BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES AS AMICI CURIAE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 09-4525

PHILIP J. CHARVAT,

Appellant,

v.

ECHOSTAR SATELLITE, LLC,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

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PRELIMINARY STATEMENT

The Court has asked the federal government to file a brief setting forth its understanding of certain provisions of the Telephone Consumer Protection Act of 1991 ("TCPA"), Pub. L. 102-243, 105 Stat. 2394 (1991), codified as section 227 of the Communications Act of 1934, 47 U.S.C. § 227, and the implementing regulations promulgated by the Federal Communications Commission ("FCC" or

"Commission") pursuant to the TCPA, *see* 47 C.F.R. § 64.1200.[1] Specifically, the Court has invited the government to file a brief setting forth its position on two issues:

i. "Whether under 47 U.S.C. § 227(b)(1)(B) and the accompanying regulations an entity is liable for calls that it did not initiate in light of the FCC's Memorandum Opinion and Order, *In the Matter of Rules and Regulations Implementing the TCPA of 1991,* 10 FCC Rcd 12391 (1995), 47 U.S.C. § 227(c)(5), 47 C.F.R. § 64.1200, or otherwise."

ii. "If the answer to the first question depends on section 227(c)(5)" of the Communications Act of 1934, whether "the 'on behalf of' clause in that section incorporates principles of agency law."[2]

A brief summary of the federal government's response follows.

1. In the view of the federal government, an entity can be liable under the TCPA for a call made on its behalf even if the entity did not directly place the call. Under those circumstances, the entity is properly deemed to have initiated the call through another.

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[1] Letter from Leonard Green, Clerk, United States Court of Appeals for the Sixth Circuit, to Neal Kumar Katyal, Acting Solicitor General of the United States, United States Department of Justice, and Austin C. Schlick, General Counsel, Federal Communications Commission (Oct. 15, 2010) ("*Green Letter*").

[2] *Id.* at p.1

2. The FCC, in exercising its authority to promulgate regulations to implement the TCPA, has not determined whether 47 U.S.C. § 227(c)(5) incorporates, or is limited by, general principles of agency law. To the extent that section 227(c)(5) incorporates agency principles, however, the phrase "on behalf of" in that provision should not be tied to the local law of a particular state. Tethering section 227(c)(5) to state law in the absence of a controlling interpretation by the FCC could produce varying applications of the federal TCPA statute across different jurisdictions, thereby undermining the uniform federal regulatory regime the statute was enacted to create.

The doctrine of primary jurisdiction, and the mechanisms to invoke it, are available to help this Court obtain a further answer to the question whether, and to what extent, section 227(c)(5) incorporates principles of agency law. This Court may wish to hold this case in abeyance and direct the litigants to ask the Commission to determine whether the "on behalf of" clause incorporates, or is limited by, agency law principles. Alternatively, the Court could direct the litigants to present the "on behalf of" issue to the Commission and remand the case to the district court for entry of an appropriate order staying the suit. If the Court decides to refer the matter to the FCC for resolution under the primary jurisdiction doctrine, the Commission agrees to seek comment no later than 30 days from the date of receipt of a petition for declaratory ruling or other appropriate document

from one or more of the parties. Once the Commission has addressed the petition(s), litigation could then resume with the benefit of the FCC's interpretation.

STATEMENT OF INTEREST OF AMICI CURIAE

The Commission has primary responsibility for implementing and enforcing the TCPA. The Commission and the United States also share an interest in ensuring that the TCPA, a federal statute, is given a uniform interpretation by the courts and that it is applied in a manner that furthers one of its principal goals – "protect[ing] residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." 47 U.S.C. § 227(c)(1).

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

The TCPA regulates the use of telemarketing – the marketing of goods or services by telephone. In 1991, Congress found that telemarketing had grown substantially and that calls seeking to sell products and services "can be an intrusive invasion of privacy." Pub. L. No. 102-243, §§ 2(4), 2(5), 105 Stat. 2394 (1991). *See* 47 U.S.C. 227 note. Congress further found that "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations." TCPA § 2(7). "Under the circumstances," a Congressional committee explained, "federal

legislation [was] needed to both relieve states of a portion of their regulatory burden and protect legitimate telemarketers from having to meet multiple legal standards." H.R. Rep. 102-317 (1991), at 10. Congress accordingly enacted the TCPA to give the FCC the authority to regulate interstate and intrastate telemarketing. *See generally* 47 U.S.C. § 227.

