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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278

JOINT PETITION OF DISH NETWORK, LLC AND THE UNITED STATES, THE STATES OF CALIFORNIA, ILLINIOIS, NORTH CAROLINA, AND OHIO FOR AN EXPEDITED CLARIFICATION OF AND DECLARATORY RULING ON THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

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DISH Network, L.L.C., the United States of America and the States of California, Illinois, North Carolina, and Ohio, hereby jointly petition the Federal Communications Commission ("Commission" or "FCC"), pursuant to 47 C.F.R. § 1.2, for declaratory ruling of issues referred by the United States District Court for the Central District of Illinois.

I. DISH'S POSITION

DISH'S PETITION FOR A DECLARATORY RULING THAT THE TCPA AND FCC RULES DO NOT SUPPORT APPLYING "ON BEHALF OF" LIABILITY TO A PERSON OR ENTITY FOR UNLAWFUL CALLS INDEPENDENTLY PLACED BY THIRD PARTIES

A. INTRODUCTION

It is DISH's position that the Telephone Consumer Protection Act of 1991 (the "TCPA") does not permit applying "on behalf of" liability to a person or entity, such as DISH, when the allegedly violative telephone solicitations were independently placed by third party

retailers. The TCPA statute itself does not include the phrase "on behalf of" as relevant to the determination of liability for actions brought by a government party.

Even if there is a basis to hold a non-user of the telephone liable for an offending call, the Commission's implementing regulations do not support the broad liability proposed by plaintiffs United States of America ("Federal Plaintiff") and the States of California, Illinois, North Carolina, and Ohio (collectively, "State Plaintiffs") (Federal Plaintiff and State Plaintiffs are collectively referred to herein as "Plaintiffs"). Indeed, broadening the scope of liability to hold a person or entity responsible for the unlawful telemarketing conduct of another, even where a person or entity neither directs nor controls the third party's actions, would create an unlimited standard of liability. Such liability – essentially a strict liability standard for the acts of others – would unreasonably hinder legitimate telemarketing practices and have a ripple effect on the economy at large, which relies on legitimate telemarketing activities. Again, even assuming the broadest reach of the statute to non-users, which DISH believes is inappropriate, persons and entities can only reasonably be expected to influence the actions that they take themselves or those which are undertaken under their direction and control. And such liability should be determined based on federal common law principles of agency, which can be uniformly applied across all federal courts, and thereby provide for predictable standards with which businesses can comply, and government parties can enforce.

B. PROCEDURAL HISTORY

On March 25, 2009, Plaintiffs filed an initial Complaint and Demand for Jury Trial, which was later amended by Plaintiffs on April 30, 2009 (the "Complaint"), in the United

States District Court for the Central District of Illinois.[1] Federal Plaintiff alleges in the Complaint that DISH violated certain provisions of the Federal Trade Commission's Telemarketing Sales Rule, while State Plaintiffs allege that DISH is liable for violations of the TCPA, and similar laws of the states of California, Illinois, North Carolina and Ohio.[2] State Plaintiffs' claims are premised on allegations that DISH itself made telemarketing calls to numbers on the national Do Not Call Registry (the "DNCR") and made telemarketing calls that used artificial or prerecorded voices.[3] State Plaintiffs' claims are also premised upon the allegations that DISH is liable for telemarketing calls that were made by independent third party retailers to numbers on the DNCR and/or that used artificial or prerecorded voices, even where such activities were not at the direction or under the control of DISH.[4] As relevant to this petition, Plaintiffs alleged that, under the TCPA, DISH is liable for telemarketing calls made by these independent retailers because they acted unlawfully "on behalf of" DISH by virtue of DISH entering into business contracts with such independent retailers, allowing them generally to market, promote and solicit orders for DISH or DISH programming, and allowing them to use DISH's trademark or trade name.[5]

On December 21, 2010, DISH moved the District Court to apply the primary jurisdiction doctrine to State Plaintiffs' TCPA claims. On February 4, 2011, the District Court

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1 *United States et al. v. DISH Network, LLC,* United States District Court for the Central District of Illinois, Case No. 09 cv 3073- MPM-BGC, Complaint (d/e 1) and Amended Complaint (d/e 5).

2 *United States et al. v. DISH Network, LLC,* United States District Court for the Central District of Illinois, Case No. 09 cv 3073- MPM-BGC, Amended Complaint (d/e 5) ("Amended Complaint").

3 *Id.*

4 *Id.*

5 *Id.*

granted the motion.[6] The court ruled that "considerations of uniformity, discretion and expertise all militate in favor of primary jurisdiction" in this case.[7] The court suspended proceedings related to the "on behalf of" TCPA claims and directed the parties to "jointly file an administrative complaint with the FCC seeking the FCC's interpretation of the phrase "on behalf of" within the context of the TCPA.[8] This petition for declaratory ruling is presented in response to the District Court's directive. As discussed below, the parties request that the Commission interpret the do-not-call and prerecorded voice call provisions of the TCPA and the Commission's implementing regulations to determine whether they create liability for a person or entity by virtue of telephone calls made by an independent third party retailer.

