WILTSHIRE & GRANNIS LLP

February 21, 2014

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: *CG Docket No. 02-278*

Dear Ms. Dortch:

This is to inform you that on February 19, 2014, Stacy Fuller, April Ammeter, Becca Wahlquist, and undersigned counsel on behalf of DIRECTV, LLC met with Jonathan Sallet and Stephanie Weiner of the Commission's Office of General Counsel, and John B. Adams, Kurt Schroeder, Mark Stone, and Kristi Lemoine of the Commission's Consumer and Governmental Affairs Bureau with respect to the above referenced proceeding. In that meeting, DIRECTV discussed the need for clarification of the term "capacity" as used in the Telephone Consumer Protection Act of 1991 ("TCPA") in order to restore the statutory scheme for liability to the regime originally envisioned by Congress. The topics of discussion are reflected in the attached handout, which was supplied during the meeting.

Respectfully submitted,

/s/

William M. Wiltshire
Counsel for DIRECTV

Attachment

cc: Jonathan Sallet
Stephanie Weiner
John B. Adams
Kurt Schroeder
Mark Stone
Kristi Lemoine

THE MEANING OF "CAPACITY" UNDER THE TCPA

- The Telephone Consumer Protection Act of 1991 ("TCPA") imposes liability for certain calls made with an "automatic telephone dialing system" ("ATDS")
  - ATDS is defined by the statute as "equipment which has the ***capacity*** (A) to store or produce telephone numbers to be called, using ***a random or sequential*** number generator; ***and*** (B) to dial such numbers." (47 U.S.C. § 227(a))
  - Section 227(b) was intended to cover blind telemarketing calls. Entities making targeted calls (and needing to comply with DNC) were covered by§ 227(c), which provided affirmative defenses and lesser damages.
- "Capacity" is being read to cover calls placed with any equipment that has the ability (even a hypothetical, future ability) to place calls without human intervention, and lawsuits under§ 227(b) abound.
  - With modern technology, this arguably could even cover calls made by a smartphone.
  - This interpretation is problematic for businesses that make informational or transactional calls to lists of existing customers with equipment ***not configured*** to conduct random/sequential dialing (and such dialing would make no sense, as companies want business-related calls to go only to their customers).
- ***The Commission should clarify that "capacity" to randomly/sequentially dial as used in the TCPA refers to actual, configured capability of the system at the time a call is made.***
  - Would allow DIRECTV and other well-intentioned businesses to address abusive TCPA lawsuits by providing evidence ***up front*** about the systems making the calls – proving consent would not be an issue for calls placed by equipment without requisite "capacity".
  - Protects ability to make informational/transactional calls to numbers provided by customers without fear of ruinous statutory damages never meant to apply to such calls.
  - At a minimum, apply this clarification of "capacity" to informational/transactional calls.
- Failure to issue clarification would result in additional, needless TCPA litigation.
  - Litigation has increased rapidly, and class litigation can involve millions of calls for a large business.
  - Companies are forced to devote significant resources defending TCPA litigation, and plaintiffs' lawyers use the current confusion over "ATDS" definition to force companies into expensive defense of lawsuits seeking information on every call placed by a company.
  - Defending myriad TCPA lawsuits by having to show "consent" defense (which often requires long periods of discovery) is expensive and burdensome – but would be unnecessary if cases could be resolved on threshold "capacity" showing.

47 USC 227
Private Right of Action Provisions

(b) Restrictions on use of automated telephone equipment

(3) Private right of action

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

(A) an action based on a violation of this subsection or 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 **$500** in damages for each such violation, whichever is greater, or

(B) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

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(c) Protection of subscriber privacy rights

5) Private right of action

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 may, if otherwise permitted by the laws or rules of court of a State bring in 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. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.