BEFORE THE
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

In the Matter of	)	
	)	FTC File No. R611016
Proposed Amendment to	)	
16 C.F.R. Part 308	)	
Pay-Per-Call Rule	)	

COMMENTS OF THE BILLING REFORM TASK FORCE

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TABLE OF CONTENTS

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The Billing Reform Task Force ("BRTF"), through its attorneys, hereby submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") addressing the Commission's Trade Regulation Rule ("900 Number Rule") issued pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 ("TDDRA"), 16 C.F.R. § 308.[1] Through a separate notice delivered to the Commission today, the BRTF is requesting an opportunity to participate in the related public workshop to be held on May 20-21, 1999.

I. INTRODUCTION

The BRTF is a non-profit organization representing the interests of leading service bureaus, information providers, and billing entities that provide 800, 900, and other interactive telephone services.[2] Collectively, members of the BRTF process a significant

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[1] 63 Fed. Reg. 58524 (released October 30, 1998).

[2] BRTF members include Advanced Telecom Services, Inc., American Telnet, Inc., IAS, Inc., ICN Ltd., IntegreTel Incorporated, Micro Voice Applications, Inc., Mirage Marketing, Inc., National A-1 Advertising, Inc., National Telephone, Inc., Network Telephone Services, Inc., TPI Group, Telecompute Corporation, USP&C, and West Interactive, Inc.

percentage of pay-per-call traffic and other telephone-billed purchases generated in the United States. Many BRTF members were members of the Interactive Services Association (now the Internet Alliance), and as such, were active participants in other pay-per-call proceedings initiated by the Federal Trade Commission ("FTC" or "the Commission") and the Federal Communications Commission ("FCC").

The BRTF was established in 1998 to work with regulators, consumer groups, telephone carriers, and billing entities to implement critically needed billing and collection reforms. The BRTF's goals are to (i) ensure that consumers are fully informed of both their rights and responsibilities associated with telephone-billed purchases, including pay-per-call services; (ii) reduce the inordinately high level of chargebacks that continue to plague the pay-per-call industry; and (iii) preserve the viability of pay-per-call services and the use of the telephone bill as a billing mechanism for a wide variety of communications and non-communications services in a manner beneficial to consumers. The BRTF believes that these objectives can best be achieved through voluntary industry initiatives combined with changes to federal and state pay-per-call rules.

II. SUMMARY

The BRTF supports many of the Commission's proposals, as well as the Commission's efforts to curtail the unfair and deceptive practices engaged in by some pay-per-call businesses. However, in advancing these proposals, the Commission has turned a deaf ear to the industry's reasonable requests for stronger safeguards against consumer fraud and abuse. In addition, some of the Commission's proposals, if implemented, would impose unnecessary costs on service providers with no corresponding benefit to consumers. Set forth below is a summary of the BRTF's objections to the NPRM.

Billing Notice Disclosures. High chargebacks continue to plague the pay-per-call industry because consumers continue to take advantage of the 900 Number Rule by making repeated calls to pay-per-call services with no intention of paying for them. To address this problem, the Commission must adopt sorely needed, and long-overdue, changes to the billing disclosure requirements set forth in proposed Section 308.20(m). Specifically, the BRTF wants the notice to advise consumers that failure to pay legitimate pay-per-call charges may result in denial of access to 900-number and other non-communications services in the future. Moreover, the notice should state that the pay-per-call service provider to whom the charges are owed has the right to pursue collection of the disputed amounts and may report any failure to pay to a credit reporting agency. There was a general consensus in favor of a billing notice with substantially similar provisions at the FTC's pay-per-call workshop two years ago. However, the Commission appears to have ignored that consensus. The BRTF's proposed amendment would simply alert consumers to their rights, obligations, and potential liabilities *in advance* to deter unjustified chargebacks.

Industry Database. An important second prong in the industry's effort to fight chargebacks is the establishment of an industry database consisting of caller adjustments reported by billing entities. The database would be used by service providers independently to assess the risk of providing service to chronic abusers of pay-per-call services. The Commission should now clarify that industry efforts to establish such a database would not violate the 900 Number Rule, as long as the database includes appropriate consumer safeguards and is administered in a manner that complies with other applicable federal and state laws.

Incremental Billing Requirements. The BRTF strongly opposes the Commission's proposed change to Section 308.10(b), which would upset and alter over a decade of industry practice by prohibiting pay-per-call service providers from billing in one minute increments. Contrary to the Commission's assertion, the proposed rule change is *not* mandated TDDRA. This is an unprecedented and seriously flawed proposal that would have a devastating impact on the industry. In the process of trying to fix something that is not broken, the Commission would impose unnecessary costs on service providers, and ultimately on consumers. Market forces, not the hand of government, should determine how pay-per-call services are billed.

Dispute Resolution Procedures. The BRTF opposes two revisions to the Commission's dispute resolution procedures proposed in Section 308.20(c). First, the Commission's proposal to require billing entities to respond in writing to *all* notices of billing errors (unless the charge in question is forgiven) would impose significant additional costs on service providers with no corresponding benefit to consumers. The BRTF urges the Commission to retain its existing rule, which already provides that consumers may obtain a written response to a billing error notice simply by *requesting* such a response. Second, the Commission should reconsider its proposal to allow consumers to rebut Automatic Number Identification ("ANI") data simply by submitting a signed declaration indicating that they did not make the calls in question. This proposal tips the scale too far by inviting consumer abuse. ANI data maintained by service providers in the ordinary course of business is inherently reliable, and thus, should be presumed valid absent something more than a mere denial from a consumer.

Multiple Billing Entities. The Commission has proposed that when multiple entities are involved in billing for 900-number or other non-communications services, the entities must designate a single point of contact for resolution of consumer billing disputes. The BRTF agrees, but is concerned that as written, the rule would permit LECs to adjust consumer charges, even if another entity, such as a billing aggregator, was in fact designated to respond to consumer disputes. The BRTF proposes that the Commission instead permit charges to be adjusted *only* by the entity designated on the bill to receive and respond to consumer inquiries. This additional requirement would provide some assurance to service providers and billing aggregators that billing disputes will be handled properly.

