BILLING CODE 6750-01-P

FEDERAL TRADE COMMISSION

16 CFR Part 308

Pay-Per-Call Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: In this document, the Federal Trade Commission (the "Commission" or "FTC") issues a Notice of Proposed Rulemaking to amend the Commission's Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 (the "900-Number Rule," "Rule," or "original Rule"), 16 CFR Part 308, and requests public comment on the proposed changes.   The 900-Number Rule governs the advertising and operation of pay-per-call services, and establishes billing dispute procedures for those services as well as for other telephone-billed purchases.

This document invites written comments on all issues raised by the proposed changes and, specifically, on the questions set forth in Section I of this Notice. This document also contains an invitation to participate in a public workshop to be held following the close of the comment period, to afford the Commission staff and interested parties an opportunity to explore and discuss issues raised during the comment period.

DATES: Written comments will be accepted until January 8, 1999. Notification of interest in participating in the public workshop also must be submitted on or before January 8, 1999. The public workshop will be held at the Federal Trade Commission, 6th Street and Pennsylvania Avenue, N.W., Washington, DC 20580, on February 25 and 26, 1999, from 9:00 a.m. until 5:00 p.m.

ADDRESSES: Six paper copies of each written comment should be submitted to the Office of the Secretary, Room 159, Federal Trade Commission, 6th Street and Pennsylvania Avenue, N.W., Washington, DC 20580. To encourage prompt and efficient review and dissemination of the comments to the public, all comments should also be submitted, if possible, in electronic form, on either a 5 ¼ or a 3 ½ inch computer disk, with a label on the disk stating the name of the commenter and the name and version of the word processing program used to create the document. (Programs based on DOS are preferred. Files from other operating systems should be submitted in ASCII text format to be accepted.) Individual members of the public filing comments need not submit multiple copies or comments in electronic form. Comments should be identified as "Pay-Per-Call Rule Review -- Comment. FTC File No. R611016."

Notification of interest in participating in the public workshop should be submitted in writing, separately from written comments, to Carole Danielson, Division of Marketing Practices, Federal Trade Commission, 6th Street and Pennsylvania Avenue, N.W., Washington, DC 20580. The public workshop will be held at the Federal Trade Commission, 6th Street and Pennsylvania Avenue, N.W., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Adam Cohn, (202) 326-3411, Marianne Schwanke, (202) 326-3165, or Carole Danielson, (202) 326-3115, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

Section A. Background

1. Telephone Disclosure and Dispute Resolution Act of 1992 ("TDDRA").

Congress enacted the Telephone Disclosure and Dispute Resolution Act of 1992 ("TDDRA"), 15 U.S.C. 5701 *et seq.*, to curtail the unfair and deceptive practices engaged in by some pay-per-call businesses and to encourage the growth of the legitimate pay-per-call industry.[1] Title I of TDDRA directed the Federal Communications Commission ("FCC") to adopt regulations defining the obligations of common carriers in connection with providing tariffed common carrier services to pay-per-call services.[2] Title I also set forth the original definition of "pay-per-call services," which limited the term to certain specified services accessed through the use of a 900 telephone number.[3]

Titles II and III of TDDRA required the FTC to prescribe regulations governing various aspects of telephone-billed purchases, including pay-per-call services.[4] Title II of TDDRA directed the Commission to enact regulations governing the advertising and operation of pay-per-call services. Among other things, TDDRA specified that certain disclosures appear in all advertising for pay-per-call programs and in introductory messages ("preambles") at the start of such pay-per-call programs. Title II also prohibited pay-per-call providers from engaging in certain practices, such as directing their services to children under 12 years of age, or providing

[1] This statement summarizes Congress' findings regarding the pay-per-call industry at the time it passed the legislation. For greater detail concerning the problems Congress found to be associated with pay-per-call services, *see* 15 U.S.C. 5701(b).

[2] Title I is codified at 47 U.S.C. 228. The FCC published its Notice of Proposed Rulemaking and Notice of Inquiry at 58 FR 14371 (March 17, 1993). The FCC's Rules are at 47 CFR 64.1501 *et seq.*

[3] 47 U.S.C. 228(i)(1). *See* note 14, *infra*.

[4] Title II of TDDRA is codified at 15 U.S.C. 5711-5714. Title III of TDDRA is codified at 15 U.S.C. 5721-5724.

pay-per-call services through an 800 number or other toll-free number. In addition, the statute directed pay-per-call providers to comply with any additional standards the Commission might prescribe to prevent abusive practices.[5]

Title III of TDDRA required that the FTC's regulations establish procedures for dispute resolution and for correcting billing errors in connection with telephone-billed purchases. Both Title II and Title III directed the Commission to include provisions in its regulations that would prohibit acts or practices that evade the rules or undermine the rights provided to consumers by the statute.[6] Notwithstanding Section 45(a)(2) of Title 15,[7] TDDRA granted the FTC jurisdiction over common carriers in connection with their activities as service bureaus or pay-per-call providers, as well as in connection with any billing and collection activities undertaken on behalf of providers of pay-per-call services or other telephone-billed purchases.[8]

2. 900-Number Rule.

On July 26, 1993, the FTC adopted its 900-Number Rule, 16 CFR Part 308; the Rule became effective on November 1, 1993.[9] Pursuant to TDDRA's requirements, the 900-Number Rule incorporated the definition of "pay-per-call services" set out in Section 228 of the Communications Act of 1934, thus limiting the applicability of the advertising and operating standards of the Rule to services accessed by dialing a 900 number.[10] Among other provisions, the Rule requires that advertisements for pay-per-call services contain certain disclosures of material information, including the cost of the call. This material information must also be included in an introductory message (preamble) at the beginning of any pay-per-call program where the cost of the call could exceed two dollars. The Rule requires that anyone who calls a pay-per-call service must be given the opportunity to hang up at the conclusion of the preamble without incurring any charge for the call. In addition, the Rule requires that all preambles to pay-

---

[5] 15 U.S.C. 5711(a)(2)(J).

[6] 15 U.S.C. 5711(a)(4) and 5721(a)(1).

[7] Under that Section, "common carriers subject to the Acts to regulate commerce" are exempted from FTC jurisdiction to prohibit the use of "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

[8] 15 U.S.C. 5711(c) and 5721(c). The term "telephone-billed purchase," as used in TDDRA, refers to a purchase of goods or services (other than telephone toll services) that is "completed solely as a consequence of completion of the call or a subsequent dialing, touch tone entry, or comparable action of the caller." 15 U.S.C. 5724(1). The term includes all pay-per-call services.

[9] The Statement of Basis and Purpose and Final Rule were published at 58 FR 42364 (August 9, 1993).

[10] *See* note 14, *infra*.

per-call services state that individuals under the age of 18 must have the permission of a parent or guardian to complete the call.

The 900-Number Rule also establishes procedures for resolving billing disputes for telephone-billed purchases, such as pay-per-call services.[11] The Rule imposes certain obligations on entities that bill and collect for telephone-billed purchases, such as investigating and responding to billing disputes.[12]

3. Telecommunications Act of 1996 ("1996 Act").

On February 8, 1996, the President signed into law the Telecommunications Act of 1996 (the "1996 Act")[13] to provide a regulatory framework for telecommunications and information technologies and services. Section 701(b) of the 1996 Act provides that:

> Section 204 of [TDDRA] is amended to read as follows:
> (1) The term 'pay-per-call services' has the meaning provided in section 228(i) of the Communications Act of 1934,[14] except that the [Federal Trade] Commission by rule may, *notwithstanding subparagraphs (B) and (C) of Section 228(i)(1) of such Act*, extend such definition to other similar services providing audio

---

[11] The term "telephone-billed purchase" is defined more broadly than the term "pay-per-call services," and thus includes within its scope all pay-per-call services. *See* note 8, *supra*, and discussion, *infra*, on the definition of "telephone-billed purchase."

[12] Other TDDRA protections were established by the FCC in that agency's rules set out at 47 CFR 64.1501 *et seq.* Under the FCC rules, a consumer's telephone service cannot be disconnected for failure to pay charges for a 900-number call, and 900-number blocking must be made available to consumers who do not wish to have access to 900-number services from their telephone lines.

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

[14] Section 228(i)(1) of the Communications Act of 1934, 47 U.S.C. 228(i)(1) provides that:

> The term 'pay-per-call services' means any service--
> (A) in which any person provides or purports to provide--
> (i) audio information or audio entertainment produced or packaged by such person;
> (ii) access to simultaneous voice conversation service; or
> (iii) any service, including the provision of a product, the charges for which are assessed on the basis of completion of the call;
> (B) for which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call; and
> (C) which is accessed through use of a 900 telephone number or other prefix or area code designated by the [Federal Communications] Commission in accordance with subsection (b)(5) [47 U.S.C. 228(b)(5)]."

information or audio entertainment if the [Federal Trade] Commission determines that such services are susceptible to the unfair and deceptive practices that are prohibited by the rules prescribed pursuant to section 201(a) [of TDDRA]. [Emphasis and footnote added.]

The 1996 Act thus authorizes the FTC, through its 900-Number Rule, to extend the definition of the term "pay-per-call services" -- and, in effect, the Rule's coverage -- to include certain audiotext[15] services that may use a dialing prefix other than 900[16] and services for which there is a charge that is greater than, or in addition to, the charge for transmission of the call.[17] If the FTC determines that such audio information and entertainment services are susceptible to the unfair and deceptive practices that are prohibited by its 900-Number Rule, the FTC has the authority to define those services as "pay-per-call services" and require them to comply with the Rule's provisions.

Section 701 of the 1996 Act also modified several provisions in Title I of TDDRA, directing the FCC to amend its regulations regarding pay-per-call services.[18] The FCC took action to implement this statutory mandate in July 1996.[19] In that proceeding, the FCC also proposed certain other modifications to its rules not expressly mandated by statute in an attempt to reduce fraudulent practices in the audiotext industry.

4. Initiation of Rule Review and Request for Comment.

The 900-Number Rule provides that the Commission initiate a rulemaking review proceeding to evaluate the Rule's operation no later than four years after its effective date of

---

[15] The term "audiotext" describes audio information and entertainment services offered through any dialing pattern, including services accessed via 900 numbers as well as those accessed through international and other non-900-number dialing patterns.

[16] 47 U.S.C. 228(i)(1)(C).

[17] 47 U.S.C. 228(i)(1)(B).

[18] Congress changed the definition of "pay-per-call services" as it applies to the FCC's regulations under Title I of TDDRA by deleting the exception for "tariffed services," without authorizing either the FTC or the FCC to further modify the Title I definition in any way. The FTC's authority to change the definition only impacts Titles II and III of TDDRA. Thus, the FTC's proposed definition of "pay-per-call services" will only apply to this Rule and not to any regulations promulgated by the FCC pursuant to Title I of TDDRA.

[19] Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996, Order and Notice of Proposed Rulemaking, CC Docket No. 96-146, 11 FCC Rcd 14738 (1996) ("FCC Pay-Per-Call Order and Notice").

November 1, 1993.[20] The Commission decided to conduct this review in conjunction with a Request for Comment to obtain information on whether, pursuant to Section 701 of the 1996 Act, the definition of "pay-per-call services" should be extended to cover audiotext services that fall outside the original definition. Thus, on March 12, 1997, the Commission published a notice in the *Federal Register* seeking comment on the overall effectiveness of the Rule and on whether the Commission should extend the definition of "pay-per-call services" to include a broader array of audio information and audio entertainment services provided through the telephone.[21]

Written and oral comment. In response to the notice, the Commission received 34 comments from industry, law enforcement, and consumer representatives, as well as from individual consumers.[22] Virtually all of the commenters praised the effectiveness of the 900-Number Rule in combating the deceptive and unfair practices that had plagued the 900-number industry before the Rule was promulgated. They also strongly supported the Rule's continuing role as the centerpiece in the effort to implement TDDRA's goals of protecting consumers and promoting the growth of the pay-per-call industry. As will be discussed in more detail *infra*, a number of commenters suggested modifications they believed would enhance the consumer protections offered by the Rule and reduce some of the burden on industry. In addition, the majority of commenters strongly urged the Commission to extend the Rule's definition of "pay-per-call services" to cover audio information and audio entertainment services provided by international direct dialing and by other non-900-number dialing patterns. Many commenters also supported additional restrictions on telephone-billed purchases that result in monthly or other recurring charges on consumers' telephone bills.

