ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 13-1182

DISH NETWORK L.L.C.,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties, Intervenors, and Amici.

The parties in this Court are:

Petitioner

DISH Network L.L.C.

Respondents

Federal Communications Commission
United States of America

There are no intervenors in this case.

The Cruise Lines International Ass'n, Inc. is participating in this case as an amicus curiae.

All parties participating in the FCC proceedings below are listed in petitioner's brief.

2. Ruling under review.

In the Matter of The Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protections Act (TCPA) Rules, et al. (CG Docket No. 11-50), Declaratory Ruling, 28 FCC Rcd 6574 (released May 9, 2013) ("*Order*") (A459).

3. Related cases.

There are two related cases, as set forth in petitioner's brief.

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GLOSSARY

APA	Administrative Procedure Act
DISH	DISH Network L.L.C.
DOJ	U.S. Department of Justice
FCC or Commission	Federal Communications Commission
FTC	Federal Trade Commission
TCPA	Telephone Consumer Protection Act of 1991

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BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

JURISDICTION

The Commission's *Order* was released on May 9, 2013.[1] The petition for review was filed on May 17, 2013. This Court has jurisdiction to review "final orders" of the Federal Communications Commission under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344. As discussed in Argument I,

[1] *In the Matter of The Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protections Act (TCPA) Rules, et al.* (CG Docket No. 11-50), Declaratory Ruling, 28 FCC Rcd 6574 (released May 9, 2013) ("*Order*") (A459).

however, jurisdiction is lacking in this case because, among other things, the only portion of the *Order* on review that petitioner DISH Network L.L.C. ("DISH") challenges is not a reviewable final order.

QUESTIONS PRESENTED

In the *Order* under review, the Commission ruled that the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227, and its implementing regulations permit vicarious seller liability for the unlawful calls of third-party telemarketers under federal common-law agency principles. *Order* ¶ 28 (A469); *see generally id.* ¶¶ 29-45 (A469-477). In a single paragraph of that *Order*, the Commission also provided certain "illustrative examples" as "guidance" regarding the types of evidence that "may" support vicarious liability. *See Order* ¶ 46 (A477).

This case presents the following questions:

(1) Whether the Court should dismiss the petition for review for lack of jurisdiction because it challenges "guidance" that does not constitute a "final order" of the Federal Communications Commission made judicially reviewable by 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344.

(2) Whether this Court should dismiss the petition for review because it challenges Commission guidance that is not ripe for review.

(3) Whether, if reviewable, the challenged guidance is lawful.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are included in the Addendum to this brief.

COUNTERSTATEMENT OF THE CASE

In the *Order* on review, the FCC addressed three petitions for declaratory ruling regarding the proper construction of the TCPA, which protects residential consumers and others from certain unwanted and intrusive telemarketing calls. The Commission ruled that a seller is not *directly* liable for unlawful telemarketing calls that are "initiate[d]" by third-party telemarketers within the meaning of the TCPA and its implementing regulations. *Order* ¶¶ 25-27 (A467-469) (citing 47 U.S.C. § 227(b)(1)(B) and 47 C.F.R. § 64.1200(c)(2)). At the same time, the Commission construed the statute and its rules to permit *vicarious* seller liability for the unlawful calls of third-party telemarketers under federal common-law agency principles, including not only formal agency, but also broader agency principles of apparent authority and ratification. *Order* ¶ 28 (A469); *see generally id.* ¶¶ 29-45 (A469-477).

DISH Network L.L.C., which employs third-party telemarketers to promote its satellite television service, filed for review of the Commission's

Order. DISH does not take issue with the Commission's determination that the TCPA and the Commission's implementing rules provide for vicarious liability; nor does DISH dispute that vicarious liability is governed by federal common-law principles of agency. Br. 3. Instead, DISH seeks to overturn a single paragraph of the *Order* to excise certain "illustrative examples" that the Commission provided as non-binding "guidance" regarding the types of evidence that "may" support or "be persuasive" in supporting a finding of vicarious liability. *See Order* ¶ 46 (A477).

COUNTERSTATEMENT OF FACTS

I. REGULATORY BACKGROUND

The TCPA "regulates the use of telemarketing – the marketing of goods or services by telephone." *Order* ¶ 2 (A459). "Among its provisions," and as relevant here, the statute makes it unlawful, subject to certain exceptions, 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). Congress had determined that residential telephone subscribers viewed such calls – often referred to as "robocalls" – as "a nuisance and an invasion of privacy." TCPA § 2(10), 105 Stat. 2394, note following 47 U.S.C. § 227 (Congressional Findings).

The statute also authorizes the FCC "to establish a national 'do-not-call' registry that consumers can use to notify telemarketers that they object to receiving telephone solicitations." *Order* ¶ 3 (A460) (citing 47 U.S.C. § 227(c)(1) – (4)). The Commission's implementing regulations provide – again, subject to certain exceptions – that no person or entity may "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). *See Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1233-34 (10th Cir. 2004) (upholding FCC do-not-call rules).

"Congress provided complementary means of enforcing the [TCPA]." *Mims v. Arrow Fin. Servs. Inc.*, 132 S. Ct. 740, 746 (2012). First, the statute establishes separate private rights of action for violations of the robocalling and do-not-call restrictions. With respect to robocalling, section 227(b)(3) states that "[a] person or entity" may bring "an action [for damages and injunctive relief] based on a violation" of the statutory prohibition or the Commission's implementing regulations. 47 U.S.C. § 227(b)(3)(A). With respect to the do-not-call restrictions, section 227(c)(5) permits "persons" to seek damages and injunctive relief 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).

Second, the TCPA provides that "State Attorneys General may 'bring a civil action [in federal district court] on behalf of [State] residents,' if the Attorney General 'has reason to believe that any person has engaged … in a pattern or practice'" of violating the statute or the FCC's implementing regulations. *Mims*, 132 S. Ct. at 746 (quoting 47 U.S.C. § 227(g)(1)).

Third, the statute contemplates multiple avenues for TCPA administration and enforcement by the FCC itself. "The TCPA envisions civil actions instituted by the Commission for violations of [its] implementing regulations." *Mims*, 132 S. Ct. at 746 n.4 (citing 47 U.S.C. § 227(g)(7)). "The Commission may also seek forfeiture penalties for willful or repeated failure to comply with the Act or regulations." *Id.* (citing 47 U.S.C. §§ 503(b), 504(a)). Additionally, "[t]he Commission may intervene in [State Attorney General] suits." *Id.* at 746 (citing 47 U.S.C. § 227(g)(3)). The Commission may also entertain administrative complaints alleging that telecommunications common carriers have violated the TCPA. *See* 47 U.S.C. § 208.[2] And the Commission may issue declaratory rulings to clarify

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[2] *See*, *e.g.*, *Consumer.Net v. Verizon Commc'ns, Inc.*, 25 FCC Rcd 2737 (E.B. 2010); *Consumer.Net v. AT&T Corp.*, 15 FCC Rcd 281 (1999).

the law and remove controversies, for example, when (as occurred here, *see infra* 7-15) asked to do so on primary jurisdiction referral from courts in which TCPA actions are pending. *See Allnet Commc'n Serv., Inc. v. Nat'l Exch. Carrier Ass'n*, 965 F.2d 1118, 1120 (D.C. Cir. 1992) (referral of Communications Act issues to FCC under the doctrine of primary jurisdiction is warranted to ensure uniformity of outcomes and the application of agency's expert judgment); *see also Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 465-68 (6th Cir. 2010) (referring TCPA issues to the FCC under the doctrine of primary jurisdiction); 47 C.F.R. § 1.2(a) (providing that "[t]he Commission may, in accordance with [5 U.S.C. § 554(e)] … issue a declaratory ruling terminating a controversy or removing uncertainty").

