate TCPA compliance for the calls at issue in this proceeding, to work with HHS in a similar fashion and reduce the number of health insurance scam calls.

2. Most of the HHS calls will not trigger TCPA compliance issues. We walked through an analysis of the calls and texts about which HHS seeks clarity.

The TCPA applies to most of the entities listed in the HHS letter as callers (all contractors and local governments). They are therefore subject to the TCPA's requirement that a caller have the called party's prior express consent before making an autodialed or prerecorded call or text to a cell phone number. However, in other contexts the Commission has ruled that the called party's provision of their telephone number to the caller or an intermediary in relation to the subject of the call constitutes prior express consent for automated texts and prerecorded calls to that telephone number. While we reserve the right to object to that conclusion, we recognize that it would be inconsistent for the Commission not to apply it to the calls described in HHS's letter.⁷ We also note that callers can easily avoid making calls to telephone numbers that have been reassigned to someone other than the enrollee by using the fully operational Reassigned Number Database created by the Commission.

Continuation in Governmental Health Coverage Programs, CG Docket No. 02-278 (filed May 24, 2022), (hereinafter Reply Comments) available at <https://www.fcc.gov/ecfs/search/search-filings/filing/105241963120304>

³ See, e.g. Federal Comm'n's Comm'n, *FCC, FTC Demand Gateway Providers Cut Off Robocallers Perpetrating Coronavirus-Related Scams from United States Telephone Network* (Apr. 3, 2020), available at <https://www.fcc.gov/document/fcc-ftc-demand-gateway-providers-cut-covid-19-robocall-scammers> ,

⁴<https://media.youmail.com/mcs/glb/audio/s6diZGlyX2M1c2Rpcjp0b21jYXQxODY3OjE2NTE0MTk5NDUwMjJE6orZ9S.gen.mp3>

⁵<https://media.youmail.com/mcs/glb/audio/s6diZGlyX2JwbWRpcjp0b21jYXQ0NTMyOjE2Mzc2Mjk3MDkyMDkxggg4ul.gen.mp3>

⁶ <https://www.nclc.org/issues/energy-utilities-a-communications/scam-robocalls-will-continue-until-telecom-providers-no-longer-profit-from-them.html>

⁷ See Comments of NCLC, *supra* note 2.

The following chart was used to illustrate the analysis:

	Types of Communication	For calls made by ...	What is needed to make the call comply with TCPA	Necessary steps to make call legal
1	<u>Live calls</u> to cell phones & landlines to anyone	Anyone	No consent required	none
2	Prerecorded calls to <u>landlines</u> to anyone	Anyone	No consent required	none
3	Prerecorded calls and texts to cell phones to anyone	Federal or state governmental body or its employees	Nothing – federal and state government employees are not governed by the TCPA	none
4	Prerecorded calls and texts to cell phones to enrollee <u>at the number provided by enrollee</u>	Local government, or contractors for federal, state, or local government	Prior express consent required	Legal if enrollee <u>provided their number to provider</u> ⁸ in relation to health coverage, and that number is used to reach the enrollee. (Note that the number must be run through the <u>reassigned number database</u> first to make sure that callers are actually calling the enrollee who provided the number.)
5	Prerecorded calls and texts to cell phones to enrollees using <u>numbers found by data brokers</u>	Local government, or contractors for federal, state, or local government	FCC could exempt these messages if they are <i>not charged to called party</i> , and include other privacy protections. See 47 USC § 227(b)(2)(C)	Compliance with the exemption requirements.
6	Prerecorded calls and texts to cell phones to <u>wrong numbers</u>	Local government, contractors for federal, and state or local government	Same as # 5	Same as # 5

⁸ The called parties' provision of their telephone numbers during enrollment brings the callers within the scope of Commission rulings that treat the provision of a telephone number to the caller or an intermediary in relation to the subject of the call as prior express consent to receive automated calls or texts at that number. While we do not endorse those rulings, we recognize that, if they are applied to the calls in question, it will mean that government contractors and local governments have the prior express consent that the TCPA requires to make calls to numbers provided by the called parties in a context that relates to the subject matter of the proposed calls.

3. The FCC should create an exemption for the wrong number calls and calls made to enrollees whose original number has been reassigned but for whom a data broker or other source has provided a new number. For calls made to the wrong number or to numbers derived from data brokers, as we explained in our Reply Comments, we suggest that the FCC provide an exemption from the prior express consent requirement for automated texts and prerecorded telephone calls to cell phones as permitted by 47 U.S.C. § 227(b)(2)(C). The FCC can allow these calls and texts to cell phones so long as they are “not charged to the called party” and are subject to other conditions imposed by the Commission “in the interest of the privacy rights” protected by the TCPA. Our suggested conditions and appropriate restrictions for the calls made pursuant to this proposed exemption are set out in our Reply Comments, in Section II.⁹

4. Declaring the government the maker of the calls will not resolve the issue. Many of the comments supporting HHS's request encourage the FCC to declare the government the maker of the calls, presumably to relieve the contractors delivering the messages of TCPA compliance obligations. As detailed in the *ex parte* we filed relating to our meeting on June 1, 2022 with staff of the Commission's Bureau of Consumer and Governmental Affairs, such a determination would conflict with prior Commission orders.¹⁰

In those orders the FCC stated that the most critical determinant appears to be who physically dials the calls, or causes the call to be placed: We find persuasive the logic in our DISH Declaratory Ruling analysis that “a person or entity ‘initiates’ a telephone call when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call.” We find that a person who dials the number of the called party or the number of a collect calling service provider in order to reach the called party, rather than the collect calling service provider who simply connects the call, “makes” the call for purposes of the TCPA.¹¹

While the Commission has never said that who places the call is the sole factor or the determinative factor in determining the maker of the call, it would be a significant departure from the Commission's prior application of these standards to hold that an entity that had nothing to do with the physical placement of the call was the “maker.” Such a ruling would also open the door to claims by many other callers—including many problematic callers—that they are not “makers” of the calls and are not subject to the TCPA. This would be a very dangerous path for the Commission to go down.