C. BACKGROUND

This proceeding requests clarification of two provisions of the TCPA statute and implementing rules. In Count IV of the Complaint, as relevant to this petition, the State Plaintiffs assert that DISH is liable under Section 227(c)(3)(F) of the TCPA and 47 C.F.R. § 64.1200(c)(2) for unlawful telemarketing calls that were independently placed by third party retailers to consumers' telephone numbers registered on the DNCR.[9] In Count V of the Complaint, the State Plaintiffs assert, as relevant to this petition, that DISH is liable under Section 227(b)(1)(B) of the TCPA and 47 C.F.R. § 64.1200(a)(2) for unlawful telephone solicitations to residential telephone numbers, which were independently made by third party

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6 *United States et al. v. DISH Network, LLC*, United States District Court for the Central District of Illinois, Case No. 09 cv 3073-MPM-BGC, Order entered February 4, 2011 (d/e 86) ("February 4 Referral Order").

7 February 4 Referral Order.

8 *Id.* at 10.

9 Amended Complaint, Count IV. While State Plaintiffs do not delineate which portion of Section 227(c) they claiming under, it appears that they are relying upon Section 227(c)(3)(F).

retailers using an artificial or prerecorded voice without the called party's prior express consent.[10] It is DISH's position that the third party retailers who allegedly placed these unlawful calls did so on their own accord, and not at the direction, or under the control of, DISH.

D. STATEMENT OF FACTS

DISH is in the business of delivering DISH Network® direct broadcast satellite television products and services throughout the United States. DISH offers its products and services through direct sales channels and thousands of independent third party persons and entities nationwide, such as small satellite retailers, local and regional consumer electronics stores and nationwide retailers (collectively, "Retailers"). DISH's direct sales channels include internal call centers, and external call centers hired by DISH, to place outbound telemarketing calls. DISH's activities at its internal and external call centers are not at issue in this petition.

The Retailers (all independent contractors) are authorized under contractual agreements with DISH to market, promote and solicit orders for DISH Network® products and services. These contracts require the Retailers to comply with all applicable government statutes, laws, rules, regulations, ordinances, codes, directives and orders (whether federal, state, municipal or otherwise), but DISH does not, and cannot, control how the Retailers market and/or sell DISH Network® products and services. The details of when, how, and by whom the actual marketing and sales are to be performed are left to the Retailers. While the Retailers may use any lawful form of marketing to sell DISH Network® products and services, including telemarketing, direct mail, and newspaper advertising, DISH does not track (nor would it be possible for it to track) which forms of marketing are utilized by each Retailer. Thus, in most

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[10] *Id.* at Count V.

instances, DISH has no way of knowing whether each of its thousands of Retailers use outbound telemarketing calls as a means to market and/or sell DISH® products and services.

E. THE COMMISSION MUST DECIDE WHETHER THE TCPA IMPOSES "ON BEHALF OF" LIABILITY UPON A PERSON OR ENTITY FOR ACTIONS BY INDEPENDENT THIRD PARTIES

The District Court's referral order directs the parties to seek a ruling from the Commission to interpret the phrase "on behalf of" within the context of the TCPA.[11] Specifically, the case presents two issues for the Commission to resolve:

> 1. Whether a person or entity may be liable under 47 U.S.C. § 227(c)(3)(F) or 47 C.F.R. § 64.1200(c)(2) for unlawful telemarketing solicitations independently made by a third party retailer to a consumer's telephone number that is registered on the DNCR?
>
> 2. Whether a person or entity may be liable under 47 U.S.C. § 227(b)(1)(B) or 47 C.F.R. § 64.1200(a)(2) for unlawful telephone solicitations to residential telephone numbers, which are independently made by a third party retailer who uses artificial or prerecorded voices?

1. Summary of Argument

Congress and the FCC have long recognized that the TCPA addresses two important concerns. The TCPA "balance[s] the concern that customers' privacy be protected with the imperative that telemarketing practices not be unreasonably hindered,"[12] given that telemarketing is "a legitimate method of selling goods and services," which provides consumers with valuable savings and convenience.[13] This balancing of privacy rights and legitimate telemarketing activities also is consistent with President Obama's directive that all agencies

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11 February 4 Referral Order at 10, d/e 86.

12 *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Memorandum Opinion and Order, 10 FCC Rcd 12391, 12393 (¶ 4) (1995) ("1995 Reconsideration Order").

13 *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Report and Order, 18 FCC Rcd 14014, 14018 (¶ 3) (2003) ("2003 TCPA Amendments").

employ a pragmatic regulatory approach,[14] and honors the well-established requirement that federal agencies respect the precision of Congress's statutory directives, such as those set forth in the TCPA.[15] Indeed, the TCPA recognizes the varied practices and participants in telemarketing, assigns distinct rights and duties to each participant, and, while prohibiting certain types of telephone solicitations, carefully articulates such restrictions to avoid impeding legitimate telemarketing activities.