Among its other provisions, the TCPA generally makes it unlawful for any person within the United States to "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B). *Accord* 47 C.F.R. § 64.1200(a)(2) (implementing statutory prohibition). The statute authorizes the Commission to establish a "do-not-call" registry that consumers can use to notify telemarketers that they object to receiving telephone solicitations. 47 U.S.C. § 227(c)(1)-(4). Under the Commission's regulations establishing such a registry, no person or entity is permitted to "initiate any telephone solicitation . . . to any residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry." 47 C.F.R. § 64.1200(c)(2). In addition, no telemarketer may call a residential telephone subscriber unless the telemarketer has procedures for maintaining a list of persons who do not wish to be called by it. 47 C.F.R. § 64.1200(d).

Beyond empowering the FCC and the state Attorneys General to enforce the statute, *see* 47 U.S.C. § 227(f)(1), (3), the TCPA creates a private right of action. This right of action allows individuals to seek injunctive relief and damages if they have "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." 47 U.S.C. § 227(c)(5). *See also* 47 U.S.C. § 227(b)(3) (creating private right of action for violation of restrictions on use of automated telephone equipment).

II. THE PRESENT LITIGATION

Plaintiff Phillip Charvat commenced a private action against defendant EchoStar Satellite LLC in the United States District Court for the Southern District of Ohio. He asserted, among other claims, violations of the TCPA stemming from his receipt of 30 calls from telemarketers attempting to sell subscriptions to EchoStar satellite television programming. *Charvat v. EchoStar Satellite, LLC*, 676 F. Supp. 2d 668, 670 (S.D. Ohio 2009). Twenty-seven of the calls were prerecorded, and three were placed by live operators. *Id.* Charvat's requests to be placed on the callers' do-not-call list apparently went unheeded. *Id.* EchoStar moved for summary judgment, arguing that it could not be held liable for TCPA violations because the calls were made by "independent contractors" rather than by EchoStar itself. *Id.* at 674.

The district court granted EchoStar's motion. The court held that whether EchoStar's telemarketing "[r]etailers" were "agents" or "independent contractors" was "not necessarily dispositive" of the legal question whether, under the TCPA, their telephone solicitations were made "on behalf of" EchoStar. *Id.* at 674. Rather, the district court looked to principles of Ohio agency law to determine whether the calls were made "on behalf of" EchoStar. The court observed that, under Ohio law, a hired party "act[s] 'on behalf of' the hiring party" when the "hiring party retains 'the right to control the manner or means' by which a particular job is completed." *Id.* at 674-75 (quoting *Bostic v. Connor*, 524 N.E.2d 881, 883 (Ohio 1988)). The court reasoned that the state-law question whether EchoStar had the "right to control the manner or means" of its retailers' conduct therefore was dispositive of the "on behalf of" question under the TCPA. *See id.* at 676 ("the question [is] whether EchoStar retains the right to control the manner or means by which the Retailers carry out their contractual duties."); *see also id.* (relevant question is "whether EchoStar controls the manner or means by which the Retailers *market* the product") (emphasis in original).

Relying on EchoStar's contracts with its retailers,[3] the court held that EchoStar did not have the right to control the manner and means of the retailers' conduct as required under the state agency law standard. The court acknowledged that EchoStar retained control over the selection and prices of the programming that its retailers offered to potential subscribers; that it reserved the right to discipline or terminate retailers for their failure to comply with telemarketing laws; and that the retailers agreed to indemnify EchoStar for any losses it incurred as a result of their marketing efforts. 676 F. Supp. 2d at 676; *see also id.* at 674 (quoting Retailer Agreement). Nonetheless, finding that "[t]he Retailers have the sole authority to determine how to best market [the] products [offered] and whom to solicit," the district court concluded that EchoStar did not exercise sufficient control over their marketing efforts to be held liable for their acts under the TCPA. *Id*. at 676.

