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January 10, 2005

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex K)
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Via Hand Delivery

**Re: Prerecorded Message EBR Telemarketing, Project No. R411001
FTC Notice of Proposed Rulemaking ("TSR NPRM")**

Ladies and Gentlemen:

SBC Communications Inc. ("SBC"), on behalf of its operating subsidiaries, respectfully submits the following Comments to the Federal Trade Commission ("FTC" or "Commission") with regard to the proposed modification of the Commission's Telemarketing Sales Rule, 16 C.F.R. §310 ("TSR"), to include a new safe harbor at 16 C.F.R. §310.4(b)(5) to allow the use of prerecorded messages in connection with telemarketing calls made to consumers with whom the seller on whose behalf the calls are made has an established business relationship.¹

As a general matter, the TSR prohibits telemarketers from abandoning calls. Telemarketers must ensure that a live sales representative is available within two seconds of the called party's completed greeting.² There is a basic common sense behind this rule: when a consumer reacts to a telemarketer's call, interrupts what she is doing, and walks across the room to take the call, she should not be met with dead air.

Likewise, there is common sense to a key exception to the prohibition on call abandonment. In recognition of the fact that telemarketers and sellers legitimately use technology to reach a broad a spectrum of consumers, the TSR includes a safe harbor that permits the use of so-called "predictive dialers."³ Predictive dialers maximize productivity by allowing telemarketers to call multiple consumers for every sales representative. This same

¹ SBC subsidiaries are not necessarily subject to the FTC's TSR, as they fall instead within the ambit of the FCC's similar rule at 47 C.F.R. §64.1200. Nonetheless, as is common practice, SBC uses third-party vendors to assist with telemarketing efforts, and SBC and these vendors must coordinate their activities. These vendors are, in many cases, subject to the TSR; therefore, the application of these rules will impact directly the manner in which SBC does business.

² 16 C.F.R. §310.4(b)(1)(iv).

³ 16 C.F.R. §310(b)(4).

functionality, of course, also means that there will be a certain number of abandoned calls because there will be random instances when there are insufficient sales representatives to cover connected calls. The existing safe harbor allows the use of predictive dialers, i.e., allows some telemarketing calls to be abandoned, so long as certain conditions are met, including that the telemarketer or seller abandon no more than three percent of all calls answered by a person as measured “per day, per campaign.”⁴ Put another way, for every distinct telemarketing campaign, on a given day, the telemarketer must connect 97% of all calls to a live sales representative. Accordingly, a telemarketing campaign consisting solely of prerecorded messages would violate the TSR.

Safe Harbor for Prerecorded Messages

SBC supports the FTC’s tentative conclusion to create an additional safe harbor to the TSR that would permit telemarketers and sellers to use prerecorded messages in their sales campaigns. Prerecorded messages are an efficient, effective method of conveying useful information to customers. Properly employed, they implicate the best aspects of telemarketing while avoiding the abuses that led to the enactment of the TSR: consumers will be guaranteed to be met with a voice almost immediately after answering the phone, i.e., there will effectively be no call abandonment; consumers will receive focused information on sales, promotion and related opportunities; the call will last a confined period of time; and, of course, the consumer will be free to hang up at any moment during the call with no awkwardness and with no concern over having to deal with an overly persistent sales representative. Indeed, as the use of prerecorded messages becomes more entrenched, consumers will be less likely to hang up, as their expectation will be to receive practical, beneficial information over a reasonably predictable span of time. Moreover, the limitation of the proposed safe harbor that the seller have an established business relationship with the consumer⁵ will further curtail any potential abuses otherwise associated with telemarketing calls: the information conveyed will be bounded by the existing compact between seller and customer, and the seller, wanting to maintain goodwill with the customer, will take steps to ensure that the messages are informative and of appropriate length.

The FTC recognizes the legitimacy of using prerecorded messages, as evidenced by its interim adoption of the proposed safe harbor pending the completion of the rulemaking.⁶ The FTC should extend the common sense of the existing safe harbor, and the TSR itself, by enacting permanently the proposed new safe harbor.

⁴ *Id.*

⁵ The proposed rule would utilize the existing definition of “established business relationship” found at 16 C.F.R. §310.2(n). TSR NPRM at 5, n. 6. SBC agrees with the continued use of this definition.

⁶ TSR NPRM at 14.

Results from a survey conducted by SBC illuminate the potential usefulness of prerecorded messages. The survey of 1217 existing SBC DSL Internet access customers across SBC's 13-state franchise territory evaluated customer satisfaction with automated, prerecorded messages that remind customers of service installation dates and other pertinent service information.⁷ A significant percentage of customers confirmed both that the automated system saved them time – 34.6% of those surveyed cited the prerecorded as obviating the need to take the time to call SBC – and that the messages in general were well received – 55.1% responded that they would like to receive prerecorded messages in the future. While these results are not directly apposite, as they relate to service-activation and related transactional messages, they nonetheless demonstrate that customers find prerecorded messages – if properly handled – useful and helpful.

