Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Calling Party Pays Service Offering in	)	CC Docket No. 97-207
the Commercial Mobile Radio Services	)	
	)	
	)	
	)	

Comment of the
<u>FEDERAL TRADE COMMISSION</u>

September 17, 1999*

---

*Inquiries regarding this Comment should be directed to
Bureau of Consumer Protection
Staff Attorney, Adam Cohn (202) 326-3411

I. The FTC's Interest in this Proceeding

The Federal Trade Commission (FTC or Commission) welcomes this opportunity to present its views on important consumer protection issues raised in the above-captioned proceeding. In this proceeding, the Federal Communications Commission (FCC) has issued a Notice of Proposed Rulemaking (NPRM) with the purpose of removing "regulatory obstacles to the offering to consumers of Calling Party Pays (CPP) services by Commercial Mobile Radio Services (CMRS) providers."[1]

The FTC is an independent administrative agency charged with promoting the efficient functioning of the marketplace by taking law enforcement action against commercial practices injurious to consumers, and by increasing consumer choice by promoting vigorous competition. The Commission fulfills this mandate by enforcing the Federal Trade Commission Act (FTC Act).[2] Our comments on the issues presented in the NPRM are based on our experience in enforcing Section 5 of the FTC Act[3] and in promulgating and enforcing the FTC's Pay-Per-Call Rule pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992.[4]

---

[1]NPRM at 1.

[2]15 U.S.C. § 41 *et seq*. The Commission also has responsibilities under 40 additional statutes, *e.g.*, the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, which establishes important privacy protections for consumers' sensitive financial information. The Commission also enforces over 30 rules governing specific industries and practices, *e.g.,* the Telemarketing Sales Rule, 16 C.F.R. Part 310, which defines and prohibits deceptive telemarketing practices and other abusive telemarketing practices.

[3]15 U.S.C. § 45(a).

[4]15 U.S.C. § 5701 *et seq.* and 47 U.S.C. 228.

A. Section 5 of the FTC Act

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce" and applies to a wide range of business practices, including advertising, marketing, and billing and collection. Deception occurs under Section 5 "if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material."[5] Section 5 also prohibits "unfair" acts or practices. A practice is "unfair" if it causes substantial injury to consumers, if the harm is not outweighed by any countervailing benefits, and if the harm is not reasonably avoidable.[6] The Commission pursues both deceptive and unfair practices under Section 5 either through administrative law enforcement actions or through federal district court actions seeking temporary and permanent injunctive relief and, ultimately, restitution to injured consumers.

---

[5] *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 165, *appeal dismissed sub nom.*, *Koven v. FTC*, No. 84-5337 (11th Cir. 1984) (hereinafter *Cliffdale*). It is deceptive to omit "material information, the disclosure of which is necessary to prevent [a] claim, practice, or sale from being misleading." *Id.* at 177. Express claims, or deliberately-made implied claims used to induce the purchase of or payment for a particular product or service, are presumed to be material. *Thompson Medical Co., Inc.*, 104 F.T.C. 648, 816 (1984), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). Information concerning the cost of a product or service also has been found to be material. *Cliffdale* at 174.

[6] 15 U.S.C. § 45(n). *See also Orkin Exterminating Company, Inc. v. FTC*, 849 F.2d 1354, 1363-68, *reh'g denied,* 859 F.2d 928 (11th Cir. 1988), *cert. denied*, 488 U.S. 1041 (1989); and *American Financial Services v. FTC*, 767 F.2d 957, 972-78 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986).

B. The Pay-Per-Call Rule and the Telephone Disclosure and Dispute Resolution Act of 1992

Pay-per-call transactions became widely available in the late 1980s in the form of 900 numbers. By the early 1990s, advertisements for 900-number services were widely disseminated in print publications, on billboards, and on television and radio. Deception and fraud were rampant in these advertisements, in the operation of pay-per-call services, and in the billing and collection of charges for these services.[7]

Against this backdrop, Congress enacted the Telephone Disclosure and Dispute Resolution Act of 1992[8] (TDDRA). TDDRA creates the statutory framework for FCC and FTC regulation of pay-per-call services and other telephone-billed purchases. TDDRA is divided into three discrete parts. Title I directs the FCC to issue rules governing telephone common carriers' provision of service to pay-per-call providers. Title II directs the FTC to issue rules governing the advertising and operation of pay-per-call services, including requirements regarding the free "preamble" disclosure message to be played at the start of most pay-per-call programs. To address the problems encountered by consumers who received charges from pay-per-call and other telephone service vendors, Title III of TDDRA directs the FTC to issue rules for billing and

---

[7]Advertisements often induced consumers to call 900 telephone numbers to claim fabulous prizes, to access "free" services, or to talk with celebrities (*e.g.,* "Kids: call this number to talk live to Santa Claus"). These ads typically contained no cost disclosures at all. The few cost disclosures that were made in advertisements lacked clarity and were buried in mouseprint. When consumers called the 900 numbers, they were put on hold or otherwise kept on the telephone for extended periods, all the while running up significant but unknown charges. When consumers received charges on their telephone bills, often for calls placed by their children, their LECs told them that they had to pay or their phone service would be disconnected.