III. BILLING NOTICE DISCLOSURES (Proposed Section 308.20(m))

One of the most serious problems facing the pay-per-call industry is that chargebacks for pay-per-call services are extraordinarily high.[3] One reason for this problem is that federally-mandated billing notice disclosure requirements actually *invite* consumers to

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[3] *See* Comments of the Interactive Service Association ("ISA") in FTC File No. R611016 filed May 12, 1997, at 5 (showing that in 1996, 900 number service providers lost nearly $180 million in billed, but unpaid phone charges, representing 18% of total end-user billings.)

withhold payment for legitimate pay-per-call services. To remedy this problem, in 1997, the ISA asked the Commission to revise proposed Section 308.20(m) (formerly Section 308.7(n)) to ensure that consumers understand both their rights *and their obligations* when they are billed for pay-per-call services.

In the NPRM, the Commission declined to adopt the ISA's suggested billing disclosure requirements because the Commission did not want to "mandate specific language" for telephone billing notices.[4] The Commission found that "vendors, service bureaus, and billing entities are in the best position to negotiate among themselves to provide any additional information to consumers regarding their liability for telephone-billed purchases."[5] For the reasons discussed below, the Commission should reconsider this decision, and amend Section 308.20(m) as proposed in Exhibit A-1.

A. The Commission Misunderstood The ISA's Requested Relief.

First, the Commission appears to have misunderstood the ISA's request. The ISA did not ask the Commission to "mandate specific language" in billing disclosures. Rather, the ISA proposed a rule modification that would require billing entities to disclose customers' rights, obligations and liabilities in billing notices. To illustrate how this rule modification would work, the ISA included a *sample* billing notice showing how a billing entity could

[4] 63 Fed. Reg. at 58554 ("In the original Rule, the Commission declined to mandate specific language for the Notice of Billing Error Rights. ... The Commission continues to believe this approach is still appropriate.").

[5] *Id.*

comply with both the proposed amendment to Section 308.20(m) and the FCC's parallel disclosure requirements in 47 C.F.R. § 64.1510.[6]

The ISA's sample billing notice, which was circulated for comment at the Commission's 1997 workshop, was generally supported by those in attendance. Indeed, in response to a question from Eileen Harrington as to whether there was a "consensus" in favor of the ISA's proposal, the National Consumers League said it would support the ISA's billing notice "as long as it strongly voiced the consumers' rights as it does the company's rights."[7] MCI indicated that it would "strongly support uniform language."[8] Southwestern Bell also supported the proposal with the caveat that "the [precise] message on the bill ... shouldn't be mandated other than certain key points..."[9] No workshop participant opposed the ISA's proposal.

Like the ISA, the BRTF is not asking the Commission to *mandate* the specific language for billing notices. The BRTF simply wants the Commission to sanction the use of sample billing language as a "safe harbor" that would be deemed compliant with the Commission's requirements. This would help to create more uniformity in billing notices, and lead to the reform of existing billing notices that invite unwarranted chargebacks. The specific safe harbor language proposed by the BRTF is attached as Exhibit A-2.

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[6] *See 1997 Pay-Per-Call Workshop Transcript ("Transcript")* at 143.

[7] *Transcript* at 138-39.

[8] *Id.* at 144.

[9] *Id.* at 141.

B. The Commission Premised Its Proposal On An Incorrect Factual Assumption.

The Commission also incorrectly concluded that pay-per-call service providers have the ability to "negotiate among themselves" for more appropriate billing notice disclosures. This simply is not true. Virtually all end user billings for pay-per-call services are processed through local exchange carriers ("LECs") that have contracts to bill for such services with interexchange carriers ("IXCs") and other billing entities. However, most pay-per-call service providers do not have direct contractual relationships with LECs, and thus, are not in a position to negotiate changes to billing notice disclosures.

Moreover, as to those parties that have standing with the LECs, there is substantial evidence showing that they have little or no leverage to negotiate changes to their billing and collection agreements.[10] In proceedings at the FCC, MCI has documented the "take it or leave it" tactics it has encountered when attempting to negotiate billing and collection contracts with LECs.[11] Similarly, Cable & Wireless explained that service providers are

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[10] *See generally* Comments of Cable & Wireless, Inc. at 2, Frontier Corporation at 2-3, Hold Billing Services, Ltd. at 5-6, and Pilgrim Telephone, Inc. at 4, filed on July 25, 1997 *In the Matter of MCI Telecommunications Corporation, Billing and Collection Services Provided by Local Exchange Carriers for Non-Subscribed Interexchange Services,* Docket No. RM-9108, 12 FCC Rcd 8366, June 25, 1997 (the "MCI Proceeding"); Comments of America's Carriers Telecommunication Association at 5, Americatel Corporation at 3, Competitive Telecommunications Association at 9, Nevadacom at 6, 7-8, and USP&C at 3, filed on November 13, 1998 *In The Matter of Truth-In-Billing and Billing Format,* CC Docket No. 98-170, 13 FCC Rcd 18176, September 17, 1998 (the "Truth-In-Billing Proceeding"); and Comments of AT&T at pages 5-6 of Volume I of transcript of FCC's Public Forum on Local Exchange Carrier Billing for Other Businesses, held on June 24, 1997 ("LEC Public Forum Transcript").

[11] *See* MCI's *Petition for Rulemaking* in the MCI Proceeding at 2, 6, 13, 14 (one LEC told
(continued...)

