

DC Circuit Court Holds that FCC Guidance on Agency Law in TCPA Cases is Not Binding on Courts

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Yesterday, in *DISH Network, LLC v. FCC and United States*, No. 13-1182 (DC Cir. Jan. 22, 2014), the D.C. Circuit Court of Appeals issued a *per curiam* decision dismissing a petition by DISH Network, LLC that challenged the FCC's "guidance" on the interpretation of agency law in the context of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"). Relying on the FCC's representations to the Court that its guidance was not binding, and was not entitled to deference under *Chevron*¹, the Court held that the FCC's findings were not a final order ripe for judicial review.

In its May 9, 2013 Declaratory Ruling,² the FCC held that the federal common law of agency governs a court's determination of whether a seller is liable for TCPA violations committed by third-party telemarketers of seller's goods. Declaratory Ruling, ¶ 28. In short, the FCC found that the seller could be held vicariously liable for a telemarketer's TCPA violations if the telemarketer acted as an agent of the seller under the federal common law of agency. *Id.*; see Client Advisory: [FCC Opens the Door to Vicarious Liability for Third-Party Telemarketing Under Certain Conditions](#). However, the Declaratory Ruling went on to provide "guidance" to courts applying the federal common law of agency. The paragraphs of the Declaratory Ruling at issue on appeal provided hypothetical examples which purported to apply the federal common law of agency and commented on circumstances that "may demonstrate" the existence of an agency relationship. *Id.* at ¶¶ 46, 47. DISH Network, LLC challenged this guidance as beyond the FCC's authority and as an incorrect application of the federal law of agency.

On review, the FCC asserted that this portion of the order was not intended to be binding, and thus challenged the court's jurisdiction to hear challenges to the content of the guidance. Relying on the FCC's concessions in its brief and at oral argument, the Court concluded that the FCC's guidance is not a final order ripe for judicial review. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1037 (D.C. Cir. 2002). The Court emphasized, "The FCC agrees that the 'guidance' in question has no binding effect on courts, that it is not entitled to deference under *Chevron* U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837 (1984), and that 'its force is dependent entirely on its power to persuade.

As a result of the D.C. Circuit's decision, no court will be bound by the FCC's guidance applying the law of agency in the context of TCPA violations. Questions of agency will be litigated in individual TCPA cases, but courts may not afford the FCC's guidance special deference and are free to credit or disregard the FCC's opinions on the application of agency law.

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¹ *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)

² *In re 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 Protection Act (TCPA) Rules, the Petition Filed by Philip J. Charvat for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules, and the Petition Filed by DISH Network, LLC for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, CG Docket No. 11-50 (rel. May 9, 2013) (“Declaratory Ruling”).