[8]15 U.S.C. 5701 *et seq.* and 47 U.S.C. 228.

collection of charges for "telephone-billed purchases"[9] – rules that were to be modeled after the dispute resolution system for credit card charges.[10]

The TDDRA regulations have largely been successful in reducing the abuses that plagued the 900-number industry during the early 1990's.[11] However, following the implementation of these regulations, new frauds have appeared, which were carefully structured to evade the TDDRA regulatory regime. The first of these was the use of sham contracts that resulted in consumers being charged for the purchase of telephone information and entertainment (audiotext) services as a result of calling 800 or other toll-free numbers. The second, and more pervasive fraud involved the use of alternative dialing patterns (dialing patterns other than 900), such as international telephone numbers,[12] to sell audiotext services without providing the cost disclosures, free preamble, and dispute resolution protections that were required by TDDRA.[13]

---

[9]The dispute resolution provisions of the Rule apply to all "telephone-billed purchases," a term that includes all pay-per-call services, but is significantly broader than that term. The term telephone-billed purchase currently includes the purchase of any good or service (other than the purchase of long-distance or local telephone services) that is completed as the result of placing a telephone call, subsequent dialing, or comparable action of the caller. 16 C.F.R. 308.7(a)(6); 15 U.S.C. 5724(1). The FTC has proposed an expansion of the definition of telephone-billed purchase. FTC Proposed Pay-Per-Call Rule, 63 *Fed. Reg.* 58524, 58541 (hereinafter "Proposed Pay-Per-Call Rule").

[10]The dispute resolution system for credit card charges is set forth in the Fair Credit Billing Act, 15 U.S.C. §§ 1666 *et seq.*

[11]Proposed Pay-Per-Call Rule at 58526.

[12]The audiotext providers profit from these international audiotext schemes by sharing in the "settlement payments" made to the terminating long distance carrier.

[13]Currently, TDDRA regulations only apply to audiotext services offered over 900 numbers. The FTC has proposed an expansion of the Pay-Per-Call Rule provisions to cover all audiotext services, regardless of dialing pattern. Proposed Pay-Per-Call Rule at 58533-35.

Finally, in 1997 we witnessed the widespread emergence of "cramming" – the appearance on consumers' telephone bills of unauthorized charges for a variety of telephone-billed purchases. Utilizing the rulemaking authority set forth in TDDRA as well as additional authority provided by Section 701(b) of the Telecommunications Act of 1996,[14] the FTC has proposed amending its Pay-Per-Call Rule to address all of these abuses.[15]

II. Summary of the FTC's Consumer Protection Concerns in this Proceeding

Under most circumstances in the United States today, a consumer who has subscribed to wireless telephone service is responsible for paying for airtime and other charges associated with both incoming and outgoing calls. Under a CPP calling plan, the person *calling* a wireless customer who had signed up for a CPP plan would incur at least some of the airtime charges associated with the call that he or she placed.

We note four important consumer protection concerns that arise from the offering of CPP plans to consumers and businesses, based on our experience in enforcing Section 5 of the FTC Act and in promulgating, enforcing, and revising the Pay-Per-Call Rule under TDDRA. First, we comment on the proposed consumer notification system to be used to inform a "calling party" that an attempted call is to a CPP-subscribed telephone number. Disclosure of accurate and meaningful cost information is very important. In addition to our comments here, the FCC may

---

[14]Pub. L. 104, 701, 110 Stat. 56 (1996) [codified at 47 U.S.C. 228 and at 15 U.S.C. 5714(1)].

[15]Proposed Pay-Per-Call Rule at 58527-29.

wish to look to provisions of the Pay-Per-Call Rule for guidance in creating a nationwide system of caller notification.

Second, we note that one form of CPP – one based on a non-interconnection approach[16] – would share some important similarities to pay-per-call and may be susceptible to problems that are similar to those seen in the early days of pay-per-call. To help alleviate these potential problems with non-interconnection CPP, the FCC may wish to look to several of the consumer protections provided by the Pay-Per-Call Rule, such as cost disclosures, blocking, and dispute resolution procedures.

Third, we note that some CPP service offerings may run counter to the FTC's recent law enforcement activities and regulatory oversight to halt practices that evade the FTC's Pay-Per-Call Rule.[17] Currently, many of the Pay-Per-Call Rule's core requirements (advertising disclosure requirements, free "preamble" message at the beginning of each program) apply only to those services offered over the 900-number platform. As mentioned above, some vendors have attempted to evade the Pay-Per-Call Rule by offering their audio information or audio entertainment services over a multitude of different non-900 platforms. In response, the FTC has proposed to broaden the scope of the Rule to cover these programs.[18] To avoid any potential conflict between the actions proposed in the NPRM and the FTC's efforts to prevent evasion of

---

[16]The distinctions between an interconnection and a non-interconnection approach to CPP are discussed in more detail in section III.B, *infra.*

[17]16 C.F.R. part 308.

[18]Proposed Pay-Per-Call Rule at 58533-35.

its Pay-Per-Call Rule, the FCC may wish to consider taking certain actions in this proceeding to prevent CPP from becoming a platform for pay-per-call services.

Finally, the FCC may want to consider providing a means for the "billed party" in a CPP transaction to control his or her costs. Although it may be convenient to think in terms of the interests of the "calling party" and the "called party," this is not quite accurate. It is not the "calling party" who will be required to pay the bill for the call to the CPP-subscribed number. Rather, the person who will be required to pay this charge – the "billed party" -- is actually the telephone subscriber whose telephone is used to call the CPP-subscribed service. In non-interconnection CPP, this raises special concerns because of the potential lack of privity between the billed party and the CMRS carrier. Regardless of whether the FCC adopts an interconnection or a non-interconnection approach to CPP, the FCC may wish to consider the interests of the "billed parties" by providing them with the tools to avoid unauthorized charges for calls to CPP services.

III. Analysis

A. The FCC May Wish to Consider Implementing a Notification System that Accurately Discloses the Cost of a Particular Call to a CPP service.

The NPRM proposes that a system of uniform notification be developed, and seeks comment on what elements that notification system should contain.[19] The NPRM proposes that the notification include the following elements:

[19] NPRM at 13-14.