II. THE ADMINISTRATIVE PROCEEDINGS BELOW

The administrative proceedings leading to the *Order* on review began with the filing of three petitions for declaratory ruling. Those petitions were filed in response to primary jurisdiction referrals in two federal lawsuits alleging that DISH had violated telemarketing prohibitions under the TCPA and the FCC's regulations. *See Order* ¶¶ 5-10 (A461-63) (describing background of TCPA litigation in *Charvat v. EchoStar Satellite, LLC*, 676 F.

Supp. 2d 668 (S.D. Ohio 2009), *remanded*, 630 F.3d 459 (6th Cir. 2010); and *United States v. DISH Network, LLC*, 667 F. Supp. 2d 952 (C.D. Ill. 2009)).[3]

On April 4, 2011, the FCC's Consumer and Governmental Affairs Bureau issued a *Public Notice* seeking comment on the petitions. The Bureau asked generally for comment "on the circumstances under which a person or entity is liable for telemarketing violations committed by dealers or other third parties that act on the person's or entity's behalf," and posed two sets of questions:

> 1) Under the TCPA, does a call placed by an entity that markets the seller's goods or services qualify as a call made on behalf of, and initiated by, the seller, even if the seller does not make the telephone call (*i.e.*, physically place the call)?
>
> 2) What should determine whether the telemarketing call is made "on behalf of" a seller, thus triggering liability for the seller under the TCPA? Should federal common law agency principles apply? What, if any, other principles could be used to define "on behalf of" liability for a seller under the TCPA?

Order ¶ 13 (A463-64) (quoting *Public Notice*, DA 11-594, at 4 (released April 4, 2011) (A87)).

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[3] As noted above, there were three petitions for declaratory ruling generated by these cases. In response to the referral from the *United States v. DISH Network* case, DISH, the United States, and the States of California, Illinois, North Carolina and Ohio filed a joint petition with the FCC. Joint Petition (A50). In response to the referral from the *Charvat* litigation, plaintiff Philip Charvat and defendant DISH (previously known as EchoStar) filed separate petitions with the FCC. Charvat Petition (A7); DISH Petition (A28).

After receiving numerous comments, the FCC issued the declaratory *Order* on review. The Commission first held that a seller is not *directly* liable for unlawful telemarketing calls that are "initiate[d]" by third-party telemarketers within the meaning of the TCPA and its implementing regulations. *Order* ¶¶ 25-27 (A467-469) (citing 47 U.S.C. § 227(b)(1)(B) and 47 C.F.R. § 64.1200(c)(2)). In the Commission's view, reading the statute to mean that a seller generally "initiates" calls made by its third-party telemarketers would sweep too broadly – encompassing "a host of activities which have only a tenuous connection with the making of a telephone call." *Id.* ¶ 26 (A468). Moreover, the Commission noted, such a reading would be inconsistent with the agency's existing regulations defining the separate terms "seller" and "telemarketer." *Id.* ¶ 27 (A468-69) (citing 47 C.F.R. § 64.1200(f)(7) & (9)).

The FCC then determined that a seller nevertheless could be held *vicariously* liable for the unlawful calls of third-party telemarketers under federal common-law agency principles, including not only formal agency, but also broader agency principles of apparent authority and ratification. *Order* ¶ 28 (A469); *see generally id.* ¶¶ 29-45 (A469-477). In this regard, the Commission explained that "[f]ederal statutory tort actions, such as those authorized under the TCPA, typically are construed to incorporate federal

common law agency principles of vicarious liability where, as here, the language of the statute permits such a construction and doing so would advance statutory purposes." *Order* ¶ 29 (A469). Thus, the Commission noted, the Supreme Court had held that the Federal Housing Act imposed vicarious liability for racial discrimination according to agency principles[4] and that "general principles of agency," including "apparent authority theory," may establish a basis for liability in private antitrust actions under 15 U.S.C. § 15.[5] And the Commission cited similar lower court rulings (including a TCPA case) holding that, absent liability predicated on agency doctrines of vicarious liability, parties could execute "an end-run around the TCPA's prohibitions."[6]

The Commission stated that the TCPA should be construed to incorporate the full panoply of agency-related theories of vicarious liability, because such a reading would best advance the policies of the statute. These agency doctrines, the Commission explained, go beyond classical agency,

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[4] *Order* ¶ 29 n.84 (A469) (citing *Meyer v. Holley*, 537 U.S. 280, 285 (2003)).

[5] *Order* ¶ 29 n.84 (A469) (quoting *American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 565-74 (1982)). *See also id.* ¶ 36 (A472) (discussing *Hydrolevel* case).

[6] *Order* ¶ 29 n.84 (A469) (quoting *Accounting Outsourcing, LLC v. Verizon Wireless Personal Commc'ns*, 329 F. Supp. 2d 789, 794-95, 805-06 (M.D. La. 2004)).

which "contemplates 'the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control.'" *Order* ¶ 34 (A471) (quoting Restatement (Third) of Agency § 1.01 (2006)). The Commission concluded that vicarious liability under the TCPA also should attach, for example, under principals of "apparent authority," which "holds a principal accountable for the results of third-party beliefs about an actor's authority to act as an agent when the belief is reasonable and is traceable to a manifestation of the principal." *Id.* (quoting Restatement (Third) of Agency § 2.03, cmt. c (2006)). Under "apparent authority," the Commission noted, "a principal's manifestation" need not "be directed to a specific third party in a communication made directly to that person," but can arise in multiple ways, such as "by appointing a person to a particular position" from which third parties reasonably may infer authority. *Order* ¶ 34 n.102 (A471-72) (quoting Restatement (Third) of Agency § 2.03, reporter's note a (2006)). In addition, the Commission noted, vicarious liability under the TCPA may incorporate agency-related principles of "ratification," under which a principal knowingly accepts the benefits of the agent's unlawful activities. *Id.* ¶ 34 (A472) (citing Restatement (Third) of Agency § 4.01, cmt. d (2006)).

The Commission determined that construing the TCPA to incorporate the full range of agency-related vicarious liability principles would best serve the statute's consumer protection goals, not only by giving consumers a fair opportunity to seek compensation for unlawful invasions of privacy, but also by deterring future violations. *Order* ¶ 36 (A472). Addressing the record before it, the Commission found agreement among consumers, government commenters, and the telemarketing industry that the seller is in the best position to monitor and police TCPA compliance by third-party telemarketers.[7] Potential seller liability under agency-related principles would thus "give the seller appropriate incentives to ensure that [its] telemarketers comply" with the law. *Order* ¶ 37 (A473). By contrast, the Commission found that reading the TCPA to narrow the range of available agency-based vicarious liability theories could permit the seller to "benefit from undeterred unlawful acts, and the statute's purpose … [to] go unrealized." *Order* ¶ 37 (A473). The Commission also determined that a broad incorporation of agency-related vicarious liability principles into the

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[7] *Order* ¶ 37 (A473) (citing FTC Comments at 7 (A145); United States Comments at 13 (A212); Comments of the States of California, Illinois, North Carolina and Ohio ("States Comments") at 8 (A126); American Teleservices Ass'n Comments at 3 (A151); Joe Shields Comments at 2 (A229); Stewart Abramson Comments at 2-3 (A232-33); Robert Biggerstaff Reply at 9-10 (A297-98)).