The second concern that the TCPA addresses is the scope of liability for unlawful telemarketing by carefully assigning liability only to the person or entity that "makes" or "initiates" a prohibited solicitation.[16] By assigning liability to the entity that "makes" or "initiates" a telemarketing call, the statute is clear that each participant in the telemarketing industry is responsible for his actions only.[17] Neither TCPA statutory provision at issue references or permits "on behalf of" liability.[18] Indeed, the only section of the TCPA that includes the phrase "on behalf of" relates to the creation of a private right of actions for individuals who receive calls.[19] There is no section of the TCPA that uses the phrase "on behalf of" to create liability, or that would apply to an action brought by a government party.[20]

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14 *Improving Regulation and Regulatory Review* – Executive Order, Jan. 18, 2011 (nation's regulatory system must "promote economic growth, innovation, competitiveness and job creation" by using "the best, most innovative, and least burdensome tools" available); http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order; *see Prepared Remarks of Chairman Julius Genachowski*, Broadband Acceleration Conference, at 4, Feb. 9, 2011 (agency should "remove barriers that are needlessly hurting businesses and our economy") http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-304571A1.pdf

15 *Int'l Science & Tech Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1152 (4th Cir. 1997).

16 47 U.S.C. § 227(c)(3)(F); 47 U.S.C. § 227(b)(1)(B).

17 *Id.*

18 *Id.*

19 47 U.S.C. § 227(c)(5)

20 47 U.S.C. § 227.

Although the government argued otherwise in an Amicus Brief to the Court of Appeals for the Sixth Circuit in *Charvat v. Echostar Satellite, LLC*,[21] the TCPA does not support applying "on behalf of" liability to a person or entity, such as DISH, when the allegedly violative telephone solicitations were independently placed by third party retailers. To support its position before the Sixth Circuit, the government relied on an isolated statement in a *1995 FCC Reconsideration Order* that purports to extend liability to all actions of entities acting "on behalf of" the person or entity.[22] However, the government's reliance on this order was misplaced, because the FCC's 1995 statement was made in the context of interpreting the narrow exemption for non-profit entities (specifically, when non-profit entities hire a third party to conduct fundraising), and not in interpreting liability in general for any participant engaged in telemarketing.[23] This isolated FCC statement made in connection with its interpretation of a non-profit exemption is *dicta*. It cannot be interpreted as broadly as proposed by the government because to do so would contradict the plain meaning of the TCPA and the jurisdictional reach of the Communications Act of 1934, as amended (the "FCA"). Thus, the *1995 Reconsideration Order* does not provide precedent for broad "on behalf of" liability. Nor do various other FCC actions cited by the government in the Amicus Brief to the Sixth Circuit establish that a person or entity can be held liable for telemarketing calls placed by independent third party retailers.[24] Instead, the TCPA is clear that parties are responsible for their own actions, and not for those of independent third parties.

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21 *Charvat v. Echostar Satellite, LLC*, Case No.: 09-4525, Document: 006110789638, p. 11 (6th Cir. Nov. 15, 2010) ("Amicus Brief").

22 1995 Reconsideration Order, 10 FCC Rcd 12391.

23 *Id.*

24 Amicus Brief at p. 11.

Even if the TCPA could permit liability for the conduct of third parties acting on their own accord, under no circumstances could "on behalf of" liability extend so broadly to include independent actions of third parties who are not acting under the direction and control of a person or entity. Broadening the scope of liability to include instances where a person or entity neither directs nor controls the third party's actions would render the person's or entity's liability unpredictable, unlimited and uncontrollable. Such liability – essentially a strict liability standard for the acts of others – would unreasonably hinder legitimate telemarketing practices and have a ripple effect on the economy at large, which relies on legitimate telemarketing activities. This would be an example of the type of regulation the President Obama warned "[has] gotten out of balance, placing unreasonable burdens on business [and is having] a chilling effect on growth and jobs."[25] A person or entity can only reasonably be expected to influence the actions that they take themselves or those which are undertaken under their direction and control. The most predictable and pragmatic basis to impose such liability is under federal common law principles of agency, which, based on well-established precedent, can be uniformly applied across all federal courts. Agency principles have played a role in American jurisprudence for years and there is no reason to abandon those principles in exchange for a murky, ill-defined hybrid standard. Such a predictability is key to an agency that "is smart on economics and businesses."[26]

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25 Barack Obama "Toward a 21st Century Regulatory System," Wall Street Journal Jan. 8, 2011.

26 Prepared Remarks of Chairman Julius Genachowski, Broadband Acceleration Conference, at 3, Feb. 9, 2011.

2. Detailed Argument

a. Congress Has Spoken to the Precise Issue, Mandating That The TCPA Only Creates Liability For A Person Or Entity That Actually Makes Illegal Telemarketing Laws

A threshold question to be decided by the Commission is whether the TCPA can apply to a person or entity who did not place any unlawful telemarketing calls or otherwise use the telephone with respect to such unlawful telemarketing calls, but where independent third party retailers make such calls. As set forth more fully below, Congress has spoken on this precise issue and rejected such broad liability. For this reason alone, the Commission must find that there can be no liability under the TCPA, or the regulations promulgated thereunder, for a person or entity that did not place or otherwise use the telephone with respect to the unlawful telemarketing calls at issue.