(1) Notice that the calling party is making a call to a wireless subscriber that has chosen the CPP option, and that the calling party therefore will be responsible for payment of the charges.

(2) Identification of the CMRS provider.

(3) The per minute rate, and other charges, that the calling party will be charged by the CMRS provider.

(4) Notice that the calling party will have an opportunity to terminate the call prior to incurring any charges.[20]

The FTC's Pay-Per-Call Rule requires a similar cost-free notification or "preamble"[21] for all calls to pay-per-call services. This approach has ensured that callers to pay-per-call services receive important information about the service they are attempting to access, and provides them the opportunity to avoid uncertainty about the charges that will result. As with the FCC's proposal here, the preamble requirement in the Pay-Per-Call Rule requires the disclosure of the name of the provider, the cost of the service, and the notice of the opportunity to hang up before charges accrue.[22] Based on our positive experience with the preamble in the context of the Pay-Per-Call Rule, we support the proposal to create a uniform notification announcement, and we generally agree with the elements that the FCC has proposed be a part of such notification system. We also support the proposal to develop specific language for the announcement "in cooperation with the states, consumers, and industry representatives."[23] Such a balanced approach to

[20]NPRM at 20-21.

[21]16 C.F.R. § 308.5(a).

[22]The Pay-Per-Call Rule also requires additional preamble disclosures, such as a disclosure regarding parental consent for callers under 18. 16 C.F.R. § 305(a)(4).

[23]NPRM at 20.

developing the announcement would help ensure that callers received the most important information in a useful form, without extraneous and confusing additional disclosures.

The notification proposal, however, does raise two potential concerns. First, the proposed disclosure of "the per minute rate, and other charges, that the calling party will be charged by the CMRS provider" may be construed by some CMRS providers to permit disclosure of highly *general* information about costs, such as a range of possible rates depending on the time of day, the day of the week, whether the CPP subscriber was "roaming," or other factors. We are concerned that providing such a wide range of potential costs might not be particularly useful to consumers, and might be potentially confusing or even misleading. The main benefit of a disclosure would be to provide consumers with the material information necessary to decide whether to stay on the telephone or hang up before incurring charges. To make this decision, consumers would likely need accurate information about the cost that they will incur in placing *that particular call.* The FCC may wish to clarify that the disclosure would provide material information about the charges that will be incurred for that particular call.

Second, the notification disclosure to consumers that they will have an opportunity to terminate the call prior to incurring "any" charges may be misleading. This disclosure has the potential to mislead consumers because, in some instances, consumers may incur telecommunications charges other than those related to CPP. For example, if a wireline subscriber in Oregon placed a "1+" long-distance call to a number in Florida that happened to be a CPP-subscribed number, that caller could incur long-distance rates for the call, notwithstanding the fact that the call also will generate CPP charges to the Oregon subscriber. To remedy this

problem, we suggest that more precise wording be used in the notification that does not imply that the entire call would be free if the caller hangs up before the end of the notification message.

The NPRM also seeks comment on the desirability of moving to a simpler, more streamlined notification system – one that would not include rate information – after consumers have become accustomed to CPP and are aware of the additional charges involved.[24] We believe it is important that consumers be able to determine the cost of a service prior to purchasing that service. At this early stage in the development of CPP, it may be premature to consider implementing a notification system that does not include the disclosure of rate information. It may be easier to weigh the costs and benefits of such a proposal after consumers have started to become familiar with CPP. Thus, the FCC may wish to defer a decision on this issue at this time.

Finally, we wish to highlight a potential violation of the FTC's Pay-Per-Call Rule. One of the suggestions in the NPRM for an alternative notification option indicates that one company

> uses a nationwide single, toll-free number to access its Paging Party Pays (PPP) offering, because it eliminates the complication of multiple routing and pricing structures in using regional LECs for billing and collection. The caller is then provided a notification that informs them that they are paging a PPP subscriber, and that a specified charge will appear on their bill if they proceed with the call.[25]

This alternative notification system might be in violation of the FTC's Pay-Per-Call Rule because it charges a telephone subscriber on the basis of the fact that a call to a toll-free number was

---

[24]NPRM at 21.

[25]NPRM at 23.

placed from that subscriber's telephone.[26] The practice may also be in violation of Section 5 of the FTC Act.[27] Similarly, this system may also be in violation of one or more of the FCC's regulations implementing TDDRA.[28] Absent some specific agreement with the *person who will be charged for the call*, the FTC believes that toll-free numbers should remain free.[29] Under both the current and the proposed revisions to the Pay-Per-Call Rule, if a consumer wishes to make a purchase over a toll-free number, the vendor must charge *that consumer* for the service (for example, by credit card or separate agreement), and may not apply any charge to the telephone bill of the person whose telephone was used to make the toll-free call.

---

[26]Specifically, the Pay-Per-Call Rule states that "any person is prohibited from using an 800 number or other telephone number advertised or widely understood to be toll free in a manner that would result in . . . the calling party being assessed, by virtue of completing the call, a charge for the call." 16 C.F.R. § 308.5(i). Incidentally, the FTC has proposed amending this section to remove the reference to the "calling party" and prohibit "any customer" from being assessed a charge for such a call. Proposed Pay-Per-Call Rule at 58564.

[27]In recent years, the FTC has brought law enforcement actions under Section 5 targeting the practice of charging consumers on the basis of a call to a toll-free number. *International Telemedia Associates, Inc.*, No. 1-98-CV-1925 (N.D. Ga, filed July 10, 1998) (unfair practice to bill line subscriber for services that line subscriber did not purchase or receive, based on the use, or purported use, of a line subscriber's telephone to call to a toll-free number); *FTC v. Interactive Audiotext Services, Inc.*, No. 98-3049 CBM (C.D. Calif., filed April 22, 1998) (unfair practice to bill consumers whose telephones were used by someone else to access and purchase defendants' entertainment services by dialing non-blockable toll-free numbers).

