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## SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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August 15, 2007

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Re: In the Matter of EchoStar Satellite LLC Owning  
the Trademark Dish Network's Failure to Register  
as a Telemarketer and the Solicitation it made to  
those Registered on the Do Not Call List  
Docket TC06-191

Dear Folks:

Attached each of you will find copies of Commission Staff's Brief in Reply to EchoStar's Motion for Summary Judgment. This is intended as service upon you by mail.

Very truly yours,

Kara Semmler  
Staff Attorney

Enc.

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF ECHOSTAR SATELLITE )  
LLC OWNING THE TRADEMARK DISH )  
NETWORK, ECHOSPHERE, LLC'S FAILURE )  
TO REGUSTER AS A TELEMARKETERS AND )  
THE SOLICITATIONS THEY MADE TO THOSE )  
REGISTERED ON THE DO NOT CALL LIST. )

**COMMISSION STAFF'S  
BRIEF IN REPLY TO  
ECHOSTAR'S MOTION FOR  
SUMMARY JUDGMENT**

**TC06-191**

COMES NOW Commission Staff (herein 'Staff'), by and through its attorney, Kara Semmler, in reply to EchoStar Satellite LLC's motion for summary judgment. Staff respectfully requests the Commission deny EchoStar Satellite LLC's request for summary judgment. Issues of material fact exist making summary judgment inappropriate and thus require a hearing.

**FACTS**

The consumer affairs division (here in "Consumer Affairs") of the Public Utilities Commission (herein "PUC") received its first complaint regarding unwanted DishNetwork telephone sales calls in early October 2006. Consumer Affairs continues to collect complaints from consumers regarding unwanted DishNetwork calls. Additionally, some complainants have received repeated unwanted telephone calls, all from DishNetwork. Specifically, Consumer Affairs collected complaints from Sixty-Five individual South Dakota residents. The number of illegal phone calls more than doubles the individual complainant count due to repeated, illegal phone calls.

Despite the massive number of complainants and the larger number of illegal phone calls, the consumer experience is nearly always the same. The consumer experience follows one of

two patterns. Pattern one is:

- 1) The consumer did not want to receive unsolicited telephone calls and therefore placed his or her phone number on the South Dakota Do Not Call Registry.
- 2) The consumer was contacted by an individual calling for the sole purpose of selling the DishNetwork product.
- 3) The sales person possibly offered a variety of promotional products or attempted to otherwise entice the consumer to purchase DishNetwork. Regardless of the method, the caller identified him or herself as DishNetwork.
- 4) The consumer always asked the caller to remove his or her phone number from the solicitation list. Some consumers received repeated calls despite the request.

The second calling pattern is as follows:

- 1) The consumer did not want to receive unsolicited telephone calls and therefore placed his or her phone number on the South Dakota Do Not Call Registry.
- 2) The consumer was contacted by an automated message “from DishNetwork” informing the consumer of a DishNetwork product and/or promotion. The automated message left a call back phone number.
- 3) Some consumers called the number left and asked to be removed from the calling list. Despite the request, many consumers received multiple solicitation phone calls.

When consumers contact Consumer Affairs they nearly all complain about “DishNetwork” as the actual Do Not Call violator. Staff learned, however, “DishNetwork” is simply a product name or trademark. EchoStar Satellite, LLC owns the product name, the

technology and ultimately benefits from every DishNetwork sale regardless of who or what makes the sale. More specifically, regardless of who or what sells the DishNetwork hardware, the consumer must subscribe for service through EchoStar Satellite LLC to obtain any picture on the television screen. The “retailer contract” available for potential DishNetwork sales people allow the sales person to promote and solicit orders for “DishNetwork programming”. See Retailer Contracts, “Collection of Programming and Other Fees”, attached hereto as Exhibit A. However, the available contracts also specify the retailer cannot be paid based on programming sales. All programming sales are made for the benefit of EchoStar and collected by EchoStar. Ultimately, the retailer “sells” hardware necessary to receive DishNetwork.