In reaching this conclusion, the district court declined to follow a recent decision in another telemarketing case against EchoStar (now known as "Dish Network, LLC") brought by the United States and the states of California, Illinois,

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[3] In response to a post-judgment motion filed by the United States and the State of Ohio as intervenors, the district court recently unsealed the previously confidential Retailer Agreements that supported EchoStar's summary judgment motion. *Charvat v. EchoStar Satellite, LLC,* No. 2:07-cv-1000, 2010 WL 3401090, 2010 U.S. Dist. LEXIS 90342 (S.D. Ohio Aug. 31, 2010). Those agreements may prove relevant to the issues in this case. *See, e.g.,* Paragraph 7.3 of the Retailer Agreements.

North Carolina, and Ohio. In *United States v. Dish Network, LLC*, 667 F. Supp. 2d 952 (C.D. Ill. 2009), *certification of interlocutory appeal denied*, No. 09-3073, 2010 WL 376774, 2010 U.S. Dist. LEXIS 8957 (C.D. Ill. Feb. 4, 2010), the court held that no formal agency relationship was necessary to impose TCPA liability on Dish Network. Rather, it was sufficient if Dish retailers "acted as Dish Network's representatives, or for the benefit of Dish Network." 667 F. Supp.2d at 963.

Charvat appealed from the district court's grant of summary judgment dismissing his TCPA claims. On October 15, 2010, this Court by letter invited the FCC and the United States to submit their views on the meaning of "on behalf of" as that phrase is used in the TCPA and the Commission's implementing regulations.

ARGUMENT

I. UNDER THE TCPA AND FCC RULES, AN ENTITY CAN BE HELD LIABLE FOR CALLS MADE ON ITS BEHALF EVEN IF THE ENTITY ITSELF DID NOT DIRECTLY PLACE THE CALL.

This Court's letter of October 15 asks the federal government to answer "the question whether, under 47 U.S.C. § 227(b)(1)(B) and the accompanying regulations, an entity is liable for calls that it did not initiate."[4] As we explain below, the FCC has made clear that a person or entity can be liable for calls made

[4] *Green Letter* at p.1.

on its behalf even if the entity does not directly place those calls. In those circumstances, the person or entity is properly held to have "initiated" the call within the meaning of the statute and the Commission's regulations.

The FCC has explained that its "rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397 ¶ 13 (1995) ("*1995 Order*"). Thus, as the FCC further explained, "[c]alls placed by an agent of a telemarketer are treated as if the telemarketer itself placed the call." *Id.*

The Commission's interpretation of its rules in the *1995 Order* – that, for an entity to be liable for calls it did not place, the calls must have been placed "on behalf of" the entity – is consistent with the language of 47 U.S.C. § 227(c)(5). That section establishes the private right of action for persons who have received more than one unlawful telemarketing call "by or on behalf of" the same entity. Thus, as the FCC has made clear, an entity can be liable under the TCPA for a call made on its behalf even if the entity did not directly place the call. Under those circumstances, the entity is properly deemed to have initiated the call through the person or entity that actually placed the call.

Subsequent Commission precedent confirms this interpretation. In a 2005 declaratory ruling that addressed telemarketing calls made by agents on behalf of an insurance company, the FCC "t[ook] th[e] opportunity to reiterate that a company on whose behalf a telephone solicitation is made bears the responsibility for any violation of our telemarketing rules and calls placed by a third party on behalf of that company are treated as if the company itself placed the call." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of State Farm Mutual Automobile Insurance Company for Clarification and Declaratory Ruling,* Declaratory Ruling, 20 FCC Rcd 13664, 13667 ¶ 7 (2005) (citing *1995 Order* ¶ 13). And, reflecting a similar understanding of the TCPA, the Commission has approved consent decrees that terminated investigations into possible TCPA violations by entities on whose behalf third-party telemarketers made allegedly unlawful calls. *See, e.g., In the Matter of T-Mobile, USA, Inc.,* Order, 20 FCC Rcd 18272 (2005); *In the Matter of NOS Communications, Inc.,* Order, 22 FCC Rcd 19396 (2007).