On June 19 and 20, 1997, staff of the Commission conducted a public workshop at the Federal Trade Commission in Washington, DC. Fourteen associations, individual businesses, consumer organizations, and law enforcement agencies, each with an affected interest and ability to represent others with similar interests, were selected to engage in the roundtable discussion.[23] The participants were encouraged to address each other's comments and questions, and were asked to respond to questions from Commission staff. The workshop was open to the public; oral comments from the public were invited and several individuals spoke during the course of the

---

[20] 16 CFR 308.9.

[21] 62 FR 11749 (March 12, 1997).

[22] A list of the commenters, and the acronyms that will be used to identify each commenter in this notice, is appended as Attachment A.

[23] The selected participants were: AT&T, FLORIDA, GORDON, ISA, ITA, MCI, NAAG, NCL, SW, PILGRIM, PMAA, SNET, TPI, and TSIA. Consumers Union also was selected as a participant, but was unable to send a representative to the workshop.

two-day workshop. The entire proceeding was transcribed and placed on the public record.[24] The public record to date, including the comments that were submitted in electronic form and the workshop transcript, has been placed on the Commission's web site on the Internet.[25]

Many commenters reported that the 900-Number Rule has been successful in reducing the abuses that led to the passage of TDDRA[26] and that, since the 900-Number Rule became effective, consumer confidence has increased[27] and complaints about 900-number services have decreased dramatically.[28] Commenters credited the 900-Number Rule with these positive developments.[29] Commenters generally agreed that the Rule has been effective yet balanced, without unnecessarily burdening the pay-per-call industry.[30] Recognizing that the Rule appears to have substantially reduced the abuses that had plagued the 900-number industry, commenters uniformly believe that it is important to retain the Rule.[31]

Despite the success of the Rule in correcting the abuses in the 900-number industry, complaints about other types of audiotext services (accessed via dialing patterns other than 900 numbers) continue to flood into the offices of local exchange carriers, consumer groups, and law

---

[24] References to the workshop transcript are cited as "Tr." followed by the appropriate page designation. References to comments are cited as "[acronym of commenter] at [page number]."

[25] The electronic portions of the public record can be found at http://www.ftc.gov/ftc/consumer.htm. The full paper record is available in Room 130 at the Federal Trade Commission, 6th Street and Pennsylvania Avenue, N.W., Washington, DC 20580, telephone number: 202-FTC-HELP (202-382-4357).

[26] AARP at 1; AT&T at 2; FLORIDA at 4; GORDON at 1; ISA at 2; NAAG at 2; NCL at 2; PMAA at 1-2; SNET at 2-3; TPI at 2; and TSIA at 2-3.

[27] GORDON at 1; AT&T at 2; NAAG at 2; PMAA at 1-2; TPI at 2; TSIA at 2-3. TSIA believes that the requirements established by the FTC in its 900-Number Rule have benefitted consumers and enhanced the fairness and credibility of the audiotext industry. TSIA at 2-3.

[28] AT&T at 3; TPI at 2; AMERITECH at 2; GORDON at 1; FLORIDA at 10; SW at 4; SNET at 2-3; NAAG at 2; NCL at 2; US WEST at 4-5 (noting a "materially significant reduction" in 900-number complaints).

[29] According to one representative comment, the 900-Number Rule can be credited with "eradicating abuses in the pay-per-call industry" and helping to make 900 numbers "a viable marketing and promotional tool for many legitimate marketers of consumer products and services." PMAA at 1-2.

[30] *See, e.g.*, PMAA at 1-2, 4; NCL at 2; ISA at 2.

[31] *See, e.g.*, FLORIDA at 4; GORDON at 1; NCL at 2; PMAA at 4.

enforcement agencies.[32] The majority of complaints now involve 800 numbers, international numbers, or other dialing patterns that do not use the 900-number prefix.[33] Many consumer and law enforcement agencies also have been receiving complaints from consumers who have discovered unexplained monthly recurring charges on their telephone bills for services that were never authorized, ordered, received, or used.[34]

Some commenters expressed the opinion that the effectiveness of the 900-Number Rule has led fraudulent operators to find alternate ways to market their services in order to evade the Rule's protections.[35] Conversely, some industry members argue that the high chargeback rates experienced by services offered through 900 numbers have driven providers to seek other methods of delivering their services and of billing and collecting for them. In addition, these commenters point to high transport rates charged by the interexchange carriers in the United States as a reason for the development of alternate ways to market and bill for audio information and entertainment services. Thus, these audio information or entertainment providers allege that by using non-900-number dialing patterns they can provide consumers with services that are similar or comparable to those offered through 900 numbers, but cost consumers less.[36] Consumer groups and law enforcement responded to this argument by alleging that providers who offer their services through dialing patterns other than the 900-number exchange can charge less for their services precisely because the non-900-number format enables providers to collect unauthorized and illegitimate charges from consumers without fear of chargebacks, because non-900 numbers do not provide the TDDRA protections to consumers.[37]

5. Notice of Proposed Rulemaking.

Regardless of the factors that prompt providers to use alternatives to the 900-number dialing pattern to bill for their audiotext services, the question is whether these alternate billing methods undermine the rights that Congress intended for consumers to have under TDDRA. In

---

[32] After an initial decrease in the number of pay-per-call complaints received by such organizations after the Rule became effective, the numbers soon began to increase. Although pay-per-call complaints dropped to 16th place in 1994 after the Rule became effective, by 1996 they had climbed back to 12th place. NCL at 2.

[33] ALLIANCE at 2-3; CINCINNATI at 1; FLORIDA at 4; NAAG at 1; NCL at 2; SW at 2; SNET at 3-4. NCL states that, in 1996, it received three times as many complaints about 800 numbers as it did about 900 numbers. NCL at 2.

[34] NCL at 3-4; SW at 3; Tr. at 382, 384, 498-504.

[35] ALLIANCE at 2-3; FLORIDA at 4; NCL at 2; NAAG at 1; SW at 2; SNET at 3-4.

[36] TSIA at 21.

[37] Tr. at 367-68, 372-74, 380-81, 388-460.

TDDRA, Congress provided that consumers of audio information and entertainment services should be protected from unfair and deceptive practices and that they should have adequate rights of redress.[38] Congress also realized that it could not anticipate all provisions that might be necessary to prevent abusive practices. Therefore, TDDRA gave the Commission the flexibility to prescribe "such additional standards" as may be needed "to prevent abusive practices."[39] In addition, in both Title II (advertising and pay-per-call standards) and Title III (billing and collection), Congress directed the Commission to include in its Rules provisions to "prohibit unfair or deceptive acts or practices that evade such rules or undermine the rights provided to customers" by the statute.[40]

The record developed in this matter, as well as the Commission's law enforcement experience, leave little doubt that many important consumer protections provided by TDDRA have been eroded. The Commission believes that the record supports the necessity of establishing additional standards to ensure that consumers receive the protections and rights that TDDRA intended. Accordingly, the Commission has determined to retain its 900-Number Rule, but proposes to revise the Rule. The Commission believes these revisions are necessary in order to ensure that technological innovations in the telecommunications industry do not undermine the rights of consumers or otherwise operate to destroy the credibility and confidence that consumers and vendors have come to expect from the legitimate pay-per-call industry.

By this document, the Commission is proposing revisions to its 900-Number Rule. The proposed changes to the Rule are made pursuant to the rule review requirements of the Rule,[41] and pursuant to the authority granted to the Commission by TDDRA to prevent abusive practices, to prohibit practices that evade the Commission's rules or undermine the rights of consumers, and to encourage the growth of the legitimate pay-per-call industry.[42] The proposed changes also are made pursuant to the authority granted to the Commission by Section 701(b) of the Telecommunications Act of 1996 Act to extend the definition of "pay-per-call services" to cover similar audio information and entertainment services that are susceptible to the unfair or deceptive acts or practices prohibited by the 900-Number Rule. As discussed in detail *infra*, the Commission believes the proposed modifications are necessary to ensure that the Rule fulfills the Congressional mandate in TDDRA that the FTC encourage the growth of the legitimate audiotext industry, while curtailing those practices that are abusive, unfair or deceptive, that evade the 900-

---

[38] 15 U.S.C. 5701(a)(7).

[39] 15 U.S.C. 5711(a)(2)(J).

[40] 15 U.S.C. 5711(a)(4) and 5721(a)(1). In Title II, Congress specifically directs the Commission to prohibit "alternative billing or other procedures" which are unfair or deceptive or undermine the rights provided to consumers under that Title. 15 U.S.C. 5711(a)(4).

[41] 16 CFR 308.9.

[42] 15 U.S.C. 5711(a)(2)(J), 5711(a)(4), and 5721(a)(1).

Number Rule, or that undermine the rights of consumers provided by TDDRA. The Commission believes that the proposed modifications strike a balance between maximizing consumer protections and minimizing the burden on the audiotext industry.

Section B. Overview

1. Changes in the Marketplace.

At the time the original Rule was promulgated, the only significant example of a "telephone-billed purchase" was a purchase of *audiotext* services over a *900 number*. These services were (1) blockable under Title I of TDDRA, (2) covered by the advertising restrictions and free preamble disclosure requirements of Title II of TDDRA, and (3) fully protected by the dispute resolution procedures of Title III of TDDRA.

In the years since promulgation of the Commission's 900-Number Rule, the marketplace for telephone-billed purchases has changed in several significant ways:

Proliferation of audiotext transactions that use dialing patterns other than 900 numbers (such as international audiotext and audiotext provided over toll-free numbers). The development of non-900-number audiotext services raises consumer protection implications because: (1) these transactions are not blockable in the manner contemplated by Title I of TDDRA; (2) they are not subject to the advertising requirements and preamble disclosure requirements provided by Title II of TDDRA; and (3) in instances where the charge for the cost of the information or entertainment is hidden within the cost of a toll call (*i.e.*, international audiotext),[43] these transactions are not subject to the dispute resolution mechanisms provided by Title III of TDDRA.

Emergence of a market for non-audiotext telephone-billed purchases based on ANI. More recently, there has been a sharp rise in the development of a market for *non-audiotext* telephone-billed purchases that are in many cases not directly related to telecommunications services or sold by common carriers. For example, consumers can now purchase voice mail, Internet access, club memberships, and a host of other services from vendors who charge the consumer's telephone bill, often based solely on Automatic Number Identification (ANI).[44] For

---

[43] International audiotext services are accessed by dialing international telephone numbers. These services are beyond the current scope of the Rule because they are not provided over 900 numbers, and because the resulting charges are not greater than or in addition to the charge for transmission, a requirement for pay-per-call services contained in the TDDRA definition. 47 U.S.C. 228(i). To receive payment for their services, international audiotext operators enter revenue-sharing arrangements with foreign telephone companies, and thus obtain a portion of the funds paid by callers to the telephone companies for transmission of international calls to the audiotext services.

[44] Automatic Number Identification ("ANI") is technology similar to "Caller-ID" that permits the (continued...)

these non-audiotext transactions, the telephone is merely the instrument of purchase, and the product or service may have little or nothing to do with the telephone. Rather, the telephone becomes much like a credit card data capture terminal, but without the security or accompanying dispute resolution procedures and other consumer protections afforded to consumers who make purchases with credit cards.

The use of the telephone bill to charge for services, products, and memberships, even without the use of ANI. Consumers can sign up for a service *in person*, and charge the service to a telephone number (their own or someone else's), merely by filling in a phone number on a form. This has resulted in two newer types of unauthorized charges: (1) unauthorized charges billed to a telephone subscriber for a benefit received by someone else, such as entering a sweepstakes to win a prize; and (2) unauthorized charges to consumers who are unaware that by filling out a form, they are deemed to have authorized a telephone-billed purchase. These practices are a growing part of a larger problem known as "cramming" -- the practice of placing unauthorized and deceptive charges on consumers' telephone bills.