[28]47 C.F.R. 64.1501(a), 64.1504 and 64.1606.

[29]In the context of discussing "presubscription agreements" to charge consumers for services offered over toll-free numbers, the FTC stated that "it is essential that the consumer who will be billed for a service agree, in advance, to pay for the service after receiving clear and conspicuous disclosure of all the material terms of the agreement." Proposed Pay-Per-Call Rule at 58538.

B. The FCC May Wish To Consider Implementing Consumer Protections for Non-Interconnection CPP that are Comparable to the Protections Available in Pay-Per-Call.

The NPRM discusses two different potential systems for structuring CPP, an interconnection approach, and a non-interconnection approach. The non-interconnection shares some similarities with the billing system used for pay-per-call services. Thus, if the FCC chooses to adopt a non-interconnection approach to CPP, it may wish to consider taking steps to reduce the susceptibility of CPP to the types of abuses that were seen in the pay-per-call industry prior to promulgation of TDDRA.

1. Interconnection Approach to CPP.

Under the interconnection approach, which is the system used in Europe and elsewhere,[30] the LEC would bear the sole responsibility for charging the customer whose telephone was used to place the call to the wireless telephone. Under this system, the customer whose telephone was used to place the call has no contact with the wireless carrier terminating the call. Instead, the charges for a call to a CPP service would be handled through expansion of existing interconnection agreements between wireline (*i.e.,* LECs) and wireless (CMRS) carriers.[31] Thus, when a wireline subscriber places a call to a CPP-subscribed wireless telephone, the called party's wireless carrier imposes a wireless termination access charge on the LEC of the person whose telephone was used to place the call.[32] The LEC could then recoup the charge from the consumer

---

[30]NPRM at 35.

[31]*Id*.

[32]We avoid the use of the term "caller" here, as elsewhere in this comment, because it is not necessarily the *"caller"* or the *"calling party"* who is billed for a CPP call. Importantly, the bill would be sent to the subscriber whose telephone was used to place the call to the CPP-

"if it so chose."[33] Under the interconnection approach to CPP, a consumer in a competitive environment would be able to shop around for a LEC that charged the lowest prices for calls to CPP wireless telephones.[34]

2. Non-Interconnection Approach to CPP.

Under a non-interconnection model, rather than having the carriers handle the CPP charges, the telephone subscriber whose telephone is used to place a call to a CPP service would be charged directly by the CMRS carrier terminating the call. This system is comparable to pay-per-call, where the person whose telephone is used to place a call receives a bill from the vendor who operates the pay-per-call number[35] – a vendor with whom the consumer may have no prior existing relationship. In non-interconnection CPP, as in pay-per-call, the *recipient of the call* has maximum control over the rates that will be paid by the person whose telephone was used to place the incoming call to the wireless telephone. In non-interconnection CPP, a person desiring to call a particular CPP number would have no ability to shop around for lower costs for a

subscribed number.

[33]NPRM at 36.

[34]The interconnection model is roughly comparable to the system currently used in the United States for wireline long distance traffic. Although there may be many different carriers involved in any given long distance call (an originating LEC, a long distance carrier, a terminating LEC), the consumer receives only one bill for the call. The multiple carriers that may be involved in carrying a long distance call charge *each other* for the use of their services. The fees charged by the various different carriers involved in the transmission become a part of the fee charged by the consumer's chosen carrier.

[35]Or from the LEC on behalf of such vendor.

particular call. Instead, one would have a simple choice: either pay the rates set by the carrier chosen by the recipient of the call, or hang up the telephone.[36]

3. Pay-Per-Call and Non-Interconnection CPP Share Important Similarities.

As a result of the structural similarity of the non-interconnection approach to CPP to pay-per-call, non-interconnection CPP may also share some of the attendant problems that have been experienced in the pay-per-call industry. For instance, in both pay-per-call and non-interconnection CPP, the call recipient has complete control over the cost of the call, but may have no incentive to disclose that cost accurately to the caller. Indeed, there may actually be an incentive to avoid accurate disclosure of the cost. The Pay-Per-Call Rule's free preamble and mandatory advertising disclosures help solve this problem in the context of pay-per-call. Similarly, the free notification message[37] discussed above would go a long way towards addressing this potential problem in the context of CPP.

Another similarity between pay-per-call and non-interconnection CPP is that, in both contexts, the subscriber whose telephone is used to place the call to the service has little control over the cost of that service. In both contexts, the cost of the service is determined entirely by the recipient of the call. In some cases, these fees will be quite reasonable. In other cases, the fees may be very high. While cost disclosure provides significant protection against potential harm to consumers, it is important to recognize that, in many instances, the consumer who receives the bill for the service will not be the same person who placed the call and received the cost disclosures.

[36]This assumes that the caller would be made aware of the cost of the call before the call was connected.

[37]NPRM at 14.

In the pay-per-call context, consumers can avoid the risk of incurring these unpredictable charges by selecting 900-number blocking at no charge.[38] As discussed in more detail below, the FCC may wish to consider implementing a similar form of blocking for CPP calls.

