UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Before the
Federal Communications Commission

In the Matter of

Policies and Rules Governing Interstate Pay-Per-Call Services and Other Information Services Pursuant to the Telecommunications Act of 1996 and Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act

Comment of the
Federal Trade Commission

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I. INTRODUCTION

On July 11, 1996, the Federal Communications Commission ("FCC") published an Order and Notice of Proposed Rulemaking ("Order and Notice") that implemented various provisions of the Telecommunications Act of 1996(1) ("1996 Act") and proposed related changes in FCC rules designed to curb abusive practices in the pay-per-call industry.

The Federal Trade Commission ("Commission" or "FTC") strongly supports the FCC's efforts to reduce abusive practices in the pay-per-call industry. These practices threaten consumers' pocketbooks and undermine consumer confidence in the entire pay-per-call industry. The Commission believes that revising the FCC's rules as mandated by the 1996 Act will reduce these abusive practices. The Commission also supports the efforts of the FCC to attempt to close remaining "loopholes" in the regulation of the pay-per-call industry that allow these abuses to continue.

II. BACKGROUND

Pay-per-call technology offers consumers a convenient way to access information and entertainment services.(2) Using only a telephone, a consumer can obtain information or entertainment without investing in the latest computer technology.(3) When first introduced, this technology promised to vastly expand the market for information services and unleash the growth of a new communications industry. Unfortunately, while the technology was a convenient tool for consumers, it also became easy for unscrupulous operators to abuse. As a result, the 900-number industry "was tainted early on by scam artists who adopted the technology in large numbers."(4) This early flood of abusive practices might help explain why the development of "the pay-per-call industry has yet to meet expectations."(5)

In the early days of pay-per-call technology, the FTC took action against fraud and deception in this industry by using its general authority to stop deceptive or unfair acts or practices under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 41 et seq.(6) The Telephone Disclosure and Dispute Resolution Act of 1992 ("TDDRA"), 15 U.S.C.

5701 et seq., required both the FCC and the FTC to prescribe regulations governing pay-per-call services. The FTC adopted its "900-Number Rule," 16 C.F.R. Part 308, on July 26, 1993, and it became effective November 1, 1993.

The Rule requires that advertisements for 900 numbers contain certain disclosures, including information about the cost of the call. This information must also be included in an introductory message (preamble) at the beginning of any 900-number program where the cost of the call could exceed two dollars. Anyone who calls a 900-number service must be given the opportunity to hang up, at the conclusion of the preamble, without incurring any charge for the call. In addition, the Rule requires that all preambles to 900-number services state that individuals under the age of 18 must have the permission of a parent or guardian to complete the call.

The 900-Number Rule also establishes procedures for resolving billing disputes for 900-number calls (16 C.F.R. 308.7). The Rule imposes certain obligations on entities that bill and collect for 900-number services, such as investigating reports by consumers of "billing errors," a defined term in the Rule. Under TDDRA, a consumer's telephone service cannot be disconnected for failure to pay charges for a 900-number call, and 900-number blocking must be made available to consumers who do not wish to have access to 900-number service from their telephone lines.

The volume and nature of the complaints received by this agency regarding 900-numbers indicate that the 900-Number Rule has reduced deception in the 900-number industry. Unfortunately, complaints involving non-900 numbers reveal that the "900 number crooks"(7) have merely migrated to alternate, non-900 pay-per-call schemes. Rapid changes in the telecommunications industry have allowed these scam artists to successfully move their abusive practices into other venues outside the 900 system, often outside the scope of the Commission's 900-Number Rule.(8)

The FCC's Order and Notice accurately describes how scam artists evade the regulatory scheme created by TDDRA. By abusing the tariffed service exemption and the presubscription agreement exception to the TDDRA scheme, scam artists have billed unsuspecting consumers for millions of dollars without providing cost and other required disclosures and have left consumers without adequate means to resolve billing disputes.

In the first part of the Order and Notice, the FCC implements regulatory changes specified by Congress in the Telecommunications Act of 1996. The FTC is hopeful that these provisions will help eliminate many abusive practices that have appeared in connection with pay-per-call services offered outside the 900-number service access code. In the second part of the Order and Notice, the FCC proposes several regulatory changes which it hopes will close remaining loopholes and prevent pay-per-call abuse.