While SBC enthusiastically supports the proposed safe harbor, including most of its specific provisions, some of the criterion would likely do little if anything to benefit consumers and vastly increase the cost and complexity of complying with the rule. The safe harbor criteria articulated by the FCC include the following:

1. The seller must allow the telephone to ring for a least fifteen seconds or four rings before disconnecting the call;⁸
2. The seller must play the prerecorded message within two seconds of the called party's completed greeting;⁹
3. The prerecorded message must provide the customer, "at the outset," an opportunity to assert an entity-specific Do-Not-Call ("DNC") request pursuant to 16 C.F.R. §310.4(b)(1)(iii)(A).¹⁰
 - In this regard, the FTC sees possible value in requiring that the prerecorded message system be enabled with an interactive feature that would allow the called party to stop the prerecorded message and reach a live sales representative by pressing a button on the telephone keypad.¹¹

⁷ SBC does not use prerecorded messages in its telemarketing activities, but does use *transactional* prerecorded messages, such as appointment reminders, payment-receipt notification, etc. The new safe harbor would free SBC, and its telemarketing vendors, to put prerecorded messages to additional valuable uses.

⁸ TSR NPRM at 12.

⁹ *Id.* at 12-13.

¹⁰ *Id.* at 13.

¹¹ *Id.*

4. The new safe harbor would not obviate or negate any other provision of the TSR, or other federal or state laws.¹²

SBC suggests modifications to these criteria, specifically element no. 3. First, a requirement for an indication at the outset of a prerecorded message that the customer can assert an entity-specific DNC request would be clumsy and confusing. The principal purpose of the prerecorded message – especially one sent to an existing customer – is to provide useful information in a focused, time-confined manner. A reminder at the beginning of the message that the customer can choose not to receive such messages will seem out of place and potentially make the customer wary of the message in the first instance, even when the information conveyed may ultimately be quite helpful to the customer. A better, more common sense approach would be to require that the prerecorded message contain, before the end of the message, simple, short and concrete information regarding the customer’s DNC rights and how the customer can assert them. In this way, the call will have an even, uninterrupted flow, but the customer will surely know by the end of the call how to avoid receiving such calls in the future.

Second, requiring an interactive feature would be both unnecessary and impractical. Converting systems to support this interactivity would require a significant investment of time and capital to synchronize telephonic dialing capabilities with interactive-voice platforms and databases. Moreover, the interactive feature would lend no more value to customers than would the provision of an 800-number that a customer could call to be connected to a service representative and, thereby, make an entity-specific DNC request. That is, in the end, an interactive feature would do little more than save the customer the minor trouble of hanging up the phone and dialing 11 digits,¹³ but it would come at substantial cost and effort. This fractional ease of dialing does not justify the cost. In short, technology might *theoretically enable* any number of features that could “gold plate” the way a particular seller might interact with its customers, but the mere *ability* to employ a feature does not mean that its benefits are justified. The significant costs would not be justified here.¹⁴

In this same vein, there is no need to require that sellers seek prior consent from a customer before contacting her with prerecorded telemarketing messages.¹⁵ The combination of information regarding opt-out rights, and an 800-number to call to effect such opt-out, will empower customers to eliminate prerecorded messages, if they wish. A prior-consent

¹² *Id.* at 14.

¹³ To clarify, it would not necessarily be the case that the interactive feature would connect the customer to a live sales representative any faster than if the customer were simply to dial an 800-number and connect to, potentially, the very same call center that would be reached through the interactive system.

¹⁴ It is instructive that the FCC’s safe harbor for the use of prerecorded messages, 47 C.F.R. §64.1200(a)(6)(i), contains no requirement for this type of interactive feature, nor does it require a DNC reminder at the outset of the call. To our knowledge, this rule has been operated effectively.

¹⁵ TSR NPRM at 28 (Question no. 3).

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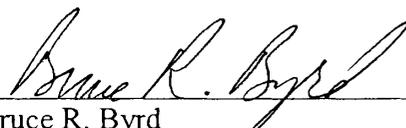
requirement would multiply exponentially the number of calls that sellers will make, and callers will receive, all simply to confirm that a customer is willing to receive yet more calls in the future. In the end, this would be tantamount to a new layer of DNC opt-out regulation and almost certainly would confuse customers.¹⁶

Conclusion

SBC appreciates this opportunity to comment on the Commission's proposal. SBC respectfully urges the Commission to adopt permanently the proposed additional safe harbor to the TSR for prerecorded messages, with the modified criteria as articulated above.

Respectfully submitted,

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¹⁶ The FCC's safe harbor for prerecorded messages only requires prior consent when the seller *does not have* an established business relationship with the customer. 47 C.F.R. §64.1200(a)(6)(i). Thus, the FCC recognizes that the preexisting business relationship obviates the need for prior consent. As the FTC's proposed safe harbor is conditioned in all instances on the existence of an established business relationship, so too does it obviate the need for prior consent in any instances.