Non-interconnection CPP is similar to pay-per-call in another important respect. In pay-per-call, telephone subscribers may receive charges from vendors with whom they have no preexisting relationship. Similarly, in non-interconnection CPP, telephone subscribers may receive charges from CMRS carriers with whom they have no preexisting relationship. Some of these vendors or CMRS carriers will be trustworthy, honest, and responsible entities, and some of them will not. Either way, since the telephone subscriber may have no preexisting (or future) relationship with the vendor or CMRS carrier, there is less incentive for the vendor or CMRS carrier to implement an adequate process for resolving disputes with customers that receive charges for their services. The Pay-Per-Call Rule implements a comprehensive dispute resolution procedure that gives consumers the opportunity to dispute charges for pay-per-call services in roughly the same manner in which they can dispute charges that appear on their credit cards.[39] Among other things, consumers can use the procedures mandated by the Pay-Per-Call Rule to dispute charges for calls to pay-per-call services that were never placed, and can dispute charges for pay-per-call services that differ from the charges promised in advertisements or the preamble

[38] 47 C.F.R. 64.1508.

[39] 16 C.F.R. 308.7. The FTC has proposed several substantive amendments to this dispute resolution procedure. *63 Fed. Reg.* at 58550-55. In addition to looking at the current Pay-Per-Call Rule, the FCC may wish to look to these proposed amendments in addressing the potential problem of billing disputes relating to non-interconnection CPP charges.

message. The FCC may wish to look to these dispute resolution procedures in determining what actions a CMRS carrier should take in responding to disputes relating to CPP charges.

C. The FCC May Wish to Take Steps to Prevent Some CPP Services From Falling Victim to Deceptive, Unfair, and Abusive Practices Similar to Those Prohibited by TDDRA and the Pay-Per-Call Rule, and From Becoming a Haven for Evasion of TDDRA.

Some CPP calling plans may be particularly susceptible to certain types of fraudulent and abusive practices. For example, some abuse of CPP may occur if CMRS carriers began structuring CPP calling plans in a manner that provides a material benefit to the CPP subscriber based on the number or duration of incoming calls. Such a system could be a ready opportunity for abuse by unscrupulous subscribers, who could have an incentive to generate a high number of incoming calls, and to keep (incoming) callers on the telephone as long as possible. In the FTC's recent Notice of Proposed Rulemaking announcing the Proposed amendments to the Pay-Per-Call Rule, the FTC opined that, where a charge for a service is generated on the basis of a call and a portion of that charge is paid, directly or indirectly, to someone who provides or purports to provide information or entertainment over that telephone call, this creates a situation that is especially susceptible to certain types of unfair and deceptive practices.[40]

Our experience with pay-per-call shows that where there is an opportunity to make money based on the volume or duration of calls received to a certain number, there will be unscrupulous persons ready to seize the opportunity through abusive practices. In many cases, a notice or

---

[40]Pursuant to Congressional authority granted in Section 701(b) of the Telecommunications Act of 1996, the FTC has proposed that these services be covered by the FTC's Pay-Per-Call Rule, and subject to the advertising disclosure requirements, the free "preamble" requirements, and various other requirements of the Pay-Per-Call Rule. Proposed Pay-Per-Call Rule at 58533-34.

"preamble" message may be highly effective in preventing these types of practices. However, this may not always be the case. The FTC's enforcement experience encompasses many highly innovative scams designed to generate a high call volume to numbers where the call recipient receives some material benefit based on the volume or duration of calls received.[41] Four illustrative hypothetical examples amplify the wide range of possible (and not altogether unlikely) schemes that might exist if CPP plans could be structured so that CMRS subscribers were able to materially benefit from the volume or duration of incoming calls to the services.

Example A: CMRS carrier offers CPP plan where each incoming minute costs $3.00 per minute, and each outgoing minute costs $0.30 per minute. Under this CPP plan, for each minute of incoming calls received by the subscriber, the subscriber receives five "free" minutes of outgoing calls. An unscrupulous subscriber places small advertisement in local newspaper advertising lucrative job opportunity, and listing the CPP subscribed telephone number as the contact. The job opportunity does not actually exist, but the advertisement generates enough calls so that the unscrupulous subscriber never pays any money for the outgoing calls from his or her wireless telephone. Even with clear cost disclosures in a recorded notice, callers to the CPP service are injured because they call the number (and continue on the call even after cost disclosures) based on the deceptive representation that they will receive valuable information.

Example B: A software company hires dozens of new technical assistants to answer consumer questions about a complicated new software program. In order to offset costs of hiring the

---

[41]For example, in one case, an Internet web site promised consumers the opportunity to view "free" adult-oriented images by downloading a particular "viewer" software program. Upon downloading and installing this software, the consumer's computer turned off the modem speaker, surreptitiously disconnected from the Internet, and dialed an international telephone number. Once connected to the international number, the computer was reconnected to the Internet via a server located outside the United States, and was able to "surf" the web as usual. The consumer's computer thus remained connected to the Internet through that international call as long as the computer was left on – costing some consumers thousands of dollars in international toll charges. The defendants who operated this deceptive web site shared in the revenue generated by the international calls through an arrangement with the international carrier. The more calls and the longer they lasted, the more revenue the defendants received. Over a million minutes were generated to the number before the FTC obtained a court order shutting it down. This case is but one example that demonstrates the seriousness of these concerns about the fraud and abuse potential of non-interconnection CPP. *FTC. v. Audiotex Connection, Inc.,* No. 97-0726 (E.D.N.Y., filed Feb. 13, 1997).

technical assistants, the software company directs its subsidiary CMRS carrier to create a CPP plan where both incoming and outgoing minutes are billed at $3.00 per minute. In its brochures and advertisements, the software company instructs consumers with questions to call telephone numbers subscribed to this CPP plan. The technical assistants answer all customer inquiries from telephones subscribed to that plan. To further offset costs, the software company encourages its assistants to take several calls at once, keeping several consumers on hold and paying the $3.00 per minute. Although these CPP services are virtually indistinguishable from the typical 900 number service, consumers who call these services will receive few or none of the legal protections for those services guaranteed by Congress under the TDDRA. Notably, consumers may not be able to block access to these calls via TDDRA-blocking, and they will not be able to avail themselves of the dispute resolution provisions specified by Congress for all telephone-billed purchases.

