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**Before the
Federal Communications Commission
Washington DC 20544**

In the matter of	CG Docket No. 11-050
Petitions filed by Dish Network, LLC, et al for Declaratory Ruling concerning the Telephone Consumer Protection Act	DA 11-594
	Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

Gerald Roylance's Reply Comments re Dish Network Petition

Having read the comments on the docket, I like the FTC's position. Congress wants the FCC and FTC efforts to be in harmony, and the FTC suggests how that harmony is accomplished. The FCC can affirm that a seller is liable if a third party made the violative calls "on behalf of" the seller. The FTC suggests a little guidance for the courts, but rather than spelling out a definition of "on behalf of", the FTC wants "the plain meaning" of the phrase to control. It's a little murky, but it's not the kind of murkiness that a seller can exploit with a narrow interpretation of an abstract definition.

There's another reason for the FCC to avoid saying too much. These petitions were really triggered by pending lawsuits. Adjudicating the same issue in two different forums is not a good practice because it thwarts judicial economy. I get the sense that Dish Network was losing in District Court. A District Court has already denied Dish Network's motion to dismiss by holding that no formal principal-agent relationship is required.¹ Dish is before the FCC, a different forum, as a litigation tactic to get a second bite of the apple. If Dish can prevail with the FCC, then it will raise a Hobbs Act challenge to kick the case out of District Court. There's an element of gamesmanship here that stinks. The FCC's expertise is in communications; it should tread lightly when ruling on legal issues that courts are well equipped to handle.

¹ FTC Comments, page 6.

DirecTV's arguments are appalling. DirecTV wants to claim that its dealers are independent and that DirecTV has no control over them. For proof, DirecTV submitted a copy of its dealer contract. Looking at that contract is revealing. Control of the dealer permeates the contract.

The contract appoints a RETAILER to "market, promote and advertise the sale of DIRECTV Programming packages ("Subscriptions"), by extending the "Consumer Offers" on behalf of DIRECTV..."² (Emphasis added.) Clearly, if the TCPA has an "on behalf of" liability standard, then from DIRECTV's own mouth, it is dead in the water. Dish Network's "independent contractors" are doing the same thing as DirecTV's retailers, so prerecorded calls selling Dish are on behalf of Dish. Dish Network would fall under an on behalf of standard, too.

DirecTV's contract wants to deny agency, but there are at least indicators of agency within the four corners of the contract.

DirecTV controls the day to day operation of the RETAILER. In ¶ 2.2, DirecTV requires the RETAILER to display "point of sale materials" approved by DirecTV. DirecTV requires a demonstration system tuned to channels designated by DirecTV. If the RETAILER were independent, it would choose how it advertised, whether it needed a demo system, and what channels to watch.

The RETAILER is under DirecTV's direction and control: "RETAILER shall market, promote and advertise ... DIRECTV Programming Packages as directed by DIRECTV, at RETAILER's sole cost, using such marketing tactics, channels, methods and at such frequency as DIRECTV may reasonably designate. All advertising, marketing and promotional materials related to DIRECTV ... shall be subject to DIRECTV's prior approval." DirecTV does not trust its RETAILER, so DirecTV has retained the right to control what the RETAILER does. Under California law, it is the right to control and not the actual control that determines agency.

DirecTV and the RETAILER are in the same business. DirecTV is not hiring an expert with business skills that DirecTV does not have. In fact, DirecTV trains the RETAILER at ¶ 2.3. DirecTV is not hiring an independent contractor in the same sense of a homeowner hiring a plumber to fix a stoppage. The homeowner doesn't have the plumber's expertise or his tools. DirecTV is in the same business, has the same expertise, and provides the tools (such as advertising material).

Although the contract's Telemarketing Policy prohibits faxes, prerecorded calls, and cold calling, those prohibitions cut several ways. It shows that DirecTV is not hiring for marketing expertise but rather controlling how the RETAILER markets (even to the point of prohibiting legal outbound live calls). The prohibition also shows that DirecTV is aware that a RETAILER may use illegal techniques. So even though the methods may be prohibited, the use of such techniques would not be a surprise to the DirecTV. In legal

² Independent Retailer Agreement, ¶ 1.1(a).

terms, the action is foreseeable. Even though prohibited, it would fall within the scope of employment.

Contracts can include indemnity, but they cannot insulate parties from liability. Since we are talking satellite TV, then HBO's *The Sopranos* can be germane. Tony Soprano's crew would go out and collect debts. Assume Tony negotiated a contract with his crew members that told them they were supposed to use only legal methods of collecting debts. They were not to intimidate, set fire to businesses, break legs, or use cement overshoes. Should those contractual terms insulate Tony from racketeering charges when his crew steps over the line? DirecTV or Dish Network may not want illegal methods used, but they, like Tony, know it can happen. If Tony really wanted to go straight, he'd be checking up on his crew and firing those that break the law.

To summarize, I support the FTC's view. Use the on behalf of liability for prerecorded calls. State that the plain meaning of "on behalf of" should be used. I would explicitly reject (as the District Court did in the FTC's comments) that agency is a requirement. I would also hope that the FCC would explicitly reject an independent contractor defense.

/s/ Gerald Roylance

P.S. The FCC regulates Dish Network and DirecTV in areas that are outside of telemarketing. I trust that will not influence the FCC's deliberations, but there has been some disturbing news. FCC Commissioner Meredith Atwell Baker, after voting to let Comcast purchase NBC Universal, has now landed a job at NBC Universal as its Senior VP of Government Affairs. What a way to inspire public trust.