TCPA would "advance[] Congress' intent that the Commission harmonize its TCPA enforcement, to the extent possible, with that undertaken by the [Federal Trade Commission ("FTC")] in connection with its [parallel] Telemarketing Sales Rule." *Order* ¶ 37 (A473-74) (citing *Mainstream Mktg. Servs.*, 358 F.3d at 1234 n.4).[8] The FCC noted that, "[u]nder that Rule, the FTC has taken the position that sellers are responsible for the violations of their authorized dealers." *Order* ¶ 37 (A474).

Finally, the Commission found that its reading of the TCPA was entirely consistent with Congressional intent to preserve legitimate telemarketing practices while protecting consumer privacy. The Commission explained that its interpretation allows sellers to "protect their legitimate commercial interests by exercising reasonable diligence in selecting and monitoring reputable telemarketers and by including indemnification clauses in their contracts with those entities." *Order* ¶ 44 (A476).

Having concluded that the TCPA broadly incorporates agency-related principles of vicarious liability, the Commission provided, as "guidance in this area," some "illustrative examples of evidence that *may* demonstrate" that such principles are satisfied. *Order* ¶ 46 (A477) (emphasis added). The

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[8] *See* Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003).

Commission noted, "[f]or example," that apparent authority "may be supported" by "evidence that the seller allows the outside sales entity access to information and systems that normally would be within the seller's exclusive control." *Id.* The Commission stated that a telemarketer's "ability … to enter consumer information into the seller's sales or customer systems," as well as its authority to use the seller's trade name, trademark, or service mark "may also be relevant." *Id.* The Commission observed that "[i]t may also be persuasive" that the seller "approved, wrote or reviewed the outside entity's telemarketing scripts." *Id.* Noting that DISH had acknowledged as much in its filings with the agency,[9] the Commission also posited that a seller "would be responsible" for the "unauthorized conduct of a third-party telemarketer that is otherwise authorized to market on the seller's behalf if the seller knew (or reasonably should have known) that the telemarketer was violating the TCPA on the seller's behalf and the seller failed to take effective steps" to curb such conduct. *Id.* The Commission opined that these types of evidence – once developed through discovery, if the consumer is not privy to it at the time the complaint is filed – "should" be sufficient to place upon the seller the burden of moving forward with evidence that "a reasonable

[9] *Order* ¶ 46 n.138 (A477) (citing, *e.g.*, DISH Notice of Ex Parte Presentation, Dec. 9, 2011, at 2 (A427)).

consumer would not sensibly assume that the telemarketer was acting as the seller's authorized agent." *Id.* (A477-78).

Explaining its decision to offer this illustrative guidance, the Commission observed that – in addition to the authority Congress delegated to it to interpret and enforce the TCPA – its "decades of experience" in administering the TCPA provided a practical understanding of "the circumstances in which telemarketing call[s] may arise." *Order* ¶ 46 n.137 (A477). The agency thus concluded that announcing its views on how the agency principles might apply in the telemarketing context would benefit "regulated parties, consumers, and courts." *Id.*

SUMMARY OF ARGUMENT

DISH's judicial challenge in this case is aimed at persuading this Court to edit a single paragraph of non-binding illustrative guidance regarding the types of evidence that "may" be relevant to the existence of vicarious liability under common-law agency principles. *See* Br. 3 (citing *Order* ¶ 46 (A477)). Because the challenged guidance is neither a "final order" reviewable under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344, nor ripe for review, DISH's petition for review should be dismissed. In the alternative, if the guidance is reviewable, it is nevertheless lawful, and the petition for review should be denied.

I.A. FCC pronouncements are not reviewable "final orders" unless (1) they reflect the "consummation of the agency's decisionmaking process" and (2) determine "rights or obligations." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1037 (D.C. Cir. 2002) (citation omitted). The challenged guidance in paragraph 46 of the *Order* does not satisfy this test.

In particular, the guidance is non-binding and thus does not determine rights or obligations. Rather, its force is dependent entirely on its power to persuade. In those circumstances, it is well settled that the practical – as opposed to legal – consequence that a party may be required to defend itself before the agency or in court against claims predicated on that guidance does not render it a final reviewable order. *National Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) (guidance not reviewable where it has no binding effect on administrative enforcement or citizen suit); *see also Center for Auto Safety v. National Highway Traffic Safety Admin.*, 452 F.3d 798, 810-11 (D.C. Cir. 2006) ("*Center for Auto Safety*") (reviewability cannot be predicated on the practical as opposed to legal effect of guidance).

B. The guidance also is not ripe for review. *See AT&T Corp. v. FCC*, 349 F.3d 692, 699-700 (D.C. Cir. 2003) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967) (setting forth ripeness test)). The Court would benefit from postponing review to see how the guidance is applied in a

concrete setting, since it is generally a question for the trier of fact whether, under all the facts and circumstances presented in a particular case, the predicates of vicarious liability are met under applicable common-law agency principles. *See* Restatement (Third) of Agency § 2.03 cmt. d (2006); *id.* § 4.01 cmt. d. Such postponement would cause no undue hardship.

II. If it reaches the merits of the Commission's guidance, the Court should reject DISH's claim that the guidance is *ultra vires* and misstates agency principles.

First, given the FCC's unchallenged conclusion that the TCPA incorporates common-law agency principles of vicarious liability, and in light of the agency's enforcement and other statutory responsibilities under the Act, the Commission had ample authority to provide tentative guidance regarding the types of evidence that might be pertinent to vicarious seller liability. DISH provides no support for its suggestion that such guidance is *ultra vires.*

The guidance, moreover, is reasonable. Contrary to DISH's argument, the guidance does not ignore the requirement under common-law agency principles that apparent liability must be predicated upon a direct or indirect manifestation of the principal. Rather, the guidance outlines evidence that may be pertinent to that question, but does not displace the trier of fact's

established role in making vicarious liability determinations under common-law standards. Nor does it establish a strict liability standard or reverse the burden of persuasion borne by the party alleging the existence of an agency relationship between the seller and telemarketer.

STANDARD OF REVIEW

As we discuss below, this Court lacks jurisdiction to review DISH's challenge to the Commission's "guidance" regarding the possible application of pertinent agency principles in the telemarketing context. *See Order* ¶ 46 (A477-78). The Commission's guidance does not constitute a judicially reviewable final order, and, in any event, DISH's challenge is not ripe for review. To the extent that the Court determines that the challenged guidance is a reviewable final order and that it is ripe for review, such review is subject to the Administrative Procedure Act, under which the Court sets aside agency action "found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

ARGUMENT

I. THE COMMISSION'S GUIDANCE IS NOT A REVIEWABLE FINAL ORDER AND, IN ANY EVENT, DISH'S CHALLENGE TO THAT GUIDANCE IS UNRIPE.

DISH expressly limits its challenge in this case to the "guidance" in paragraph 46 of the *Order* regarding "illustrative examples of evidence" that "may" demonstrate that a seller is liable under common-law agency-related

principles for TCPA violations committed by its third-party telemarketers. This Court should not consider that challenge for two threshold reasons. First, the Court lacks jurisdiction to consider it, because the guidance is not a reviewable "final order" of the Commission within the meaning of 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344. Second, even if that guidance were subject to review under those provisions as a matter of jurisdiction, the Court should decline to consider DISH's challenge at this time because it is unripe. *See Mount Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462, 1465-66 (D.C. Cir. 1990) (a final order "nonetheless can be unripe").

