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December 9, 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 December 8, 2011, DISH Network LLC ("DISH Network") met with the following FCC personnel in connection with the proceeding identified above: Jessica Almond, Special Counsel, Office of Chairman Julius Genachowski and Jacob Lewis of the Office of General Counsel. 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, 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

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these unintended consequences by refusing to make sellers responsible for the acts of third parties unless they direct and control the telemarketing activities of the retailer.

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 was asked about application of the federal agency factors, as articulated by the U.S. Supreme Court in *Community for Creative Non-Violence v. Reid* (“CCNV”), in the telemarketing context. DISH Network stated that, under these factors, liability could attach only if the alleged principal directed and controlled the purported violative conduct. For example, “if the principal directs the retailer’s telemarketing activity by providing call lists for telemarketing, the principal can be held liable for the reseller’s telemarketing based on those lists.” In addition, “if the principal knows that a retailer is repeatedly engaging in violative telemarketing when selling the principal’s products or services, and the principal fails to take reasonable measures to address the unlawful conduct, depending on the facts, that also could be interpreted as directing the unlawful conduct.”

These factors reasonably go to if and how the principal directs and controls the unlawful actions of the third party. As such, they provide a reasonable basis for applying third party liability under federal common law agency principles.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven A. Augustino". The signature is stylized with a large, sweeping initial "S" and a long, horizontal flourish extending to the right.

Steven A. Augustino

SAA:pab

cc: Jessica Almond
Jacob Lewis
Angela Giancarlo
Angela Kronenberg
Mark Stone