Example C: A CMRS carrier offers a CPP plan that provides its customers with a 75% "bonus" for every minute of billed airtime. Incoming and outgoing calls are billed at $4.99 per minute. The CMRS provider discovers that the CPP plan is popular with "psychic friends" and providers of adult-oriented chat services. One subscriber to the CPP plan advertises during television programs directed at children, and instructs the children to call a CPP number to "talk to Santa Claus."[42] Although these CPP services are virtually indistinguishable from the typical 900 number service, consumers who call these services will receive few or none of the legal protections for those services guaranteed by Congress under the TDDRA. The FTC's Pay-Per-Call Rule, promulgated under TDDRA, prohibits marketing to children in the manner described in this example.[43]

Example D: A CMRS carrier offers a CPP plan that provides its customers with a 10% "bonus" for every minute of billed airtime. Incoming and outgoing calls are billed at $0.30 per minute. Some unscrupulous customers make a regular habit of calling their CMRS telephone number from hotel telephones, or from telephones within a large institution utilizing a PBX system, such as a hospital or university. This generates additional "bonus" money for the subscriber, with costs being borne by the hospital or university -- institutions that never received the cost disclosures specified by the FCC's NPRM.

The FCC may wish to consider taking measures to protect against these types of abuses.

---

[42]Prior to the promulgation of the Pay-Per-Call Rule, the FTC brought a number of cases to halt this type of practice. *Audio Communications, Inc.*, 114 F.T.C. 414 (July 24, 1991) (unfair practice to induce children to dial a 900 number without providing adequate means to ensure parental authorization); *Phone Programs, Inc.*, 115 F.T.C. 977 (Dec. 10, 1992) (unfair practice to induce children to dial 900 number without providing any reasonable means for persons responsible for payment to exercise control over the transaction).

[43]16 C.F.R. § 308.3(e), 308.5(h).

To achieve this goal, we suggest that FCC consider implementing three policies:

(1) A prohibition against CMRS carriers offering CPP plans where the CMRS subscriber will receive any material benefit tied to the number or duration of calls placed to the CMRS telephone number;

This provision would prevent unscrupulous CMRS subscribers from abusing CPP plans to defraud consumers, as in examples A and D, above.

(2) A prohibition against CMRS carriers offering CPP plans that share any revenue with any person or entity providing (or purporting to provide) any information or entertainment that callers would purportedly obtain by calling a CPP-subscribed line.

This provision would prevent "information providers"[44] from abusing CPP services to use them as a vehicle to provide pay-per-call services, as in examples B and C, above. Without such a restriction, an information provider could simply find a CPP service where the rates for incoming calls were set high enough to cover not only the actual transmission costs to the service, but also to cover the cost of providing that information or entertainment program. The information provider could simply negotiate an arrangement to share in the revenue (either directly or indirectly) generated by calls to the CPP service.

(3) A requirement that a CMRS carrier maintain a strictly "content neutral" position with respect to any CPP service, prohibiting a CMRS carrier from exercising any control, influence, or interest over the content of a CPP call.

This provision would prevent information providers from disguising themselves as common carriers. In some circumstances, the FTC has seen fraudulent information providers masquerading as "common carriers" and charging exorbitant "long-distance rates" to consumers

---

[44]"Information providers" are vendors who provide or purport to provide audio information or audio entertainment over the telephone, and recover their costs for providing that information or entertainment by collecting a portion of the charge billed to the person whose telephone is used to make the call.

who access certain information or entertainment lines. We are aware of instances where information providers have disguised themselves as "carriers" and have billed consumers for these information or entertainment programs in the form of "conference calls," "calling card charges" or some other content-neutral offering. Thus, these bogus carriers attempt to shield themselves from coverage by the FTC's Pay-Per-Call Rule and to elude the FTC's jurisdiction under Section 5 of the FTC Act,[45] while still committing the same unfair, deceptive, and abusive practices that the FTC's Pay-Per-Call Rule is designed to prevent. If a non-interconnection approach to CPP is adopted, we have every expectation that these same sorts of unscrupulous information providers will set up bogus "CMRS carriers" to offer their services in a manner that evades the FTC's Rule. To prevent this practice, the FCC may wish to consider prohibiting CMRS carriers from exercising any control, influence, or interest over the content of calls carried over CPP subscribed lines. In other words, requiring that CMRS carriers maintain a strictly "content neutral" status with regard to the calls they transport. This type of restriction would help prevent information providers from evading the Pay-Per-Call Rule by disguising themselves as CMRS carriers.

We believe that consideration of these provisions would help prevent CPP from becoming a means to evade the FTC's Pay-Per-Call Rule. In other words, they would be an important step towards ensuring that the proposed rule regarding CPP services does not "duplicate, overlap, or conflict" with any other Federal Rules.[46] Moreover, we believe that these suggested provisions

---

[45]To the extent that a common carrier in engaged in the provision of basic common carrier transmission services, the FTC lacks jurisdiction to prohibit that entity from engaging in unfair or deceptive practices under Section 5 of the FTC Act. 15 U.S.C. § 45(a)(2). However, notwithstanding this restriction, the FTC does have jurisdiction to apply the provisions of the Pay-Per-Call Rule to common carriers. 15 U.S.C. 5711(c) and 5721(c).

[46]NPRM at B-12.

would be supportive of recent amendments that the FTC has proposed to the Pay-Per-Call Rule, which are designed to stop evasions of the Rule by vendors of audio information and entertainment services.