The landmark *Chevron* case, which governs the analysis required here, mandates that where, as here, Congress has spoken on the matter at issue, the agency and the courts must give meaning to Congress's intent:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.[27]

In the express language of the TCPA, Congress has spoken as to the liability of entities for telemarketing activities. In both Section 227(b)(1)(B) (governing prerecorded calls) and Section 227(c) (governing the DNCR), Congress limited liability to the entity that places a prohibited telephone solicitation.[28]

Section 227(b)(1)(B) states that it shall be unlawful for any person:

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[27] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

[28] 47 USC § 227(b)(1)(B); 47 U.S.C. § 227(c).

> To ***initiate*** any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party ...[29]

The statute does not make a person liable for calls initiated independently by a third party, or even calls made "on behalf of" or "for the benefit of" the person.[30] ***Only*** the person that "initiates" the prohibited call is liable for the use of an unwanted prerecorded telephone solicitation.[31]

Likewise, Section 227(c)(3)(F) addresses liability to the person or entity that placed the call to a subscriber on a do-not-call list.[32] Specifically, that Section provides that, if the FCC requires the operation of a national do-not-call database (which it did), the Commission's regulations shall:

> Prohibit any person from ***making*** or ***transmitting*** a telephone solicitation to the telephone number of any subscriber included in such database.[33]

As with Section 227(b)(1)(B), no provision makes a person liable for calls independently made by a third party, or calls made "on behalf of" or "for the benefit of" the person.[34] Rather, the statute makes a party liable for the calls that ***it*** makes – not calls independently made by a third party acting on its own accord.[35]

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29 47 U.S.C. § 227(b)(1)(B).

30 *Id.*

31 *Id.*

32 47 U.S.C. § 227(c)(3)(F).

33 *Id.*

34 *Id.*

35 *Id.*

Section 227(f)(1) of the TCPA, which provides for enforcement actions by state attorneys general, confirms Congress's intent.[36] Specifically, that section provides, in relevant part, that:

> Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person ***has engaged or is engaging in a pattern or practice of telephone calls*** or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions.[37]

This subsection again confirms that the TCPA was designed to reach only the person engaging in (*i.e.*, making or initiating) telephone calls.

The only section of the TCPA that uses the phrase "on behalf of" pertains to the creation of a private right of action for persons who have received illegal telephone calls.[38] Specifically, 47 U.S.C. §227(c)(5) states that:

> A person who has received more than one telephone call within any 12-month period ***by or on behalf of the same entity*** in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State—
>
> A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.[39]

As this subsection describes the right of a private citizen to bring a claim, it has no applicability to the enforcement action brought by Plaintiffs here. There is no section of the TCPA statute that

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36 47 U.S.C. § 227(f).

37 *Id.* (emphasis added).

38 47 U.S.C. § 227(c)(5)

39 *Id.* (emphasis added).

uses the phrase "on behalf of" in the context of establishing liability for the acts of others in actions brought by a government party.[40] Nor does this section, or any other, create "on behalf of" liability.[41] It is simply an enabling section. In sum, there is no basis to find liability for the acts of independent third parties under the TCPA. To the extent the dubious argument is made that vicarious liability under 47 U.S.C. § 217 can be applied to the TCPA, that statutory provision does not impose liability on a person or entity who did not use the telephone to make illegal calls. Rather, it confirms that Congress only intended to codify a form of vicarious liability limited to "common carrier[s] or user[s]."[42] Indeed, Section 217 provides that:

> In construing and enforcing the provisions of this chapter, the act, omission, or failure of any officer, agent, or other person acting for or employed ***by any common carrier or user***, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.[43]

Here, Congress again circumscribed the reach of the FCA to users and common carriers. At least one court has noted the obvious – that a user must be someone who used the telephone to make the offending call.[44] Section 217 confirms that the reach of the FCA, including the TCPA, is limited to entities and persons that actually use the telephone (*i.e.*, initiate, transmit or place the offending call).[45] Thus, Congress has carefully delineated the types

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40 47 U.S.C. §227.

41 *Id.*

42 Case No.: 09-4525, Document: 006110789638 (6th Cir. Nov. 15, 2010).

43 47 U.S.C. §217.

44 *See Charvat v. Echostar Satellite, LLC*, 676 F. Supp. 2d 668, 678 (S.D. Ohio 2009) ("Plaintiff then reasons that a 'user' includes anyone who 'uses' a telephone, including Echostar. The problem with Plaintiff's logic is that Echostar did not 'use' a telephone system in connection with the alleged violations."); *see also Charvat v. Echostar Satellite, LLC*, __ F.3d __, 2010 WL 5392875, * 5 (6th Cir. Dec. 30, 2010) (discussing the meaning of the word "user" under the FCA).

