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

**Re: CG Docket No. 11-50, Dish Network, LLC Petition for Declaratory Ruling
Concerning the Telephone Consumer Protection Act**

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, AT&T Inc. (AT&T), on behalf of its subsidiaries, submits this ex parte in the aforementioned docket. Specifically, AT&T responds to ex partes filed by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), which support application of a strict liability standard to persons or entities for the telemarketing violations of third parties acting on their behalf. If strict liability is not adopted, as an alternative, they propose factors the Commission should offer to the courts as guidance to determine if the seller is liable for telemarketing violations committed by third parties acting on their behalf.

As AT&T demonstrates below, the TCPA does not impose primary or strict liability on sellers for illegal telephone solicitations made by third parties on their behalf. If the Commission offers guidance to the courts in assessing a seller's liability for illegal telemarketing calls made by such third parties, it should advise the courts to consider the measures taken by a seller to establish and implement, with due care, reasonable practices and procedures to effectively prevent illegal telephone solicitations — the standard expressly stated in Section 227(c)(5).

The TCPA is not a strict liability statute. DOJ asserts that the TCPA imposes strict liability on any person or entity for *illegal telemarketing calls* made on its behalf by third parties.¹ In support of this assertion, DOJ references the Telephone Consumer Protection Act (TCPA), the FCC's Order implementing the TCPA, and several court decisions.² But as AT&T demonstrates below, neither the TCPA, nor the FCC's orders or court decisions require strict liability for a seller for the telemarketing violations of third parties acting on their behalf.

First, the express language of Section 227(c) of the TCPA, which governs unwanted telephone solicitations, does not compel strict liability for sellers. Specifically, Section 227(c)(5) states, "A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection

¹ DOJ Ex Parte at 1-2; Comments of DOJ at 15.

² DOJ Ex Parte at 1.

may, if otherwise permitted by the laws or rules of court of a State bring an appropriate court of that State —

- (a) An action based on a violation of the regulations prescribed under this subsection to enjoin such violation,
- (b) An action to recover for actual monetary loss from such a violation, or to receive up to \$500 in damages for each such violation, whichever is greater, or
- (c) Both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection.”³

By its terms, this provision permits a person or entity to sue the entity or entity telemarketing on its behalf for violations of Section 227(c). It also permits any defendant in such a suit — the seller or third party — to avail itself of the affirmative defense. So, if the seller can show that it “established and implemented, with due care, reasonable practices and procedures to effectively prevent” illegal telephone solicitations, it can avoid liability *even if* a third party telemarketing on its behalf is liable for telemarketing violations.

Second, neither the FCC’s order implementing the TCPA nor the court decisions cited by DOJ conclude that sellers are strictly liable for the telemarketing violations of third parties acting on their behalf. DOJ is correct that the FCC and courts have interpreted *Section 227(b)*⁴ to impose ultimate liability on the seller. However, what DOJ does not mention is that those interpretations apply only to unsolicited facsimile advertisements,⁵ not *unwanted telephone solicitations* which are governed under Section 227(c), and nothing in the TCPA, the FCC’s implementing orders, or cases cited by DOJ suggest otherwise. Further, DOJ fails to even acknowledge that Section 227(c), unlike Section 227(b), expressly includes the “on behalf of” language *and* an affirmative defense for defendants, which in tandem clearly show that sellers are *not* strictly liable for illegal telephone solicitations made by third parties acting on their behalf.

³ 47 U.S.C. §227(c)(5).

⁴ Section 227(b) imposes restrictions on the use of automated telephone equipment. 47 U.S.C. §227(b).

⁵ *ALEA London Limited v. American Home Services*, 638 F.3d 768 (2011)(“The TCPA creates a private right of action under which a party can bring ‘an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater.’ *Id.* § 227(b)(3)(B). The TCPA is essentially a strict liability statute which imposes liability for erroneous unsolicited faxes.”); *CE Design Limited v. Prism Business Media, Inc.*, 2009 WL 2496568 (N.D.Ill. 2009) (“In its single claim in this case, Plaintiff alleges that Defendant violated a provision of the TCPA that prohibits the ‘use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine.’ 47 U.S.C. 227(b)(1). The statute provides a private right of action for injunctive relief and/or damages for a violation of 47 U.S.C. 227(b). The TCPA is a strict liability statute, but the court has discretion to award treble damages for a willful or knowing violation of 47 U.S.C. 227(b).”).