Emergence of a new type of service bureau providing critical billing and collection functions. Service bureaus now provide much more than the access to voice storage and telephone service that they typically provided when the original Rule was promulgated. In the current marketplace, a key function of service bureaus is to provide a contractual framework for billing and collection. As the recent Commission and State cramming cases have shown, some service bureaus, known as "billing aggregators" (*i.e.,* billing clearinghouses) act as intermediaries between vendors and the local telephone companies ("local exchange carriers" or "LECs"). These service bureaus process their client-vendors' billing data into the electronic format required by the LEC, contract with the LECs to have their client-vendors' charges appear on line subscribers' telephone bills, and act as conduits to the vendor for revenues collected by the LECs from consumers for the vendors' services. In addition, service bureaus also commonly structure revenue-sharing arrangements with foreign telephone companies and provide services to bill consumers by direct mail.

Increase in the level of "chargebacks" for 900 numbers. Audiotext vendors report difficulty collecting *valid* 900-number charges from consumers. They report that, when LECs are unsuccessful in collecting these legitimate charges, the vendors have great difficulty in obtaining the information they need to collect the charges on their own.

2. Summary of Proposed Major Changes to the Rule.

Each of the changes in the marketplace described above has led to the growth of deceptive and fraudulent practices in areas not adequately addressed by the original Rule. The proposed

---

[44](...continued)
recipient of a telephone call to identify (or "capture") the telephone number from which a call is made.

Rule is intended to address these deceptive or abusive practices by adapting the Rule to respond to the changes in the marketplace in a manner consistent with the original intent of Congress. Each of the proposed changes is discussed in detail in this Notice. Additionally, Commission staff has prepared an unofficial redlined version of the proposed Rule, showing proposed additions and deletions, which is available on the Commission's Internet site at www.ftc.gov. A summary of the proposed major changes to the Rule is set forth below:

Coverage of Rule: The proposed revisions to the Rule would ensure that TDDRA protections apply to the offer and sale of every audiotext service, regardless of the dialing pattern used to access the service. In addition, the revisions would ensure that international audiotext services could not be offered in a manner that evades TDDRA's dispute resolution procedures.

This would be achieved in two ways. First, the proposal would expand the Rule's definition of "pay-per-call services." Second, the proposal would prohibit the practice of hiding the cost of an audiotext service within a regulated toll charge for either a domestic or international long-distance call.

These proposed revisions address abuses that have arisen in connection with audiotext services offered through international numbers and other non-900 dialing patterns. Chief among these abuses is nondisclosure (or inadequate disclosure) of cost and other material information to consumers before they incur charges for an audiotext service. The revised Rule also would give consumers protection against charges for audiotext services that cannot be blocked from their telephone lines. In addition, the proposed revisions would ensure that consumers who incur charges for an audiotext service can use TDDRA procedures to dispute such charges, regardless of the number dialed to access the service.

Toll-free Numbers: The original Rule prohibits charging consumers for an audiotext service accessed by dialing an 800 or other toll-free number, but it creates a limited exception to this prohibition where the consumer enters into a prior agreement (a "presubscription agreement") with the provider to pay for the service. The proposed Rule tightens this exception to prohibit certain abusive practices that have arisen in connection with billing for audiotext services accessed by dialing toll-free numbers. These abuses include sham presubscription agreements, and ineffective methods of preventing unauthorized access to services under presubscription agreements. The proposed Rule would require an audiotext provider, before permitting access to a service, to have a contractual agreement with the party responsible for paying for the service. The provider would be required to send that party a written statement of all material terms and conditions of the agreement, along with a "personal identification number" ("PIN") to prevent unauthorized access to the service.

Consumers cannot block calls from their lines to toll-free telephone numbers, so they cannot block access to audiotext services that are reached by dialing toll-free numbers. Thus, the proposed revisions to the requirements for presubscription agreements protect consumers from incurring charges for services they cannot block. The proposed revisions provide this protection by requiring that a contract exist between the provider and the person responsible for paying for the service before the service is provided, and by requiring an effective method to prevent unauthorized access to the contracted service.

Finally, the proposed Rule gives consumers additional rights to dispute charges for audiotext accessed by dialing toll-free numbers. If consumers have not entered into a "presubscription agreement" that satisfies the proposed Rule's definition of that term, but are charged for audiotext services accessed through a toll-free number, the revised Rule permits consumers to challenge such charges as "billing errors," and the Rule's dispute resolution rights and protections would apply.

Unauthorized Charges, or "Cramming": Unauthorized charges that are "crammed" on to consumers' telephone bills generally are for telephone-billed purchases that cannot be blocked by 900-number blocking, and many of them are recurring charges. The proposed Rule takes a four-fold approach to the problem of cramming.

First, the proposed Rule provides that any telephone-billed purchase, other than one that arose from a blockable (*i.e.*, 900-number) transaction, requires the express authorization of the person to be billed for the purchase. The proposed Rule also prohibits vendors, service bureaus, and billing entities from collecting or attempting to collect for such unblockable telephone-billed purchase charges where the vendor, service bureau, or billing entity knew or should have known that the purchase was not authorized by the person who was the target of the collection efforts. The revised Rule would create strong incentives for vendors, service bureaus, and billing entities who offer telephoned-billed transactions that cannot be blocked to ensure that such transactions are authorized by the party who is to be billed for them.

Second, vendors would be prohibited from causing consumers to receive monthly or other recurring charges for pay-per-call services in the absence of a presubscription agreement with the person to be billed for the service. Thus, a single call to a pay-per-call service could no longer result in a consumer being enrolled in a "psychic club" or other service plan which would result in recurring fees. The vendor would be required to get advance authorization of the person to be billed for any pay-per-call service that resulted in recurring fees, and would be required to send that consumer a written copy of the agreement before any chargers could accrue.

Third, consumers would be able to dispute unauthorized charges "crammed" on to their phone bills and have these charges removed. Under the proposed Rule, when a consumer disputes a charge for a service that cannot be blocked,[45] the billing entity, in order to sustain that charge, must provide the consumer with actual proof that the consumer expressly authorized the transaction that resulted in the charge. Similarly, under the proposed Rule, when a consumer disputes a charge purportedly resulting from a presubscription agreement, the billing entity cannot

[45] The proposed Rule identifies these as charges that cannot be blocked in advance by 900-number blocking, or TDDRA blocking, as provided by 47 U.S.C. 228(c).

sustain the charge absent evidence of a valid presubscription agreement with the person being billed. Unless the billing entity provides such proof, the charge must be forgiven. These revisions are intended to deter the current widespread problem of cramming.

Fourth, the proposed Rule provides dispute resolution protections for *all* transactions that result in non-toll charges on a subscriber's phone bill, even if the charges for such purchases did not result from a telephone call and were not based on ANI capture. This would be accomplished by expanding the definition of "telephone-billed purchase" to encompass all such transactions. This revision would ensure that a consumer who has an unauthorized charge on his or her phone bill -- regardless of whether it arose from a telephone call -- would be able to contest the charge through the Rule's dispute resolution procedures. This revision would address the growing problem of unauthorized charges being "crammed" on to a consumer's telephone bill as a result of filling out a sweepstakes entry form or some action other than placing a telephone call.

Liability of Billing Entities and Billing Aggregators for Unauthorized Charges: The proposed Rule would impose liability on billing entities and billing aggregators for providing unscrupulous vendors the *sine qua non* for cramming -- access to the telephone billing and collection system. These parties would be unable to evade responsibility under the revised Rule for processing charges and inserting them in consumers' monthly telephone billing statements on behalf of unscrupulous "crammers" and other vendors who blatantly violate the Rule.

Holding billing aggregators responsible for their part in cramming would be accomplished by amending the Rule's definition of "service bureau" to specifically include billing aggregators. This ensures that billing aggregators would be liable for civil penalties any time they "knew or should have known" that their client-vendors were in violation of the Rule. Billing entities' responsibilities would be increased via a proposed provision that would hold them accountable for billing a consumer for unblockable telephone-billed purchases when they knew or should have known that the transaction was not authorized by the consumer being billed.

The proposed revisions addresses the problem of billing entities and billing aggregators knowingly profiting from, facilitating, encouraging, and yet evading responsibility for, illegal practices such as cramming.

Disputed Charges: The proposed Rule would ensure that any time a consumer disputes a charge for a telephone-billed purchase, the consumer will not be required to pay that charge until he or she is provided with both documentary evidence of the validity of the charge and a written explanation describing why the charge is valid.

This would be accomplished by specifically prohibiting collection of a charge for a telephone-billed purchase that is in dispute unless the validity of the charge has been investigated, and unless the consumer has received an explanation and documentary evidence supporting the charge's validity. The Rule would also be modified to give more specific guidance as to what the requirement (present in the current Rule) for an "investigation" entails. To prevent "passing the buck" among multiple parties involved in collecting a charge for a telephone-billed purchase (*e.g.*, the LEC that prepares and sends the consumer a phone bill, the billing aggregator that forwards billing data from the vendor to the LEC, and the vendor that handles the transaction from which the charge arises), the proposed Rule imposes a new requirement that these multiple parties (1) designate which of them will bear ultimate responsibility for receiving and responding to billing disputes, and (2) disclose that designation on the telephone bill.

These revisions would address the problem experienced by many consumers who attempt to dispute a charge for a telephone-billed purchase, only to be faced with collection action by a party other than the original billing entity, and who are passed from one billing entity to another without ever achieving resolution of their dispute. Multiple parties involved in billing and collection could not hand a consumer off from one to another, but instead would be required to respond to the consumer's dispute.

Deceptive Statements to Billing Entities Conducting Investigations: The proposed Rule would prevent vendors, service bureaus, and providing carriers from using deceptive tactics in attempting to sustain an illegitimate charge for a telephone-billed purchase.

This would be accomplished by a provision in the proposed Rule that would prohibit a vendor, service bureau, or providing carrier from providing false or misleading information to a billing entity conducting an investigation of a disputed charge for a telephone-billed purchase. Thus, practices such as falsely representing to a billing entity that a consumer called a 900 number when, in fact, the consumer called a toll-free number, would be prohibited by the proposed Rule.

Solicitations Transmitted by Pager or Facsimile: The proposed Rule addresses the use of pagers and facsimile machines to solicit calls to audiotext services. These two techniques have been used deceptively in connection with audiotext services that are accessed through numbers other than 900 numbers and that therefore cannot be distinguished from non-audiotext numbers. The proposed Rule would require disclosure of cost and other material information in any facsimile-transmitted or pager-transmitted solicitation to call a pay-per-call service.

The proposed Rule would accomplish this by adding two new provisions, one expressly requiring the same disclosures in pager solicitations that are required in advertisements in other media, and another expressly requiring the same disclosures in facsimile solicitations that are required in advertisements in other media.

The disclosure requirement for pager solicitations of calls to pay-per-call services will remedy the deception that occurs when a consumer receives a pager message and reasonably assumes that an urgent business or personal reason exists to call a number that turns out to access a pay-per-call service. The consumer who calls such a number in response to a page may incur charges for audiotext services without intending to do so. This Rule modification will eliminate this problem. Similarly, the disclosure requirements for facsimile solicitations will address the increasing problem of consumers being urged by facsimile messages to call numbers that turn out to be pay-per-call services, without adequate disclosures of cost and other material information about the advertised service.

Section C. Discussion of Proposed Revisions to the Rule

1. General Changes.

Title of the Rule. The Commission proposes to change the title of the Rule to the "Rule Concerning Pay-Per-Call Services and Other Telephone-Billed Purchases." The current title ("Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992") does not adequately describe the purpose of the Rule. The Commission believes that it is important for the industry and consumers to recognize that the Rule provides more than just pay-per-call service standards. The Rule also creates a structure for resolving billing disputes that applies to a broad array of telephone-billed purchase transactions. The Commission believes that the title "Rule Concerning Pay-Per-Call Services and Other Telephone-Billed Purchases" more accurately describes the substance of the Rule.

