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November 16, 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:

DISH Network LLC (“DISH Network”), by its undersigned attorney, submits this letter in further response to the recent *ex parte* filings submitted by the Federal Trade Commission (“FTC”) on October 20, 2011¹ and U.S. Department of Justice (“DOJ”) on October 26, 2011.² DISH Network has already responded to the policy arguments made by the FTC and DOJ in support of an expansive liability standard for third party telemarketing.³ This letter responds to the government parties’ claim that the Commission has authority to create a liability standard that departs from federal common law agency principles. As explained below, if the Commission were to accept the government parties’ invitation, the resulting standard would violate step 1 of the familiar two-part test in *Chevron U.S.A. Inc. v. Natural Resources*

¹ Letter from Russell Deitch, Federal Trade Commission, to Marlene H. Dortch, Federal Communications Commission, CG Docket No. 11-50 (Oct. 20, 2011) (“FTC Letter”).

² Supplemental Letter from Lisa K. Hsiao, U.S. Department of Justice, to Marlene H. Dortch, Federal Communications Commission, CG Docket No. 11-50 (Oct. 26, 2011) (“DOJ Letter”).

³ Letter from Steven A. Augustino, counsel for DISH Network, to Marlene H. Dortch, FCC, CG Docket No. 11-50, dated November 3, 2011.

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*Defense Council, Inc.*⁴ Put simply, Congress is the only entity with authority to create a liability standard. Federal common law is presumed to apply to federal statutes unless Congress specifies a different standard. Congress' decision not to apply a different standard in the TCPA requires the Commission to use federal common law agency principles in the event third party liability is found to exist under the Act.

The FTC and DOJ openly ask the FCC to create its own liability standard from scratch. The DOJ's letter is most explicit on this point. The DOJ argues that the Commission should not "import[] agency law principles" in the TCPA.⁵ Doing so, the DOJ asserts, "creates significant risks of inconsistent adjudication in TCPA cases."⁶ Further, if the Commission were to incorporate agency law, it would "miss the chance to use its expertise" to guide consumers, enforcement agencies and the industry.⁷ To solve this alleged problem, the DOJ urges the FCC to "craft a standard for seller liability" not bound by federal common law agency principles but instead that is specific to telemarketing practices.⁸ It appears that the DOJ believes the Commission is empowered to do so by the second step in the *Chevron* test.

This assumption is incorrect. As DISH Network explained in its reply comments, where, as here, the TCPA does not speak directly to how third party liability shall be applied (assuming that any third party liability exists), then the federal common law of agency applies.⁹ Any interpretation otherwise would contradict the statute's plain meaning.

An agency's statutory interpretation is governed by the familiar two-part *Chevron* test. If "Congress has directly spoken to the precise question at issue ... that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."¹⁰ Only if the statute is silent or ambiguous does the court defer to an agency's interpretation so long as it is a "permissible construction of the statute."¹¹

⁴ 467 U.S. 837 (1984).

⁵ DOJ ex parte at 3.

⁶ *Id.*, at 4.

⁷ *Id.*, at 5.

⁸ *Id.*

⁹ Reply Comments of DISH Network, LLC, at 14-15, CG Docket No. 11-50 (May 19, 2011).

¹⁰ *Chevron*, 467 U.S. at 842-43.

¹¹ *Id.*, at 843.

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Case law is clear that in some instances, Congress speaks through established presumptions that apply to Congressional action. When Congress creates a tort action (such as the TCPA), “it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules.”¹² Congress’ silence as to vicarious liability in a statute, thus “permit[s] an inference that Congress intended to apply *ordinary* background tort principles.”¹³ It takes an explicit provision to the contrary to overcome this presumption. As the Supreme Court held:

In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.¹⁴

Nothing in the TCPA “speaks directly” to the application of federal common law agency principles. Because the statute does not establish a different standard, the traditional application of federal common law agency principles would govern vicarious TCPA liability. As a result, none of the government parties’ attempts to write a new liability principle – be it the now-discarded “benefit” test,¹⁵ the similarly discarded “brand name marketing” test,¹⁶ or the newly-minted “telemarketing-specific” test – could withstand scrutiny under *Chevron*.¹⁷ Instead, the presumption of federal agency law would apply.