A. The Challenged Guidance Is Not A "Final Order" Subject To Judicial Review Under 47 U.S.C. § 402(a) And 28 U.S.C. §§ 2342(1) And 2344.

In deciding to inform "regulated parties, consumers, and courts as to how [the FCC] understand[s]" principles of "federal agency law" to apply in the telemarketing context, the Commission relied on its broad experience "in applying Congress's goals under the statute" to provide "illustrative examples" that "may demonstrate" that a telemarketer is a seller's "authorized representative" for purposes of vicarious liability under the TCPA. *Order* ¶ 46 & n.137 (A477). Such guidance, "like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law," is "entitled to respect" commensurate with

its "power to persuade" and with the Commission's body of experience administering the TCPA.[10] *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *Borg-Warner Protective Servs. Corp. v. EEOC*, 245 F.3d 831, 836 (D.C. Cir. 2001). It is not, however, a "final order" of the Commission that is reviewable in this Court under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344. The Court, accordingly, should dismiss the petition for review for want of jurisdiction.[11]

The test for reviewable "final orders" under the Hobbs Act generally coincides with the test the Supreme Court announced in *Bennett v. Spear*, 520 U.S. 154 (1997), for "final agency action" under the APA. *See, e.g.*, *Fox Television Stations, Inc. v. FCC*, 280 F.3d at 1037 (applying *Bennett* test to determine reviewability of FCC order); *US West Commc'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1055 (9th Cir. 2000) (applying *Bennett* in determining whether FCC decision is a "final order," because "a 'final agency action'

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[10] *See* pp. 6-7 above (outlining FCC's TCPA enforcement powers).

[11] Although other, unchallenged aspects of the *Order* are final and would be reviewable, that does not render the entire *Order* a "final order" within the meaning of 28 U.S.C. §§ 2342(1) and 2344. *See AT&T Corp. v. FCC*, 349 F.3d at 703 (holding that challenged passages in an FCC declaratory ruling containing "descriptive statements by the agency" but without the "force of law" were not reviewable).

under the APA is analytically equivalent to a 'final order' under the Hobbs Act"). Under that test, an order is final and reviewable if: "(1) it is 'the consummation of the agency's decisionmaking process,' and (2) 'rights or obligations have been determined' by the action or 'legal consequences will flow' from it." *Fox Television*, 280 F.3d at 1037 (quoting *Bennett*, 520 U.S. at 154). The challenged guidance from paragraph 46 of the *Order* does not satisfy this test because it neither determines rights or obligations, nor imposes legal consequences.

In assessing whether an order determines rights or obligations or imposes legal consequences sufficient for reviewability, this Court looks to "'whether an agency has issued a binding norm or merely' an unreviewable 'statement of policy.'" *Center for Auto Safety*, 452 F.3d at 806 (quoting *Wilderness Soc'y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006)). "The language used by the agency is an important consideration in such determinations," although tentative language may at times be overcome by independent indicia of an intent to bind, such as Federal Register publication or subsequent agency adjudications that apply the guidance in a binding manner. *Center for Auto Safety*, 452 F.3d at 806; *see also Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1420 (D.C. Cir. 1998) (binding nature of nominal policy statement can be "exhibited" through subsequent

adjudication). An assessment of these factors in this case makes clear that the paragraph 46 guidance is not a final order.

The facts of *Center for Auto Safety* are instructive. In that case, the National Highway Traffic Safety Administration ("NHTSA") had sent generic letters to automobile manufacturers outlining a policy regarding the circumstances in which a manufacturer might recall automobiles for safety-related defects on a regional, rather than nationwide, basis. 452 F.3d at 803. The petitioning public interest groups challenged the Administrator's action, arguing among other things, that "approving" regional recalls was contrary to the NHTSA Authorization Act of 1991. *Id.* at 804.

This Court ruled that the NHTSA had not established a reviewable policy regarding regional recalls, finding that the letters "read as *guidelines*, not binding regulations." *Id.* at 809. The Court noted, for instance, that the letters stated "that, *in general*," it was not appropriate to limit the scope of a recall if the defect can appear after only short-term – as opposed to long-term – exposure to regional weather conditions. *Id.* The Court noted that the NHTSA letters' characterization of manufacturers' obligations to notify vehicle owners regarding defects was "similarly conditional" – stating that "*in some cases it may be permissible* for a manufacturer to modify the [otherwise mandatory] content of the owner notification letter" and that "the

agency *may act favorably* on" manufacturers' modification requests. *Id.* And the Court observed that the agency's description of its views regarding regional recalls for defects related to long-term exposure to weather conditions was "only general in its prescriptions" and suggested that "the agency's position on regional recalls remains flexible." *Id.*

In short, on the basis of that language (and on the fact that the NHTSA letters had not been published in the Federal Register and had not been applied as binding norms), the Court determined that "NHTSA has not commanded, required, ordered, or dictated." *Id.* Rather, the guidance provided in the letters was simply a "privileged viewpoint in the legal debate," *id.* at 808, leaving the agency "free to exercise discretion in assessing proposed recalls and in enforcing the Act," *id.* at 809.

The same is true of the challenged guidance in paragraph 46 of the *Order*. That guidance provides the FCC's views on the types of showings that might suffice to establish vicarious seller liability under agency-related principles for the TCPA violations of its third-party telemarketers. First, the guidance is expressly "illustrative." *See Industrial Safety Equip. Ass'n, Inc. v. EPA*, 837 F.2d 1115, 1120 (D.C. Cir. 1988) (EPA guidance document regarding recommended respirators for asbestos protection was merely "illustrative" and did not constitute reviewable binding agency action). It

also is explicitly tentative and contingent – identifying evidence that "may" "demonstrate" or "support[]" or be "relevant" to vicarious liability. *Order* ¶ 46 (A477). Using another term that customarily is associated with non-binding guidance, the Commission also identifies the type of showing that "*should* be sufficient" to place the burden of production on the seller. *Id.* (emphasis added).[12]

Finally, the guidance posits one circumstance in which the seller "would be responsible." *Order* ¶ 46 (A477). But DISH does not dispute that the seller "would be responsible" in that circumstance – *i.e.,* where "a third-party telemarketer that is otherwise authorized to market on the seller's behalf" engages in conduct on the seller's behalf that violates the TCPA and the seller "kn[ows] (or reasonably should have known)" about it and "fail[s] to take effective steps within its power to force the telemarketer to cease that conduct." *Order* ¶ 46 (A477-78).[13] That fact situation presents a prototypical case of ratification. *See* Restatement (Third) of Agency § 4.01 cmt. d

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[12] *See American Petroleum Inst. v. EPA*, 684 F.3d 1342, 1348-49 (D.C. Cir. 2012) (finding that EPA guideline that technical work products "should be peer-reviewed" did not "bind" the agency "to a judicially enforceable norm").

[13] *See id.* n.138 (A477) (noting that DISH agrees that vicarious liability may result "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") (quoting DISH December 9, 2011 Ex Parte Letter at 2 (A427)).

(ratification may occur where the seller "is aware of ongoing conduct encompassing numerous acts by the [telemarketer]" and the seller "fail[s] to terminate" the telemarketer).

There are, in addition, no independent indicia of intent to bind that would contradict the permissive language used in paragraph 46. The guidance was not published in the Federal Register, and the agency has not applied the guidance in a binding manner.