As part of the Telecommunications Act of 1996, Congress directed the FCC to change its regulation of common carriers with respect to pay-per-call abuse, and it also authorized the FTC to change its regulation of information providers, service bureaus, and other parties involved in the provision and promotion of pay-per-call services. The 1996 Act authorizes the FTC to extend the definition of "pay-per-call services" in its 900-Number Rule to cover services other than 900 services.(9) When the Commission reviews the 900-Number Rule, it may conduct its own rulemaking to consider whether such services are susceptible to the same unfair and deceptive trade practices that are prohibited by the 900-Number Rule.(10) The Commission has not yet made any determination as to whether the definition of pay-per-call should be expanded, or if so, how.

III. TIGHTER REQUIREMENTS FOR PRESUBSCRIPTION AGREEMENTS AND BILLING METHODS FOR THESE AGREEMENTS WILL REDUCE FRAUD.

The FCC proposes tightening the rules governing presubscription agreements. Although the 1996 Act requires presubscription agreements to be in writing only for information services available through toll-free numbers, the FCC proposes requiring written presubscription agreements for information services accessed through other dialing sequences which are not necessarily toll-free (e.g., 500). The FCC also proposes requiring that written presubscription agreements be executed by a legally competent adult and be separate or easily severable from any promotions or inducements sent to a consumer. A related proposed change is to extend regulatory protection to the subscriber of the line from which a call originates instead of merely to the caller who utilizes that line to dial a toll-free number.

Pay-per-call scam artists abuse these "presubscription agreements" by using seemingly "toll-free" numbers to lure consumers into placing expensive calls. These unscrupulous information providers create sham "presubscription agreements" that do not include an effective means to prevent unauthorized access to the service. These information providers may go through the motions with a caller to create a personal identification number ("PIN") or other such device that purportedly prevents unauthorized access. In reality, however, these information providers use Automatic Number Identification ("ANI") to bill the telephone line from which the calls are placed, regardless of whether or not a caller is authorized by the subscriber to place such calls.(11) In this situation, callers to "toll-free" lines -- especially minors -- may be neither fully aware that they are entering into an agreement, nor competent to do so. These consumers may incur huge liabilities merely by placing calls to the "toll-free" number involved in the agreement. In these circumstances, the subscriber is left with very little protection against unauthorized calls.

The changes specified by Congress and implemented by the FCC will help close the loopholes for presubscription agreements made for calls to toll-free numbers, but additional steps may be needed to prevent these abusive practices from spreading to toll calls.(12) The FTC therefore supports the FCC's proposals to tighten presubscription agreement requirements with respect to toll calls as well.

The Commission supports efforts to control abusive billing practices, such as the use of ANI to bill for calls placed through service access codes other than 900, and other practices related to the misuse of the presubscription agreement provisions under TDDRA.(13) The FCC specifically seeks comment on its tentative conclusion that it is a violation of 228(c)(7)(A) of the Communications Act to use ANI to bill for calls placed to an 800 or other toll-free number. Although the Commission expresses no opinion on this conclusion -- which, in effect would ban ANI billing for presubscribed information services using toll-free numbers(14) -- it notes that there may be other options for dealing with problems associated with ANI billing short of banning the practice. For example, "pay-per-call services" might be redefined in the FTC's 900-Number Rule to include all calls billed merely upon connection and reference to ANI. This would then require full disclosure to consumers of the cost of the call via advertisements and preambles and would incorporate other TDDRA protections, such as billing dispute procedures.(15)

IV. THE FCC'S GOAL OF FUNNELING PAY-PER-CALL SERVICES INTO 900 OR OTHER SPECIFIED SERVICE ACCESS CODES WILL BENEFIT CONSUMERS.

The FCC's rules currently require all pay-per-call services to be provided through the 900 service access code. As explained in the Order and Notice, some information providers have attempted to evade the entire TDDRA regulatory scheme by restructuring the pay-per-call transaction to incorporate the cost of the information within the long distance charges for the call. While the FCC does not believe it has the authority to change the definition of "pay-per-call services,"(16) it does believe that it has the authority to prevent participants in the pay-per-call industry from sidestepping the TDDRA regulatory scheme by restructuring pay-per-call transactions in this manner.

Through its Order and Notice, the FCC seeks to eliminate disguised pay-per-call transactions, effectively moving pay-per-call transactions back into the 900 service access code. The FCC tentatively concludes that "when a common carrier charges a telephone subscriber for a call to an interstate information service, any form of remuneration from that carrier to an entity providing or advertising the service, or any reciprocal agreement between such entities, constitutes per se evidence that the charge levied actually exceeds the charge for transmission." This is the essence of a pay-per-call transaction--that an information provider is profiting by the mere generation of calls to a specific telephone number.

The Commission believes that the FCC's proposal to prevent these hidden pay-per-call arrangements (effectively funneling all interstate pay-per-call traffic through the 900 service access code) could benefit consumers.(17) Thus, the Commission supports these efforts.