"largely at the mercy" of those entities controlling billing and collection services.[12] Pilgrim Telephone described how one LEC simply "refused to negotiate or even to discuss a new contract."[13] The Electronic Commerce Association informed the FCC that its members, third-party enhanced services providers, have "so little leverage to negotiate" for billing and collection services that they are "fearful of providing their names" on the record.[14] In the face of this evidence, it is naive to assume that the problems with the existing billing notice disclosures can be resolved by arms-length negotiations between pay-per-call service providers and the LECs who bill end users.[15]

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[11] (...continued)
MCI it was "undertaking an 'across-the-board' approach to terminate, or renegotiate 'on much more favorable terms,' all of its [billing and collection] arrangements with IXCs."); *see also* Consolidated Communications Comments in the MCI Proceeding at 2 (relating encounters with take it or leave it negotiations); Excel Communications Comments at ii and 13; and Joint Comments of OAN Services, Inc. and IntegreTel, Incorporated at 4 and 6.

[12] *See* Cable & Wireless, Inc. Comments in the MCI Proceeding at 3; *see also* Competitive Telecommunications Association Comments at 6 (observing bottleneck control of billing and collection); Digital Network Services, Inc. Comments at 8 (describing "competitive stranglehold" on billing and collection services).

[13] *See* Pilgrim Telephone Comments in the MCI Proceeding at 4; Pilgrim Telephone Request for Expedited Action on MCI Rulemaking Petition at 4.

[14] *See* Electronic Commerce Association Comments in the MCI Proceeding at 6; *see also* Telephone Resellers Association Comments in the MCI Proceeding at 4. The lack of negotiating power with the LECs is a result of the lack of viable alternatives to LEC billing for telecommunications-related services. For example, AT&T has explained to the FCC that "[c]arriers would have few options in the event LECs begin unilaterally to alter or cancel their [billing and collection] contracts." LEC Public Forum Transcript, Volume I at 5-6. WinStar agreed, acknowledging that LEC billing is an "absolute" requirement in the marketplace. *Id.* at 7.

[15] Even if there were sufficient leverage to negotiate with the LECs, the IXCs often overlook pay-per-call billing issues because other issues take priority. Thus, the matters of greatest concern
(continued...)

C. The Record In the FCC's Truth-In-Billing Proceeding Demonstrates The Urgent Need For Changes In Pay-Per-Call Billing Notice Requirements.

If the Commission has any doubt about the need for the rule changes suggested by the BRTF, the record at the FCC demonstrates both the validity and seriousness of the BRTF's concerns. One of the FCC's proposals in the Truth-In-Billing Proceeding is to extend the disclosure requirements applicable to pay-per-call services to all services that are unrelated to basic phone service (*e.g.,* voice mail, Internet access, etc.).[16] Specifically, using TDDRA as a model, the FCC has suggested segregating non-communications charges from other charges on telephone bills and including "a prominent disclosure at the top of the page or section stating that non-payment of certain charges would not result in the termination of the customer's local or long distance service."[17] This, of course, is the precise disclosure that is of concern to the BRTF.

There was *overwhelming* opposition to the FCC's proposal. Why? Because telephone carriers are understandably concerned that applying the pay-per-call billing disclosure requirements to services that *they* offer would invite consumer abuse and cause unreasonably

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[15] (...continued)
to pay-per-call service providers frequently get lost in the shuffle during IXC/LEC billing and collection negotiations.

[16] 13 FCC Rcd 18176 at 18187.

[17] *Id.* (The FCC labels such charges "non-deniable.") Section 64.1510(a)(2)(ii) of the FCC's rules provides that "any charges for pay-per-call services [must be displayed] in a part of the bill that is identified as not being related to local and long distance telephone charges."

high chargebacks. For example, Bell Atlantic said that the FCC's proposal would lead consumers to believe that they need not pay portions of their phone bills.

> Bell Atlantic does not think that customers should be encouraged not to pay their bills. This would likely be the effect of requiring that bills have flashing neon lights highlighting charges that the customer has less obligation to pay. The overwhelming majority of the billions and billions of charges we bill -- both our own and those we bill for other providers -- are legitimate. Bills should not suggest that it's OK not to pay some of the charges on them.[18]

Time Warner Telecom expressed similar fears:

> Services which are classified as non-deniable, and therefore, not subject to local service disconnection for non-payment are legitimate services the charges for which are properly due and owing when consumers elect to purchase those services. TW Telecom is concerned that over time attaching the label 'non-deniable' to services on telephone invoices may indicate to consumers that those charges may be ignored without risk of disruption to their telephone service. . . . Separately identifying deniable and non-deniable charges on bills may significantly reduce the collection rate for those services listed as non-deniable, thereby increasing the collection costs for those services, and ultimately the prices for those services.[19]

Other parties were concerned that differentiating non-communications charges from communications charges would "invite" consumers not to pay non-deniable charges,[20] while Ameritech said it would "lead to a significant rise in non-payment of legitimate charges and, thereby, inflate costs and the rates paid by the average honest consumer."[21] Sprint opposed

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[18] Comments of Bell Atlantic in the Truth-In-Billing Proceeding at 9.

[19] Comments of Time Warner Telecom, Inc. in the Truth-In-Billing Proceeding at 14.

[20] *See, e.g.*, Comments of Commonwealth Telephone Company in the Truth-In-Billing Proceeding at 4.

[21] Reply Comments of Ameritech in the Truth-In-Billing Proceeding at 9.

the FCC's proposals because they "would increase carriers' bad debt significantly, and negatively affect carriers' cash flow, by *encouraging unscrupulous or irresponsible consumer behavior*."[22]

Members of the BRTF have seen pay-per-call bad debt skyrocket precisely because of the "unscrupulous and irresponsible" consumer behavior that Sprint and other carriers fear. Yet, the industry's pleas for a modest rule change to address this problem have largely been ignored. Adoption of the BRTF's proposal will help stem the growing tide of pay-per-call chargebacks and, at the same time, address the concerns expressed by parties in the FCC's Truth-In-Billing Proceeding.[23] Specifically, the BRTF's proposed amendment to Section 308.20(m) will ensure that consumers are informed that service providers have the right to pursue collection of legitimate charges and may report any failure to pay such charges to a credit reporting agency.[24] Once consumers are educated about the consequences of failing to pay legitimate charges, they will be less inclined to walk away from their responsibilities to pay for telephone-billed purchases.