DISH nevertheless contends (Br. 24) that the Commission's guidance may cause "confusion among litigants and courts in private TCPA litigation" and that courts may "accept[]" litigants' arguments based on that guidance (Br. 21). *See also* Br. 5 (arguing that courts "may erroneously conclude that, because the Commission is charged to administer and implement the TCPA, its views on the application of common-law agency principles in that area are entitled to deference"). The Commission, of course, issued the guidance in the expectation that consumers, regulated parties, and the courts would find it useful and accord it the respect its persuasive power warrants. Such potential impact, however, does not convert the guidance into a reviewable final order. It is well settled that the fact that non-binding guidance may have "practical" (as opposed to "legal") consequences – such as signaling a potential threat of future litigation or administrative enforcement action – does not convert it

into a reviewable final order. *See National Ass'n of Home Builders v. Norton*, 415 F.3d at 15 (the practical effect of potentially having to defend against administrative enforcement or "citizen suit" does not render guidance reviewable, if it would not have binding effect in such proceedings); *see also Independent Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) ("practical consequences, such as the threat of having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement, are insufficient to bring an agency's conduct under [the Court's] purview") (citation omitted); *Center for Auto Safety*, 452 F.3d at 810-11 (reviewability cannot be predicated on the practical as opposed to legal effect of guidance); *Industrial Safety Equip. Ass'n*, 837 F.2d at 1120 ("agency process without binding effect, even if it leads to significant 'practical consequences,' is not reviewable").

B. DISH's Challenge To The Commission's Guidance Is Not Ripe For Review.

Even if there were doubt about whether the Commission intended to provide non-binding guidance or binding norms in paragraph 46 of the *Order*, DISH's challenge to that paragraph would not be ripe for review. Indeed, where such doubt exists, "the issues of reviewability and ripeness converge" and dictate that judicial review await a concrete application of the guidance. *Florida Power & Light Co. v. EPA*, 145 F.3d at 1420 (quoting *Kennecott*

Utah Copper Corp. v. U.S. Dept. of Interior, 88 F.3d 1191, 1223 (D.C. Cir. 1996)).

The established framework for determining ripeness requires a reviewing court to evaluate "both the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." *AT&T Corp. v. FCC*, 349 F.3d at 699 (quoting *Abbott Laboratories*, 387 U.S. at 149). "Under the 'fitness of the issues' prong, the first question for a reviewing court is 'whether the disputed claims raise purely legal questions and would, therefore, be presumptively suitable for judicial review." *Id.* (citations omitted). The court then considers "whether the court or the agency would benefit from postponing review until the policy in question has sufficiently 'crystallized' by taking on a more definite form." *Id.* at 700 (citation omitted).

"[W]here there are strong interests militating in favor of postponement," courts consider the "hardship" prong of *Abbott Laboratories*. *AT&T Corp.*, 349 F.3d at 700. But "[i]f '[t]he only hardship [a claimant] will endure as a result of delaying consideration of [the disputed] issue is the burden of having to [engage in] another suit,' this will not suffice to overcome an agency's challenge to ripeness." *Id.*

The Commission's guidance simply provides illustrative examples of the types of evidence that "may" be persuasive in resolving questions of apparent authority. *Order* ¶ 46 (A477). It is not possible in the abstract to determine how the Commission's guidance may be applied or whether such application will comply with agency principles.

Moreover, on questions of apparent authority – a major focus of the paragraph 46 guidance – "[i]t is usually a question for the trier of fact whether a … third party would believe that an agent had the authority or the right to do a particular act," and "[i]t is a separate but related question of fact whether such a belief is traceable to a manifestation of the principal." Restatement (Third) of Agency § 2.03 cmt. d (2006). Similarly, "[i]t is a question of fact whether conduct is sufficient to indicate consent" in determining whether a person may be deemed to have ratified another party's action. *Id.* § 4.01 cmt. d. Under the circumstances, therefore, both the Court and the agency would benefit from postponing review of the Commission's guidance to see how it applies in a concrete setting – either in FCC enforcement proceedings or in court proceedings.

Nor would postponing review cause DISH undue hardship. Although DISH expresses concern about how the guidance with be applied in future court proceedings, it is well settled that "the burden of participating in further

administrative and judicial proceedings does not constitute sufficient hardship to overcome the agency's challenge to ripeness." *AT&T Corp. v. FCC*, 349 F.3d at 702. *Accord Sprint Corp. v. FCC*, 331 F.3d 952, 958 (D.C. Cir. 2003); *Florida Power & Light Co. v. EPA*, 145 F.3d at 1421. In this regard, although the courts that have considered the *Order* thus far have correctly found it to be binding on the interpretative question of whether the TCPA incorporates principles of apparent authority and ratification (as well as classical agency) – a proposition DISH does not contest – no court to date has held that the paragraph 46 guidance itself is binding or disposes of any particular dispute.[14] In any event, parties are free to challenge the applicability or persuasiveness of the guidance in the concrete context of the facts of a particular case if the guidance becomes an issue in district court TCPA litigation.

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[14] *See, e.g.*, *Smith v. State Farm*, 2013 WL 5346430 at *2, *3-*6 (N.D. Ill. Sept. 23, 2013); *Bridgeview Health Care Ctr. Ltd. v. Clark*, 2013 WL 4495221 at *2 (N.D. Ill. Aug. 21, 2013); *Mey v. Monitronics Int'l, Inc.*, __ F. Supp. 2d __, 2013 WL 4105430 at *4-*5 (N.D. W.Va. Aug. 14, 2013). DISH suggests (Br. 5 & n.2) that the district court in *Mey* treated the paragraph 46 guidance as dispositive. However, the "guidance" with which the court was "armed" in *Mey*, was the Commission's unchallenged general holding in the *Order* that vicarious liability under the TCPA "does not require a formal agency relationship," but also may arise under "principles of ratification and apparent authority." *Mey* at *4.

II. THE COMMISSION'S GUIDANCE IS REASONABLE.

DISH argues that the paragraph 46 guidance should be set aside on several grounds. Most broadly, DISH suggests that – apparently, right or wrong – the guidance should be vacated because the FCC allegedly "has no expertise or authority concerning common-law agency principles." Br. 19; *see also id.* at 24. DISH also alleges that the guidance in various respects misstates "the meaning and application of the common-law agency doctrine," and suffers from arbitrary internal inconsistencies. Br. 18-19, 20. Finally, DISH claims that the guidance unlawfully purports to reverse the applicable burden of proof. Br. 21. If the Court considers the merits of DISH's challenge, it should reject these claims.

1. There is no basis for DISH's claim that the Court should vacate the FCC's guidance solely on the ground that the agency lacks "expertise or

authority" over agency principles.[15] Whether or not the Commission's guidance regarding the content of common-law agency principles is entitled to *Chevron* deference, it was well within the agency's statutory authority to offer such guidance. First, the Commission reasonably determined – and DISH does not dispute (Br. 3) – that the TCPA incorporates common-law agency principles of vicarious liability into the statute itself. Moreover, as outlined above (at pp. 6-7) and as the Supreme Court has confirmed, the Communications Act authorizes the Commission to implement the TCPA in multiple ways, including through the adoption of regulations, *Mims*, 132 S. Ct. at 746 (citing 47 U.S.C. § 227(b)(2) & 227(c)), through civil actions in court and administrative enforcement actions, *id.* at 746 n.4 (citing 47 U.S.C. §§ 227(g)(7), 503(b), 504(a)), and through declaratory ruling proceedings to terminate controversies or remove uncertainty, *see* 5 U.S.C. § 554(e), 47

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[15] None of the cases DISH cites (Br. 22-25) stands for the proposition that agency findings regarding the application of agency principle to particular factual settings are *per se* reversible as outside the agency's expertise. Indeed, the cited National Labor Relations Board cases – which involved questions of whether individuals were "employees" or "independent contractors" under agency principles – were not even subject to *de novo* review. Rather, the courts acknowledged that the NLRB determinations at issue would be upheld if they reflected the agency's "choice between two fairly conflicting views," even if the court, on its own, would have come to a different conclusion. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 260 (1968); *accord C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995).