The consumer has no way to know all the parties involved in the complicated process it undergoes to obtain DishNetwork. Despite the corporate “EchoStar Satellite LLC” name and the claimed independent retailer, all bills for monthly television programming are sent from “DishNetwork.” Further, the consumer pays “DishNetwork,” calls “DishNetwork” if problems arise and ultimately has no reason to know “EchoStar Satellite, LLC ” exists. The consumer believes, from the first phone call regardless of the initiating entity, it is contracting with DishNetwork. He or she has no way to know DishNetwork is merely a tradename. A reasonable consumer believes he or she contracted with and receives programming from DishNetwork. Despite consumer perception, for clarity, I will refer to EchoStar Satellite, LLC and any other related entity as “EchoStar” from herein. Additionally, the product alone, as the consumer receives it will be referred to as “DishNetwork.”

The hardware all consumers are required to obtain is compatible only with DishNetwork programming. It is not universally usable for any other purpose. All sales people regardless of

how or who pays his or her for sales efforts, benefits EchoStar. The benefit is not only in the form of a hardware product sale, but it is also in the form of an ongoing requirement to purchase network programming from EchoStar Satellite.

Robert Munger, Director of Call Center Operations for EchoStar provided a sworn affidavit, attached here to as exhibit B, to show EchoStar does not make unsolicited calls in violation of the Do Not Call Registry. More specifically, he swore none of the Complaints filed in the Commission office at the time of the Affidavit's creation originated within the walls of EchoStar or its call centers. Staff has no reason not to believe Mr. Munger and does not challenge his position. Staff cannot prove a complainant's phone call came directly from EchoStar. Rather, Staff has reason to believe sales calls at issue were made by outside parties. The outside parties attempted to sell DishNetwork television programming through unsolicited phone calls. Although the sales people do not obtain any financial reward for the programming sale, they do get paid for hardware sales. The programming cannot be obtained without the hardware. The third party hardware sales people are incentivised to sell, and paid to sell the DishNetwork hardware package based on sheer sales numbers. Please see the attached contracts for specific incentive programs available to retailer sellers. In addition to retailer hardware sales, Staff does not doubt various retailers have leads hunters or hire outside calling agencies to sell the product. Staff does not believe, however, such callers are excused from the Do Not Call Registry rules and statues.

The final step prior to receipt of programming is installation. It too is often done by an outside contracted company or a retailer subcontractor. Again, like with the initial sale, the installer often identifies him or herself as DishNetwork. The installer, regardless of the

relationship with EchoStar acts on behalf of EchoStar to take necessary authorization steps and complete the technical circle. As an end result the EchoStar hardware sends the DishNetwork programming to the television screen. All the players along the way act as a catalyst to get the final television programming to the consumer. None of the players act independently from EchoStar or DishNetwork, as the only purpose for purchasing the hardware is to receive programming.

### ANALYSIS

Commission Staff does not dispute EchoStar's statement of Summary Judgment Standard of Review and only wishes to reiterate that, "if reasonable persons, upon examining the evidence, might reach different conclusions, a motion for summary judgment should be denied and the case tried on the merits." Laber v. Koch, 383 N.W.2d 490, 380 (SD 1986). Staff believes there are significant issues of fact at issue for Commission decision. Such issues make EchoStar's Motion for summary judgment inappropriate.

All complaining consumers believed they were called by EchoStar (the company owning DishNetwork). In the course of discovery, EchoStar made it clear it does not generally sell the DishNetwork hardware through company sales calls. In fact, they don't need to. EchoStar can pay others to do it, yet it knows the consumer must always go to it for programming. No sale of any hardware is complete without program arrangements through EchoStar. Hardware sales do not stand on their own as valuable in the least to any consumer. Consequently DishNetwork hardware sales people cannot operate independent from EchoStar Satellite.