Finally, whatever rules are ultimately adopted in this proceeding, it is critical that the Commission coordinate with the FCC to ensure that the same billing disclosures and segregation requirements apply equally to carriers and non-carriers alike for similar services.

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[22] Comments of Sprint in the Truth-In-Billing Proceeding at 15 (emphasis added).

[23] The BRTF has proposed rule changes to the FCC that parallel those proposed here. Copies of the BRTF's comments and reply comments in the Truth-In-Billing Proceeding are attached as Exhibit B.

[24] *See* Exhibit A-1.

In this regard, Pilgrim Telephone has informed the FCC that at least one LEC insists that voice mail billed for *third parties* be segregated from other charges on the telephone bill pursuant to the FCC's pay-per-call segregation requirements, while the LEC's *own* voice mail service is not similarly segregated.[25] Pilgrim claims that LEC "billing notices are omitted entirely, or printed on the bill in such a way that the consumer is unaware that the same non-payment rights apply to the LEC offered enhanced services as apply to the competitor enhanced services."[26] The BRTF urges the Commission to work with the FCC to ensure that such blatantly unfair and anti-competitive billing practices are stopped.[27] The 900 Number Rule must not become a means for LECs or other carriers to create an uneven playing field in the provision of telephone-billed products and services.

IV. INDUSTRY DATABASE (Proposed Section 308.20(l))

In addition to new billing disclosure requirements, an important second prong in the industry's effort to fight chargebacks is the establishment of an industry-wide database. Such a database would consist of caller adjustments reported by billing entities (*i.e.*,

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[25] *See* Comments of Pilgrim Telephone at 18 in the Truth-In-Billing Proceeding.

[26] *Id.*

[27] Significantly, TDDRA does not *mandate* the billing notice disclosures adopted by the FCC or the FTC. The FCC established its billing notice requirements in response to suggestions made by certain parties. 8 FCC Rcd 6885, 6898 (August 13, 1993). The FTC explained that its billing notice disclosures emanated from TDDRA's mandate to promulgate "requirements for billing and collection of pay-per-call services ... that are substantially similar to those prescribed under the Truth In Lending Act and the Fair Credit Billing Act." 58 Fed. Reg. 13370, 13375 (March 10, 1993). Thus, the Commission has discretion to eliminate the billing notice requirement altogether if it finds such action to be in the public interest.

telephone number, date of call, and amount of adjustment) and would be used by individual service providers to assess the risk of providing service to chronic abusers.

Two years ago, the Commission asked whether its rules affected the establishment of such a database.[28] The ISA responded that Section 308.20(l), formerly Section 308.7(i), which prohibits certain retaliatory actions by service providers, raised concerns that needed to be addressed. The ISA asked the Commission to amend this rule to explicitly permit the use of an industry-wide database.

While participants at the Commission's 1997 workshop recognized that many details would have to be worked out, there was substantial support for the establishment of an industry database.[29] Surprisingly, the NPRM does not even mention the industry database. The Commission asked the right questions, but ignored the answers.

The BRTF, like the ISA, wants to establish an industry-wide database that will provide pay-per-call service providers with critical information concerning write-offs and adjustments reported by billing entities on a more timely basis.[30] Accordingly, the BRTF urges the Commission to amend Section 308.20(l) to clarify that the rule does not preclude service providers from utilizing information maintained in an industry database to block a

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[28] 62 Fed. Reg. 11750 at 11755.

[29] *See e.g.*, *Transcript* at 283-84, 292-94, 298.

[30] The BRTF commends the Commission for shortening to 30 days the time in which billing entities must notify other vendors of the decision to forgive a disputed charge, as proposed in Section 308.20(c)(3). Ideally, this information should be communicated on a real-time, or near real-time, basis. In addition, the database would benefit from the institution of standardized, meaningful "reason codes," which would denote the specific reason given by the consumer for not paying the charge.

consumer's access to pay-per-call services if such information shows that the consumer has repeatedly requested credits for legitimate charges.[31]

A proposed amendment to Section 308.20(l) is attached as Exhibit C. The amendment differs from the ISA's proposal, in that it specifically addresses the need for the database to be established with appropriate consumer safeguards and administered in a manner that complies with other applicable federal and state laws. Adoption of the proposed amendment will clear the way for the industry to help itself by implementing proactive measures to control fraud.

V. BILLING INCREMENTS (Proposed Section 308.10(b))

Pay-per-call services have been advertised and billed in one-minute units since their inception. The Commission has concluded that because billing in fractions of a minute is now possible, service providers must use fractional billing.[32] This proposal must be withdrawn because it alters longstanding industry practices, ignores the plain language of TDDRA, is inconsistent with TDDRA's legislative history, and imposes unnecessary costs on service providers.[33]

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[31] Individual service providers would decide for themselves whether a caller has repeatedly requested credits for "legitimate charges" based on the caller adjustment data contained in the industry database. The U.S. Department of Justice has approved a similar database for use by the long-distance industry.

[32] 63 Fed. Reg. at 58546.

[33] Notwithstanding Section 5711(c) of TDDRA, which gives the FTC jurisdiction over common carriers with respect to unfair and deceptive practices, the fractional billing proposal is beyond the scope of the FTC's authority to the extent that it mandates the billing increments to be (continued...)

A. The Commission Misreads The Plain Language of TDDRA.

Section 5711(a)(2)(D) of TDDRA provides that: "The Commission shall prescribe rules to require that each provider of pay-per-call services . . . stop the assessment of time-based charges immediately upon disconnection by the caller."[34] Contrary to the Commission's assertion, this language does *not* compel the conclusion that pay-per-call service providers are required to implement fractional billing. The language simply requires service providers to stop billing when the caller hangs up. Service providers can stop billing when the caller hangs up and still calculate the cost of the call on a per minute basis. The distinction between these two aspects of the billing process -- the *time* at which charges stop accruing, and the *unit* in which those charges are calculated -- is critical.