C.F.R. § 1.2(a). Indeed, this declaratory ruling proceeding was commenced precisely for the purpose of removing uncertainty in response to a Sixth Circuit primary jurisdiction referral. *See Charvat*, 630 F.3d at 465-68.

Even apart from its statutory authority to interpret the TCPA (which should be sufficient to dispose of DISH's argument), the FCC also had sound reasons to voice its views on the basis of its experience both in examining "the circumstances in which telemarketing call[s] may arise on behalf of sellers" and "in applying Congress's goals" under the TCPA. *Order* ¶ 46 n.137 (A477). Such guidance helps serve a central purpose of the TCPA, *i.e.*, promoting uniformity of regulation in telemarketing. *See Mims*, 132 S. Ct. at 751; *see also Order* ¶ 36 n.107 (A472-73) (compiling TCPA legislative history reflecting Congressional intent to promote uniformity of regulation). And the agency's knowledge of the telemarketing industry – acquired in the course of interpreting and enforcing the TCPA[16] – is particularly pertinent, because determining the existence of agency relationships is highly fact-based and contextual. *See* p. 28, above. Accordingly, if it finds the guidance

[16] A list of the numerous FCC enforcement actions regarding the TCPA's robocall and do-not-call restrictions may be found on the Commission's website. *See, e.g.*, *http://transition.fcc.gov/eb/tcd/DNCall.html* (listing FCC enforcement actions regarding do-not-call restrictions); http://transition.fcc.gov/eb/tcd/tsol.html (listing FCC enforcement actions regarding robocall restrictions); http://transition.fcc.gov/eb/tcd/Robocall.html (listing additional FCC enforcement actions regarding robocall restrictions).

to be reviewable, the Court not only should reject DISH's *ultra vires* claim; the Court also should, at a minimum, accord that guidance "respect" commensurate with its "power to persuade." *Christensen v. Harris Cty.*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. at 140).

2. DISH contends generally that the Commission's examples of evidence that "may" support vicarious seller liability are inconsistent with agency principles in various respects and otherwise are arbitrary and capricious. In this regard, it is notable that DISH does not challenge part of the guidance at all – *i.e.,* the statement that "a seller would be responsible under the TCPA for the unauthorized conduct of a third-party telemarketer that is otherwise authorized to market on the seller's behalf if the seller knew (or reasonably should have known) that the telemarketer was violating the TCPA on the seller's behalf and the seller failed to take effective steps within its power to force the telemarketer to cease that conduct." *Order* ¶ 46 (A477). Indeed, as the Commission noted (*id.* n.138 (A477)), DISH acknowledged below that such conduct could form a basis for vicarious seller liability. As explained below, DISH's complaints regarding the remaining aspects of the Commission's guidance are without merit.

DISH argues that the illustrative examples the Commission provided of evidence that may support a finding of apparent authority – evidence that the

telemarketer has access to the seller's "information and systems," can "enter consumer information" into those systems, or may use the seller's trade name, service mark and telemarketing scripts – all ignore the common-law requirement that the *principal* must make a "manifestation" that reasonably leads the third party to believe that the actor is authorized to act on the principal's behalf. Br. 30; *see also id.* at 26-27. In DISH's view, these examples all focus on "interactions between the principal and the purported agent of which the injured party would be wholly unaware." Br. 30

As the Commission explained, however, "a principal's manifestation" need not "be directed to a specific third party in a communication made directly to that person." *Order* ¶ 34 n.102 (A471-72) (quoting Restatement (Third) of Agency § 2.03, reporter's note a (2006)). Instead, a principal may create apparent authority in multiple ways, including "by appointing a person to a particular position" or by "permit[ting] an agent to acquire a reputation of authority … by acquiescing in conduct by the agent under circumstances likely to lead to a reputation." *Id.* (quoting Restatement (Third) of Agency § 2.03 cmt. c (2006)). Thus, DISH ignores case law establishing that a finding of apparent authority may be supported by, among other factors, a principal's decision "to take a role of minimum involvement" with third parties while making the agent the lone (or almost the lone) interface with such parties.

NLRB v. Kentucky Tennessee Clay Co., 295 F.3d 436, 445 (4th Cir. 2002) (finding employees apparent agents for union); *Walker v. Pacific Mobile Homes, Inc.*, 413 P.2d 3, 5 (Wash. 1966) (salesman's "solitary presence in the company office and about the lot on several occasions," among other factors, "allowed a person of ordinary business prudence to reasonably assume that the salesman had authority" to receive trailers on consignment). As pertinent here, a marketing business model in which the principal initially eschews direct interaction with potential customers and farms out the marketing function to third-party telemarketers that use the seller's trade name and can access the seller's price lists and internal systems may similarly clothe the telemarketer with apparent authority.

Moreover, as noted above, questions regarding "whether a … third party would believe that an agent had the authority or the right to do a particular act" and "whether such belief is traceable to a manifestation of the principal" are generally for the trier of fact. Restatement (Third) of Agency § 2.03 cmt. d (2006); *see also DBI Architects, P.C. v. American Express Travel-Related Servs. Co., Inc.*, 388 F.3d 886, 890 (D.C. Cir. 2004) ("The existence of apparent authority is a question of fact that should normally be left to the jury."). A consumer might reasonably assume that a telemarketer that provides detailed price quotes, uses the seller's trade name and service

mark, and promises to submit customer orders is doing so because the principal has made its systems available to the telemarketer – an *indirect* manifestation by the principal that the telemarketer in fact is authorized to make the call. *See* Restatement (Third) of Agency § 2.03, reporter's note a (2006) (Third Restatement "eliminate[s] any inference that, to create apparent authority, a principal's manifestation must be directed to a specific third person in a communication made *directly* to that person") (emphasis added). Indeed, DISH argues (Br. 33-34) that sellers commonly give telemarketers such access.

DISH further asserts that the Commission effectively acknowledged that factors such as access to price lists and internal systems are not relevant manifestations of the authority of the seller, when it stated that plaintiffs could acquire such information through discovery if they were not privy to that information at the time the complaint is filed. Br. 31 (citing *Order* ¶ 46 (A478)). That is so, according to DISH, because apparent authority "is measured by the injured person's understanding at the time of the relevant event." Br. 31. As previously explained, however, it may be reasonable for the consumer to believe – and to reasonably allege – that a telemarketer that provides detailed price quotes, uses the seller's trade name and service mark, and promises to submit customer orders is doing so because the seller

manifested the telemarketer's authority to do so by making the seller's systems available to the telemarketer. Discovery provides a way for the consumer to confirm that the indirect manifestation actually occurred as the consumer alleges (*i.e.,* that the seller actually gave the telemarketer access and thus that the telemarketer could have acted as the consumer alleges), but this vehicle for developing proof in no way refutes the possibility that the consumer reasonably discerned the presence of apparent authority at the time of the call. Conversely, it is open to the seller to prove that such access was not provided and, accordingly, that there was no manifestation.