45 The TCPA was added to Title II of the FCA, which regulates communications by wire or telephone.

of calls that are prohibited (and those that are permitted) under the TCPA. Congress also has carefully delineated the persons and entities who are responsible for violations of the law. Nothing in the FCA or the FCC's rules may upset this congressional mandate by imposing liability for third party actions that a party asserts were purportedly made on behalf of the person or entity.

b. The Regulations At Issue Here Expressly Reach Only Persons Or Entities Making Or Initiating Telephone Calls

Consistent with the fact that the TCPA statutory language reaches only the person or entity initiating telephone calls (the users of the telephone), the regulations promulgated by the FCC also only create liability for a person or entity that makes or ***initiates*** an offending call. Specifically, subsection (a)(2) of 47 C.F.R. § 64.1200 provides that:

> (a) No person or entity may:
>
> (2) ***Initiate*** any telephone call to any residential line using an artificial or pre-recorded voice to deliver a message without the prior express consent of the called party, unless the call;
>
> (i) Is made for emergency purposes;
>
> (ii) Is not made for a commercial purpose;
>
> (iii) Is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation;
>
> (iv) Is made to any person with whom the caller has an established business relationship at the time the call is made; or
>
> (v) Is made by or on behalf of a tax-exempt nonprofit organization.[46]

Similarly, subsection (c)(2) of 47 CFR § 64.1200 provides, in relevant part, that:

> (c) No person or entity ***shall initiate*** any telephone solicitation, as defined in paragraph (f)(12) of this section, to:
>
> (2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call

[46] 47 C.F.R. § 64.1200(a)(2).

> registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government. Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator.[47]

There is simply nothing in either of these provisions that would create liability for a person or entity who does not make or initiate unlawful telemarketing calls, but instead attaches such liability to calls that are separately made or initiated by independent third party retailers. Accordingly, there is no statutory basis for the FCC to interpret its rules to allow for such broad (indeed, unlimited) third party liability.

c. The Commission's Treatment of Non-Profit Solicitations is Consistent with Congress's Limitation on Third Party Liability Under the TCPA

Proponents of broad vicarious liability have claimed that a 1995 FCC order is precedent for imposing liability generally for calls placed "on behalf of" a third party under the TCPA.[48] This argument mischaracterizes the Commission's order. In the *1995 Reconsideration Order*, the FCC addressed petitions for reconsideration of its initial Report and Order implementing the TCPA.[49] But the *1995 Reconsideration Order* did not address liability based on the conduct of third parties. Rather, the order merely addressed the scope of an *exemption* permitting telephone solicitations by non-profit entities.

The TCPA exempts from the definition of "telephone solicitation" a call or message "by a tax exempt nonprofit organization."[50] Because many non-profits contract out fundraising activities, several parties requested clarification that this non-profit exemption also

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47 47 C.F.R. § 64.1200(c)(2).

48 Amicus Brief at 11.

49 *1995 Reconsideration Order.*

50 47 U.S.C. § 227(a)(3).

exempts fundraising calls made on behalf of nonprofits by independent telemarketers. The FCC interpreted this *exemption* to cover both fundraising conducted by the non-profit, and by the for-profit entity hired by the non-profit to conduct its fundraising calls (which notably contains a direct nexus between the non-profit entity and the third party it hires to place such calls, and therefore directs and controls).[51] The Commission's interpretation of this exemption is consistent with the TCPA and honors Congress's intent to exempt calls of a nonprofit or charitable nature from the TCPA's scope, given the reality that many nonprofits rely upon third parties to assist in conducting their fundraising activities.[52]

It is not reasonable to interpret the Commission's *1995 Reconsideration Order* as a mandate to broaden TCPA liability generally. The single statement in the Order that "the party on whose behalf a solicitation is made bears ultimate responsibility for any violations"[53] was made only in the context of the interpreting the exemption for calls made solely on behalf of non-profit organizations, and not with respect to the scope of liability for persons or entities that *are* subject to TCPA obligations.

d. Even if the TCPA Permitted "On Behalf of" Liability, a Person or Entity Can Only be Responsible for Those Acting Under Its Direction and Control

Even if the TCPA permitted "on behalf of liability," which it does not, under no circumstances can "on behalf of" liability extend so broadly to include independent actions of

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51 *1995 Reconsideration Order*, 10 FCC Rcd at 12397 (¶ 13) ("we revise our rules to clarify that telephone solicitations made by or on behalf of tax-exempt nonprofit organizations are not subject to our rules governing telephone solicitations").

52 For similar reasons, the FCC's 2005 *State Farm* Declaratory Ruling does not alter the outcome here. *State Farm* merely cites to the *1995 Reconsideration Order* without further analysis. *See Telephone Consumer Protection Act of 1991 (State Farm Petition for Declaratory Ruling)*, 20 FCC Rcd 13664, 13667 (¶7) (Cons. Gov't Affairs Bur. 2005).

53 *1995 Reconsideration Order*, 10 FCC Rcd at 12397 (¶ 13)(citing Appendix).

third parties who are not acting under the direction and control of a person or entity. Broadening the scope of liability to include instances where a person or entity neither directs nor controls the third party's actions would create an unlimited and uncontrollable standard of vicarious liability. Such liability – essentially a strict liability standard for the acts of others – would unreasonably hinder legitimate telemarketing practices and have a ripple effect on the economy at large, which relies on legitimate telemarketing activities. This also would thwart President Obama's pragmatic approach toward the regulation of businesses. Persons and entities engaged in commercial activities can only reasonably be expected to influence the actions that they take themselves or those which are undertaken under their direction and control.