Section 5711(a)(2)(D) mandates that pay-per-call service providers stop billing at the time the caller hangs up, as the word "immediately" directs. Indeed, the use of the word "immediately" underscores the statute's temporal focus. By its wording, TDDRA speaks only to the moment in time at which the provider stops assessing charges. TDDRA is *silent*,

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[33] (...continued)
used *by IXCs*. IXCs' billing increments are part of their tariff filings, and therefore fall within the FCC's jurisdiction pursuant to 47 U.S.C. § 205. The FTC's jurisdiction is limited to preventing unfair and deceptive acts or practices in or affecting commerce. 15 U.S.C. § 45. As shown below, one minute billing is not a deceptive act or practice, and therefore does not implicate the FTC's limited authority over common carriers under Section 5711(c).

[34] 15 U.S.C. § 5711(a)(2)(D).

however, regarding the *unit* of time in which a pay-per-call service must be billed.[35] Thus, if a pay-per-call service is billed in one minute *units*, and a caller hangs up after 2 minutes and 30 seconds, the service provider is in full compliance with TDDRA so long as it stops assessing charges immediately after the caller hangs up. The fact that the caller is billed for a 3-minute call results from the billing *unit* used, not from a failure to immediately stop assessing charges. Since the word "immediately" speaks only to time, it cannot reasonably be read as a limitation on the *unit* in which pay-per-call services are billed.

Billing in whole units is a common business practice. For example, parking garages typically use the hour as the unit of billing. Charges are calculated as of the exact moment the driver exits the garage, but are calculated in whole hour units. Car rental agencies typically charge customers in daily units. When a customer returns a rental car, the agency notes the *tim*e at which the car is returned, and uses that time to determine the number of *units* that the car was rented. There is nothing deceptive about these practices, as the customer knows and understands that the applicable unit is the whole hour or the whole day.

Similarly, the one-minute billing unit has been the standard for IXC and pay-per-call billing for years. Attached as Exhibit D are copies of tariffs offered by several long distance providers that bill in one-minute increments. Attached as Exhibit E is a chart compiled by the Telecommunications Research and Action Center showing that every major dial-around

[35] Ironically, the 900 Number Rule requires that pay-per-call advertising disclosures and preamble messages include the cost per *minute*. *See* 16 C.F.R. §§ 308.3(b)(1)(ii), 308.5(a)(2)(ii); proposed 16 C.F.R. §§ 308.4(a)(1)(ii), 308.9(a)(2)(ii).

company in the U.S. bills in one-minute units. If it is not deceptive for long distance carriers to bill in whole minute increments, why should the same practice be deemed deceptive in the pay-per-call industry?

The simple truth is that it should not. One minute billing is an acceptable, non-deceptive practice in the telecommunications industry. If different billing units are to be available, it should be a matter of consumer demand and business discretion -- not government mandate.[36]

One minute billing is also consistent with consumer expectations, which have been shaped by the prevalence of one minute billing in the telecommunications industry. Consumers are fully accustomed to being billed in one minute units because of their experience with long distance bills. Quite simply, if a company advertises a service at a cost of $1.99 per minute, consumers generally expect to be billed by the minute.

In sum, the Commission mistakenly reads Section 5711(a)(2)(D), which dictates the *time* when charges must stop being assessed, as a limitation on the permissible billing *unit* for pay-per-call services. The plain language of the statute does not support the Commission's interpretation of TDDRA or its designation of one minute billing as a

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[36] Indeed, some service providers presently bill in alternative units. For example, as shown in Exhibit F, Qwest uses a per-second billing unit after the first minute of a long distance call. Qwest advertises this billing unit to lure subscribers from other IXCs. Consumers who perceive per-second billing as beneficial will make the switch, while others remain with their existing carriers.

deceptive practice. As such, a decision by the Commission to mandate fractional billing will not withstand judicial scrutiny.[37]

B. TDDRA's Legislative History Does Not Support The Commission's Interpretation Of The Statute.

Because the language of Section 5711(a)(2)(D) is clear on its face, the Commission need not resort to its legislative history. Nonetheless, TDDRA's sparse legislative history does not support the Commission's interpretation of the statute.

The most relevant time for determining a statutory provision's meaning is the time when the statute is enacted.[38] Since TDDRA was enacted in 1992, Congress could not have possibly intended to require end-user fractional billing for 900-number services because per second billing was not in use at that time, as it is not used now. The Commission is now impermissibly interpreting this provision in light of today's technological advances while ignoring the plain language of the statute. The legislative history of TDDRA indicates that Congress enacted Section 5711(a)(2)(D) to curb abuses by service providers that continued

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[37] *See Salinas v. Rodriguez,* 963 F.2d 791, 793 (5th Cir. 1992) ("When the regulations are contrary to the wording of the statute itself ... this Court must follow the plain statutory language and not the regulations"); *Webb v. Hodel*, 878 F.2d 1252, 1255 (10th Cir. 1989) ("Regulations are entitled to no deference if they are inconsistent with Congressional intent...") (citations omitted); and *Scott v. Angelone*, 771 F. Supp. 1064, 1066 (D. Nev. 1991) ("[A]n agency acts without authority when it promulgates a rule or regulation in contravention of the will of the legislature as expressed in the statute, or a rule or regulation that exceeds the scope of the statutory grant of authority.")(citations omitted).

[38] *See MCI Telecommunications v. American Telephone & Telegraph*, 512 U.S. 218 (1994) (citing *Perrin v. U.S.*, 444 U.S. 37, 42-45 (1979)).

to assess charges *minutes* after the caller had hung up.[39] The Commission should not now read requirements into TDDRA that Congress expressly did not impose, and should not confuse the legitimate practice of billing in complete one minute units with the deceptive practice of charging for extra complete minutes.