Organization of the Rule. The Commission proposes to reorganize the original Rule in several ways to make it easier to read and understand. In the original Rule, Section 308.2 defined terms relating to the advertising and operation of pay-per-call services, while Section 308.7 defined terms relating to the billing and collection of telephone-billed purchases. The Commission proposes moving all of the Rule's definitions into a single section, proposed Section 308.2.

The proposed Rule also rearranges the order of several other provisions, and divides the Rule into four subparts in order to improve its organization and to provide greater clarity: Subpart A, Scope and Definitions; Subpart B, Pay-Per-Call Services; Subpart C, Pay-Per-Call Services and Other Telephone-Billed Purchases; and Subpart D, General Provisions. The

Commission also proposes dividing Sections 308.3 (Advertising of pay-per-call services) and 308.5 (Pay-per-call service standards) of the original Rule into several smaller sections, each dealing with a discrete subject. This approach allows provisions dealing with specific subjects (*e.g.*, children's advertising or liability for refunds) to be more easily identified within the Rule.

Global Wording Changes. The Commission decided to make several wording changes throughout the proposed Rule to standardize the usage of specific words and phrases, to more accurately reflect the extended coverage of the proposed Rule, and to reflect changes in technology since the original Rule was promulgated. Each change is discussed below.

(1) Caller, consumer, and customer. The original Rule used three terms to describe the individual to be protected by the Rule's requirements -- "consumer," "caller," and "customer." The Commission proposes to change the Rule's usage of these three words. In most cases, the word "consumer" has been replaced by one of the other terms because the term "consumer" is not sufficiently precise to describe the intended beneficiary of the Rule's protections. The terms "caller" and "customer" better reflect the purpose and intent of the various provisions. For example, the proposed Rule uses the word "caller" in provisions that regulate preamble disclosures because the person making the call is the beneficiary of the protections in those sections. On the other hand, the dispute resolution provisions afford rights to the "customer," a term that includes both the caller and the person who receives the billing statement. In other provisions, such as the definition of "presubscription agreement" or "personal identification number," the more generic term "consumer" has been retained because in those instances "caller" or "customer" would be too narrow. In some instances, the proposed Rule clarifies that the person referred to by the Rule is the person to whom the billing statement has been, or will be, directed.[46]

(2) Vendor. The term "vendor" in the original Rule was used in the billing and collection section (Section 308.7 of the original Rule) to describe a person or entity that offers goods or services through a telephone-billed purchase. The term "provider of pay-per-call services" was used in the sections of the Rule regulating advertising and operation of pay-per-call services (Sections 308.2 through 308.6). Even under the original Rule, a "provider of pay-per-call services" was a "vendor" because all pay-per-call services were telephone-billed purchases. The proposed Rule simplifies the terminology by using "vendor" to refer to all providers of telephone-billed purchases, including all providers of pay-per-call services.

(3) Use of 888 and 877 numbers. Since the original Rule was promulgated, the use of toll-free "888" and "877" numbers has grown. Therefore, the proposed Rule has added "888" and "877" to those provisions of the Rule that deal with the use of toll-free numbers.[47]

---

[46] *See, e.g.,* Section 308.2(j)(1).

[47] Proposed Sections 308.2(b)(4), 308.7(e), and 308.13 contain those references.

2. Proposed revisions to specific provisions.

The proposed Rule makes no substantive revisions to the following sections of the original Rule, apart from renumbering and any of the global wording changes discussed above that might affect these sections: 308.3(e), 308.4, 308.5(h), 308.5(k), and 308.8.[48]

SUBPART A -- SCOPE AND DEFINITIONS

Section 308.1 Scope of Regulations.

The proposed Rule adds a citation to the Telecommunications Act of 1996.

Section 308.2 Definitions.

The definitions that formerly appeared in the billing and collection section of the original Rule have been moved to Section 308.2 of the proposed Rule, which contains all definitions. The definitions have been reordered alphabetically and renumbered accordingly. The following definitions from the original Rule are unchanged, apart from renumbering: "bona fide educational service," "Commission," " program-length commercial," "providing carrier," "reasonably understandable volume," "slow and deliberate manner," and "sweepstakes."

(1) Section 308.2(a) -- Billing entity. The proposed Rule clarifies that the term "billing entity" covers a person who transmits *any* statement of debt to a customer for a telephone-billed purchase, including, but not limited to, a telephone bill. The definition of "billing entity" is critical to the dispute resolution process governed by Section 308.20 of the proposed Rule because all persons and entities that fall within the meaning of the term "billing entity" will be required to comply with the steps set forth in that section. This proposed change recognizes that multiple parties often play a role in the billing and collection of charges for telephone-billed purchases. The proposed modification helps preserve the consumer's billing dispute rights in situations where a disputed charge for a telephone-billed purchase is passed from one billing entity to another. Under the original Rule, this practice often allowed the consumer's rights to be extinguished.

The revision to the definition of "billing entity" is designed to cover all of the participants in the typical billing and collection process for telephone-billed purchases. In most cases, the LEC sends the initial billing statement to the consumer. On that billing statement, the LEC provides the disclosures about consumers' rights and obligations regarding billing errors, as required by original Section 308.7(n). Once a consumer disputes a charge, the other participants in the billing

[48] These sections of the original Rule correspond to the following sections of the proposed Rule: Original § 308.3(e) is now proposed § 308.5 (Advertising to children prohibited); original § 308.4 is now proposed § 308.8 (Special rule for infrequent publications); original § 308.5(h) is now proposed § 308.11 (Prohibition on services to children); original § 308.5(k) is now proposed § 308.15 (Refunds to customers); and original § 308.8 is now proposed § 308.21 (Severability).

and collection process (*i.e.*, the vendor or service bureau) may attempt to collect the disputed charge by calling the consumer and making oral statements that the consumer has an obligation to pay.

The proposed Rule clarifies that *any* communication to a consumer regarding an alleged debt will bring a person within the definition of "billing entity," as long as the communication contains a statement of debt involving a telephone-billed purchase. Thus, the proposed Rule ensures that, where multiple entities (including LECs, vendors, service bureaus, and third-party debt collectors) are involved in collecting a charge for a telephone-billed purchase, each of those entities will be considered a billing entity and therefore must afford a consumer his or her dispute resolution rights under the Rule.

(2) Section 308.2(b) -- Billing error. This definition is also a key concept underlying the dispute resolution provisions set forth in proposed Section 308.20. Under that section, a billing entity will be required to refund any disputed amount on a consumer's bill, once the consumer has invoked his or her rights by submitting a "billing error notice," unless the billing entity can provide evidence to the consumer that there was no billing error and that the disputed amount is a legitimate debt.[49]

Original definition. The original Rule delineates eight different types of billing errors. Six of these billing errors track almost verbatim provisions in TDDRA that define the term "billing error" in a similar list.[50] A seventh billing error[51] was added to the statutory definition pursuant to the Commission's authority to create additional billing errors,[52] and in the eighth instance, the Commission determined that the Rule should not track the statute word-for-word. In that instance, the statute stated that a billing error occurred when a telephone-billed purchase was not made by the customer. By contrast, the original Rule provided that a billing error occurred when

---

[49] If a disputed charge is found not to be a "billing error," the sole consequence is that the Rule does not require the billing entity to refund the consumer's money. The fact that a charge is not a "billing error" in no way affects any rights that a consumer may have under State law to dispute that charge or to receive a refund of that charge. In addition, under State law a consumer may have rights to dispute charges that are not "billing errors." The Commission's Rule cannot by law supersede any rights a consumer may have under State law to dispute such charges, unless such law is inconsistent with the FTC's Rule. 15 U.S.C. 5722(a).

[50] 15 U.S.C. 5724(2)(B - G).

[51] 16 CFR 308.7(a)(2)(viii).

[52] 15 U.S.C. 5724(2)(H).

the telephone-billed purchase was not made by the customer *nor made from the customer's telephone*.[53]

As a result of that modification, under the original Rule, a consumer was *not* entitled to dispute a telephone-billed purchase made from that consumer's telephone on the ground that it was unauthorized. The Commission refined the statutory definition of "billing error" in this way because, at the time the original Rule was promulgated, virtually all "telephone-billed purchases" were purchases of *pay-per-call services*, accessed by dialing 900 numbers. Because TDDRA mandated that 900-number blocking be made available to consumers by common carriers,[54] the Commission reasoned that TDDRA empowered the consumer to block access to pay-per-call services. The Commission therefore believed it unnecessary to make available in the case of alleged unauthorized telephone-billed purchases (in most cases for 900-number services) the dispute resolution mechanisms appropriate to other kinds of disputed charges.[55]

Changes in the marketplace. In the years since adoption of the original Rule, the marketplace has changed. In addition to pay-per-call services, many other goods and services are now the subject of telephone-billed purchases. More important, billing based on ANI for services accessed or received through dialing patterns other than 900 numbers (*e.g.*, audiotext provided over international or toll-free numbers) has become more widely used. These dialing patterns are not blockable in the manner intended by TDDRA. Thus, it is clear now that it is possible to offer telephone-billed purchases through methods that *cannot* be blocked as TDDRA intended.

In addition to audiotext services, many other products and services, including club memberships, voice mail, Internet access, personal 800 numbers, and pagers, are now available through telephone-billed purchases.[56] Though some of these services are offered in a non-deceptive manner, in many instances, consumers have been charged for these miscellaneous services on their telephone bills even though they had never authorized or ordered the goods or

---

[53] The statute provided that a billing error occurred when there was "[a] reflection on a billing statement for a telephone-billed purchase which was not made by the customer or, if made, was not in the amount reflected on such statement." 15 U.S.C. 5724(2)(A). By contrast, the original Rule defined the equivalent billing error as a "[a] reflection on a billing statement of a telephone-billed purchase that was not made by the customer *nor made from the telephone of the customer who was billed for the purchase* or, if made, was not in the amount reflected on such statement." 16 CFR 308.7(a)(2)(i) [Emphasis added].

[54] 47 U.S.C. 228(c).

[55] The fact that a consumer could not dispute these charges under the Rule in no way affected the consumer's right under State law to refuse to pay for a service that was not ordered.

[56] Such services, often referred to as "enhanced services," are billed on a telephone bill through the use of the 42-50-01 Exchange Message Interface ("EMI") billing records.

services for which they were being charged.[57] These unauthorized charges have been characterized by the popular press as "cramming." In theory, there is no limit to the types of products or services that may be billed on consumers' telephone statements.

The Commission has received approximately 9,000 complaints about cramming since October 1997. Cramming has become the fifth most common complaint by consumers, as reflected in consumer contacts with the FTC through its Consumer Response Center. Based on the record in this rule review proceeding, on the consumer complaints received about this problem, and on recent State[58] and Commission[59] law enforcement experience, the Commission believes that unauthorized charges pose a very serious threat to consumers in the telephone-billed purchase marketplace, and thus a corresponding threat to the healthy growth of this innovative purchasing mechanism.

Proposed definition. The first eight billing errors listed in Section 308.2(b) of the proposed Rule remain virtually identical to those in the original Rule.[60] The proposed Rule,

---

[57] *FTC v. Hold Billing Services, Ltd.*, No. SA98CA0629 FB (W.D. Texas, filed July 19, 1998).

[58] *See, e.g., State of Wisconsin v. Telecom Operator Service d/b/a USP&C Operator Services*, No. 98 CV 2319 (Cir Ct. Milwaukee County, filed March 27, 1998; amended complaint filed July 27, 1998) (continuing to bill line subscribers who deny ordering services or who request backup regarding charges); *People of Illinois v. RCP Enterprises Group, et. al.*, No. 98 CH 112 (Cir. Ct., 7th Jud. Cir.-Sangamon County, filed March 19, 1998) (using 1/16-inch print on opposite side of sweepstakes entry form as authorization to bill consumer for calling card services); *People of Illinois v. BLJ Communications*, No. 98 CH 113 (Cir. Ct., 7th Jud. Cir.-Sangamon County, filed March 19, 1998) (sustaining charges for unordered pre-paid calling cards despite informing consumers that credits would be issued); *People of Illinois v. Coral Communications Inc.*, No. 98 CH 3526 (Cir. Ct., Ch. Div.-Cook County, filed March 1998) (using sweepstakes entry forms as authorization to bill for pre-paid calling cards and voice mail, and sustaining charges for unordered pre-paid calling cards and voice mail despite informing consumers that credits would be issued); *People of Illinois v. New World Telecommunications Inc.*, No. 98 CH 115 (Cir. Ct., 7th Jud. Cir.-Sangamon County, filed March 19, 1998) (billing line subscribers for voice mail which they did not order, and failing to provide effective billing dispute mechanism); *State of Missouri ex. rel. Nixon v. Coral Communications Inc.*, No. 98 CC 716 (Cir. Ct., St. Louis County, filed 1998) (using miniature typeface on contest entry forms as authorization to bill for pre-paid calling cards and voice mail, and sending follow-up miniature typeface "junk mail" postcards as confirmation and last chance for consumer to cancel services).