Finally, we note that an interconnection approach may be less susceptible to becoming a haven for evasion of TDDRA than would an non-interconnection approach to CPP. This is because, in a competitive environment, LECs would be responsible for paying these charges and would bargain with CMRS carriers to bring the costs down to the point where there would be less room for "kickbacks" to information providers or to CPP subscribers. Conversely, since CMRS providers using non-interconnection CPP plans would be largely free to set the rates for incoming calls as they see fit – this could lead to some CMRS carriers *deliberately* setting rates at a level sufficient to provide a commission or kickback to a CPP subscriber or to an "information provider." Regardless of the method chosen for CPP, the FCC may wish to consider implementing policies to prevent CPP from becoming a means to evade the protections provided to consumers by TDDRA.

D. The FCC May Wish To Consider Measures to Protect the Interests of the "Billed Party" in Addition to the "Calling Party" ("Privity of Contract") in a CPP Transaction.

The challenge faced in attempting to structure a non-interconnection type of CPP is that there is no tariff, contract or other legal basis for holding any person other than the CMRS *subscriber* liable for charges resulting from that agreement. As a result, these charges could be interpreted as a case of unauthorized billing. In non-interconnection CPP, there would be no "privity of contract"[47] between the CMRS carrier providing the service and the person who is

[47]NPRM at 25.

billed for that service. The NPRM discusses this problem by noting that there is a need to "create a contractual obligation for *calling parties*, who are not subscribers of the CMRS carriers, to pay for CPP calls."[48]

In recognizing this problem, however, the NPRM may take an overly restrictive view of the problem. The FCC's preliminary assessment is that "providing the caller the rates, terms, and conditions prior to the completion of a call would establish an enforceable contract between the *caller* and the carrier."[49] However, the contract problem may be more problematic in that the *calling party* is not necessarily the person who will receive the bill for the call, and will frequently not be the person from whom carriers will attempt to collect the CPP-related charges.[50]

For some consumers, the potential injury resulting from unauthorized calls to non-interconnection CPP services could be large. This is because, in non-interconnection CPP, there is no limit to the amount that might be charged for a single CPP call. In non-interconnection CPP, the cost of the call, as well as other terms and conditions of the service, are determined as a matter of contract between the *recipient of the call* and the CMRS carrier. The CPP subscriber would be free to choose a plan that had high rates for incoming calls (perhaps as a way of subsidizing the cost of outgoing calls or as a way of discouraging people from making incoming

---

[48]*Id.* (emphasis added).

[49]*Id.* (emphasis added).

[50]Moreover, even if the calling party is the subscriber who will incur the charge for the non-interconnection CPP service, the calling party may not speak the language in which the cost disclosure is given. In the pay-per-call context, the Pay-Per-Call Rule requires that the cost disclosures in the preamble message be "in the same language as that principally used in the pay-per-call message." 16 C.F.R. 303.5(a). This solution would unworkable in the context of CPP, where the CMRS carrier would have insufficient means to determine the primary language that would be used by the callers.

calls), while the person who would be charged these high rates may not even be the same person who placed the call and heard the cost disclosures. The CMRS carrier would then transmit a bill for this service to someone who was not a party to the agreement which established those rates. Moreover, as the FCC noted in the NPRM, under non-interconnection CPP, "[d]irect competitive pressure on the rate does not exist in the case of a call to the CPP subscriber . . . because the caller does not select the carrier and does not have the ability to switch to a different carrier to obtain a better rate for completing the call."[51]

Under the legal principles that apply to other types of goods and services (*i.e.*, those goods and services covered by Section 5 of the FTC Act), a notification system that creates a contractual obligation with a *calling party* would be insufficient to obligate a telephone subscriber whose telephone was used to make the purchase -- this would be a case of unauthorized billing. While the legal requirements of the FTC Act do not apply to a common carrier in the context of providing telecommunications common carriage,[52] the FCC may wish to look for guidance to the consumer protection principles that apply to cases of unauthorized billing in the context of Section 5. Ordinarily, telecommunications common carriage is provided (and billed) on the basis of a tariff or contract that may contain terms that specify a subscriber's liability in the case of unauthorized use of the service by a third party.[53] Here, however, there appears to be little or no

[51]NPRM at 26.

[52]15 U.S.C. § 45(a)(2).

[53]The issue of unauthorized use does not present a legal problem in the wireline telecommunications context, because where a service is provided by a presubscribed wireline carrier, there is a firm legal basis to hold telephone subscribers liable for unauthorized use of their telephones to place calls – the tariff. Similarly, the written contract between a CMRS carrier and a CMRS subscriber provides a contractual basis to charge the CMRS subscriber for all uses of the

legal basis for charging telephone subscribers for calls to non-interconnection CPP services where those subscribers did not authorize the call.

It is well-established that unauthorized billing is an unfair practice, in violation of Section 5, and in recent years the FTC has brought numerous law enforcement actions alleging this violation.[54] Importantly, the FTC has made it clear that this principle of law is not diminished simply because the service involved is billed via a telephone bill. In a number of recent cases involving non-common carrier goods and services purchased over the telephone, the FTC has taken the position that, even where notice is given to a calling party, a vendor cannot hold the telephone subscriber liable for purchases made from his or her telephone without that subscriber's authorization.[55]

---

subscriber's wireless telephone.

[54] *See, e.g., FTC v. J.K. Publications, Inc., et al.*, Docket No. CV-990004 ABC (AJWx) (C.D. Cal., filed Jan 5. 1999) (unauthorized billing of charges to consumers' credit card accounts alleged as unfair); *U.S. v. Bally's Health & Tennis Corp.*, No. 94-0821 (D.D.C. 1994) (consent order) (unauthorized billing of charges to consumers' credit card accounts alleged as unfair); *FTC v. Windward Marketing*, No. 1:96-CV-615-FMH (N.D. Ga. May 22, 1996) (unfair debiting of consumers' checking accounts without authorization); *Choice Diet Products, Inc. et al.*, C-3587 (F.T.C. 1995) (consent order) (unauthorized debiting of consumers' bank accounts and unauthorized billing of charges to consumers' credit card accounts alleged as unfair).

