

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

In the Matter of)
The Joint Petition Filed by DISH Network,)
LLC, the United States of America, and the)
States of California, Illinois, North Caroline,)
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") Rules) CG Docket No. 11-50
And)
The Petition Filed by DISH Network, LLC For)
Declaratory Ruling Concerning The Telephone)
Consumer Protection Act ("TCPA") Rules)
)

REPLY COMMENTS OF THE UNITED STATES

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I. INTRODUCTION

The United States respectfully submits the following reply to the comments filed in response to the Public Notice issued by the Federal Communications Commission (hereinafter “Commission”) on April 4, 2011.

The negative and frustrating experiences of the consumer commentators (“consumers”) with unwanted telemarketing calls illustrate the continuing harm to consumers if the Commission were to adopt the interpretation of the Telephone Consumer Protection Act (“TCPA”) advocated by DISH Network LLC (“DISH”) and the other corporate commentators. The consumers report being victimized repeatedly by voluminous, harassing, and persistent calls from telemarketers selling the goods and services of sellers such as DISH and DIRECTV. Attempts to identify the telemarketers and to hold them accountable for their misconduct are often futile, as are efforts to obtain adequate relief from the ultimate sellers, which benefit from the telemarketers’ marketing efforts but disclaim responsibility for their violative conduct. The corporate commentators’ proposed interpretation of the TCPA would grant sellers broad immunity from liability by validating this self-serving marketing strategy, to the ongoing detriment of consumers.

The United States also responds to the legal arguments advanced by DISH and others that would emasculate the TCPA and unnecessarily import agency principles into this consumer protection statute. DISH’s attempt to parse the language of various parts of the statute and regulations in a vacuum disserves the TCPA’s plain language and meaning, as well as its overall structure. The statutory and regulatory scheme authorizes holding liable all parties that stand to benefit from illegal telemarketing calls, whether that party is the seller that sets in motion the marketing process or the third-party dealer or telemarketer that dials the telephone. Consistent

with its prior precedent, the Commission should consider not only the words used in the statute and regulations, but how those words effectuate the statutory scheme established by Congress.

II. THE VIEWS OF THE UNITED STATES

A. Harm To Consumers and Enforcement Authorities

The consumers unanimously describe exasperating and unsuccessful attempts to stop the abusive telemarketing calls that result when sellers use third-party dealers to market their services but disavow any control over those dealers' activities.¹ DISH and the other corporate commentators would interpret the TCPA to grant broad immunity to such sellers.² In DISH's view, sellers should be free to collect revenue generated by violative telemarketing without fear of TCPA liability, while consumers and enforcement agencies should shoulder the Sisyphean task of pursuing the myriad unidentifiable and judgment-proof telemarketers that promote those sellers' goods and services.³

The argument that the TCPA holds liable only the entity that physically dialed the telephone is untenable. The hundreds of unwanted telemarketing calls that the consumers have received demonstrate the real harms that would persist under DISH's interpretation of the TCPA. As the consumers explain, businesses involved in telemarketing go to considerable lengths to disguise their identities, typically using a web of call centers,⁴ shell companies,⁵ international affiliates,⁶ caller-ID masking,⁷ and lead-list generators.⁸ These consumers' best efforts to

¹ See, e.g., Comments of Robert Biggerstaff at 6, Comments of Robert H. Braver at 2-3, Comments of Gerald Roylance at 3, Comments of A. Charles Dean, Esq. at 2-4.

² *Joint Petition of Dish Network, LLC and the United States, the States of California, Illinois, North Carolina, and Ohio for an Expedited Clarification of and Declaratory Ruling on the Telephone Consumer Protection Act of 1991* (hereinafter *Joint Petition*) at 1-2, February 22, 2011.

³ See generally Comments of the United States at 10-12.

⁴ Comments of Robert Biggerstaff at 2.

⁵ Comments of A. Charles Dean, Esq. at 2-3.

⁶ Comments of Nathan Burdge at 1-2.

discover, reveal, and even sue the foregoing entities have been futile in stopping the illegal calls; indeed, consumers often cannot even identify the entity that called them.⁹

Consumers frequently can, however, identify the sellers whose goods and services are promoted by unscrupulous telemarketers. Because the seller is the starting and ending point for such telemarketing – *i.e.*, the party which first sets in motion and finally benefits from the calls – consumers and enforcement agencies reasonably perceive that the seller should be responsible for the violative calls that result when it outsources its marketing to third parties.¹⁰

Unfortunately, when consumers and enforcement agencies complain to sellers about telemarketing calls selling their goods and services, or seek the sellers’ help in stopping such calls, many sellers, such as DISH, disclaim any responsibility for these calls based on their self-serving interpretation of the TCPA.¹¹

In this proceeding, DISH would legalize such conduct by insulating from TCPA liability any seller that disclaims control and asserts ignorance of abusive telemarketing. This would remove the most successful tool available to consumers and enforcement agencies for stopping violative calls.¹² Taken to its logical conclusion, the position that the TCPA proscribes conduct only by the entity that physically handles the telephone will likely mean that nobody will be held

⁷ Comments of Robert H. Braver at 2.