Thus, in the event the Commission believes that the FCA and the TCPA can reach non-users, which DISH believes it should not, such liability should be determined based on federal common law principles of agency. The federal common law agency test can be uniformly applied across all jurisdictions (many of which already apply the Restatement (Second) of Agency criteria). It is well established and easy to apply. The United States Supreme Court has culled several factors from federal case law and the Restatement (Second) of Agency, which include at least the following:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[54]

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[54] *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

These factors should be used to determine whether an entity exerts direction and control over a third party that is alleged to be telemarketing "on behalf of" a person or entity.

F. CONCLUSION

The plain language of the TCPA rejects applying "on behalf of" liability to a person or entity for unlawful calls that are independently placed by third parties. The Commission's implementing regulations likewise do not provide for the liability proposed by Plaintiffs. Moreover, to accept Plaintiffs' interpretation would broaden the scope of liability to a strict liability standard for the acts of others. For the reasons provided above, DISH requests that the Commission enter a declaratory ruling in accordance with the relief sough by DISH.

II. PLAINTIFFS' POSITION

THE STATES' PETITION FOR A DECLARATORY RULING THAT THE TCPA CONTEMPLATES THAT A CALL PLACED BY AN ENTITY THAT MARKETS A SELLER'S GOODS OR SERVICES QUALIFIES AS A CALL MADE ON BEHALF OF, AND INITIATED BY THE SELLER

This petition gives the Commission the opportunity to clarify a critical consumer protection law and to end the efforts of unscrupulous companies that seek to evade the restrictions imposed by the Telephone Consumer Protection Act of 1991 ("TCPA") by using outside entities to place millions of illegal, unwanted, and harassing telemarketing calls to American consumers.

Pursuant to the Order (d/e 86) of the District Court in *United States et al. v. DISH Network, LLC,* No. 09-cv-3073, 2011 WL 475067 (C.D. Ill. Feb. 4, 2011) ("the underlying case"), the States of California, Illinois, North Carolina, and Ohio ("the States") and the United States submit their portion of this Joint Petition to the Federal Communications Commission ("Commission" or "FCC") for an expedited clarification of and declaratory ruling on certain provisions of the TCPA: specifically, the circumstances under which a seller of goods or services is liable for telemarketing violations committed by dealers that act on its behalf.

A. Summary Of The Underlying Case

The Amended Complaint in the underlying case alleges that Dish sells satellite-television programming services, *inter alia*, through "authorized dealers" that promote Dish's services to consumers through means that include telemarketing calls. In Counts IV and V of the Amended Complaint, the States, acting pursuant to 47 U.S.C. § 227(f)(1), allege that Dish violated the TCPA. These counts allege that Dish, either directly, or indirectly as a result of a third party acting on its behalf, engaged in a pattern or practice of (i) initiating telephone calls to telephone numbers on the National Do-Not-Call ("DNC") Registry and (ii) initiating telephone

calls using prerecorded voices without the consent of the called party. Am. Compl., Counts IV-V, *DISH Network,* No. 09-cv-3073, (d/e 5).

In the underlying case, as well as in other, similar cases, Dish has responded to the allegations above by contending, *inter alia,* that: (i) Dish does not control the means and manner of its authorized dealers' marketing activities; and (ii) Dish affirmatively tells its authorized dealers that they may not commit telemarketing violations.

In December 2010, Dish moved to stay the underlying case so that the FCC could exercise its primary jurisdiction to interpret those portions of the TCPA under which the States allege that Dish is liable for telemarketing violations committed by dealers acting on Dish's behalf. On February 4, 2011, the District Court granted Dish's motion to stay the TCPA claims, but declined to stay the discovery of the underlying case. *DISH Network,* 2011 WL 475067. The District Court ordered the parties to file this joint petition by February 18, 2011, and to file a status report with the Court within seven days after the Commission renders its decision. *Id.* at *4.

B. <u>Question Presented By The States</u>

> Whether under the TCPA, a call placed by an entity that markets the seller's goods or services qualifies as a call made on behalf of, and initiated by, the seller?

The States seek a ruling by the Commission that interprets the verb "initiate" as it appears in, *inter alia*, 47 C.F.R. § 64.1200(a)(2) and 47 U.S.C. § 227(b)(1)(B), and the phrase "on behalf of," as those terms apply to the context in which a seller uses dealers or other entities to market its goods or services and those entities commit telemarketing violations in doing so. In making this request, the States do not ask the Commission to break new ground, but rather to expand upon its earlier statement that "calls placed by a third party on behalf of [a] company are treated as if the company itself placed the call." *Request of State Farm Mut. Auto. Ins. Co. for*

Clarification & Declaratory Ruling, Declaratory Ruling, 20 FCC Rcd 13664, 13667 ¶ 7 (2005) (hereinafter "2005 State Farm Ruling"). *See also* FCC Amicus Brief, *Charvat v. Echostar Satellite*, 2010 U.S. App. LEXIS 26404 ("ma[king] clear" that a call placed "on behalf of" a company is "initiated" by that company under the TCPA).

To resolve this petition, the Commission need only confirm that this statement applies to sellers, such as Dish, that use dealers or other entities to solicit business for them. The States ask the FCC to find that, under the TCPA, a call placed by a seller's dealer to market the seller's services qualifies as a call made "on behalf of" and initiated by the seller. The issue is not complex and requires only minor amplification of the Commission's prior statements.