[55]*See, FTC v. Hold Billing Services, Ltd.*, No. SA98CA0629 FB (W.D. Texas, filed July 19, 1998) (unfair practice to bill line subscribers for sweepstakes entry forms filled out by someone other than line subscriber where line subscriber did not consent to the charges); *International Telemedia Associates, Inc.*, No. 1-98-CV-1925 (N.D. Ga., filed July 10, 1998) (unfair practice to bill line subscriber for services that line subscriber did not purchase or receive, based on the use, or purported use, of a line subscriber's telephone to call to a toll-free number); *FTC v. Interactive Audiotext Services, Inc.*, No. 98-3049 CBM (C.D. Calif., filed April 22, 1998) (unfair practice to bill consumers whose telephones were used by someone else to access and purchase defendants' entertainment services by dialing non-blockable toll-free numbers); *Audio Communications, Inc.*, 114 F.T.C. 414 (July 24, 1991) (unfair practice to induce children to dial a 900 number without providing adequate means to ensure parental authorization); *Phone Programs, Inc.*, 115 F.T.C. 977 (Dec. 10, 1992) (unfair practice to induce children to dial 900

A powerful tool to protect billed parties against injury from unauthorized CPP calls is to make a form of blocking available to residential customers. TDDRA requires that such a system be made available for blocking pay-per-call services, and the FCC regulations require such a blocking system.[56] In the context of telephone-billed purchases, the FTC believes that blocking is an important tool in protecting consumers' ability to avoid unauthorized charges on their telephone bill. In this context, the FTC has spoken at length on the topic:

> Generally, purchases of goods or services require some form of authorization from the purchaser -- that is, the purchaser must indicate some intent or desire to make the purchase.[57] Telephone-billed purchases are no exception to this broad legal principle. For telephone-billed purchases that can be blocked by TDDRA blocking, the Commission believes it is reasonable for a vendor to presume that a call that comes from a telephone subscriber's telephone was authorized by that subscriber. After all, if the subscriber wanted to prevent these types of charges from being made through his or her telephone, there is a cost-free and simple method to do so: TDDRA blocking. Election of TDDRA blocking will not require the line subscriber to sacrifice other valuable uses of his or her telephone -- he or she will still be able to use the telephone for any purpose other than making TDDRA-blockable telephone-billed purchases.
>
> However, where a telephone-billed purchase is not TDDRA blockable, the Commission does not believe that it is reasonable for vendors to presume that telephone-billed purchases made from a subscriber's telephone were, in fact, authorized by that subscriber. A line subscriber has no effective means of preventing these purchases from being made, short of monitoring the placement and content of every telephone call made from his or her telephone. A merchant is not entitled to presume that the line subscriber has

---

number without providing any reasonable means for persons responsible for payment to exercise control over the transaction).

[56]47 C.F.R. 64.1508.

[57]RESTATEMENT (SECOND) OF CONTRACTS ("RESTATEMENT") § 23 (1979).

> agreed to pay for a good or service merely because that subscriber's telephone was used to order a product or service. A consumer is no more obligated to pay for a non-blockable telephone-billed purchase made from his or her telephone than the consumer is obligated to pay for any other purchase (for example, a purchase of a sweater from a clothing catalog) that just happened to be made from that consumer's telephone.[58]

Proposed Pay-Per-Call Rule at 58548-49 (footnotes in original).

Under the interconnection approach, contractual privity (unauthorized billing) will not be an issue because the charges will always originate from the presubscribed carrier of the person who will be billed for the call. This would provide a greater level of control to telephone subscribers than in a non-interconnection CPP environment, where the billed party is charged for services provided by a third-party CMRS carrier with whom the billed party may have no preexisting relationship. However, regardless of the approach taken, the FCC may wish to consider implementing a blocking mechanism similar to the one implemented in the context of pay-per-call services. One disadvantage to such a blocking mechanism is that it would limit consumer's ability to call CPP numbers in emergency situations. To address this problem, the FCC may wish to devise a method that would allow callers to "reverse the charges" to the called party in limited, emergency situations. CPP blocking, patterned after the FCC's regulations on TDDRA blocking, would give consumers a greater degree of control over their telephone bill, and would enable them to more easily avoid unauthorized charges from CMRS providers with whom they have no preexisting contractual (or other) relationship.

---

[58] This was illustrated in two of the Commission's recent cases. *FTC v. Interactive Audiotext Services, Inc.* and *FTC v. International Telemedia Associates, Inc.*

IV. Conclusion

The FCC may wish to look to TDDRA and the Pay-Per-Call Rule in fashioning protections for consumers in the context of CPP, because some forms of CPP may be similar to the pay-per-call billing platform. TDDRA provides consumers with methods of dispute resolution, blocking of pay-per-call services, and free "preamble" disclosures before most pay-per-call programs. Similar protections could provide important benefits to consumers in a CPP marketplace, and may help ensure that CPP becomes a viable, healthy system for billing for wireless calls. Moreover, while CPP will present consumers with a wider variety of choices in the telecommunications marketplace, it may also become a vehicle for unscrupulous subscribers and CMRS carriers to engage in deceptive, unfair, or abusive practices of the kind prohibited by TDDRA. The FCC may want to consider actions to prevent CPP from succumbing to these harmful practices, and to prevent CPP from becoming a haven for evasion of TDDRA. Finally, if the FCC implements a non-interconnection approach, the FCC may wish to protect interests of the "billed party," whether or not the person billed happens to also be the "calling party."