With regard to disguised pay-per-call transactions identified by the FCC, consumers may be misled about the cost of a call and may therefore incur unanticipated costs for calls that contain an undisclosed payment to an information service provider. It is misleading to claim that the consumer is paying only "normal" long distance charges for such a call, where the cost of that call includes an undisclosed payment to an information provider. Moreover, the Commission believes that consumers should not only know when their call includes a "purchase" of information and entertainment, but they should also know its cost. Consumers in today's changing telecommunications market have the power to choose among many different pay-per-call services and among many different long distance carriers. Accurate disclosure of the costs of these varying services allows consumers to make educated choices. The Commission supports the FCC's goal of eliminating pay-per-call transactions hidden within seemingly conventional long distance calls.

Transferring all interstate pay-per-call transactions back to the 900 service access code would benefit consumers in three ways. First, consumers would be better able to determine which telephone calls would result in the purchasing of information or entertainment. Presently, many consumers know that there are charges (beyond the cost of transmission of the call) inherent in all 900 number calls, just as many consumers have come to expect that 800 number calls are free. Moving pay-per-call back to the 900 dialing pattern would prevent consumers from unwittingly incurring charges for calls to pay-per-call services.

Second, because all pay-per-call transactions would include the cost and other disclosures mandated by the TDDRA regulatory scheme, consumers would have all necessary pricing information before deciding to make a "purchase" of information or entertainment services.

Third, parents and other telephone subscribers would be better able to prevent unauthorized charges for which the subscriber may be liable. The TDDRA-mandated ability to block calls to pay-per-call services from one's telephone line is an important tool for consumers to protect themselves against unauthorized charges. It is the Commission's understanding, however, that this blocking capability is not currently available for non-900 pay-per-call services. Technological difficulties aside, it may not be a convenient or practicable solution to suggest that consumers block non-900 number lines, such as international dialing access, from their telephones.

Another factor should be considered in addition to these three benefits to transferring pay-per-call transactions back to 900-number lines. Namely, alternative solutions to pay-per-call abuse may be more complicated and costly than FCC's proposal. For example, any possible expansion of the 900-Number Rule (as authorized under the 1996 Act) to apply TDDRA's cost disclosures to certain international 011 or 809 calls might prove to be quite burdensome. This is because the disclosure requirements of TDDRA and the 900-Number Rule appear to work best in the context of a 900 number, where the consumer is charged only by the information provider, not the long distance provider.

There also may be costs to funneling all pay-per-call transactions through one service access code. For example, in the 900 system, information providers must comply with all the strictures of TDDRA. Furthermore, requiring the use of the 900 service access code may increase the regulatory and financial burdens of international pay-per-call service providers that wish to offer their services on a world-wide basis. To the extent that funneling increases consumer confidence in the industry, however, it is likely to provide worthwhile benefits to the pay-per-call industry as a whole. Consumer confidence in the pay-per-call industry, which until now has been seriously compromised by the abuses described above, is needed if the industry is to prosper and mature.(18) The FCC's proposals provide consumers greater protections from incurring hundreds or even thousands of dollars in unexpected or unauthorized calling charges.(19) With this increased protection, consumers may be more willing to use pay-per-call services and to use them for a wider variety of information services.

Thus, for the reasons provided above, the Commission supports the FCC's proposal to channel all pay-per-call transactions into one service access code.

V. CONCLUSION

The Commission would welcome the opportunity to have its staff meet with appropriate FCC staff to discuss the issues raised in this comment.

1. Pub. L. 104-104, Sec. 701, 110 Stat. 56 (1996) (codified at 47 U.S.C. 228).

2. Bureau of Consumer Protection, Federal Trade Commission, Anticipating the 21st Century: Consumer Protection Policy in the New High-Tech, Global Marketplace, Vol. II at 13 (1996) (copy attached).

3. Id.

4. Id. at 12.

5. Id.

6. See, e.g., *FTC v. Transworld Courier Services, Inc.*, C.S. No. 1:90- CV-1635-JOF (N.D. Ga. 1991); *FTC v. Starlink, Inc.*, 1992-1 Trade Cases 69,715 (E.D. Pa. 1992); *FTC v. First Capital Financial, Inc.,* C.A. No. HAR-90-2007 (D. Md. 1992); *FTC v. Interactive Communications Technology, Inc.,* C.A. No. CV F 91018 REC (E.D. Cal. 1992); *FTC v. M.D.M. Interests, Inc.,* C.A. No. H-92-0485 (S.D. Tex. 1992); *FTC v. National Credit Savers,* C.A. No. 91-A-1218-S (M.D. Ala. 1992); *FTC v. U.S. Sales Corp.,* 785 F.Supp. 737 (N.D. Ill. 1992); *Phone Programs, Inc.,* 115 F.T.C. 977 (1992); *Teleline, Inc.,* 114 F.T.C. 399 (1991); *Audio Communications, Inc.,* 114 F.T.C. 414 (1991).