C. The Commission's Proposals Will Impose Unnecessary Costs On Service Providers, To The Detriment of Consumers.

As a practical matter, the costs of changing from full minute to fractional billing would vastly outweigh any perceived benefits. Carriers, service bureaus, and information providers would have to change their billing systems to accommodate fractional billing. The estimated cost of changing a service bureau's billing system to handle fractional billing could easily amount to $200,000 per service bureau.[40] The cost to change carrier billing systems would likely be substantially more.

Additional expenditures would be required to reprint advertisements and change preamble disclosures to reflect new fractional billing units. For example, one BRTF member has over 2000 currently operating 900 number programs. Most of these programs are advertised in print, but many are promoted on television. The estimated cost of redoing the

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[39] *See* S. Conf. Rep. No. 190, 102d Cong., at 19 (1991) (emphasis added) ("[Service providers] must stop billing for pay per call services when the caller hangs up. When calls are placed to a 900 service and the caller is billed on a per minute or time basis, billing should cease when the caller hangs up the telephone. The Committee recognizes that it takes time for the telephone system *to recognize that a caller has concluded a call*; however, billing should cease within seconds, not minutes.") This passage indicates that Congress intended Section 5711(a)(2)(D) to prohibit charges from continuing to accrue after the caller hangs up.

[40] *See* Declaration of Robert Bentz, attached as Exhibit G.

advertisements preambles for these programs to reflect fractional billing would be almost $2,000,000 just for this one service bureau.[41]

These costs are simply too high for service providers to absorb, and would be incurred solely because the Commission wants to fix something that is not broken. Even if service providers raise prices to stay in business in the short term, the higher prices will attract fewer consumers, which will, in turn, cause providers to raise prices again, which will attract even fewer customers. At the end of the day, it will be consumers who pay the price for the Commission's proposals, either in the form of higher per-unit rates, or a drastically reduced number and variety of available pay-per-call services. Indeed, service providers may be forced to alter their billing methods and charge for calls on a flat-rate basis, as the Commission's rules already permit, to recover losses imposed by a per-second billing requirement.

Mandating fractional billing is equivalent to telling companies how to package their products. The BRTF is not aware of any other instance in which unit packaging is similarly mandated. The Commission should let market forces determine the unit of time in which pay-per-call services are billed. As long as consumers understand the unit of time for which charges accrue, and can choose among providers in a fair, competitive market, their interests will be adequately protected.

VI. DISPUTE RESOLUTION PROCEDURES (Proposed Section 308.20(c)(2)(ii))

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[41] *Id.*

TDDRA directs the Commission to impose billing and collection requirements that are "substantially similar" to those imposed by the Truth in Lending Act ("TILA") and Fair Credit Billing Act ("FCBA"), and to diverge from those requirements as appropriate "in order to protect customers, and in order to be cost effective to billing entities."[42] Thus, while Congress directed the Commission to use the TILA and the FCBA as models, it recognized that divergence from those statutes would be necessary to accommodate the unique needs and practices of telephone service providers. This is important, because in many instances, the "billing error" and "reasonable investigation" provisions of the TILA and the FCBA simply do not fit the pay-per-call industry. As discussed below, the BRTF opposes two revisions to the Commission's dispute resolution procedures proposed in Section 308.20(c).

A. Billing Entities Should Not Be Required To Respond In Writing To All Suspected Billing Errors That They Have Investigated.

The Commission has proposed that to sustain a charge for a telephone-billed purchase, a billing entity must conduct a reasonable investigation and then respond in writing to *all* notices of billing errors. This proposal should be withdrawn because it is inconsistent with the immediacy demanded in today's telephonic environment and would impose unnecessary costs on billing entities.

Proposed Section 308.20(c)(2)(ii) requires that, in response to a customer's billing error notice, a billing entity must conduct a reasonable investigation "after which it shall transmit a written explanation to the customer, setting forth the reasons why it has

[42] *See* 15 U.S.C. § 5721(a)(2), (d)(10).

determined that no billing error occurred." This proposal mirrors Regulation Z, which requires a creditor to "mail or deliver to the consumer an explanation setting forth the reasons that the billing error alleged by the consumer is in error, either in whole or in part."[43]

The goal underlying this proposal is to ensure that responses to billing error notices "provide evidence to the customer that the charge is valid" and "address with particularity" the facts asserted by the consumer in the billing error notice."[44] However, mandating a written explanation in response to *every* investigation of a telephone-billed purchase is not necessary to achieve that goal. In many instances, an oral explanation will be sufficient.

Since telephone-billed purchases generally occur over the telephone, consumers expect to address billing errors over the telephone. In addition, an oral explanation would enable consumers to discuss the dispute with a live person in an interactive environment and engage in a simultaneous exchange of information. Ultimately, the verbal explanations can give consumers a faster, and possibly immediate response, without the delay that a writing requirement would introduce.

For example, it is not unusual for a consumer to call a service provider and say something like "I did not order these services," or "I don't know what these charges are for." Frequently, after a brief oral explanation from the service provider, the consumer will recall what the charge is for and agree to pay for the services in question. Nevertheless, under the

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[43] *See* 12 C.F.R. § 226.13(f)(1) (1998). Regulation Z was promulgated by the Federal Reserve Board to implement TILA. *See id.* § 226.1(a).

[44] 63 Fed. Reg. at 58552.

Commission's proposals, because the consumer's remarks would constitute a "notice of billing error," the service provider would be *required* to follow up that conversation with a written explanation. This simply makes no sense. It is an improper carryover from a different regulatory scheme, and conflicts with the immediacy that today's telephonic environment demands.

Moreover, an oral explanation is consistent with the Commission's proposal to allow consumers to provide oral notice of billing errors.[45] Specifically, proposed Section 308.20(b)(1) gives billing entities the option of requiring written or oral notice of billing errors.[46] By contrast, Regulation Z requires consumers to notify the creditor *in writing* when a billing error occurs.[47] It does not make sense to require a billing entity to respond to a billing inquiry with a written explanation, as Regulation Z does, when the Commission does not require consumers to *initiate* a billing inquiry for telephone-billed purchases in the same manner as Regulation Z. Whereas a creditor's obligation to respond in writing flows logically from the consumer's obligation under Regulation Z, requiring billing entities to respond in writing to every billing error notice does not flow logically from the proposed changes to the 900 Number Rule.

