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November 23, 2011

**VIA ECFS**

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

Re: Notice of *Ex Parte* Presentation, DISH Network, L.L.C.  
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 November 21, 2011, DISH Network L.L.C. ("DISH Network") met with Angela Kronenberg and Louis Peraertz of Commissioner Clyburn's office in connection with the proceeding identified above. In attendance on behalf of DISH Network were Jeffrey Blum, Senior Vice President and Deputy General Counsel; Alison Minea, Corporate Counsel; and Steven A. Augustino and Alysa Z. Hutnik, Kelley Drye & Warren LLP.

DISH Network emphasized that a strict liability standard for third party actions would harm the hundreds of small businesses that are authorized to retail DISH Network products. These businesses rely upon lawful telemarketing (such as telemarketing to customers with an established business relationship with the retailer) to market their services. If the Commission were to adopt a strict liability standard, national brands like DISH Network likely would react by prohibiting all telemarketing, including telemarketing methods that are lawful under the TCPA. This, in turn, would make it more costly for retailers to market their products, and likely would lead to a reduction in their businesses and the loss of jobs from retailers that no longer are able to justify the costs of marketing. DISH Network urged the Commission to avoid these unintended consequences by refusing to make companies responsible for the acts of third

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parties that retail their products, unless the company directs and controls the telemarketing activities of the retailer.

DISH Network further added that, if the FCC were to conclude that the TCPA did provide for some type of third party liability, the federal common law of agency is the governing standard for determining how to apply such third party liability to a given set of facts. For the reasons discussed in DISH Network's *ex parte* letter dated November 16, 2011, the creation of a different liability standard other than the federal common law of agency would be unlawful under the first step in the two-prong analysis in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>1</sup> The federal common law of agency test involves a list of factors, but primarily focuses on whether the principal directed and controlled the manner and means of the agent's conduct at issue to thus be legally responsible for such conduct. The U.S. Supreme Court's decision in *Community for Creative Non-Violence v. Reid* ("*CCNV*") sets forth the factors to be considered.

DISH Network explained that the existing federal common law of agency is sufficient to provide the needed uniformity and predictability for telemarketers and consumers. The FCC should not create a new standard, as urged by the FTC and DOJ, because such a deviation from federal common law would lead to more litigation, not less, and likely would lead to future referrals to the Commission to explain the new standard.

DISH Network further stated that the *CCNV* factors do not need additional explanation in the telemarketing context. If the Commission were to entertain the DOJ's suggestion, it should confine its discussion to factors which restate the agency principles outlined in *CCNV*. It should not adopt factors which establish FCC-specific standards or which subject

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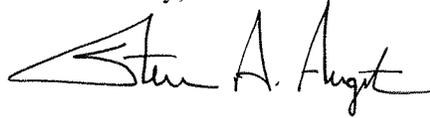
<sup>1</sup> 467 U.S. 837 (1984).

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telemarketers to strict liability for the actions of third parties not under their direction and control.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven A. Augustino". The signature is written in a cursive style with a large, stylized initial "S".

Steven A. Augustino

SAA:pab

cc: Angela Kronenberg  
Louis Peraertz