[59] *See, e.g., FTC v. Interactive Audiotext Services, Inc.*, No. 98-3049 CBM (C.D. Calif., filed Apr. 22, 1998); *FTC v. International Telemedia Associates, Inc.*, No. 1-98-CV-1935 (N.D. Ga., filed July 10, 1998); and *Hold Billing Services*.

[60] The only change is that the proposed Section 308.2(b)(8) slightly modifies the language in Section 308.7(2)(viii) of the original Rule to more clearly convey that it is a billing error to identify charges for telephone-billed purchases in a manner that violates the Rule's requirements for billing statement

however, adds three additional billing errors to make newly-emerging problems associated with unauthorized charges subject to the Rule's dispute resolution procedures.[61] A discussion of these provisions follows.

Section 308.2(b)(9) -- Charges resulting from a purported presubscription agreement that does not meet the requirements of the Rule. This proposed Section specifies that the term "billing error" includes any charge incurred pursuant to a purported presubscription agreement that does not meet the requirements of the proposed Rule's definition of that term.[62] This would address a significant problem that has surfaced since the Rule was promulgated, whereby consumers who have never entered into a presubscription agreement with a provider are charged for audiotext services that are, or allegedly have been, provided pursuant to a presubscription agreement.[63]

This situation occurs when a telephone line subscriber is billed for charges under a presubscription agreement entered into by some other party who dialed an 800 or other toll-free number using the subscriber's telephone.[64] The Commission continues to be concerned that presubscription agreements not be mere shams to justify billing a consumer for calls to toll-free numbers, or for services sold under an "agreement" that is based solely on the fact that a telephone call was placed from that consumer's telephone (*i.e.,* based solely on ANI capture).[65] The proposed new definition of presubscription agreement is based on this concern, and the corresponding billing error contained in Section 308.2(b)(9) provides recourse for consumers who have been wrongly billed for telephone-billed purchases resulting from purported presubscription

---

[60](...continued)
disclosures.

[61] Specifically, these amendments are proposed pursuant to the Commission's authority under 15 U.S.C. 5724(2)(H) to prescribe additional billing errors, and pursuant to its rulemaking authority under 15 U.S.C. 5711(a), 5721(a), and 5723.

[62] "Presubscription agreement" is defined in the proposed Rule at § 308.2(j).

[63] *See, e.g., Interactive Audiotext Services*. *See, also,* FLORIDA at 8; NCL at 4-5; NAAG at 11; Tr. at 169, 193-94.

[64] *See, e.g., Interactive Audiotext Services.* In its comment, NCL stated that most of the audiotext-related complaints they receive involve 800 numbers. NCL at 2.

[65] *See, e.g., U.S. v. American TelNet, Inc.,* No. 94-2551 CIV-NESBIT (S.D. Fla., filed Nov. 30, 1994). In that case, the Commission obtained $2 million in redress and a civil penalty of $500,000 against American TelNet for charging consumers for information or entertainment services accessed by calling 800 numbers, in violation of the Rule's requirements.

agreements entered into by another party, or resulting from purported presubscription agreements[66] that otherwise do not meet the requirements of the Rule.

Section 308.2(b)(10) -- Unauthorized charges not avoidable by blocking. Section 308.2(b)(10) of the proposed Rule would treat as a billing error any charges on a customer's billing statement that were "not expressly authorized by that customer" and that were not "blockable pursuant to 47 U.S.C. 228(c)."[67] This provision would enable a consumer to dispute a charge and to receive a refund when a charge was not authorized by that consumer, *and* the charge would not have been avoided had the consumer elected TDDRA blocking. This proposed billing error dovetails with proposed Section 308.17, which explicitly requires the "express authorization" of the person to be billed for any telephone-billed purchase that is not avoidable by TDDRA blocking.

The Commission does not propose revising the definition of "billing error" to bring in *all* unauthorized telephone-billed purchase charges. The Commission believes that this would sweep too broadly. In many instances, consumers still have a practical, simple, and cost-free method of avoiding a large category of unauthorized telephone-billed purchases -- namely, blocking of services accessed through 900 numbers.[68] Generally, where 900-number blocking would have been effective to enable a consumer to avoid an unauthorized charge, the Commission believes it would be an undue burden on billing entities to require them to determine if such charges were, in fact, authorized.[69]

---

[66] For there to be a "purported" presubscription agreement, the vendor need not explicitly claim that a charge is based on a presubscription agreement. For instance, where a consumer is charged without authorization for a service for which the proposed Rule requires a presubscription agreement (*e.g.*, monthly or other recurring pay-per-call service charges), the consumer can make use of this billing error to dispute the charge.

[67] Proposed Section 308.2(b)(10). Only the form of blocking specified by Congress in TDDRA, codified at 47 U.S.C. 228(c), will satisfy the requirements of this subsection.

[68] Many commenters noted that the availability of 900-number blocking has resulted in a dramatic decrease in the number of complaints about 900-number services. AMERITECH at 2; AT&T at 3; FLORIDA at 10; SW at 4; SNET at 2-3; NCL at 2.

[69] However, where a single call to a blockable 900 number results in monthly or other recurring charges on a consumer's telephone bill, the Commission does not believe that it would be an undue burden for a billing entity to show proof of authorization. A single call to a pay-per-call service is simply not enough for a vendor, service bureau, or billing entity to assume that the telephone subscriber has authorized his or her enrollment in a "psychic club" or other similar service plan. The Commission proposes requiring that these charges be provided only pursuant to a presubscription agreement that meets all of the requirements of the proposed Rule's definition of that term. See proposed Section 308.14.

In situations where audiotext services are offered through an unblockable dialing pattern, however, a consumer has no means to protect herself from being billed for charges that result from another person accessing the service using her telephone. Many of the commenters and workshop participants identified this as a significant problem and a source of numerous complaints.[70] Where TDDRA blocking cannot effectively prevent access to telephone-billed purchasing, the vendor, service bureau, and billing entity should have the obligation to ensure that the line subscriber has expressly authorized the purchase. Under these circumstances, consumers who believe that they have been billed for an unauthorized charge should have the right to dispute the charge under proposed Section 308.20, and to receive proof of authorization before collection activities continue.

Some commenters urged that the Commission require that all audiotext services be provided through the 900-number dialing platform.[71] Instead, the Commission proposes a more flexible approach -- specifying that it is a billing error if the consumer receives charges for a telephone-billed purchase that the consumer did not authorize, and the telephone-billed purchase could not have been prevented by TDDRA blocking. This will create an incentive for providers to use a dialing platform that is subject to TDDRA-blocking, because by using such a dialing platform, these providers will not be obligated under the proposed Rule to secure evidence that such charges were expressly authorized by the person being billed.

The Commission uses the term "express authorization" in describing this billing error to indicate that it is *not* sufficient for a provider to demonstrate that the telephone of the consumer being billed was the telephone used to make the call that resulted in a telephone-billed purchase. In order to sustain the charge, the provider must show tangible evidence that the person being billed for the telephone-billed purchase actually consented to the charge.[72]

Section 308.2(b)(11) -- Inconsistency with blocking option selected. The Commission is aware of complaints from consumers who allege that 900-number calls have been made from their telephones even though the consumer had previously opted to have a 900-number block on their telephone.[73] Section 308.2(b)(11) of the proposed Rule addresses this situation by specifying that it is a billing error when a consumer receives a telephone bill containing a charge that is

---

70 FLORIDA at 8; NCL at 4-5; NAAG at 11; Tr. at 169, 193-94, 472.

71 *See, e.g.,* SW at 2; SNET at 2; AT&T at 29-30.

72 For example, a tape recording of the person who was billed, agreeing in advance to pay for the charge after hearing the material terms of the agreement, would constitute evidence of such authorization sufficient to show that this billing error did not occur. Of course, if the voice recording was *not* of the person being billed, the vendor would not be able to sustain the charge. For additional examples of evidence of "express authorization," see discussion of proposed § 308.17, *infra*.

73 TURJANICA at 1. *See also*, Transcript of "FCC Public Forum on Local Exchange Carrier Billing for Other Businesses," (June 24, 1997), p. 113 .

inconsistent with a blocking option already selected by the consumer. This billing error will provide the consumer with a means to challenge such a charge and receive a credit or refund if in fact the consumer had already elected to block access to that type of service or dialing pattern. Under this scenario, regardless of the reason for the block being ineffective (*i.e.*, because the block failed or because someone using the consumer's telephone "dialed around" the block),[74] the consumer would be entitled to a credit or refund if they had elected to block such calls and the block was supposed to be in place at the time the call was placed. The Commission believes that once a consumer has taken the affirmative step to elect TDDRA blocking, this should be interpreted as an affirmative statement that the consumer does not authorize any telephone-billed purchases *that should have been blocked by this action*. If the TDDRA blocking system fails, the economic burden should not be borne by the consumer who had taken the steps available to guard against access to such purchases.

(3) Section 308.2(e) -- Customer. The definition of "customer" remains largely unchanged. Depending upon the context, the term refers to either the person who made the call or the person who received the bill for a telephone-billed purchase, or both. The only proposed substantive change is that an unnecessarily limiting phrase at the end of the definition was deleted. The Commission intends for this definition to cover any recipient of a bill for a telephone-billed purchase, regardless of whether he or she is the subscriber.

(4) Section 308.2(f) -- Pay-per-call purchase. The Commission has added a definition of "pay-per-call purchase" to fill the need for a term that succinctly refers to both an attempt to purchase a pay-per-call service as well as an actual purchase of such services.

(5) Section 308.2(g) -- Pay-per-call service -- Background. Virtually all interested parties -- industry as well as consumer advocates and law enforcement -- overwhelmingly support extending the definition of "pay-per-call service" to cover audio information and entertainment services that are accessed and delivered through dialing patterns other than 900, but in other respects are similar to 900-number services and subject to the same abuses.[75] Indeed, the majority of complaints now relate to toll-free numbers, international numbers, or other dialing patterns that do not use the 900-number prefix.[76] In general, the problems associated with these non-900 audiotext services are the same types of problems that Title II of TDDRA was designed to

---

[74] For example, a caller can "dial around" a 900-number block that has been placed on the line by the line subscriber's carrier simply by dialing another carrier's "10-XXX" access code, then dialing a 900 number.

[75] AARP at 3; ALLIANCE at 4-6; AT&T at 24; CINCINNATI at 1; CU at 1; FLORIDA at 2; NCL at 3; GORDON at 1, 3; ISA at 26-27; SNET at 4-6; SW at 2, 4-5; TSIA at 20-21; Tr. at 17-19, 21-24, 38-40, 418, 458.