⁸ Comments of Robert Biggerstaff at 3, 6.

⁹ *See, e.g.*, Comments of A. Charles Dean, Esq. at 2-3; Comments of Gerald Roylance at 3.

¹⁰ DISH’s suggestion that a telemarketer who physically places the call to sell the products of another qualifies as a “seller” under the TCPA is untenable. Comments of DISH Network, LLC at 2 n.3. A third-party dealer calling consumers to sell DISH satellite television service, when DISH, not the dealer, consummates the ultimate sale and provides the service, is acting on behalf of DISH. In such a context, DISH is a “seller” under the TCPA regulations. 47 C.F.R. § 64.1200(f)(7) (2010).

¹¹ Comments of Robert Biggerstaff at 6; Comments of Robert H. Braver at 3. As observed by a number of the commentators, the seller, and not consumers or regulator entities, are the “lowest cost avoider” for stopping abusive telemarketers. *See, e.g., id.* at 5. The seller enters into contracts with, compensates, and receives leads from telemarketers, and in some instances permits third-party dealers to access its internal sales systems. As such, the seller is in the best position to investigate and police its dealers’ conduct.

¹² Comments of Stewart Abramson at 2; Comments of Joe Shields at 2.

liable. The seller will disavow responsibility for or involvement in placing the call, and the multiple entities who are involved in placing the calls – if they can be identified at all – will disclaim responsibility for dialing them. Adopting the corporate commentators’ interpretation of the law would thus leave consumers and enforcement agencies with no effective remedy and no effective means to deter such illegal conduct.

By contrast, the positions advanced by the United States and the States offer the best prospect for preventing illegal and intrusive telemarketing calls to American consumers. As some consumers observed, illegal calls persisted until they or enforcement agencies filed suit against the sellers whose goods or services were being marketed.¹³ By finding sellers liable for violative calls placed by entities that market their goods and services, the Commission would advance the public policy reflected by the TCPA of curtailing abusive telemarketing, while providing clear guidance to companies that use telemarketing.

B. Proper Interpretation of the TCPA

As outlined in the Comments of the United States, the Federal Trade Commission, and the States, prior Commission precedent and the plain language of the TCPA support imposing liability on sellers and other entities that benefit from illegal telemarketing calls placed to promote those sellers’ goods and services.¹⁴ DISH and the other corporate commentators would ignore this prior precedent and shield sellers from liability through obfuscation and an artificially strained interpretation of the TCPA. Such arguments are unavailing.

¹³ See n. 12 *supra*.

¹⁴ See generally Comments of the United State Department of Justice at 6-8; Comments of the Federal Trade Commission at 5-10; Comments of the States of California, Illinois, North Carolina, and Ohio at 3-6. Contrary to DISH’s representation, the Commission’s prior statements regarding a seller’s liability are not inconsequential surplusage. Comments of DISH Network, LLC at 16-19. The Commission expressly reaffirmed that a seller “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). Simply because an interpretation disfavors DISH’s position does not render it dicta.

DISH's argument focuses on the presence or absence of specific words and phrases in the statute and regulations: "make," "initiate," and "on behalf of."¹⁵ The cramped reading of the law yielded by this approach defies the TCPA's statutory and regulatory scheme, which contemplates the broader interpretation of the law advocated by the United States and the other governmental commentators. In its opening comments, the United States discussed the broad interpretation of the words "make" and "initiate" and how their common meanings advance its reading of the statute. Moreover, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole."¹⁶

The TCPA's overall structure supports reading the law as imposing liability for illegal telemarketing calls on all parties who benefit from such calls, including sellers such as DISH. Two TCPA provisions define the types of telephone calls that violate the statute: (1) the bans on automated or prerecorded calls – 47 U.S.C. § 227(b)(1);¹⁷ and (2) the bans on telephone calls to persons on the national do-not-call registry ("National DNC Registry") – 47 U.S.C. § 227(c)(3)(F).¹⁸ These provisions identify which telephone calls violate the statute, not who is

¹⁵ DISH further distracts from the statutory purpose by citing to the presence of the word "use" in various subsections and titles of the TCPA and its legislative history. Comments of DISH Network, LLC at 4-7. It is illogical overreaching to suggest that the mere presence of the word "use" precludes imposing liability on anyone other than the physical dialer of the telephone. "Use," which is not statutorily defined, has no inherent limiting connotation. This is particularly true in the context of the TCPA. As demonstrated by statutory provisions ascribing liability for calls "on behalf of" a seller and for "initiating" violative calls, the TCPA holds both telemarketers and sellers liable for illegal calls.

¹⁶ *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 129 U.S. 120, 133 (2000) (internal citations and quotations omitted); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 & n.10 (1991) (stating that a "statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context" and noting that "court[s] should adopt that sense of words which best harmonizes with context and promotes policy and objectives of legislature.") (internal citations omitted).