Commission Staff does not dispute EchoStar's assertion it did not personally make any sales calls that resulted in this consumer protection action initiated by Staff. Staff has neither

theory nor facts to dispute the affidavit of Mr. Munger. Additionally, Staff does not believe the admitted DishNetwork call centers organized through EchoStar Satellite make unsolicited phone calls to Do Not Call Registrants. Rather, the complaints all show a caller contacted the Do Not Call Registrant on behalf of EchoStar, selling a product only useful through EchoStar. The telephone solicitor identified him or herself as DishNetwork, and attempted to sell a product to allow the consumer to receive DishNetwork television programming. In the event the sales person did not have actual authority to make the solicitation, he or she certainly had apparent authority to make a sales call on behalf of EchoStar, the owner of the DishNetwork trade name.

The agency relationship is either ostensible or actual. An actual agency relationship “exists if the relationship expressly created by an agreement whereby the principal appoints his agent who agrees to serve in that capacity.” Dahl v. Sittner, 429 N.W.2d 458, 462 (SD 1988). “Ostensible agency exists where the law implies an agency relationship because the principal affirmatively intentionally or by lack of ordinary care causes a third party to believe another is serving as his agent.” Id. at 463 citing Kasselder v. Kapperman, 316 N.W.2d 628, 630 (SD 1982); SDCL 59-1-5. Whether an agency relationship has in fact been created depends upon the relationship of the parties as they exist under the agreement or acts. Kasselder at 630. Ostensible or apparent authority is, “such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess.” SDCL 59-3-3; Leafgren v. American Family Mut. Ins. Co., 393 N.W.2d 275, 277 (SD 1986). “Whether or not an agent acts within the scope of his apparent authority is determined as a question of fact from all circumstances of the transaction and the nature of the principle’s business.” Draemel v. Rufenacht, N.W.2d 759, 763 (1986). Clearly issues of fact regarding the consumers’ perception and reasonableness thereof

along with behavior of EchoStar are at issue and most appropriate for the hearing process.

SDCL 49-31-1(31) requires the Commission examine the relationship of the parties. A telephone solicitor is defined as any person or organization who individually or through sales persons, makes *or causes to be made* a telephone solicitation call.” *Emphasis added.* The statute does not require that the “sales persons” be on EchoStar’s payroll. Staff believes it can and will show EchoStar, in selling its DishNetwork product, caused salespeople to make unsolicited phone calls. Again, clearly issues of fact not appropriate for Summary Judgment. Rather, Staff urges the Commission deny EchoStar’s request for Summary Judgment. Questions of fact include who made the phone calls, and who caused for the phone calls to be made. Additionally, questions of fact include whether an agency relationship existed and whether EchoStar ultimately caused for the calls to be made.

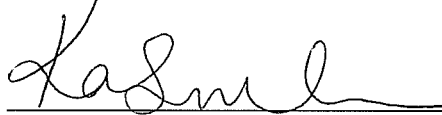
### **CONCLUSION**

In conclusion, the telemarketing laws in the State of South Dakota require the Commissioners to examine whether the telephone solicitation calls were made or caused to be made by EchoStar. In addition, Staff believes consumer perception and a variety of agency issues are potentially at issue and should be examined by the Commission. All the above include investigation into facts. Staff does not believe the issues in this case are as simplistic as EchoStar wished you to believe. EchoStar hopes to dismiss this case by simply providing an affidavit to “prove” it does not personally make unsolicited phone calls. Staff argues the statutes at issue potentially define DishNetwork as a telephone solicitor subject to our rules and regulations regarding the same. Staff anticipates presentation of fact to prove EchoStar did, indeed cause the phone calls to be made and thus falls under your jurisdiction in its failure to



follow South Dakota Do Not Call rules. Staff respectfully asks the Commissioners to deny EchoStar's request for Summary Judgment.

Dated at Pierre, South Dakota, this 15<sup>th</sup> day of August, 2007.



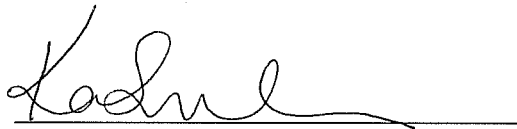
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CERTIFICATE OF SERVICE

I hereby certify that copies of the Brief in Reply to EchoStar's Motion for Summary Judgment were served on the following electronically on the 15<sup>th</sup> day of August, 2007.

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