[76] ALLIANCE at 2-3; CINCINNATI at 1; FLORIDA at 4; NAAG at 1; NCL at 2; SW at 2; SNET at 3-4. NCL states that, in 1996, it received three times as many complaints about 800 numbers as it did about 900 numbers. (NCL at 2).

prohibit -- misrepresentations about the underlying service to be provided and inadequate cost disclosures.[77]

The influx of complaints in recent years concerning international audiotext services drew particular attention from commenters, many of whom asserted that it is essential for international audiotext services to be subject to the same rules as 900-number services in order to "level the playing field" among competitors and protect all consumers who utilize such services.[78] In fact, several commenters suggested that all audiotext services should be restricted to the 900-number dialing pattern to ensure adequate protection to consumers.[79] The two commenters representing the international audiotext industry were the only commenters who opposed the extension of the definition of "pay-per-call services" to include international dialing patterns.[80]

Characteristics of services that should be covered by the Rule. The Commission believes that there are two fundamental distinguishing characteristics of all audiotext services: (1) the instantaneous nature of the transaction; and (2) the eventual receipt of remuneration by the provider of the audio information or entertainment. The instantaneous creation of a financial obligation -- the result of the instant capture of ANI by the provider -- not only enhances the convenience for the seller and buyer, it also creates fertile ground for deception.[81] Title II of TDDRA, and the provisions of the original Rule that implemented it, were designed specifically to remedy this potential for misrepresentation.

Based on the record in this proceeding, and based on the Commission's enforcement experience, the Commission believes that, in any circumstance where a provider solicits consumers to call a telephone number to receive information or entertainment, and where that provider will receive a per-call or per-minute payment as a result of those calls, the service is susceptible to the same types of unfair and deceptive practices that are prohibited by Title II of

---

[77] *See, e.g., FTC v. International Telemedia Associates, Inc.*, No. 1-98-CV-1935 (N.D. Ga., filed July 10, 1998); *FTC v. Interactive Audiotext Services, Inc.*, No. 98-3049 CBM (C.D. Calif., filed April 22, 1998); *FTC. v. Audiotex Connection, Inc.*, No. 97-0726 (E.D.N.Y., filed Feb. 13, 1997); and *FTC. v. Daniel B. Lubell*, No. 3-96-CV-8200 (S.D. Iowa, filed Dec. 17, 1996).

[78] *See, e.g.*, GORDON at 3; ISA at 26-27; CINCINNATI at 1; SNET at 3; Tr. at 17-19, 458.

[79] SNET at 2; SW at 2; AT&T at 29-30; Tr. at 344, 369.

[80] ATN generally; ITA at 3-9.

[81] Congress recognized that the instantaneous nature of the purchase of pay-per-call services is what made the consumer protections under Title II of TDDRA so important. Congress noted that "[b]ecause the consumer most often incurs a financial obligation as soon as the pay-per-call transaction is completed, the accuracy and descriptiveness of vendor advertisements become crucial in avoiding consumer abuse." 15 U.S.C. 5701(b)(6).

TDDRA.[82] The record does not suggest any justification for treating non-900 audiotext services any differently from 900 audiotext services.[83] In both circumstances, the two key factors which create the incentive and susceptibility for fraud are both present: instantaneous purchase by virtue of placement of a telephone call, and receipt of remuneration from the call revenue to the provider of the audio information or entertainment.

Proposed definition of "pay-per-call services." Pursuant to the authority granted to the Commission under Section 701(b) of the 1996 Act, the Commission proposes to extend the definition of "pay-per-call services" to cover all purchases of telephone-based audio information or audio entertainment services. The new definition is set forth in Section 308.2(g) of the proposed Rule.

Section 308.2(g)(1) sets forth the statutory definition of "pay-per-call services." Sections 308.2(g)(2)-(3) augment this definition while retaining the substance of 47 U.S.C. 228(i)(1)(A) and 228(i)(2), pursuant to the Commission's mandate under Section 701 of the 1996 Act. The proposed definition is designed to bring within its reach any audio information or entertainment service, accessed by dialing *any* telephone number or receipt of *any* telephone call, where all or a portion of the charge paid by the consumer "results in payment, either directly or indirectly, to the person who provides or purports to provide such information or entertainment service."[84] This proposed change in the Rule brings international audiotext services squarely within the definition of "pay-per-call services."

Both the written comments and the workshop discussion strongly supported using remuneration to an information or entertainment provider as the distinguishing characteristic of pay-per-call services.[85] Several commenters, however, were opposed to the strict use of a remuneration standard to the extent that it would encompass some services where the

---

[82] *See, e.g., FTC v. International Telemedia Associates, Inc.*, No. 1-98-CV-1935 (N.D. Ga., filed July 10, 1998); *FTC v. Interactive Audiotext Services, Inc.*, No. 98-3049 CBM (C.D. Calif., filed Apr. 22, 1998); and *FTC v. Daniel B. Lubell*, No. 3-96-CV-8200 (S.D. Iowa, filed Dec. 17, 1996). *See also,* ALLIANCE at 2,4; AARP at 2-3; AT&T at 6; CINCINNATI at 1; CU at 1; FLORIDA at 1,5; GORDON at 2; ISA at 4, 26-27; NAAG at 9-10; NCL at 3; SNET at 4; SW at 2; TSIA at 20-21.

[83] In fact, the record indicates that the danger of unfair and deceptive practices may be *greater* in non-900 audiotext because consumers are not able to effectively block access to these services. *See, e.g., International Telemedia Associates* and *Interactive Audiotext Services*. *See also,* ALLIANCE at 2-4; NAAG at 2.

[84] There are four exemptions which are discussed *infra*: (1) services resulting in *de minimis* remuneration to the provider; (2) services delivered pursuant to a valid presubscription agreement; (3) services utilizing telecommunications for the deaf; (4) and tariffed directory services provided by a common carrier or its affiliate.

[85] *See, e.g.,* ALLIANCE at 5; NAAG at 9-10; AT&T at 8, 25-28; Tr. at 331.

remuneration was disguised within the charge paid by the consumer for the transmission of the call (*e.g.*, 10-XXX audiotext,[86] international audiotext).[87] One commenter supported expansion of the definition of pay-per-call services to cover "all international audiotext transactions"[88] but strongly opposed the extension of the definition of pay-per-call services to cover audiotext services where the consumer merely pays a domestic toll charge that is similar in price to a "content neutral" (non-audiotext) call.[89] Another commenter went further, opposing coverage of any audiotext services where the payment to the provider is contained within the toll-charge. The commenter characterized those services where the remuneration takes the form of a toll charge as "free to consumers" because the consumers pay "no more than the normal toll charge."[90]

The fact that an international audiotext or 10-XXX audiotext call may cost the same as an ordinary, non-audiotext, "content neutral" toll call is not determinative on the issue of susceptibility to the unfair and deceptive practices prohibited by the Commission's Rule.[91] Content neutral calls (*i.e.*, regular toll calls) might cost the same amount as certain audiotext calls, but the fact that there is no remuneration to the call recipient in the case of a content neutral call is an important distinction. Because the recipient of a content neutral call lacks the economic incentive to induce consumers to call as often as possible and stay on the line as long as possible, content neutral calls are not susceptible to the types of unfair and deceptive practices that are

---

[86] Another alternative to the 900-number dialing pattern is audiotext accessed through a particular common carrier's "10-XXX" access code (such as "10-321"). Under this scenario, callers reach the audiotext service by dialing the 10-XXX number followed by a long-distance telephone number. The resulting toll charge to the consumer thus includes a hidden charge for the audiotext service itself, because the carrier and the vendor share the call revenue. The FCC effectively put an end to this practice through a pronouncement in an advisory opinion letter, which stated that common carriers that engage in such practices are "not providing common carrier services in a just and reasonable manner as required by Section 201(b) of the [Communications] Act and the spirit of [Title I of TDDRA]." *See* letter dated September 1, 1995, to Ronald J. Marlowe of Cohen, Berke, Bernstein, Brodie, Kondell & Laszlo, from John B. Muleta, Chief, Enforcement Division, Common Carrier Bureau, Federal Communications Commission. These 10-XXX access codes are currently being converted to "101-XXX" numbers.

[87] DMA generally and at 4; ISA at 28; Tr. at 309-310.

[88] ISA at 26-27.

[89] ISA at 28.

[90] DMA at 2-3. The Commission finds the characterization of an international audiotext service as "free" to be misleading. This issue is specifically addressed in *FTC. v. Daniel B. Lubell*, No. 3-96-CV-8200 (S.D. Iowa, filed Dec. 17, 1996).

[91] Similarly, the fact that some 900-number audiotext programs may cost the same or less than many international or domestic toll charges does not make these services any less susceptible to the unfair and deceptive practices prohibited by the Commission's Rule.

prohibited by the original Rule. It is the presence of this economic incentive in audiotext services that gives rise to the susceptibility to unfair and deceptive practices.[92]

Circumstances where there will be a rebuttable presumption of remuneration to a provider. Although remuneration to the service provider is the hallmark of any pay-per-call service, the actual details evidencing certain remuneration agreements are not likely to be immediately available to federal and State law enforcement authorities. For example, information about contractual arrangements between a vendor and a foreign telephone company may not be readily available. Nonetheless, enforcement experience of the FTC and State attorneys general has shown that there are certain circumstances that generally indicate that a revenue-sharing agreement exists.[93] Thus, any of these circumstances will give rise to a rebuttable presumption that payment to a provider of audio information or entertainment services as described under 308.2(g)(2) has been made:

(a) Where persons are solicited to call an international telephone number in order to receive audio information or entertainment that is not specifically related to or dependent on the country where the call supposedly terminates;[94]

(b) Where there is a sudden and unusual increase in the number of long-distance calls to a particular telephone number, or where the number of calls to an information or entertainment number is unusually high;[95]

(c) Where persons are solicited to call one or more specific telephone numbers via a specific common carrier in order to receive audio information or entertainment services;[96] and

---

[92] On the other hand, to the extent that a great portion of the toll charge actually goes towards the genuine cost of transmission of the call, and not to the information or entertainment provider, a call might fit within the exemption proposed by the Commission for *de minimis* payments to a provider, discussed *infra*. Proposed Section 308.3(a)(3)(ii).

[93] *See, e.g., Interactive Audiotext Services, Inc.*, No. 98-3049 CBM (C.D. Calif., filed April 22, 1998); *FTC v. Audiotex Connection, Inc.*, No. 97-0726 (E.D.N.Y., filed Feb. 13, 1997); and *Daniel B. Lubell*.

[94] For example, in *Daniel B. Lubell*, callers were solicited to call telephone numbers in Guyana and the Dominican Republic in order to enter a sweepstakes to win a free Hawaiian vacation and to receive information about free domestic airline travel.

[95] For example, in *Audiotex Connection*, AT&T noted an unusual and sudden increase in call volume to several telephone numbers in Moldova.

[96] For example, solicitations for consumers to call specific telephone numbers, along with instructions for a caller to first dial a carrier's 10-XXX (now 101-XXXX) access code.

(d) Where a provider of audio information or audio entertainment utilizes advertisements that emit electronic signals, including data transmission of computer programs or computer instructions, that can automatically dial a telephone number which will result in charges to a subscriber.[97]

The fact that any one of these circumstances is present will not be determinative of whether remuneration to a provider actually exists. It merely gives rise to a presumption of remuneration that can be rebutted with credible evidence that, in fact, there has been no payment to the provider.

Scope of definition. The proposed definition of "pay-per-call services" covers "audio information and audio entertainment [services], including simultaneous voice conversation services." This phrase includes live as well as pre-recorded information or entertainment programs, in addition to so-called "group access bridged" services where a provider connects two or more callers to discuss a certain topic.[98] In other words, this definition will include all services where a person provides or purports to provide the audio content of a call, and where that provider receives payment on the basis of calls placed to access that content. The expanded portion of the proposed definition includes all of the audio information and audio entertainment services included in the statutory definition of "pay-per-call"[99] but, pursuant to the Commission's authority under Section 701(b)(1) of the 1996 Act, omits any limitations based on dialing pattern.

The proposed expanded definition includes only those services "where the action of placing the call, receiving a call, or subsequent dialing, touch-tone entry, or comparable action of the caller" results in a charge to a customer.[100] This phrase is based on the language contained in the original Rule's definition of "telephone-billed purchase."[101] However, in addition to the

---

[97] *Audiotex Connection*.

[98] For example, if a provider offers callers a list or menu of suggested topics or otherwise represents that callers will be able to listen to or participate in discussions concerning certain topics, such as "adult" chat, that service would be covered by the definition. Providers who make no representations regarding the content of a call, and who exercise no control, influence, or interest over the content of the call would not be covered by the definition.