Thus, in response to this Court's first question, it is the federal government's position that an entity may be held liable under the TCPA and the Commission's regulations for calls made on its behalf, even though it did not itself initiate those calls.

II. ALTHOUGH THE FCC SHOULD BE GIVEN AN OPPORTUNITY TO ADDRESS WHETHER "ON BEHALF OF" INCORPORATES AGENCY PRINCIPLES, RELIANCE ON THE LOCAL LAW OF A PARTICULAR STATE COULD UNDERMINE IMPORTANT FEDERAL OBJECTIVES.

This Court's letter also asked whether the "on behalf of" clause in 47 U.S.C. § 227(c)(5) "incorporates principles of agency law."[5] The TCPA does not itself define the phrase "on behalf of" in section 227(c)(5) or specify that only agents can act on behalf of persons within the meaning of the provision. Nor has the FCC, in exercising its authority to promulgate regulations to implement the statute, determined whether section 227(c)(5) incorporates, or is limited by, principles of agency law. *See* 47 C.F.R. § 64.1200.

In explaining its rules in the *1995 Order*, the Commission stated that "the party on whose behalf the solicitation is made bears ultimate responsibility for any violations," and thus "[c]alls placed by an agent of the telemarketer are treated as if the telemarketer itself placed the call." 10 FCC Rcd at 12397 ¶ 13. This statement makes clear that an entity may be held liable for calls made on its behalf by its "agent," but does not state that an agency relationship (however defined) is necessarily required for "on behalf of" liability.

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[5] *Green Letter* at p.1.

A. Interpretation of Section 227(c)(5)'s "On Behalf Of" Clause Should Not Depend Upon State Agency Law.

As we explain below, a referral to the Commission under the doctrine of primary jurisdiction would enable the FCC specifically to address the relevance of agency law principles to applying the TCPA. For present purposes, however, we note that, although section 227(c)(5) may incorporate agency principles, there are compelling reasons to conclude that it does not incorporate principles of *state* agency law. Indeed, the district court's reliance on Ohio agency law to interpret section 227(c)(5)'s "on behalf of" clause risks undermining the uniform federal policy enshrined in the TCPA.[6]

As the amicus brief filed by five states (including Ohio) observes (Br. 1-2, 8-11), federal statutes are presumed not to incorporate or rely upon state law absent a clear congressional statement to the contrary. *See, e.g., Miss. Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 43 (1989); *Jerome v. United States*, 318 U.S. 101, 104 (1943); *United States v. Jackson,* 401 F.3d 747, 749 (6th Cir. 2005). That is because "federal statutes" like the TCPA "are generally intended to have uniform nationwide application" and there is a "danger that 'the federal program

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[6] The district court failed to address this concern. Nor did it explain why, even applying the principles of Ohio agency law on which it relied, EchoStar's contractually reserved rights to discipline or terminate its retailers for TCPA violations (or to obtain indemnification from them) did not give the company sufficient control over their conduct to make it liable for their TCPA violations. *See* 676 F. Supp. 2d at 676.

would be impaired if state law were to control'" interpretation of a federal law. *Miss. Band of Choctaw Indians,* 490 U.S. at 43*, citing Jerome,* 318 U.S. at 104.

That concern is particularly salient here. If the district court's state law-focused approach to section 227(c)(5)'s obligations were adopted in other cases, it could result in inconsistent understandings of that provision across jurisdictions. These disparate outcomes, in turn, would threaten to compromise Congress's objective, expressed in the TCPA's legislative history, of uniformity in the regulation of interstate telemarketing. *See, e.g.,* H.R. Rep. 102-317, at 10 (finding that "federal legislation is needed to . . . protect legitimate telemarketers from having to meet multiple legal standards"); 137 Cong. Rec. S18317-01, at 1 (1991) (remarks of Sen. Pressler) ("The Federal Government needs to act now on uniform legislation to protect consumers.").

