

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

WASHINGTON HARBOUR, SUITE 400

3050 K STREET, NW

WASHINGTON, D.C. 20007-5108

(202) 342-8400

FACSIMILE

(202) 342-8451

www.kelleydrye.com

STEVEN A. AUGUSTINO

DIRECT LINE: (202) 342-8612

EMAIL: saugustino@kelleydrye.com

NEW YORK, NY
LOS ANGELES, CA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ
BRUSSELS, BELGIUM

AFFILIATE OFFICES
MUMBAI, INDIA

December 6, 2012

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 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 December 4, 2012, DISH Network L.L.C. ("DISH") met with the following FCC personnel in connection with the proceeding identified above: Sean Lev, General Counsel; Nick Bourne and Jacob Lewis of the Office of General Counsel; Kris Monteith, Acting Chief, Consumer & Government Affairs Bureau; and Deborah Broderson of the Consumer & Governmental Affairs Bureau. In attendance on behalf of DISH were Jeffrey Blum, Senior Vice President and Deputy General Counsel, Alison Minea, Corporate Counsel; and Steven A. Augustino, Kelley Drye & Warren LLP.

DISH urged the Commission to provide the requested declaratory ruling as soon as possible. DISH noted that this proceeding has been pending since February 2011 and is one of the oldest orders on circulation with the Commission. Litigation in one of the federal district court cases that led to the referral in this proceeding is moving forward, with dispositive motions due in January and trial scheduled for June of next year. DISH requested that the Commission render a decision in January if possible.

In addition, if the Commission determines that some third party liability is permissible under the TCPA, DISH contended that federal agency law would govern the scope

KELLEY DRYE & WARREN LLP

Ms. Marlene H. Dortch
December 6, 2012
Page 2

of such liability. DISH 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 further discussed its *ex parte* notice dated December 9, 2011, which is attached to this letter. DISH stated that, under the factors articulated by the U.S. Supreme Court in *Community for Creative Non-Violence v. Reid* (“CCNV”), 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 that reads "Steven A. Augustino". The signature is written in a cursive style with a large initial 'S'.

Steven A. Augustino

SAA:pab

Attachment

cc: FCC personnel listed above