LAW OFFICE OF
MATTHEW P. McCUE

*"Protecting Consumers' Rights"*

August 30, 2011

**Via ECFS**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation, DISH Network, LLC
CG Docket No. 11-50
Petition for Declaratory Ruling Concerning The Telephone Consumers Protection Act (TCPA)

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, the undersigned counsel hereby provides notice that on August 25, 2011, attorneys Matthew P. McCue of The Law Office of Matthew P. McCue and Anthony Paronich of Broderick Law, P.C. met with Nick Bourne and Richard Welch, FCC Office of the General Counsel as well as Kurt Schroeder and Karen Johnson, FCC Consumer and Governmental Affairs Bureau; in the proceeding identified above. During the meeting, Mr. McCue and Mr. Paronich encouraged the FCC to:

1. Affirm the longstanding principle, repeatedly acknowledged and affirmed by the FCC over the years, that an entity need not itself have physically transmitted, sent, or directly dialed a "telephone solicitation" or "unsolicited advertisement" in order to be subject to liability for a violation of the TCPA, any sub-section of the TCPA, or of the TCPA's implementing regulations and interpretive decisions as issued by the FCC. Such a long standing principle is not, as DISH alleges, limited to 47 U.S.C. § 227(c), but instead is a principle that the FCC has long applied to its interpretation of the TCPA in its entirety to ensure that the entity who benefits from illegal telemarketing is the entity that is responsible to ensure compliance with the TCPA;

2. Recognize that the entity that "initiates" an illegal telemarketing call is not only the entity that physically hits the dial button, or who orders or directs the illegal call to be made, but more generally and broadly is the entity who caused a call to occur in the first instance. By authorizing its dealers to telemarket on its behalf, and in its name; by compensating and incentivizing its dealers by paying them for leads generated by illegal telemarketing, and by failing to appropriately train,

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monitor or discipline its distributors, which DISH allegedly had *actual* knowledge were engaged in illegal telemarketing, DISH caused illegal telemarketing to occur. The course of action that led to the illegal telemarketing calls at issue began when DISH gave its dealers authority to telemarket on its behalf and agreed to compensate them for generating new business. As DISH created the situation that led to the illegal calls at issue, DISH is liable for such calls even though it did not physically dial the calls or explicitly direct its distributors to make the calls.

3. Conclude that whether a call is made "on behalf of" an entity should be determined by the plain meaning of such words. A call is made "on behalf of" or "for the benefit of" an entity if it is made in the entity's interest, by an individual that represents that entity's interest, or for the entity's benefit.

4. Adopt the recommendation of the United States Department of Justice iterated in their Comments regarding DISH's liability: "A telemarketing call has been made on behalf of a seller if the seller stood to benefit from that solicitation. To determine whether a call was made on behalf of a seller, the Commission need not apply agency law, but should articulate a standard that evaluates the benefit to the seller. Not only would this test adhere to the language of the statute and to established Commission precedent, but it would advance an application of the law that would benefit consumers, encourage effective enforcement of the TCPA, and require a seller to control their dealers who use telemarketing to market the seller's products or services." *Comments of the United States* CG Docket No. 11-50, Page 4 (2011).

5. Recognize and reject the efforts by sophisticated defendants who argue that "on behalf of" liability cannot extend due to the existence of self-serving contract language requiring compliance with applicable telemarketing laws. Such contracts may be relevant to the indemnification rights between a defendant, and the entity illegally telemarketing on a defendant's behalf, but should have no bearing as to whether an illegal call is "initiated" by a defendant, or made "on its behalf." Defendants particularly should not be afforded contractual protection from TCPA liability where they have the ability to train, monitor and discipline their dealers, and fail to do so effectively, or where they have actual knowledge that dealers are engaged in illegal telemarketing and take insufficient steps to cause such conduct to cease. A defendant must not be allowed to enjoy the fruits of illegal telemarketing while turning a blind eye to illegal conduct.

In response to DISH's claim that there is no evidence that an FCC interpretation in their favor would result in an explosion of illegal telemarketing, Attorneys McCue and Paronich brought to the Commission's attention specific cases they are currently litigating in which sophisticated defendants have explicitly claimed they have no TCPA exposure for calls they did not physically dial or explicitly direct. One of these entities has even cited to the trial court decision in Charvat v. Echostar in support. The explosion of illegal telemarketing flowing from the TCPA interpretation adopted by the trial court in Charvat v. Echostar has, in fact, already occurred.