¹⁷ 47 U.S.C. § 227(b)(1) (2010). The companion regulation can be found at 47 C.F.R. § 64.1200(a) (2010).

¹⁸ 47 U.S.C. § 227(c)(3)(F) (2010). The companion regulation can be found at 47 C.F.R. § 64.1200(c) (2010).

liable for making or initiating them. Rather than stating that “sellers” or “telemarketers” are barred from making automated calls or calling numbers on the National DNC Registry, the statutes and regulations bar “any person” or “entity” from so doing.¹⁹ Thus, contrary to DISH’s claim that “all of the . . . conduct-prohibiting sections of the TCPA target the conduct of the users of telephone equipment,”²⁰ neither of these provisions purports to identify, much less restrict, who may be liable for making or initiating violative calls.

The TCPA provision that allows the States to bring suit, however, does identify who may be held liable.²¹ In the case of the States, TCPA Section 227(g) provides that when a State believes “that any person has engaged or is engaging in a pattern or practice of [violative] telephone calls or other transmissions to residents of that State, the State may bring a civil action on behalf of its residents”²² Again, the statute does not restrict the target of the suit to a “seller” or “telemarketer” – or even to those persons who made or initiated the calls – but allows the States to sue persons “engaged” in a pattern or practice of violative calls. Congress’ use of such a broad term indicates that it envisioned the TCPA as a means of holding liable anyone and everyone involved in illegal telephone calls. Certainly this provision does not limit the States to suing and seeking to impose liability on only entities that physically pick up the telephone.

The right of action afforded to consumers victimized by TCPA violations, although somewhat more limited, also would impose liability on those involved in illegal telemarketing calls without regard to who actually dials the telephone. TCPA Section 227(c)(5) authorizes a state court action by a consumer on the National DNC Registry “who has received more than one

¹⁹ See 47 U.S.C. §§ 227(b)(1), 227(c)(3)(F); 47 C.F.R. §§ 64.1200(a), 64.1200(c).

²⁰ See Comment of DISH Network, LLC at 7.

²¹ 47 U.S.C § 227(g) (2010).

²² *Id.*

telephone call within any 12-month period by or on behalf of the same entity”²³ The statute does not restrict who the consumer can sue.²⁴ Indeed, the only textual prerequisite for a consumer suit is that, over the course of a year, the consumer received more than one call by or on behalf of the same entity – again, regardless of who actually placed the violative calls.²⁵

The TCPA statute and regulations clearly specify which calls are illegal and separately identify who may bring suit for those illegal calls. The law does not limit who can be sued, especially by a condition as artificial – and in this age of automation, as meaningless – as whether a person or entity physically handled the telephone.²⁶ In sum, the TCPA is intended to create broad liability for the third-party dealer or telemarketer that places the violative telemarketing call and for the seller on whose behalf the call is made.²⁷ DISH and others who use outside dealers to market for them would manufacture a controversy of statutory interpretation where none should exist, so that they can continue to benefit from illegal telemarketing practices conducted on their behalf. The Commission should reject such efforts.

²³ 47 U.S.C. § 227(c)(5) (2010); *see also* 47 U.S.C. § 227(b)(3) (creating consumer right of action for prerecorded calls)

²⁴ DISH suggests that the lack of restriction on who can be sued under this provision indicates that only the entity physically placing the call can be sued or held liable. Comments of DISH Network, LLC at 8. As described above, DISH’s reliance on legislative history – and specifically the presence of the word “use” – to support its cramped interpretation of the TCPA is incorrect. In light of the TCPA’s structure and purpose, as well as of the practical effect of reading it so restrictively, the more appropriate interpretation of this provision would hold the seller, its third-party dealer, and the entity that actually placed the call liable for telemarketing violations.

²⁵ 47 U.S.C. § 227(c)(5); *see also* 47 U.S.C. § 227(b)(3) (creating consumer right of action for prerecorded calls).

²⁶ See Comments of DISH Network, LLC at 5, 7.

²⁷ DISH suggests that to the extent the TCPA provides for “indirect liability,” the Commission should incorporate federal common law principles of agency. Comments of DISH Network, LLC at 19-23. DISH also cautions the Commission from applying the “wooden use” of a standard out of “Webster’s dictionary” to find companies such as itself liable under the TCPA. *Id.* at 21-24. This is a “straw man” argument; the United States and the States have never argued for “indirect liability.” Rather, the government commentators advocate that the TCPA holds a company directly liable for the violative conduct of its third-party dealers for calls made to solicit the company’s goods or services. The United States urges the Commission to apply the straightforward inquiry of whether a seller stands to benefit from the telemarketer’s conduct to determine when a call has been made on behalf of the seller.

III. CONCLUSION

As shown by the consumer comments, abusive telemarketing calls constitute a significant and illegal intrusion on privacy. DISH's position conflicts with the TCPA's language, intent, and structure. Adopting its interpretation of the law would neuter the most effective enforcement mechanism available to stop such calls and would encourage those who benefit from illegal telemarketing calls to continue doing so. The Commission should reject this distortion of the TCPA and adopt the position advocated by the United States.

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