1. Statutory and Regulatory Background

Telemarketing calls represent a serious intrusion on consumers' privacy, and often are associated with abusive marketing practices that expose consumers to harassment, exploitation, and fraud. *See* FTC Amended Telemarketing Sales Rule Statement of Basis and Purpose, 68 Fed. Reg. 4580, 4581 (Jan. 29, 2003). Congress enacted the TCPA to address the increasing volume of consumer complaints, already prevalent by 1991, about abusive telemarketing, finding that unrestricted telemarketing "can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety." Pub. L. No. 102-243, § 2(5), 105 Stat. 2394, 2394 (1991).

Congress identified two reasons for the increasing number of consumer complaints: "the increasing number of telemarketing firms in the business of placing telephone calls, and the advance of technology which makes automated phone calls more cost-effective." S. Rep. 102-178, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969. With the development of new telemarketing technologies, these concerns are even greater today than they

were 20 years ago. The TCPA grants enforcement authority to the FCC, the States' attorneys general, and private parties. 47 U.S.C. § 227(b)(3), (c)(5), (f).[55]

a. Do-Not-Call Registry

In 2003, the FCC promulgated regulations under 47 U.S.C. § 227(c)(1) – (4)[56] that prohibited telephone solicitation calls to phone numbers on the National DNC Registry. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 44,144 (July 25, 2003). The regulations declare that "No person or entity shall initiate any telephone solicitation, as defined in paragraph (f)(12) of this section, to . . . (2) [a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry . . . ." 47 C.F.R. § 64.1200(c).[57] Congress recently observed that the National DNC Registry, which now contains over 200 million phone numbers, is "one of the most popular Federal programs in history." H.R. Rep. No. 110-485, at 4 (2007).

b. Prerecorded Call Prohibitions

Both the TCPA statute and regulations prohibit prerecorded solicitation calls, also using the verb "initiate." The statute provides: "It shall be unlawful for any person within the

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55 In the underlying case, the States contend that Dish is a "seller" under the TCPA; Dish denies this. The TCPA regulations define "seller" as "the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(7). The regulations refer to a "seller" on several occasions, establishing requirements for the seller, *inter alia*, to maintain records related to the percentage of abandoned calls, 47 C.F.R. § 64.1200(a)(6), to record entity-specific do-not-call requests, 47 C.F.R. § 64.1200(c)(2)(C), and to identify itself in all calls made on its behalf, 47 C.F.R. § 64.1200(d)(4).

56 These provisions do not affirmatively prohibit telephone solicitations, but instead instruct the FCC to initiate rulemaking on the subject and authorize the use of a Do-Not-Call registry.

57 "Telephone solicitation" is defined as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental [of goods or services, with some exceptions]." 47 C.F.R. § 64.1200(f)(12). There is no dispute that the phone calls that are the subject of this proceeding are telephone solicitations.

United States, or any person outside the United States if the recipient is within the United States . . . to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice . . . ." 47 U.S.C. § 227(b)(1)(B). The regulation similarly provides: "No person or entity may . . . [i]nitiate any telephone call to any residential line using an artificial or prerecorded voice." 47 C.F.R. § 64.1200(a)(2).

c. State and Private Rights of Action Under the TCPA

The States brought their TCPA claims against Dish pursuant to 47 U.S.C. § 227(f), which authorizes such state actions for all TCPA violations.

For private consumers or entities, the TCPA provides a private right of action for DNC Registry violations: "A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may [bring an action]."[58] 47 U.S.C. § 227(c)(5).

The TCPA also includes a separate private right of action for prerecorded call violations: "A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State— (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation." 47 U.S.C. § 227(b)(3). This private right of action for prerecorded calls does not include the express "on behalf of" phrase found in § 227(c)(5)'s private cause of action for DNC violations.[59]

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[58] The regulations prescribed under subsection (c) are the DNC Registry regulations, not the prerecorded call regulations.

[59] These TCPA provisions are the subject of another petition to the Commission to be filed shortly in the case of *Charvat v. EchoStar Satellite, LLC*, -- F.3d --, No. 09-4525, 2010 WL 5392875, **7-11 (6th Cir. Dec. 30, 2010), which is on referral by the U.S. Court of Appeals for the Sixth Circuit.

2. The Plain Language of the TCPA Supports the Reading Advocated by the States

Any issue of statutory and regulatory interpretation starts with the plain language of the law. The dictionary definitions of "on behalf of" are "in the interest of," Merriam-Webster's Collegiate Dictionary 103 (10th ed. 1999), or "in the interest of," "as a representative of," or "for the benefit of," Webster's Third New International Dictionary 198 (2002). *See also United States v. Frazier*, 53 F.3d 1105, 1112 (10th Cir. 1995); *Craven v. United States*, 215 F.3d 1201, 1207 (11th Cir. 2000). These common definitions are plain and unambiguous. *Madden v. Cowen & Co.*, 556 F.3d 786, 796-97 (9th Cir. 2009).

