Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Joint Petition Filed by Dish Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules, and The Petition Filed by Philip J. Charvat for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) and Rules, and The Petition Filed by DISH Network, LLC for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules	CG Docket No. 11-50

COMMENTS OF AT&T INC.

AT&T Inc. (AT&T) respectfully submits the following comments in response to the Commission's Public Notice concerning three petitions for declaratory ruling[1] ("Petitions") on certain issues relating to the Telephone Consumer Protection Act of 1991 (TCPA).[2]

[1] *In re Joint Petition by Dish Network, LLC et al. Concerning the Telephone Consumer Protection Act (TCPA) Rules, and Petition by Philip J. Charvat for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) and Rules, and Petition filed by DISH Network, LLC for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules,* , CG Docket No. 11-50, Public Notice, DA 11-594 (rel. April 4, 2011) (*Public Notice*).

DISCUSSION

The Commission seeks comment on two questions presented by the Petitions (the background for which is provided in the *Public Notice* at 2-3):

> 1. Under the TCPA, does a call placed by an entity that markets the seller's goods or services qualify as a call made on behalf of, and initiated by, the seller, even if the seller does not make the telephone call (*i.e.*, physically place the call)?; and
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> 2. What should determine whether a telemarketing call is made 'on behalf of' a seller, thus triggering liability for the seller under the TCPA? Should federal common law agency principles apply? What, if any, other principles could be used to define 'on behalf of' liability for a seller?[3]

The backdrop for the *Public Notice*'s questions is the scope of the TCPA's private rights of action with respect to (i) its pre-recorded call restrictions (47 U.S.C. § 227(c)(5)), and (ii) its Do-Not-Call restrictions (47 U.S.C. § 227(b) (3)).[4] Those sections concern two different types of conduct – robo-calling and soliciting subscribers that have placed themselves on do-not-call lists – that violate TCPA, for which the TCPA has adopted private rights of action that are expressly worded quite differently to achieve obviously different enforcement results. Specifically, in the case of robo-calling, the statute authorizes a private right of action against a defendant that, itself, violated the statutory prohibition; while, in the case of do-not-call violations, the statute authorizes a private right of action by a person that has received more than one call "by or on behalf of the same entity" in violation of the do-not-call rules.[5] Yet, the framing of these issues in the *Public Notice*, and the relevant background described, appears to ignore these important distinctions by asking what are the circumstances under which a call placed by a third party

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[2] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227. The Commission's rules implementing the relevant TCPA provisions are found at 47 C.F.R. § 64.1200.

[3] *Public Notice* at 3.

[4] *See* discussion *in Public Notice* at 2-3.

[5] *Compare* 47 U.S.C. § 227(b)(3) *with* 47 U.S.C. § 227(c)(5).

should be considered to be made "on behalf of" a defendant in both contexts – that is, do-not-call and robo-calling. But, as discussed herein, the issue whether a call should be considered to be made "on behalf of" another party is relevant only with respect to do-not-call violations – not robo-calling. It is important that these congressionally crafted and mandated distinctions are properly observed and effectuated by the Commission as it considers the issues in the Petitions.

A. Sections 227 (b)'s and (c)'s Private Remedies are Intentionally Distinct.

Briefly, section 227(b)(1)(B) places restrictions on the "use of automated telephone equipment", *e.g.*, pre-recorded voice calls (otherwise known as "robo-calling"). Specifically, it prohibits "any person within the United States [from] initiat[ing] 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, unless the call is initiated for emergency purposes" or is otherwise exempt by rule or order of the Commission.[6] Section 227(b)(3) establishes a private right of action by which a "person or entity may . . . bring . . . an action based on a violation of [227(b)(1)(B)] . . . to enjoin such violation . . ., an action to recover for actual monetary loss from such a violation . . . or both such actions." Section 227(c) and the FCC's related rules, on the other hand, protect a telephone subscriber's right to avoid unwanted telephone solicitations by establishing, among other things, do-not-call requirements, and granting a private right of action to enforce these requirements as follows:

> 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 . . . (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 (C) both such actions.[7]

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[6] 47 U.S.C. § 227 (b) (1).

[7] 47 U.S.C. § 227 (c) (5) (emphasis added).

Sections 227(b)'s and 227(c)'s private remedies reflect a congressional decision to address their respective subject matters differently. This is clear from the express language used by Congress in the relevant provisions, as described.[8] In section 227(b), Congress decided to fix its remedial gaze solely on persons who "initiate" the calls at issue, and authorized consumers receiving such calls to bring an action only against the person that actually initiated the calls. Nothing in that provision authorizes an action against a person on whose "behalf" pre-recorded calls might have been made. In contrast, in section 227(c), Congress expressly expanded the reach of the remedy beyond the entity that actually initiated the calls to the entity on whose "behalf" the calls were made. The plain language of the statute thus establishes that Congress authorized a private right of action for 227(b)(1)(B) violations against call initiators *only* (*i.e*., the entities actually making the calls), whereas Congress intended to bring both the calling entity *and* the entity on whose behalf the calls were made into § 227(c)(5)'s scope.