The Commission has previously emphasized the importance of a uniform national policy in this area. It has explained that "it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14064 ¶ 83 (2003) ("*2003 Order*"). To that end, the Commission warned that any "inconsistent interstate [telemarketing] rules" adopted by the states would "frustrate the federal

objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion." *Id.* Interpreting "on behalf of" in section 227(c)(5) according to the substantive agency law of each state could create similar problems for consumers and telemarketers, because the contours of the "private right of action" that provision confers may vary across jurisdictions.[7] Not only would that result threaten to compromise federal policy, it also would lead to uncertainty and unpredictability regarding the application of the TCPA.

B. Judicial Consideration of Charvat's TCPA Claims Should Be Deferred under the Primary Jurisdiction Doctrine to Permit the FCC to Address Whether Section 227(c)(5) Incorporates Principles of Agency Law.

The proper interpretation of "on behalf of" in section 227(c)(5) is within the FCC's statutory authority. In order for the agency to offer an interpretation that goes beyond its limited prior statements on the subject, however, a referral under the primary jurisdiction doctrine would be necessary.

The primary jurisdiction doctrine "comes into play whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . . " *United*

[7] Telemarketing is often performed on an interstate basis. *See* TCPA § 2(7). It follows that if section 227(c)(5) is interpreted pursuant to state agency law, liability for the same call may be different depending on where a suit is brought.

States v. Western Pacific R.R. Co., 352 U.S. 59, 64 (1956); *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). The doctrine permits federal courts to postpone their own consideration of such issues while the litigants present the issues to the appropriate administrative agency for its consideration. The court allows the parties to invoke the agency's adjudicatory procedures, while the court itself either holds its proceedings in abeyance or dismisses the suit without prejudice. *See Reiter*, 507 U.S. at 268 n.3; *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 222-23 (1966).

The primary jurisdiction doctrine thus provides a mechanism for federal courts to "obtain the benefit of the expertise and experience" of an administrative agency regarding issues within the agency's regulatory jurisdiction and expertise. *ALLTEL Tennessee, Inc. et al. v. Tennessee Pub. Serv. Comm'n,* 913 F.2d 305, 309 (6th Cir. 1990); *In re Long Distance Telecomm's Litig*., 831 F.2d 627, 630-31 (6th Cir. 1987). The doctrine also promotes "[u]niformity and consistency in the regulation of business entrusted to a particular agency." *Far East Conference v. United States*, 342 U.S. 570, 574 (1952); *ALLTEL,* 913 F.2d at 309; *In re Long Distance Telecomm's Litig*., 831 F.2d at 630 (*quoting Far East Conference,* 342 U.S. at 574-75).

Because the doctrine "exists for the proper distribution of power between judicial and administrative bodies and not for the convenience of the parties," it

may be raised by a court *sua sponte* at any point in the proceeding, even on appeal. *Distrigas of Massachusetts Corp. v. Boston Gas Co*., 693 F.2d 1113, 1117 (1st Cir. 1982); *see also ALLTEL*, 913 F.2d at 309-10 (invoking primary jurisdiction *sua sponte* on appeal).

This litigation is a classic candidate for application of the primary jurisdiction doctrine. The TCPA was enacted to create a "uniform regulatory scheme" for telemarketing. *2003 Order*, 18 FCC Rcd at 14064 ¶ 83 (discussing the TCPA's legislative history). To that end, Congress authorized the FCC to regulate both interstate and intrastate telemarketing, and directed the Commission to promulgate the regulations required to implement and enforce its provisions. 47 U.S.C. §§ 227(b)(2), (c)(1)-(4). The Commission is therefore uniquely well-suited to decide the proper interpretation of the "on behalf of" clause in that statute.

Where this Court previously has been presented with claims that are grounded upon a comprehensive federal regulatory regime administered by the Commission, it has invoked the primary jurisdiction doctrine. *See ALLTEL*, 913 F.2d at 309-10 (finding that claims based the Commission's rules separating costs between intrastate and interstate telephone services are within the primary jurisdiction of the FCC); *In re Long Distance Telecomm's Litig*., 831 F.2d at 631 (finding that claims based on section 201(b) of the Communications Act are within the primary jurisdiction of the FCC). There is no less reason to do so here.