Courts should examine the actions of the seller to determine liability for the actions of third parties acting on their behalf. DOJ and FTC argue that sellers must be primarily liable for illegal telemarketing calls made by third parties on their behalf; otherwise, sellers will have no incentive to follow the FCC's telemarketing rules and, further, will structure their marketing activities to avoid liability.⁶ These arguments are over-reaching and ignore the nature of the telemarketing industry. As previously stated, Section 227(c) already provides a cause of action against sellers for violations of third parties. Accordingly, sellers have an incentive to comply with the TCPA and ensure that third parties that market on their behalf do as well. AT&T, for example, has measures in place to receive DNC requests received by third parties in a timely manner, which is essential to ensure that AT&T's internal DNC lists are up-to-date. AT&T also scrubs all telemarketing lists against the national and AT&T-specific DNC lists *before* providing the lists to third parties for telemarketing to prevent illegal telemarketing calls. Further, AT&T has contractual measures in place that obligate third parties telemarketing on their behalf to (1) provide AT&T with DNC requests they receive on a daily basis, (2) automatically block future calls to any number for which the third party has received a DNC request, (3) comply with all TCPA requirements, including call abandonment and Caller ID requirements, and (4) perform periodic compliance review and performance monitoring. Thus, contrary to DOJ and FTC claims, sellers cannot and do not hand off compliance obligations to third parties to avoid liability. Rather, sellers work with third parties that market on their behalf to avoid illegal telemarketing calls initiated by them or the third party.

To be sure, there may be instances where a third party fails to adhere to the TCPA requirements and seller's contractual requirements, resulting in illegal telephone solicitations. In such instances, that entity should primarily be liable for its actions because it has an independent obligation to comply with the TCPA. Under existing law, the seller *could* also be liable, depending on the circumstances. In determining whether the seller is liable, a court should undertake the analysis set forth in Section 227(c)(5). That is, it should assess whether the seller took reasonable measures with regard to the third party to protect customers from unwanted telephone solicitations. Such analysis could include whether (1) the seller is aware that the third party is telemarketing on its behalf, (2) the seller provided the plaintiff's number to the third party for telemarketing purposes, (3) the seller had adequate processes in place to update its internal DNC list and calling lists provided to the third party, (4) the seller has contractual measures in place that require the third party to implement measures to comply with the TCPA's telemarketing requirements, and/or (5) the seller has actual knowledge of a pattern of telemarketing *violations* by the third party. DOJ, in fact, proposed many of these factors as guidance for the courts.⁷

AT&T objects to most of the factors proposed by the FTC to determine seller liability for the telemarketing violations of third parties acting on their behalf, specifically: (1) whether "a seller enters into contracts directly with consumers who choose to purchase the seller's goods or services in response to telemarketing;" (2) whether "a seller provides its services directly to those consumers;" (3) whether "a seller collects money for those services from its consumers;" (4) whether "a seller receives continuing revenue from such consumers;" and (5) whether "a

⁶ DOJ Ex Parte at 2; FTC Ex Parte at 2.

⁷ DOJ Ex Parte at 4-5.

seller compensates those who market its goods or services.”⁸ Using these factors, AT&T would always be liable for the telemarketing violations of third parties acting on its behalf because AT&T, like most telecommunications entities, compensates third parties for telemarketing, and provides contractual services directly to (and receives payment from) customers that purchase its services through telemarketing. The FTC’s proposed factors in essence would impose strict liability on sellers, contrary to the plain language and intent of Section 227(c)(5) which requires consideration of whether the seller has established and implemented, with due care, reasonable practices and procedures to effectively prevent unlawful telephone solicitations. These factors also completely ignore the fact that the TCPA requires all entities, whether the seller or third party, to comply with the telemarketing rules.

Thus, for the foregoing reasons, the Commission should reject requests for a “strict liability” interpretation of the TCPA. Further, to the extent the Commission offers guidance to the courts in assessing a seller’s liability for illegal telemarketing calls by third parties acting on the seller’s behalf, it should advise the courts to consider the measures taken by a seller to establish and implement, with due care, reasonable practices and procedures to effectively prevent illegal telephone solicitations — the standard expressly stated in Section 227(c)(5).

Very truly yours,

/s/Davida Grant
Davida Grant
General Attorney

⁸ FTC Ex Parte at 3, fn.3.