For example, in 2017, NCLC filed a letter with the Commission to initiate an enforcement action against Navient Solutions for its continuous violations of the TCPA against student loan debtors.¹² **Navient was**

⁹ Reply Comments, Section II, *supra* note 2.

¹⁰ *Ex Parte* Notice of National Consumer Law Center, *et al.* June 3, 2022, *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10603269322200>.

¹¹ In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-078, WC Docket No. 07-135, 30 F.C.C. Rcd. 7961, at ¶ 40 (F.C.C. July 10, 2015), *available at* https://docs.fcc.gov/public/attachments/FCC-15-72A1_Rcd.pdf.

¹² National Consumer Law Center *et al.*, Re: Request that the FCC initiate enforcement action against Navient Solutions, LLC for massive and continuous violations of the Telephone Consumer Protection Act against student loan debtors (June 12, 2017), *available at* <https://www.fcc.gov/ecfs/file/download/Enforcement-Request%20Filed.pdf?folder=106121158414766> (hereinafter “NCLC Navient Enforcement Request”).

a contractor for the federal government, collecting student loan debts. In our 2017 enforcement request, we noted that Navient had deliberately engaged in a campaign of harassing and abusing consumers through the use of repeated, unconsented-to robocalls, calling consumers' cell phones hundreds, and—in some cases—thousands of times after being asked to stop. Many of these calls occurred multiple times a day, often numerous times a week. These calls were frequently made to consumers while they were at work, even after they explicitly explained to Navient that they could not accept personal calls at work. Indeed, Navient's internal policies permitted up to eight calls per day in the servicing of student loan debt.¹³ Between 2014 and February 2017, there were 18,389 complaints reported to the CFPB just about Navient's practices, of which 599 are specifically classified as relating to "Communication Tactics."¹⁴ During the same period, there were 1,878 complaints reported to the Better Business Bureau (BBB) about Navient, of which 1,306 are classified as relating to "Billing/Collection Issues."¹⁵

Declaring the government the maker for calls placed by government contractors would open a Pandora's box of abusive and unstoppable automated calls to American telephone subscribers, like those made by Navient. Such a move would not only be a legal mistake, but would also seriously undermine the primary purpose of the TCPA, which is to protect consumers from unwanted automated calls.

Moreover, declaring the government the maker of these calls would not resolve the problem for the HHS calls in ten states in which the Medicaid program is run entirely by local governments. In those states, declaring the local governments the makers of the calls would merely transfer TCPA liability from the contractors to the local governments, which the FCC has unequivocally declared to be "persons" that are obligated to comply with the requirements of the TCPA.¹⁶

The ten states in which the Medicaid program is run by local governments are:

1. California
2. Colorado
3. Minnesota
4. New Jersey
5. New York
6. North Carolina
7. North Dakota
8. Ohio
9. Virginia
10. Wisconsin

In its Broadnet Order, the Commission determined:

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

¹³ See, e.g., *McCaskill v. Navient Solutions, Inc.*, 178 F. Supp. 3d 1281, 1286 (M.D. Fla. 2016).

¹⁴ See NCLC Navient Enforcement Request at 2, n 5.

¹⁵ See *id.* at 3 n 7.

¹⁶ In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, *Broadnet Teleservices, L.L.C. Petition for Declaratory Ruling et al.*, Order on Reconsideration, CG Docket No. 02-278, at ¶ 29 (F.C.C. Dec. 14, 2020), available at https://docs.fcc.gov/public/attachments/FCC-20-182A1_Rcd.pdf [hereinafter Broadnet Order].

TCPA. As an initial matter, we note that, unlike the federal and state governments, local governments are not sovereign. 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.” 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.” Local governments, therefore, are not subject to an interpretive presumption that they are not a “person.” 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.¹⁷

The Commission’s analysis in the Broadnet order was sound. As a result, the only way to provide protection from liability for the HHS calls made by local governments is to provide an exemption as we have suggested.

5. Additional *ex parte* communications. In addition to the meeting with Chairwoman Rosenworcel’s staff described herein, I sent an email to her staff providing some of this information and requesting this meeting on June 8, 2022. Also on June 8, I sent an email to Mark Stone, Kristi Thornton, and Richard Smith, all staff with the Commission’s Consumer and Governmental Affairs Bureau, providing information about the ten states in which local governments administer the Medicaid program.

This disclosure is made pursuant to 47 C.F.R. § 1.1206.

Thank you for your consideration.

Sincerely,

/s/ Margot Saunders
National Consumer Law Center, on behalf of its low-income clients
1001 Connecticut Avenue, NW, Suite 510
Washington, DC 20036-5528
msaunders@nclc.org
202 595 7844 (direct)

¹⁷ *Id.* at ¶ 29 (citations omitted).