Further, application of the doctrine here would promote uniformity and consistency within the field of telemarketing regulation. Congress enacted the TCPA against a backdrop of inconsistent state laws to create a uniform national telemarketing scheme that would better protect consumers while reducing compliance burdens for legitimate telemarketers. As shown in Point II.A., above, an approach that interprets section 227(c)(5)'s private right of action pursuant to the local law of particular states would threaten to undermine that federal regulatory objective by increasing confusion on the part of consumers and increasing compliance costs for telemarketers. This Court has invoked the primary jurisdiction doctrine to achieve "the desirable uniformity which occurs when a specialized agency decides certain administrative questions." *ALLTEL,* 913 F.2d at 309. And it should do so again here to provide the Commission an opportunity to interpret and give uniform national effect to the "on behalf of" clause in section 227(c)(5) and its implementing rules.

Finally, allowing the Commission to formulate and present its views will not only assist the Court, but also protect the regulatory responsibilities entrusted to the Commission by Congress. If this Court were to address Charvat's cause of action under the TCPA before the Commission is able to determine – in accordance with its practices and procedures – whether section 227(c)(5) incorporates principles of agency law, and the FCC's subsequent views proved to be inconsistent with this

Court's decision, the Commission could find itself deprived of adequate opportunity to defend the merits of its position in the courts. Such an outcome would significantly compromise the Commission's statutory role in administering the TCPA.

* * *

For the foregoing reasons, this is an appropriate case for application of the primary jurisdiction doctrine. If this Court agrees with that assessment, the Court may wish to order the litigants to present the issues to the FCC for its consideration and hold the present appeal in abeyance pending the completion of the Commission's proceedings. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co*., 299 U.S. 248, 254 (1936). If the Court decides to refer the matter to the FCC for resolution under the primary jurisdiction doctrine, the Commission agrees seek comment no later than 30 days from the date of receipt of a petition for declaratory ruling or other appropriate document from one or more of the parties. Once the FCC has addressed the petition(s), the appeal can then resume before this Court with the benefit of the Commission's interpretation of the TCPA and its implementing regulations.

Alternatively, if the Court prefers not to maintain this appeal on its docket while waiting for the FCC to act, the Court may vacate the decision of the district court and remand with directions for the district court to await the Commission's exercise of its primary jurisdiction. *See In re Long Distance Telecomm's Litig.*, 831 F.2d at 632 (directing the district court on remand to stay further proceedings pending action by the FCC); *ALLTEL,* 913 F.2d at 310 (same). Under this alternative approach, the district court would hold its own proceedings in abeyance pending completion of the FCC's proceedings, and then would apply the Commission's interpretation of the statute and its rules to Charvat's claim in the first instance.

CONCLUSION

In the view of the federal government, a person or entity may be liable under the TCPA for unlawful telemarketing calls if the calls are made on behalf of that person or entity, even if the calls are not directly made by that person or entity.

Although interpreting "on behalf of" in section 227(c)(5) pursuant to the local law of a particular state has the potential to undermine the uniform federal regulatory regime that the TCPA was enacted to promote, the Commission has not had occasion to answer the specific question whether the "on behalf of" clause in 47 U.S.C. § 227(c)(5) incorporates, or is limited by, agency law principles. The Court may wish to hold this case in abeyance while the litigants present the "on

behalf of" issue to the Commission for its consideration. Alternatively, the decision below could be vacated and the case remanded to the district court for entry of an appropriate order staying the suit pending the Commission's disposition of the "on behalf of" issue in proceedings initiated by the litigants before the agency at this Court's directive.

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November 15, 2010

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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	)	
APPELLANT	)	
	)	
v.	)	
	)	
ECHOSTAR SATELLITE LLC,	)	NO. 09-4525
	)	
APPELLEE.	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Amici Curiae" in the captioned case contains 4589 words.

/S/ MAUREEN K. FLOOD

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November 15, 2010

09-4525

IN THE UNITED STATES COURT OF APPEALS
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Phillip J. Charvat, Appellant

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Echostar Satellite, LLC, Appellee.

CERTIFICATE OF SERVICE

I, Maureen K. Flood, hereby certify that on November 15, 2010, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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