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[45] After a certain amount of time, perhaps six months, it may be appropriate to require consumers to give written notice of a billing error.

[46] Proposed Sections 308.20(b)(3) and (4) require the disclosure of an address for written notice and telephone number for oral notice of billing errors.

[47] *See* 12 C.F.R. § 226.13(b) (1998).

Finally, implementation of the Commission's proposal is not practical because pay-per-call service providers generally do not have the names and addresses of their customers. Indeed, in some cases consumers may not *want* to disclose their name and address to a service provider. The consumer may prefer the convenience and privacy of a telephone-only interaction.

If a consumer does want a written response to a notice of billing error, it may be obtained under the existing rule, which *already* requires the billing entity to "transmit an explanation to the customer, after conducting a reasonable investigation . . . setting forth the reasons why it has determined that no billing error occurred . . . *and, if the customer so requests, provide a written explanation and copies of documentary evidence of the consumer's indebtedness*."[48]

Requiring a written explanation in every instance, then, will not give consumers any greater protection than the 900 Number Rule currently provides. Rather, the Commission's proposal will simply increase the costs of providing pay-per-call billing inquiry services and intrude unnecessarily into consumers' privacy.

B. Consumers Should Not Be Permitted To Rebut The Presumptive Validity of ANI By Submitting A Declaration Stating Only That A Call Was Not Made.

Footnote 3 of the 900 Number Rule currently establishes a rebuttable presumption that services were actually delivered if a vendor can produce documents prepared and maintained

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[48] *See* 16 C.F.R. § 308.7(d)(2)(ii) (1998) (emphasis added).

in the ordinary course of business showing the date, time and place to which services were transmitted or delivered.[49] The Commission has proposed to modify this footnote by allowing consumers to rebut the presumption with a declaration signed under penalty of perjury.[50]

The BRTF appreciates the Commission's concern that some vendors may not have allowed consumers to rebut the presumption that a charge supported by business records is valid, and in no way seeks to deprive consumers of their right to do so.[51] However, while protecting consumers is important, the Commission's proposal tips the evidentiary scale too far.

The most common type of business record maintained by pay-per-call service providers is ANI data, which shows the telephone number of the calling party, the telephone number to which the call was placed, and the date, time, and duration of the call. When a call is placed to a 900 number, at least three parties have ANI data confirming the details of the call: (i) the LEC that routes the call to the IXC, (ii) the IXC to whom the 900 number is assigned, and (iii) the service bureau where the call ultimately terminates. Thus, three independent sources corroborate the existence of the call, making ANI data inherently reliable. Yet, the NPRM suggests that a declaration stating nothing more than “I didn't make the call” would defeat ANI call record data, even though the Commission has deemed such

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[49] *See* 16 C.F.R. § 308.7(d)(2)(ii) n.3.

[50] *See* proposed Section 308.20(c)(2)(ii) n.4.

[51] *See* 63 Fed. Reg. at 58552.

data presumptively valid, and even though such data is sufficiently reliable to warrant the presumption. A declaration containing such a vague denial lacks the substantive content necessary to explain why the usually-reliable ANI data is incorrect in a particular instance.

The BRTF proposes that, in order to rebut the presumption of the validity of ANI data, a consumer declaration should contain something more substantial than a mere denial. Such evidence might include a statement and supporting documentation demonstrating that: (i) a 900-number block had been ordered prior to the time the calls in question were made; (ii) wire tampering had occurred; or (iii) a break-in had occurred at the time the calls were made. A declaration of this nature would have both enough substantive content and indicia of reliability to rebut the presumption. This proposal is also consistent with Regulation Z, which requires, to the extent possible, that a consumer billing error notice indicate not only the consumer's belief that a billing error has occurred, but also "the reasons for the belief that a billing error exists, and the type, date and amount of the error." [52]

Allowing consumers to avoid paying charges by stating only that a call did not occur, without more, will encourage consumer fraud and exacerbate the already serious pay-per-call chargeback problem. A suggested amendment to footnote 4 of proposed Section 308.20(c)(2)(ii) is attached as Exhibit H. This amendment is targeted specifically at the presumptive validity of ANI records generated by telephone calls which can be verified by

[52] *See* 12 C.F.R. § 226.13(b)(3).

the call records routinely maintained by LECs, IXCs and service bureaus in the ordinary course of their businesses.[53]

VII. MULTIPLE BILLING ENTITIES (Proposed Section 308.20(n))

In situations where more than one entity is involved in the billing process, the Commission has proposed requiring that the entities involved designate a single party to take responsibility for receiving and responding to billing inquiries. The Commission's proposal also requires that a phone number for this entity be listed on the consumer's bill in order to facilitate dispute resolution.

The BRTF endorses facilitating the dispute resolution process, and believes that designating a single entity as a point of contact for resolving billing disputes, and requiring the provision of contact information for that entity will further this goal. The Commission should take the next step, however, and place the power to adjust a disputed charge *exclusively* in the hands of the entity designated on the phone bill as the dispute resolution contact. Specifically, the Commission should amend proposed Section 308.20(n), as proposed by the Coalition to Ensure Responsible Billing ("CERB") in comments filed today in this proceeding.

Too often, a consumer will contact their LEC to challenge a billing error, even though the consumer's bill designates a different entity (*e.g.* a billing aggregator) to respond to such

[53] The amendment is not targeted, for example, at situations where a consumer signs up for a service, in person, by writing his or her telephone number on a card. In such situations, no actual ANI record exists.

inquires. LECs often “forgive” such charges, to the detriment of the service provider. Billing agreements between service providers, billing aggregators and LECs, uniformly ensure that the LEC gets paid for completing the call, even if the consumer pays nothing. Moreover, the LEC can cultivate consumer goodwill by adjusting such charges, and will suffer no adverse consequences for doing so. Either way, the service provider is left holding the bag, and will receive nothing for a charge it has legitimately placed on the bill.