Attorneys McCue and Paronich also shared with the Commission their personal professional experiences in which sophisticated defendants have sought to immunize themselves from TCPA liability by sub-contracting their telemarketing campaigns to entities that go to great lengths to disguise their identity, who spoof CID information to frustrate consumers' efforts to identify the source of illegal calls, who destroy their records as an ordinary business practice, and/or who claim that relevant records are located overseas and require a foreign court order to compel production. Attorney McCue explained that such efforts to defeat and circumvent the TCPA can be addressed simply by holding the entity who benefits from an illegal telemarketing call, liable for the call. It is the entity that chooses to contract with disreputable marketers who should have to travel to Costa Rica to subpoena phone records, not individual consumers.

Attorney McCue also brought to the Commission's attention class litigation captioned Michael Spafford, Jr. v. Echostar Communications Corp., CV 06-0479 RAJ (W.D.Wa.). This class action was brought against DISH for the alleged repeated violation of the TCPA by DISH's authorized retailers. Over the course of three years, class counsel went to great lengths to identify members of the class who received illegal DISH telemarketing calls. Despite the expenditure of a great number of hours by sophisticated law firms, class counsel was ultimately unable to identify the class, The efforts of class counsel were apparently repeatedly frustrated by the utilization by DISH authorized dealers of third party agents to make illegal calls, who were located out of state and ignored subpoenas, and the masking of CID information ("spoofing") to disclose the identity of the caller. In those instances where class counsel successfully identified the phone carrier relating to an illegal call, and issued appropriate subpoenas, counsel were informed that the identity of the entity that made the illegal call was "untraceable." Ultimately, a small settlement was entered into that resulted in a $50,000 donation to charity in exchange for a release of all claims by consumers in Washington- a

release that undeniably extinguished millions of dollars in consumer TCPA claims. This case is yet another specific example efforts to enforce the TCPA were deliberately frustrated by obfuscation, obstinance, and outright refusal to comply with lawful subpoenas. A copy of the Affidavit of Attorney Daniel Gallagher, recounting the above is attached at Tab A.

Attorneys McCue and Paronich concluded the meeting by urging the FCC to conclude that DISH is legally responsible for ensuring that telemarketing calls made on its behalf by its dealers are compliant with applicable telemarketing law.

Very truly yours,

Matthew P. McCue
Law Office of Matthew McCue

Anthony I. Paronich
Broderick Law

# Tab A

THE HONORABLE RICHARD A. JONES
Noted for Consideration on September 19, 2008
Without Oral Argument

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | |
|---|---|
| MICHAEL SPAFFORD, JR., individually and on behalf of a class of Washington residents similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>ECHOSTAR COMMUNICATIONS CORPORATION, a Nevada corporation; et al.,<br><br>Defendants. | NO. CV06-0479 RAJ<br><br>DECLARATION OF DANIEL C. GALLAGHER IN SUPPORT OF JOINT MOTION FOR CERTIFICATION OF A SETTLEMENT CLASS AND PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT |
| ECHOSTAR COMMUNICATIONS CORPORATION, a Colorado corporation, et al.,<br><br>Third-Party Plaintiffs,<br><br>v.<br><br>SATELLITE SYSTEMS NETWORK, LLC., a California limited liability corporation,<br><br>Third-Party Defendant. | |

I, Daniel C. Gallagher, declare as follows:

1. I am a member in good standing of the Washington State Bar. I am one of the attorneys representing Plaintiff Michael Spafford, Jr., in this matter. I make this declaration based on my personal knowledge and in support of the parties' Joint Motion for Certification of



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a Settlement Class and Preliminary Approval of Settlement Agreement. If called to testify as to the contents of this declaration, I could and would competently testify as follows.

2. My firm has prosecuted consumer fraud cases for the past decade. I am the lawyer who conceived of this class action after receiving inquiries from several individuals regarding the legality of repeated ADAD calls they reported receiving from DISH Network. My firm has played a key role in the development, strategy, decision-making, and prosecution of the action against EchoStar by investigating the claims, working directly with the Class representative and witnesses, coordinating strategy with co-counsel, participating in formal discovery, and engaging in settlement negotiations.