It is not appropriate, of course, to assume that Congress did not know what it was doing when drafting these provisions and, thus, did not intend to establish separate remedies for separate problems. To the contrary, well-settled principles of statutory construction dictate that Congress' intent – as indicated by the express language used in these provisions – be given effect in any determination of the meaning of these provisions.[9] Those principles, when applied here, compel the Commission to reject the notion that the "on behalf of" language or concept found in section 227(c) should, or even can, be grafted onto the remedy provided in section 227 (b), in which such language is conspicuously absent. Indeed, given the proximity of these provisions and their inclusion in an integrated and comprehensive legislative enactment (the TCPA), there

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[8] *See Int'l Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1152 (4th Cir. 1997) ("In enacting the TCPA, Congress wrote precisely.")

[9] *See Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (Congressional unambiguously expressed intent must be given effect.)

should be no real question that Congress did not intend for either section's private cause of action to expand, or be expanded by, the private remedy provided in the other.[10]

In light of the foregoing, the implication in the Commission's two questions that there is, or might be, a basis for imposing liability for § 227(b)(1)(B) violations – *à la* § 227(c)(5) -- on entities that do not place the calls at issue (but for whom such calls may have been placed) is unsustainable in the face of the express language of the governing statutory provisions. Accordingly, it would not be appropriate for the Commission to ignore Congress' will by cutting and pasting § 227(c)(5)'s language, and thus its effect, onto the language and effect of § 227(b)(1)(B), and any suggestion to the contrary should be rejected. The better, and only legally sustainable, choice is for the Commission to restrict its consideration of the agency and related questions posed in the *Public Notice* to section 227(c)'s do-not-call environment, to the extent that it is germane to the inquiries referred to it by the Courts.[11]

B. The "on behalf of" Language in 227 (c) Should Be Governed by Contractual Language, Where Applicable, and Agency Principles When Such Language is Absent.

With respect to construing section 227(c)(5)'s "on behalf of language," to the extent that is a necessary exercise for the Commission in this matter, AT&T agrees generally with DISH that there should be evidence that allegedly violative calls were made at the direction and request of the entity on whose behalf the calls were made or, alternatively, that the telemarketer involved

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[10] *See Immigration & Naturalization Serv. V. Cardozo-Fonseca*, 480 U.S. 421, 432 (1987) (Congress' inclusion of language in one part of a statute while omitting it from another section in the same act must be presumed to be intentional and deliberate). *See also Russello v. United States*, 464 U.S. 16, 23 (1983) (proximity of statutory sub-sections clear indication of Congress' intent to draw distinction between meaning and application of the two provisions.)

[11] In so doing, the Commission will presumably determine, ultimately, that section 227(b)(3) does not provide any private right of action remedy against persons on whose behalf pre-recorded voice calls are made in violation of section 227(b)(1)(B) unless, of course, such persons initiate such calls themselves.

acted under the control of the entity on whose behalf the calls were made based on the application of federal common law agency principles.[12]

Telemarketing relationships, in the main, are governed by contracts between sellers/retailers and their telemarketer vendors. Those contractual relationships depend on rational understandings of applicable law, and the burdens, duties and obligations negotiated in those contracts rest on those understandings. The private remedy language in sections 227(b) and 227(c), as discussed above, permits retailers/sellers and their vendors to set their respective expectations and adjust their business practices to comply with their respective obligations. Changing those expectations with an insupportable interpretation of the statutory language not only upsets those commercial relationships completely, it introduces extraordinary uncertainty into the operations of plainly worded statutes and, thus, unreasonable commercial risk.

It follows that the Commission should maintain the balance inherent in these contractual relationships by construing the statutory provisions, and its implementing rules, consistent with clearly expressed congressional intent. This would mean, in the case of section 227(c)(5)'s "on behalf of" language, that there should be no liability for the non-calling person if the calls were not made at the person's direction or request, as argued by DISH.[13] Alternatively, if the Commission does not adopt the "direction or request" test for liability under section 227(c)(5), it should apply standard federal common law of agency to the resolution of this issue. That principle, as argued by DISH, requires a showing of "control" by the alleged principal before liability can be found for the actions of the agent.

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[12] *See DISH* Petition at 13-16 and cases cited therein.

[13] *See* DISH Petition at 13-15.

Respectfully submitted,

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