CERB’s proposal would prohibit LECs from forgiving charges, unless they were designated as the dispute resolution contact on the consumer’s bill. If a consumer incorrectly contacted the LEC with a billing inquiry, the LEC would be required to refer the call to the proper contact. This addition to the FTC’s proposed rule would not compromise the Commission’s goal of simplifying the dispute resolution process, and would afford information providers some assurance that their charges would not be improperly and indiscriminately written off.

VIII. CONCLUSION

For the foregoing reasons, the BRTF respectfully requests that the Commission revise its recommended changes to the 900 Number Rule to reflect the amendments discussed in these comments.

Respectfully submitted,

THE BILLING REFORM TASK FORCE

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Dated: March 10, 1999

EXHIBIT A-1
BRTF Proposed Amendment to Proposed Section 308.20 (m)

Comparison of FTC's Proposed Rule to BRTF's Proposal
(Text recommended for deletion is indicated with a ~~strikeout~~;
text recommended for addition is printed in **bold**.)

(m) *Notice of billing error rights*-- (1) *Billing Notice*. With each billing statement that contains charges for a telephone-billed purchase, a billing entity shall include a statement that sets forth the procedure that a customer must follow to notify the billing entity of a billing error. The statement shall also disclose (i) the customer's right to withhold payment of any disputed amount; (ii) that any action to collect any disputed amount will be suspended, pending completion of the billing review; ~~and~~ (iii) that, to be guaranteed the protections provided under the Dispute Resolution Procedures of the Federal Trade Commission's Rule Concerning Pay-Per-Call Services and Other Telephone-Billed Purchases, a customer must initiate a billing review no later than sixty (60) days after the billing entity transmitted the first billing statement that contains a charge for such telephone-billed purchase**; and (iv) that if it is determined that no billing error occurred, the service provider (or other parties acting on behalf of the service provider) has the right to pursue collection of the disputed charges and may report the customer's failure to pay such charges to credit reporting agencies.**

EXHIBIT A-2
PROPOSED SAMPLE "SAFE HARBOR" NOTICE

CONSUMER BILLING NOTICE

This bill contains charges for calls from your phone to 900 numbers that provide information and/or entertainment, which are non-communications services. If you wish to dispute any specific 900 charges that appear on this bill, you must call the number at the bottom of your itemized call page no later than 60 days after we sent you the first bill on which the disputed charge(s) appeared; otherwise the charge(s) will be presumed to be valid.

Neither your local nor long distance service (including access to emergency services) will be disconnected if you do not pay the disputed charges. Even if the disputed charges are removed from your bill, the 900 service provider has the right to pursue the collection of these disputed charges. Also, if you do not pay legitimate charges, your ability to obtain non-communications services and to make 900 calls from your line may be blocked.

Your failure to pay undisputed charges timely may be reported to a third party credit reporting agency, which may adversely affect your credit. You can call your local telephone company to have 900 calls blocked from your line.

Although you do not have to pay any amount in question while we are investigating, you are still obligated to pay the parts of your bills that are not in question. You will not be reported as delinquent and no action to collect the amount you questioned will be taken until we complete our investigation of your dispute.

EXHIBIT B

Comments and Reply Comments
Filed By the Billing Reform Task Force In The
FCC's Truth-In-Billing Proceeding

EXHIBIT C
BRTF Proposed Amendment to Proposed Section 308.20 (l)

Comparison of FTC's Proposed Rule to BRTF's Proposal

(Text recommended for addition is printed in **bold**.)

(l) *Retaliatory actions prohibited*. A billing entity, providing carrier, vendor or other agent may not accelerate any part of the customer's indebtedness or restrict or terminate the customer's access to pay-per-call services solely because the customer has exercised good faith rights provided by this Section. **Nothing in this Section shall preclude a billing entity, providing carrier, vendor or other agent from utilizing information maintained in an industry database to restrict, block or terminate a customer's access to pay-per-call or other non-communications services on the basis of information which shows that the customer has repeatedly requested credits for legitimate charges, as long as such a database is established with appropriate consumer safeguards and is administered in a manner that complies with other applicable federal and state laws including those governing consumer privacy, security, and credit reporting.**

EXHIBIT D

Long Distance Carrier Tariffs
Specifying One Minute Billing Increments

EXHIBIT E

Telecommunications & Research Action Center Report on Dial-Around Billing Plans

EXHIBIT F

Qwest Advertisement For Fractional Billing

EXHIBIT G

Declaration of Robert Bentz

EXHIBIT H
BRTF Proposed Amendment to Proposed Footnote 4, Section 308.20(c)(2)(ii)

Comparison of FTC's Proposed Footnote 4 to BRTF's Proposed Footnote

(Text recommended for addition is printed in **bold**.)

4. There shall be a rebuttable presumption that goods or services were actually transmitted or delivered to the extent that a vendor, service bureau, or providing carrier produces documents prepared in the ordinary course of business showing the date on, and the place to, which the goods or services were transmitted or delivered. If a billing entity relies on this presumption in responding to a billing error notice, it shall provide the customer with the opportunity to rebut this presumption with a declaration signed under penalty of perjury. The billing entity shall not require this declaration to be notarized. **In order to rebut the presumption of the validity of Automatic Number Identification data maintained in the ordinary course of business, the customer's declaration must include some evidence to support the customer's assertion that a billing error occurred. Such evidence might include verification from the customer's local phone company that wire tampering had occurred, or that a 900-number block was requested by the customer prior to the time the calls in question were placed. Additionally, such evidence might include a police report indicating that a break-in had occurred at the time the calls in question were placed.** In enforcing violations of this Rule, the Commission may rebut this presumption with evidence indicating that, in numerous instances, the goods or services were not actually transmitted or delivered.