[99] 47 U.S.C. 228(i)(1)(A)(i) and (ii).

[100] "Comparable action" includes any scenario where a caller takes action that will result in a billing statement being generated by virtue of ANI. *See, e.g., FTC v. International Telemedia Associates, Inc.*, No. 1-98-CV-1935 (N.D. Ga., filed July 10, 1998) and *Interactive Audiotext Services, Inc.*, No. 98-3049 CBM (C.D. Calif., filed April 22, 1998). It also includes, but is not limited to, any action that a consumer might take while on the Internet or online that may cause his or her computer modem to dial a telephone number that results in a charge. *See Audiotex Connection*.

[101] Section 308.7(a)(6) of the original Rule uses the term "telephone-billed purchase" to describe
(continued...)

language contained in that definition, the Commission has added "receiving a call" to the list of actions that would result in a charge to the consumer and thus be included as a "pay-per-call service."

The Commission uses the phrase "receiving a call" to refer to all instances where a consumer incurs a charge by virtue of receiving a telephone call, including traditional "collect call" services, as well as other scenarios whereby the receipt of a call results in a charge. The Commission's experience with callback schemes in response to toll-free calls by consumers demonstrates that these schemes are susceptible to the types of abuses prohibited by the Commission's Rule.[102] The fact that the services are accessed by merely answering a telephone call (rather than placing a call) may make them even more susceptible to unfair and deceptive practices than outgoing calls from consumers because the recipient of the bill has even less ability to avoid charges for such services.[103]

Section 308.2(g)(3)(i)-(iii) -- Exemptions. These provisions describe the circumstances under which an audio information or entertainment service will not be considered to be a "pay-per-call service" and will thus be exempt from the Rule's requirements, even if it would otherwise meet the criteria contained in proposed Section 308.2(g)(2). Each exemption is discussed below.

Section 308.2(g)(3)(i) -- Presubscription agreement. This section will exempt from the Rule's requirements calls made pursuant to valid "presubscription agreements," which are described, *infra*. The Commission's intention is that no exemption will exist unless the presubscription agreement meets all of the elements of the definition of that term, as set forth in proposed § 308.2(j). This includes the requirement that the provider demonstrate that the presubscription agreement has been entered into with the person from whom payment is sought. As discussed, *infra,* the Commission has learned that, in many instances, providers of audiotext services have attempted to collect payment pursuant to a purported presubscription agreement from persons who did not authorize or were not aware of the existence of such an agreement. In order to be valid, a presubscription agreement must meet the criteria set forth in proposed Section

[101](...continued)
transactions to which the billing and collection provisions of the Rule apply.

[102] In fact, the Commission's Rule explicitly prohibits collect callback schemes that result from calls to toll-free numbers. *See, e.g., International Telemedia Associates.*

[103] Although audiotext services delivered by incoming calls to consumers are covered by the proposed definition of pay-per-call services, this does not mean that such services would be permissible under the proposed Rule. On the contrary, billing for such services would almost certainly violate proposed Section 308.17.

308.2(j).[104] Any agreement not meeting these criteria is not exempt from the Rule and its requirements.

Section 308.2(g)(3)(ii) -- De minimis payments. This proposed section will allow a vendor of audio information or audio entertainment services to show that a service is not a pay-per-call service by demonstrating that the payment received by the provider does not exceed a specified amount.[105] Many of the commenters and workshop participants supported a rebuttable presumption approach to a definition – whereby a service would be presumed to be "pay-per-call" unless the provider could show certain facts mitigating the likelihood of fraud.[106] The Commission proposes such an approach. Providers could rebut the presumption of "pay-per-call" by demonstrating that the payment for the information or entertainment is *de minimis* as defined by Section 308.2(g)(3)(ii).

At some point the amount of shared revenue is not sufficiently large for a service to be susceptible to the unfair or deceptive practices prohibited by Title II of TDDRA. Thus, the proposed Rule sets a specific threshold for such revenue, below which an audiotext service would not be considered pay-per-call, even if it otherwise met the definitional criteria. The comments and discussion at the workshop support this approach.[107] The Commission has proposed that if the provider demonstrates that, on average,[108] the payments to the provider will not exceed \$.05 per minute or \$.50 per call for the particular service, then the service will not be considered pay-

[104] Among other things, this means that the agreement must be entered into with the person to be charged for the service.

[105] The Commission intends that the demonstration specified by this section need only be made upon a prior request by the Commission or its staff, or by any other government agency with the authority to enforce this Rule, or as a defense to an enforcement action under this Rule.

[106] Alliance at 5; ISA at 28; AT&T at 8, 25-28; Tr. at 329, 331, 335.

[107] Tr. at 335-36. The AT&T supplemental comment argued against a threshold that was triggered by a certain percentage of the payment going to the vendor. AT&T-2 at 2-4. However, the AT&T supplemental comment did not address the possibility of a threshold triggered by a specific *per-minute amount* as proposed by the Commission. Indeed, many of the arguments made by AT&T in opposition to a percentage threshold seem to provide *support* for a nominal per-minute threshold.

[108] The average will be calculated for each different audiotext service offered by the provider. In the case of a "loss leader," where call volumes are inflated with low charges for some consumers to bring down the average to allow others to be charged higher rates, the Commission will consider services that charge different rates (*e.g.,* one high-priced and the other low-priced) to be separate services.

per-call.[109] The Commission seeks comment on the appropriate threshold figure for defining pay-per-call, including any relevant statistics or other numerical support.[110]

Other exemptions. Section 308.2(g)(3)(iii) exempts calls utilizing telecommunications services for the deaf, and tariffed directory services provided by a common carrier or its affiliate. This exemption tracks analogous language in the statutory definition of "pay-per-call services" found in Title I of TDDRA.[111] The proposed Rule adds the word "tariffed" to clarify the meaning of the exemption, and to prevent unscrupulous vendors from seeking to abuse the exemption.

Relationship to FCC regulations. Section 308.2(g)(4) states that this section shall not be construed to permit any conduct or practice otherwise precluded or limited by regulations of the Federal Communications Commission. For example, if the FCC were to adopt regulations prohibiting the use of a specific dialing pattern for pay-per-call services, the FTC's "pay-per-call service" definition cannot be used as a basis to argue that the FTC has permitted such a practice. The Commission believes it is important to make it clear that a service is not necessarily legal or permissible for purposes of FCC regulation of pay-per-call services simply because it falls within the FTC's proposed definition of "pay-per-call."

---

[109] The provider would only be required to demonstrate that the remuneration it receives fell below either the $0.50 per-call *de minimis* threshold or the $0.05 per-minute *de minimis* threshold. The Commission has selected these two figures based on its enforcement experience and on widely available data provided by service bureaus for international audiotext services. The appropriate threshold is one below which there is little incentive for vendors to solicit calls for the sale of audio information or entertainment. Certain arrangements, such as those described by AT&T in its comments ("TSAAs") may not be subject to unfair or deceptive practices because the payments involved may fall below the threshold. Although the record does not contain details relating to the level of remuneration involved in TSAAs, AT&T's statements at the workshop would seem to indicate that a $0.05 *de minimis* threshold would exempt these agreements. Tr. at 355. As explained in note 110, *infra*, the Commission does not agree with the view of some commenters who urged that exemptions should be granted for specific categories or types of revenue sharing arrangements, such as an exemption for all TSAAs. *See, e.g.*, AT&T at 8, 25-30.

[110] The Commission wants to ensure that its *de minimis* provision exempts only those information or entertainment services that are not susceptible to the unfair or deceptive practices covered by the Rule. One example of such a service is a local time or weather information line that is operated by a LEC. Undoubtedly, the LEC derives some minimal revenue for calls to these information lines. However, most callers will pay nothing to access the line. More importantly, the per-call and per-minute revenues derived by the common carrier for such a line are likely to be well below the *de minimis* thresholds. The Commission believes that the *de minimis* exemption is the best way to exempt such services -- a categorical exemption for such information lines would be open to abuse by unscrupulous vendors who could use common carrier status to derive significant revenue from information or entertainment lines.

[111] 47 U.S.C. 228(i). The Commission has not been given the authority under § 701(b) of the 1996 Act to extend the definition of pay-per-call services to eliminate these exemptions.

(6) Section 308.2(h) -- Person. The definition has been modified to add "unincorporated association" and "group" to the list of entities that are considered to be a "person" for purposes of the proposed Rule. The Commission adds these two terms based on enforcement experience[112] and the desire for consistency among its rules regulating telephone-related transactions.[113]

(7) Section 308.2(i) -- Personal identification number. Section 308.2(i) provides a definition of "personal identification number" ("PIN"), a term used in the definition of presubscription agreement. The original Rule's definition of presubscription agreement used a similar term, "identification number," but did not define that term or specify the manner in which it should be issued.

Background. Use of a presubscription agreement allows a vendor to avoid the Rule's requirements by entering into a contractual agreement with a consumer for providing, and receiving payment for, goods or services in a manner that, absent the agreement, would otherwise be covered by the Rule. This means that if a provider has a valid presubscription agreement with a consumer, the provider may provide services to that consumer in a manner that would otherwise violate the Rule (*e.g.*, the provider may charge a consumer for audiotext services accessed via a toll-free number). Where a consumer has entered a presubscription agreement, a PIN provides a means by which the consumer can control access to the service to which he or she has presubscribed. Thus, the original Rule establishes that one of the prerequisites of a PIN is that it prevent unauthorized access to the service by nonsubscribers.[114]

Nonetheless, some service providers have utilized PINs that do not prevent such unauthorized access. For example, some service providers have issued PINs over the telephone upon request, without taking sufficient steps to ensure that the party who has requested the PIN is also the person who will be billed for the presubscribed charges.[115] Other providers have assigned a consumer's checking account number as a PIN and then debited that checking account for services purchased by any caller who presented that PIN number.[116] Such billing methods do not prevent unauthorized access where insufficient steps are taken to ensure that the person paying by

---

[112] *FTC v. Audiotex Connection, Inc.*, No. 97-0726 (E.D.N.Y., filed Feb. 13, 1997) (International audiotext scheme where one defendant did business as "Electronic Forms Management," an unincorporated association).

[113] The definition of "person" in the Telemarketing Sales Rule includes all of these entities. 16 CFR 310.2(o).

[114] 16 CFR 308.2(e)(1)(iv).

[115] *See, e.g., U.S. v. American TelNet, Inc.*, No. 94-2551 CIV-NESBIT (S.D. Fla., filed Nov. 30, 1994) and *FTC v. Interactive Audiotext Services, Inc.*, No. 98-3049 CBM (C.D. Calif., filed Apr. 22, 1998). *See, also,* FLORIDA at 8, A44-A60; NAAG at 11; NCL at 4.

[116] *Interactive Audiotext Services*.

this method is actually authorized to debit that account. Purported presubscription agreements that entail these methods of assigning PINs do not satisfy the original Rule's criteria for a presubscription agreement because such PINs are ineffective to "prevent unauthorized access by nonsubscribers."

Proposed definition of "personal identification number." The proposed definition will furnish additional guidance to providers on what methods of assigning a PIN satisfy the Rule's requirements. The revised Rule specifies that the PIN must be "unique to the individual." This means that the PIN must be assigned to the *person* who will be billed for the offered goods or services, not to a telephone number or account. PIN assignments on the basis of ANI do not satisfy the original Rule's requirement that a PIN prevent "unauthorized access to the service by nonsubscribers,"[117] and would continue to be inadequate under the proposed Rule because they are not unique to the individual. The requirement that a PIN be unique to the individual also means that a provider cannot issue the same PIN to more than one person. Moreover, a PIN cannot be based on a number that is likely to be known to other persons, such as the telephone number from which the call is placed, a person's checking account number, credit card number, or social security number. Since the purpose of a PIN is to limit access to the service to those persons who have entered into a presubscription agreement, allowing a well-known or published number (such as a telephone number) would do little to control access.