DISH contends that the manifestation required to establish apparent authority must be of authority "specifically to engage in *unlawful* telemarketing on the seller's behalf," and that the examples the Commission provided in paragraph 46 of the *Order* represent, at most, evidence that the telemarketer may market a seller's services under some (lawful) circumstances. Br. 33 (emphasis added). However, if the telemarketer is using the seller's systems, pricing information, trade name and service mark in the course of its telemarketing – actions that reasonably may reflect the seller's indirect manifestation to the consumer of having made those systems and information available to the telemarketer – it would not be unreasonable for the called party to assume that the manifestation covers not just lawful

marketing, but the actual call being made even if it turns out the call was unlawful.

Courts have reached similar conclusions in analogous circumstances. For instance, "[n]early every jurisdiction that has addressed a factual situation where a [credit] cardholder voluntarily and knowingly allows another to use his card and that person subsequently misuses the card … has determined that the agent had apparent authority." *Steiger v. Chevy Chase Sav. Bank, F.S.B.*, 666 A.2d 479, 482-83 (1995) (cataloguing authority) (quotation marks and citations omitted). In such cases, not only is the cardholder liable for unauthorized charges by the person to whom the cardholder relinquishes the card, but also the relevant (and sufficient) manifestation of the cardholder may consist solely of the indirectly expressed representation (attributable to the agent's possession of the card) that the agent is an authorized user.[17] Nevertheless, that manifestation is sufficient because the cardholder principal "place[d] the agent in such a position as to *mislead* third persons into believing that the agent was clothed with authority." *Id.* at 482. *See also DBI Architects*, 388 F.3d at 890 (citing *Steiger* test for apparent authority with approval).

[17] No such manifestation would exist if the card were stolen, rather than voluntarily relinquished by the cardholder, and the cardholder may avoid liability by showing that the card was stolen. *Steiger*, 666 A.2d at 483.

More generally, it is well-established that "[r]estrictions on an agent's authority that are known only to the principal and the agent do not defeat or supersede the consequences of apparent authority," Restatement (Third) of Agency § 2.03 cmt. c (2006). Thus, as the Commission properly noted, "the presence of contractual terms purporting to forbid a third-party marketing entity from engaging in unlawful telemarketing activities would not, by themselves, absolve the seller of vicarious liability." *Order* ¶ 34 n.102 (A471-72).[18]

DISH contends (Br. 33-34) that factors such as access to the seller's pricing information, use of the seller's trade name and service mark and access to the seller's sales and customer systems are present in most every case in which a retailer sells the products or services of another entity and that apparent authority cannot reasonably be predicated on such common arrangements. As an initial matter, nothing in paragraph 46 says that the

[18] DISH cites *NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 113 (D.C. Cir. 2012) and *Bridgeview Health Care Ctr. Ltd v. Clark*, 2013 WL 1154206 at *5-7 (N.D. Ill. Mar. 19, 2013) for a contrary conclusion here. Br. 32. However, the pertinent employees' unlawful harassing conduct at issue in *Downtown Bid Services* went well beyond the scope of the union's manifestation with respect to those employees' authority. And the court in *Bridgeview Health Care* was not addressing apparent authority at all. *See Bridgeview Health Care Ctr.*, 2013 WL 4495221 at *1 (noting that prior opinion was based on pre-*Order* assumption that vicarious liability "was limited to circumstances of actual authority or ratification").

presence of any one of the identified factors, by itself, would be enough to establish an agency relationship; instead, that paragraph simply identifies circumstances that are relevant to the agency inquiry. Moreover, assuming that the identified relationships between sellers and telemarketers are common in the telemarketing context, the fact that such telemarketing ties may be routine does nothing to diminish their potential relevance under apparent authority theory. In either case, by employing third-party telemarketers in this manner, the seller puts them "in such a position as to *mislead* third persons into believing that the [telemarketer] is clothed with authority." *Steiger*, 666 A.2d at 482; *DBI Architects*, 388 F.3d at 890.

Nor does the frequency with which apparent authority might arise convert it into strict liability. *See* Br. 40. Liability would still be dependent upon a trier of fact's finding that the identified factors actually occurred and constituted manifestations of the seller, and that the consumer reasonably

concluded, on the basis of those manifestations, that the telemarketer was authorized to act on the seller's behalf.[19]

DISH also argues that the illustrative examples provided in paragraph 46 of the *Order* violate common-law agency principles because they fail to establish that the seller had the right to control the telemarketer's activities. Br. 34-36. Contrary to DISH's underlying premise, proof of the right of control is not a necessary predicate for liability under apparent authority or ratification. *Compare* Restatement (Third) of Agency § 1.01 (2006) (defining

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[19] Relatedly, the Commission in the *Order* "reject[ed] DISH's contention … that vicarious liability beyond strict, classical agency relationships would extend seller liability to the marketing by 'big box stores and national dealers (such as Best Buy, Sears, *etc.*) who sell numerous manufacturers' products (such as Sony televisions, Whirlpool appliances, etc.).'" *Order* ¶ 45 (A477) (quoting DISH Comments at 3 (A175)). While positing that big box *appliance* hypothetical, DISH did not argue below that big box stores marketed DISH's own satellite television *services*. The Commission thus reasonably found that DISH's "hypothetical appear[ed] to bear no relationship" its own "telemarketing model," and noted further that to the extent that a store is "selling on its own account – *i.e.,* it has purchased goods [*e.g.,* televisions or appliances] from a manufacturer and is reselling them – the manufacturer would not be a seller at all." *Id.* In its appellate brief, DISH now asserts that big box stores in fact do "sell DISH products" and "do *not* purchase subscriptions to DISH's satellite television service and then resell those subscriptions 'on their own account.'" Br. 36-37 & n.4 (emphasis added). This change in DISH's argument is barred by 47 U.S.C. § 405(a) because it was not first presented to the Commission. *See American Family Ass'n v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir. 2004) (section 405(a) bars the Court "'from considering any issue of law or fact upon which the Commission has been afforded no opportunity to pass'") (quoting 47 U.S.C. § 405(a)).

classical agency as "the fiduciary relationship that arise when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control") *with id.* § 2.03 cmt. c (apparent authority theory "holds a principal accountable for the results of third-party beliefs about an actor's authority to act as an agent when the belief is reasonable and is traceable to a manifestation of the principal"), and *id.* § 4.01 cmt. b ("The sole requirement for ratification is a manifestation of assent or other conduct indicative of consent by the principal.").

Finally, DISH argues that the alleged disconnect between the Commission's guidance and proper common-law agency principles is confirmed by the fact that the guidance is drawn from a list of factors that the Department of Justice proposed as an *alternative* to agency principles. Br. 37-40 (citing DOJ October 26, 2011 Ex Parte Letter at 5-6 (A345-346)). The asserted disconnect, however, is illusory. Although DOJ urged the Commission not to adopt agency principles into the TCPA "wholesale," it acknowledged that the factors it proposed "track some agency concepts used

to determine secondary liability,"[20] and it stated that "the agency law concept closest to what the TCPA demands is that of 'apparent authority.'"[21]

In sum, DISH has not established that the Commission's general guidance is inconsistent with agency principles.