3. A critical allegation of Plaintiff's complaint concerned EchoStar's knowledge and control over its Retailers and has been a central focus of investigation since I and the law firm of Sandler Ahern & McConaughy began investigating these phone calls over three years ago.

4. My office was responsible for tracking the calls made to Plaintiff back to the originator of the unlawful calls. Although many hours were spent in this effort, it was ultimately an exercise in futility as none of the subpoenas turned up the names and phone numbers of Class Members who had been solicited.

5. For example, Retailers used third-party agents to make the computerized, pre-recorded calls to Washington residents. This additional "firewall" often meant that the Retailer designated as the seller of the product was not actually the originator of the offensive call.

6. Even in the rare case where an originating phone number was identified, the number itself was often bogus as the Retailers and their agents often assigned bogus numbers to the switching systems used to make the calls. This effectively masks the identity of the originating caller. On more than one occasion, the phone number reflected in phone records of call recipients as the originating number was designated as "000-000-0000," which was a road to nowhere.



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7. For those rare instances where a number actually led to a viable entity, I sent out subpoenas *duces tecum* for records of the number tied to the relevant calls. I subpoenaed call records from the following entities: Digitcom Services, Inc., Electric Lightwave, Inc., Level 3 Communications, LLC, MCI, Paetec Communications, Inc., Qwest Communications, Inc., and Telemanagement Services, Inc.

8. Most of the entities were located outside of Washington State. We either received no response to the SDTs or were informed that the number had been leased to an untraceable third party.

9. What I learned was the only way to effectively track the ADAD calls was to actually sign up for the Dish Satellite service being solicited. This would generate a link to a known Retailer as the Retailers receive a commission for each sale and are assigned a Retailer ID for that purpose. For the estimated tens of thousands of ADAD calls which do not result in a sale, the only hard record of the call is likely to be found on the computer used to generate the calls. The location of this information, if it exits, is simply unknown to Plaintiff despite extensive research and discovery efforts.

10. Some of the tools at EchoStar's disposal that will enable it to perform under the injunction include:

- Comparing contact information EchoStar has on file with information Retailers, alleged to have used ADADs, provide to consumers (*e.g.*, Retailer name, location, caller ID, call-back and toll-free numbers, and employee names; as well as the same information for "independent contractors, affiliates or sub-agents" used by Retailers with EchoStar's express approval);
- Identifying Retailers when the Retailers run credit checks through EchoStar's systems on consumers who indicate they were solicited by ADAD; and
- Identifying Retailers when the Retailers activate DISH subscriptions for consumers who indicate they were solicited by ADAD.



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11. Because Class Members cannot be identified, *cy pres* relief is appropriate.

12. Without the ability to link specific Class Members to EchoStar or specific Retailers, Plaintiff would likely not prevail on a claim for statutory damages.

13. It is unlikely that a Class Member would retain proof of such a call — such as contemporaneous notes or a calendar used to track phone calls. Class Member call records would not be helpful as Retailers used various means of blocking their identity.

14. Notably, under the Settlement the Class will not be releasing third-party Retailers from *any* liability. EchoStar has consistently claimed these Retailers are the real culprits. Hence, Class Members retain their right to pursue damage claims, including statutory damage claims, against these parties who likely placed the calls to Washington consumers.

15. This Settlement is the result of intensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation in general, and with the legal and factual issues of this case in particular.

16. Counsel for both parties are particularly experienced in the litigation, certification, trial, and settlement of nationwide class actions similar to this case.

17. In negotiating this Settlement, Plaintiff's counsel had the benefit of years of experience combined with their familiarity with the facts of this case.

18. Settlement negotiations in this case were advanced by three intense mediation sessions, which culminated in a memorandum of understanding. The parties continued to negotiate the details of the Settlement Agreement for several months thereafter.

19. I support this Settlement as fair and as providing reasonable relief to the members of the Class.

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I declare under penalty of perjury of the laws of the state of Washington and the United States that the foregoing is true and correct, and that this declaration was executed in Bainbridge Island, Washington, dated this 19th day of September, 2008.

Daniel C. Gallagher, WSBA #21940

## CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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DATED this 18th day of September, 2008.

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