7. Bureau of Consumer Protection, Federal Trade Commission, Anticipating the 21st Century: Consumer Protection Policy in the New High-Tech, Global Marketplace, Vol. II at 14 (1996).

8. Actually, many of these "creative" abusive practices were already subject to and prohibited by the FTC's 900-Number Rule. For instance, some schemes have involved 800 or other toll-free numbers which merely transferred the unwitting caller to a 900 line. The 900-Number Rule specifically prohibits any person from using an 800 number in a manner that results in: (1) a charge to the calling party for completing the call; (2) transferring or connecting the calling party to a pay-per-call service; (3) a charge to the calling party for information conveyed during the call unless the calling party has a presubscription agreement to be billed; or (4) a collect call back to the calling party. 16 C.F.R. 308.5(i). The Commission has enforced its rule to halt such prohibited practices and return money to consumers. *U.S. v. American TelNet, Inc.,* No. 94-2551, (S.D. Fla. 1994) (consent decree settling charges that using sham presubscription agreements, defendants violated the 900-Number Rule by billing charges to consumers' telephone lines for calls accessed by dialing an 800-number; requiring payment of $.5 million in civil penalties, plus $2 million in consumer redress).

9. 1996 Act, 701(b)(1); 15 U.S.C. 5714(1).

10. 15 U.S.C. 5711(C); 16 C.F.R. Part 308.

11. The FTC's largest 900-Number Rule enforcement action to date, *U.S. v. American TelNet,* supra, at note 8, involved such a scenario.

12. Related to this issue of tightening requirements for presubscription agreements is the question of electronic transmission of presubscription agreements. As the FCC notes, Congress has specifically authorized electronic transmission of these agreements. Order and Notice at 42 (citing 47 U.S.C. 228(c)(7)(C)(i)). The FTC strongly supports the FCC's suggestion that "safeguards should be required to ensure that these agreements are valid commercial instruments and that electronic execution does not encourage the abuses that arose from oral execution of presubscription contracts." Order and Notice at 42.

13. For example, the FCC proposes that a consumer must use a pre-existing credit, charge, or calling card to obtain information services pursuant to a presubscription agreement. Order and Notice at 43. Although the Commission

supports the FCC's goal of reducing the abuses of "instant credit" presubscription agreements, at this time the Commission has made no determination as to whether the benefits of this specific proposal outweigh its potential costs.

14. The FCC proposal would exempt services for the deaf from this restriction on the use of ANI billing. Order and Notice at 45.

15. As a general matter, there are a number of reasons why an information provider might wish to use a combination of a presubscription agreement and ANI billing as opposed to simple use of a 900 number. For example, if used in conjunction with a personal identification number (PIN) which the caller is required to enter, it could be a means of assuring that the subscriber has actually authorized the call. However, without the added protections of a separately entered PIN, there are potential illegitimate motivations for such a scheme. For instance, the information provider might desire to prevent the consumer from being able to take advantage of 900 number blocking or the protections afforded when a consumer is billed for a 900 number call.

16. Under the 1996 Act, the Federal Trade Commission has been given the authority to change the definition of "pay-per-call services." 1996 Act at 701(b)(2), amending TDDRA, 15 U.S.C. 5701 *et seq.* At this time, the Commission expresses no opinion on the conclusion reached by the FCC in its Order and Notice, namely that regardless of what changes are implemented by the FTC, the FCC's pay-per-call rules "continue to be delineated by the statutory definition of pay-per-call services contained in Section 228(i) of the Communications Act."

17. It is not clear whether the FCC's proposal will serve to move all pay-per-call transactions back into the 900 service access code. At the present time, the Commission cannot assess whether this FCC proposal would solve the problem where U.S. common carriers were not directly involved in the transaction (e.g., payments to foreign information providers by foreign common carriers). It is also unclear how this FCC proposal would address the situation where a carrier is vertically integrated with an information service provider.

18. Bureau of Consumer Protection, Federal Trade Commission, Anticipating the 21st Century: Consumer Protection Policy in the New High-Tech, Global Marketplace, Vol. II at 12 (1996).

19. Id. at 14.