3. There is no merit to DISH's separate claim (Br. 40-41) that the Commission's guidance unlawfully imposes on the seller the burden of disproving agency. In stating that evidence of the "kinds of relationships" identified in paragraph 46 "should be sufficient to place upon the seller the burden of demonstrating that a reasonable consumer would not sensibly assume that the telemarketer was acting as the seller's authorized agent" (A477-78), the Commission was not suggesting that the consumer could avoid the ultimate burden of persuasion regarding agency. *See* Restatement (Third) of Agency § 1.02 cmt. d (2006) (noting that "the party asserting that a relationship of agency exists generally has the burden in litigation of establishing its existence"). Rather, the Commission was speaking only of the distinct burden of moving forward with additional evidence.

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[20] DOJ November 15, 2011 Ex Parte Letter at 2-3 (A371-372); *accord* DOJ November 30, 2011 Ex Parte Letter at 3-4 (A391-92).

[21] DOJ October 26, 2011 Ex Parte Letter at 4 (A344).

It is well settled that in adjudicatory proceedings the party "who holds the ultimate burden of persuasion does not necessarily have the burden of production." *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 628 F.3d 597, 605 (D.C. Cir. 2010). Indeed, the burden of moving forward often switches back and forth between the parties depending of the evidence submitted in support of their positions. *See, e.g., McFadden v. Ballard Spahr Andrews & Ingersoll, LLP*, 611 F.3d 1, 3 (D.C. Cir. 2010) (in Title VII case, "[i]f the plaintiff establishes a prima facie case, the defendant must come forward with a legitimate nondiscriminatory reason for its actions…, [and] if the defendant meets its burden of production, the burden shifts back to the plaintiff"); *C.A.R. Transp. Brokerage Co., Inc. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (describing shifting burden of production on question of agency); *The Savanna Group, Inc. v. Trynex, Inc.*, 2013 WL 4734004 at *3 (N.D. Ill. Sept. 3, 2013) (noting in TCPA case involving claim of vicarious liability that "[a]fter 'a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial'") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

In context, the challenged statement simply asserts that the types of illustrative evidence outlined in paragraph 46 are relevant to a finding of

vicarious seller liability and may, in appropriate circumstances, impose upon the seller a duty to explain why they do not support a finding of vicarious liability. If, as shown above, such evidence is pertinent to vicarious liability under common-law agency principles, the Commission's statement poses no conflict with the applicable burden of proof.

CONCLUSION

The petition for review should be dismissed. If not dismissed, the petition for review should be denied.

Respectfully submitted,

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November 7, 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISH NETWORK L.L.C.,

PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

RESPONDENTS.

NO. 13-1182

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Federal Communications Commission in the captioned case contains 9,723 words.

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November 7, 2013

STATUTORY APPENDIX

28 U.S.C. § 2342(1)
28 U.S.C. § 2344

47 U.S.C. § 227
47 U.S.C. § 402(a)
47 U.S.C. § 405

28 U.S.C. § 2342(1)

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 158. ORDERS OF FEDERAL AGENCIES; REVIEW

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

* * * * * *

28 U.S.C. § 2344

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 158. ORDERS OF FEDERAL AGENCIES; REVIEW

§ 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of--

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

47 U.S.C. § 227

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section--

(1) The term "automatic telephone dialing system" means 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.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i) of this section, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that--

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G))

(3) The term “telephone facsimile machine” means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term “telephone solicitation” means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term “unsolicited advertisement” means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

(i) to any emergency telephone line (including any “911” line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio

common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless--

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through--

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if--

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes--

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d) of this section;

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if--

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to

subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only--

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall--

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and

the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005.

(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

(C) 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.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall--

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special

directory markings, industry-based or company-specific “do not call” systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall--

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone

numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall--

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages

directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(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.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States--

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that--

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that

the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of inaccurate caller identification information

(1) In general

It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).

(2) Protection for blocking caller identification information

Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability of any caller identification service to transmit caller identification information.

(3) Regulations

(A) In general

Not later than 6 months after December 22, 2010, the Commission shall prescribe regulations to implement this subsection.

(B) Content of regulations

(i) In general

The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines is appropriate.

(ii) Specific exemption for law enforcement agencies or court orders

The regulations required under subparagraph (A) shall exempt from the prohibition under paragraph (1) transmissions in connection with--

(I) any authorized activity of a law enforcement agency; or

(II) a court order that specifically authorizes the use of caller identification manipulation.

(4) Report

Not later than 6 months after December 22, 2010, the Commission shall report to Congress whether additional legislation is necessary to prohibit the provision of inaccurate caller identification information in technologies that are successor or replacement technologies to telecommunications service or IP-enabled voice service.

(5) Penalties

(A) Civil forfeiture

(i) In general

Any person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b) of this title, to have violated this subsection shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by this Act. The amount of the forfeiture penalty determined under this paragraph shall not exceed $10,000 for each violation, or 3 times that amount for each day of a continuing

violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act.

(ii) Recovery

Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) of this title.

(iii) Procedure

No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice required by section 503(b)(3)of this title or section 503(b)(4) of this title.

(iv) 2-year statute of limitations

No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 2 years prior to the date of issuance of the required notice or notice or apparent liability.

(B) Criminal fine

Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than $10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501 of this title for such a violation. This subparagraph does not supersede the provisions of section 501 of this title relating to imprisonment or the imposition of a penalty of both fine and imprisonment.

(6) Enforcement by States

(A) In general

The chief legal officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as parens patriae, on behalf of the residents of that State in an appropriate district court of the United States to enforce this subsection or to impose the civil penalties for violation of this subsection, whenever the chief legal officer or other State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of this subsection or a regulation under this subsection.

(B) Notice

The chief legal officer or other State officer shall serve written notice on the Commission of any civil action under subparagraph (A) prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State to provide such prior notice, the State shall provide such notice immediately upon instituting such civil action.

(C) Authority to intervene

Upon receiving the notice required by subparagraph (B), the Commission shall have the right--

(i) to intervene in the action;

(ii) upon so intervening, to be heard on all matters arising therein; and

(iii) to file petitions for appeal.

(D) Construction

For purposes of bringing any civil action under subparagraph (A), nothing in this paragraph shall prevent the chief legal officer or other State officer from exercising the powers conferred on that officer by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(E) Venue; service or process

(i) Venue

An action brought under subparagraph (A) shall be brought in a district court of the United States that meets applicable requirements relating to venue under section 1391 of Title 28.

(ii) Service of process

In an action brought under subparagraph (A)--

(I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(II) a person who participated in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.

(7) Effect on other laws

This subsection does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(8) Definitions

For purposes of this subsection:

(A) Caller identification information

The term "caller identification information" means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service.

(B) Caller identification service

The term "caller identification service" means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service. Such term includes automatic number identification services.

(C) IP-enabled voice service

The term "IP-enabled voice service" has the meaning given that term by section 9.3 of the Commission's regulations (47 C.F.R. 9.3), as those regulations may be amended by the Commission from time to time.

(9) Limitation

Notwithstanding any other provision of this section, subsection (f) shall not apply to this subsection or to the regulations under this subsection.

(f) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(g) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, 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 the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(h) Junk Fax Enforcement report

The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include--

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)--

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)--

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery--

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.

47 U.S.C. § 402(a)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

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47 U.S.C. § 405

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further

proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

13-1182

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISH NETWORK, LLC, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE
UNITED STATES OF AMERICA, RESPONDENTS

CERTIFICATE OF SERVICE

I, Laurence N. Bourne, hereby certify that on November 7, 2013, I electronically filed the foregoing Brief for Federal Communications Commission with the Clerk of the Court for the United States Court of Appeals for the D.C. 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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