A solicitation is therefore made "on behalf of" a seller: (i) if it is in the seller's interest or (ii) if it aids or benefits the seller. To act on behalf of a seller, it is not necessary for the seller to be able to control or direct the third-party's solicitations. Rather, whether a telemarketing solicitation promoting a seller's services was made "on behalf of" a seller turns upon whether the solicitation was in the seller's interest, or made to aid or benefit the seller. For example, in the underlying case, the States claim that that the seller – Dish – benefits from telemarketing calls placed by its dealers in the form of increased subscriptions to its service. By placing telemarketing calls to market Dish services to prospective customers, the dealers are acting in Dish's interest, to aid Dish – *i.e.*, they are acting on Dish's behalf.

3. The FCC's Past Rulings Support the States' Position

In the past decade, the Commission has issued several rulings that support the States' view that the TCPA makes a seller liable for telemarketing violations committed by dealers that are marketing its goods and services. In 1995, interpreting the TCPA's provisions about junk faxes, the Commission said that its "rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations." *Rules and*

Regulations Implementing the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397 ¶ 13 (1995) (hereinafter "1995 Order"). As the FCC further explained, "[c]alls placed by an agent of a telemarketer are treated as if the telemarketer itself placed the call." *Id.*

In 2005, the Commission "reiterate[d] that a company on whose behalf a telephone solicitation is made bears the responsibility for any violation of our telemarketing rules and calls placed by a third party on behalf of that company are treated as if the company itself placed the call." *2005 State Farm Ruling*, 20 FCC Rcd at 13667 ¶ 7 (citing *1995 Order* ¶ 13). *See also In re Rules And Regulations Implementing The Telephone Consumer Protection Act Of 1991*, Declaratory Ruling, 23 FCC Rcd 559, 565 (2008) ("[A] creditor on whose behalf an autodialed or prerecorded message call is made ... bears the responsibility for any violation of the Commission's rules. Calls placed by a third party . . . on behalf of that creditor are treated as if the creditor itself placed the call.").

Further suggesting that it shares the States' interpretation of the TCPA on the issues here, the Commission has also approved consent decrees that resolved investigations into possible TCPA violations by entities on whose behalf third-party telemarketers made allegedly unlawful calls. *See, e.g., In re T-Mobile, USA, Inc.*, Order, 20 FCC Rcd 18272 (2005); *In re NOS Commc'n, Inc.*, Order, 22 FCC Rcd 19396 (2007).

Most recently, in late 2010, the Commission explained that it "has made clear that a person or entity can be liable for calls made on its behalf even if the entity does not directly place those calls. In those circumstances, the person or entity is properly held to have 'initiated' the call within the meaning of the statute and the Commission's regulations." Amicus Brief of

FCC and the United States at 9-10, *Charvat,* -- F.3d --, No. 09-4525, 2010 WL 5392875 (6th Cir. Dec. 30, 2010).

4. State and Federal Court Jurisprudence Also Favors the States' Reading of These TCPA Provisions

Several courts have also interpreted the TCPA's "initiate" and "on behalf of" language as advocated by the States here.[60] In the underlying case, the district court held that a complaint "need only plead facts that show that it is plausible that the Dealers acted as Dish Network's representatives, or for the benefit of Dish Network, when they conducted the alleged illegal telephone solicitations." *United States v. Dish Network, LLC,* 667 F. Supp. 2d 952, 963 (C.D. Ill. 2009); *see also* Order Denying Defendant Dish Network, LLC's Motion for Interlocutory Appeal, *Dish Network,* 2010 WL 376774 (d/e 32); *Hooters of Augusta, Inc. v. Nicholson,* 245 Ga. App. 363, 367, 537 S.E.2d 468, 472 (Ga. Ct. App. 2000) (a "junk fax" case finding that "an advertiser may not avoid liability under the TCPA solely on the basis that the transmission was executed by an independent contractor" and that it was for the jury to determine the relationship between the seller and contractor committing the violations).

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60 Some courts have strayed from the views expressed by the Commission and held that to impose TCPA liability on the seller for the dealer's conduct, the seller must exercise control over the dealer. *See, e.g., Charvat v. EchoStar Satellite, LLC,* 676 F. Supp. 2d 668, 675-77 (S.D. Ohio 2009) (applying Ohio agency law principles to find that EchoStar (now Dish) did not exercise sufficient control over its authorized dealers' telemarketing activities to subject it to liability for violative telemarketing calls made by the dealers), on referral to FCC, -- F.3d --, No. 09-4525, 2010 WL 5392875 (6th Cir. Dec. 30, 2010). *See also Charvat v. Farmers Ins. Columbus, Inc.*, 897 N.E.2d 167, 176-77 (Oh. Ct. App. 2008) (calls placed by a telephone solicitor were not "on behalf of" the seller, where there was no evidence that the caller sought to sell the seller's services or named the seller, and that the seller "gave any authority to [the telemarketer] to act on its behalf or pursue business in its name").

C. CONCLUSION

The commonsense meaning of the TCPA's language, the Commission's past rulings, and several judicial opinions all support the interpretation of the TCPA advocated by the States here. For the foregoing reasons, the Commission should resolve this petition with the uncontroversial decision that a company that uses dealers or other entities to market its goods and services is not only responsible for the marketing calls made by those dealers, but also will be liable under the TCPA if a dealer breaks the law while doing so.

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Respectfully,

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