¹² *Meyer v. Holley*, 537 U.S. 280, 285 (2003).

¹³ *Id.*, at 286 (emphasis added). The Court rejected an interpretation of the statute that departed from ordinary common law principles to extend liability to persons that would not otherwise be covered by common law liability. *See, id.* (holding that the court may not hold the owner or officer of a corporation vicariously liable for actions of the corporation’s agents).

¹⁴ *United States v. Texas*, 507 U.S. 529, 534 (1993) (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978); *Milwaukee v. Illinois*, 451 U.S. 304 (1981)).

¹⁵ *See* DOJ Comments, at 13, CG Docket No. 11-50 (filed May 4, 2011).

¹⁶ *See* State Attorneys General Comments, at 5, CG Docket No. 11-50 (filed May 4, 2011).

¹⁷ In addition, the FTC improperly cites *Goodman v. Federal Trade Commission*, 244 F. 2d 584 (9th Cir. 1957) to support the proposition that the FCC can ignore agency principles in determining third party liability under the TCPA. The *Goodman* case, however, addresses a court’s discretion in applying agency standards in a “direct aid” context. It does not ignore those standards, adopt a different standard, or suggest that a regulator can invent a standard. *Goodman* involved an individual who recruited sales agents for his deceptively-packaged reweaving course and trained them to employ deceptive sales techniques. The court’s conclusion of liability was based upon agency relationships and the doctrine of apparent authority.

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The Commission does not have discretion to disregard this presumption by declaring the statute ambiguous. It is not the case that every time the FCC is asked to analyze a statutory provision, *Chevron's* discretionary standard applies.¹⁸ Instead, this case is most like *National Public Radio v. FCC*, where the D.C. Circuit reversed an FCC interpretation that found ambiguity due to the statute's silence on the precise question presented. In *National Public Radio*, the FCC was asked to interpret the scope of a general principle exempting noncommercial broadcasters from spectrum auctions. Citing to the silence in the statute on whether this exemption applied to licenses outside the noncommercial channels, the Commission contended that the statute was ambiguous and therefore that the court should defer to the Commission's reasonable interpretation. The court disagreed:

True, nothing in the Act's text specifically says that [noncommercial educational broadcasters] applying for commercial licenses are exempt from auctions. But general rules need not list everything they cover. ... [The statute's] exemption from all auctions means that [noncommercial educational broadcasters] are exempt from auctions for commercial as well as reserved licenses.¹⁹

Thus, even though the statute allegedly was silent in *National Public Radio*, Congress had directly spoken because its general language applied to all instances. The same is true here. Congress has spoken in this instance because the general presumption in favor of federal agency principles applies here. The FCC is not free to declare the statute ambiguous, and then create its own liability standard, simply because Congress chose not to disturb this well-established presumption.

For these reasons, in order to comply with the standards applicable to agency statutory interpretation, the FCC must apply federal common law agency principles to determine third party liability. As DISH Network explained in its November 3, 2011 *ex parte*, at most the FCC could explain how the agency principles outlined in *CCNV*²⁰ apply in a telemarketing context. It cannot expand liability to circumstances that would not incur liability under federal

¹⁸ *Meredith v. Fed. Mine Safety & Health Review Comm.*, 177 F.3d 1042, 1053 (D.C. Cir. 1999) (the mere presence of a difficult question of statutory construction does not necessarily render a provision ambiguous under the *Chevron* analysis); *National Public Radio, Inc. v. FCC*, 254 F.3d 226, 229 (D.C. Cir. 2001) (“Inartful drafting is not the same as ambiguity”).

¹⁹ *Id.*, at 229-230.

²⁰ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

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common law. It cannot adopt a strict liability test, or a “telemarketing specific” test that essentially amounts to strict liability for most third parties’ actions.

Sincerely,

A handwritten signature in black ink that reads "Steven A. Augustino". The signature is written in a cursive style with a large, stylized initial 'S'.

Steven A. Augustino

SAA:pab

cc: Sherrese Smith
Mark Stone
Angela Giancarlo
Angela Kronenberg
Austin Schlick