The proposed definition also specifies that the PIN must be *valid*. Three conditions must be met in order for a PIN to be valid: (1) it must be requested by a consumer;[118] (2) it must be provided to no person other than the person who will be billed for the service;[119] and (3) it must be delivered to the person to be billed for the service simultaneously with a clear and conspicuous[120] *written* disclosure of all the material terms and conditions associated with the presubscription agreement, including the service provider's name and address, a business telephone number that the consumer may use to obtain additional information or register a

---

[117] 16 CFR 308.2(e)(1)(iv).

[118] Thus, unsolicited issuance of PIN numbers will not meet the proposed Rule's requirements for establishing a valid PIN.

[119] A valid PIN will become invalid by later disclosure to the wrong party. Thus, providers must use caution when giving out PINs to persons who claim to have "lost" or "forgotten" a previously-issued PIN.

[120] The concept of "clear and conspicuous" disclosure is well-developed in Commission case law and policy statements. *See, e.g., Thompson Medical Co.,* 104 F.T.C. 648, 797-98 (1984); *The Kroger Co.,* 98 F.T.C. 639, 760 (1981); Statement of Enforcement Policy, "Clear and Conspicuous Disclosures in Television Advertising," Trade Regulation Reporter (CCH) ¶ 7569.09 (Oct. 21, 1970); Statement of Enforcement Policy, "Requirements Concerning Clear and Conspicuous Disclosures in Foreign Language Advertising and Sales Materials," 16 CFR 14.9.

complaint, and the rates for the service. Although the proposed Rule does not require that a presubscription agreement be signed, the Commission believes that it is important for the consumer to be provided with a written copy of the terms of the agreement before the service is accessed for the first time. Written disclosures sent along with the PIN ensure that the consumer will receive an "unavoidable" disclosure of the material terms and conditions before the service can be accessed and before any charges can accrue.

The Commission does not believe it is necessary to specify the method by which the PIN should be delivered; service providers may use whatever method of delivery is most appropriate. Regardless of the method chosen, however, the service provider will be responsible for ensuring that the PIN is not distributed to anyone other than the person who will be billed for services under the presubscription agreement.

(8) Section 308.2(j) -- Presubscription agreement -- Background. The purpose of the presubscription agreement is to allow the seller and consumer to mutually agree to remove themselves from the TDDRA regulatory framework. The definition of this term generated substantial discussion both in the written comments and during the workshop. One significant issue was whether such agreements should be in writing and signed by the consumer. The audiotext industry generally opposed a writing requirement because it would inhibit the "instantaneous" nature of audiotext services offered through 800 numbers.[121] Other parties countered industry's arguments by asserting that the proper vehicle for offering instantaneous information or entertainment has been, and continues to be, through the 900-number dialing pattern.[122] These commenters believe that any vendor wishing to sell such goods or services through 800 numbers must take particular care to ensure that the consumer understands the material terms under which the service is offered, including that the consumer will be charged for the goods or services, and how much he or she will pay. One commenter specifically recommended that the Rule require these disclosures to be provided before the consumer incurs charges, even if that means that the purchase is not instantaneous.[123]

Many commenters favored a writing requirement because of the numerous complaints from consumers who have been charged for calls to 800 numbers in situations where they did not authorize such charges or where the goods or services had been represented to be free.[124] Several commenters were troubled by presubscription agreements that were formed orally during the course of a telephone call in which the consumer is issued an "instant" calling card or is asked to

---

[121] PILGRIM at 19, 21-22; Tr. at 487-90.

[122] Tr. at 79, 493, 495.

[123] SW at 5.

[124] FLORIDA at 8; NCL at 4-5; NAAG at 11; Tr. at 169, 193-94, 472-74.

provide bank account information.[125] As a result, they urged the Commission to ban oral transmission of presubscription agreements and to require that presubscription agreements be in writing.[126] Many of the same commenters believed that a written agreement was particularly important in situations where charges would be recurring.[127] NCL noted that many of the complaints received by its National Fraud Information Center ("NFIC") were from consumers who thought that certain 800-number calls were free but found out that they had been charged for the calls and/or inadvertently signed up for services, such as club memberships or voice mail, to which they had not expressly agreed.[128] Two common carriers agreed that a presubscription agreement must be in writing.[129]

The industry representatives as a whole generally opposed a requirement that the agreement be signed, based on the argument that the signature of an individual neither demonstrates legal competence nor that the proper person is being billed for the service.[130] One industry member argued that requiring an executed agreement might prevent contemporaneous purchase of merchandise.[131] Industry members also pointed out the difficulties in requiring an agreement to be signed and sent back, and that the failure of someone to sign and return an agreement would not necessarily indicate a lack of desire to use the service.[132]

A presubscription agreement must meet general principles of contract law.[133] Nonetheless, the Commission is aware of numerous examples of purported "agreements" created

---

[125] NCL at 5; FLORIDA at 8; NAAG at 11.

[126] NCL at 5; FLORIDA at 8; NAAG at 11; SW at 2, 5-6; Tr. at 18. NAAG suggested that electronic transmission of the agreement would also be sufficient to inform the consumer of the costs and terms and conditions of the service. (NAAG at 11). SW suggested that if electronic transmission is allowed, there should be a 10-day lag before the vendor could bill for the service, during which time the vendor should send a written confirmation of the agreement. (SW at 2, 5-6).

[127] NCL at 5; FLORIDA at 8; NAAG at 11; TSIA at 16-17.

[128] NCL at 4. (In 1996, the NFIC received 85 complaints against one Texas-based company regarding unauthorized charges for voice mail service after consumers had called an 800-number for a "free" psychic reading.)

[129] AT&T at 10; SW at 2, 5-6; Tr. at 488.

[130] PILGRIM at 19, 21-22; Tr. at 487-90.

[131] PILGRIM at 19, 21-22; Tr. at 487-90.

[132] Tr. at 487-88.

[133] *Complying with the 900-Number Rule: A Business Guide Produced by the Federal Trade Commission* (Nov. 1993) at 3.

during calls to 800 numbers that do not adhere to these basic principles of contract law -- *e.g.*, agreements entered into with minors, or agreements where the party to be billed for the service is not the party who placed the call and supposedly entered into the agreement.[134] Often, these purported "agreements" involve the use of ANI to identify a billing name and address and to send a bill, a practice that frequently results in one consumer receiving a bill for a service ordered by another.[135]

Proposed definition of "presubscription agreement." Because the presubscription exception to Rule coverage circumvents the TDDRA protections, the Commission believes the exception should be carefully delineated and not be a source of abusive and deceptive practices. The proposed Rule modifies original Section 308.2(e)(1) to make it clear that the disclosures must be provided to, and the agreement must be reached with, the consumer who will be billed for the service. In addition, the proposed Rule will require that presubscription agreements be delivered, in writing, to the person who will be billed for the service.[136] As explained above, Section 308.2(i) of the proposed Rule requires that the provider of presubscription services deliver (to the person who will be billed for the service) a PIN, together with a written disclosure of all the material terms and conditions of the agreement. In every instance, an actual contractual agreement *with the person to be billed for the service* must be reached *in advance of the provision of service* and the person to be billed for the service must have received clear and conspicuous disclosure of the material terms of the contract.

---

[134] *See, e.g., FTC v. Interactive Audiotext Services, Inc.*, No. 98-3049 CBM (C.D. Calif., filed Apr. 22, 1998) and *FTC v. International Telemedia Associates, Inc.*, No. 1-98-CV-1935 (N.D. Ga., filed July 10, 1998). Indeed, the Commission's first action to enforce the 900-Number Rule challenged invalid presubscription agreements. *U.S. v. American TelNet, Inc.*, No. 94-2551 CIV-NESBIT (S.D. Fla., filed Nov. 30, 1994).

[135] The Commission's view that ANI is insufficient to identify the party to a presubscription agreement is shared by FCC staff, as evidenced by a 1994 letter from FCC staff, relating to the issue of billing for audiotext services offered through 800 numbers. The FCC letter stated that a legitimate presubscription agreement is not created if the vendor immediately issues a personal identification number without determining that the caller is both the subscriber to the line and legally capable of entering into a contractual agreement. "The basic terms of the presubscription definition preclude reliance on ANI either to create or provide evidence of a valid presubscription or comparable arrangement, because ANI identifies only the originating line and not the caller who seeks to establish an arrangement. Thus billing systems based solely or primarily on ANI do not ensure that presubscribed information services charges are being properly assessed." Letter dated June 15, 1994, to Randal R. Collett, Association of College and University Telecommunications Administrators, from Gregory A. Weiss, Acting Director, Enforcement Division, FCC.

[136] While this should prohibit the instantaneous sale of audiotext over toll-free numbers, the Commission believes that 900 numbers, not toll-free numbers, should be the proper vehicle for offering "impulse" purchases of audiotext services. *See* 15 U.S.C. 5711(a)(2)(F).

The Commission has decided not to propose a requirement, advanced by some commenters, that the written agreement be signed by the consumer. Instead, the proposal would make it clear that the provider who engages in a transaction pursuant to a presubscription agreement has the burden to show that it obtained the actual authorization of the person who was billed for the service. The presubscription agreement is never valid (*i.e.*, it does not meet the conditions of the current Rule or the proposed Rule) unless the agreement is reached with the person who will be billed for the service.

In addition to the changes to the presubscription provisions discussed above, the proposed Rule makes two other minor modifications to the original Rule's treatment of presubscription agreements. First, to simplify the language of the proposed Rule, the phrase "presubscription agreement" has been substituted for the phrase "presubscription or comparable arrangement." Second, the proposed Rule adds language in Section 308.2(j)(1) to clarify that a presubscription agreement is an agreement to purchase goods or services, including audio information or audio entertainment services.

Section 308.2(j)(2) -- Billing by credit card. In promulgating the original Rule, the Commission stated that it did not appear that Congress intended to include credit card or charge card transactions within the regulatory framework of TDDRA. Therefore, in Section 308.2(e)(2) of the original Rule, the Commission included within the definition of "presubscription agreement" those credit and charge card transactions that were subject to the dispute resolution requirements of the Truth in Lending Act ("TILA") and Fair Credit Billing Act ("FCBA").[137]

In the current proceeding, some industry members urged the Commission to expand the types of billing methods that would be permitted to constitute a presubscription agreement. Specifically, one industry association advanced the argument that both pre-authorized drafts[138] and a direct billing option would provide consumers with all of the material disclosures required by the Rule while giving vendors more flexibility in the methods by which they could bill consumers.[139] Other commenters expressed concern with respect to direct billing, noting that there was no substantive difference between 800-number billing through a LEC and 800-number billing through direct billing by a third party. In other words, they believed that to allow these billing options under Section 308.2(e)(2) of the original Rule would effectively allow a person to be charged for a call to a toll-free number -- a practice prohibited by TDDRA.[140] These commenters expressed the belief that, if a vendor is charging for audiotext services offered

---

[137] 58 FR at 42367.

[138] By use of a pre-authorized draft (also known as a "demand draft" or a "phone check") a seller can obtain funds from a buyer's checking account without that person's signature on a negotiable instrument.

[139] TSIA at 15-16; Tr. at 473-82.

[140] 15 U.S.C. 5711(a)(2)(F). *See also*, Tr. at 480-87.

through an 800 number, there should be an actual agreement, regardless of the billing method.[141] Furthermore, some commenters pointed out that they have received complaints from consumers who were billed directly for services after they called an 800-number, but who had not understood that there would be a charge.[142]

The Commission has carefully considered all of the comments and discussion regarding presubscription agreements, and has decided to retain in the proposed Rule the "credit and charge card" presubscription option in its current form, with only minor technical changes. The Commission also has determined not to include within this option other types of cards, such as debit, prepaid, or calling cards, which are not subject to both TILA and FCBA.

Presubscription agreements based on a credit or a charge card are permitted because these transactions are already subject to the legal protections of TILA and FCBA, including the right to dispute unauthorized charges. In the absence of the protections afforded by these Acts, however, 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. Title III of TDDRA directed the Commission to promulgate rules with requirements "substantially similar to the requirements imposed, with respect to the resolution of credit disputes, under the Truth in Lending and Fair Credit Billing Acts."[143] To allow a calling card, a debit card, or other means not within the ambit of both TILA and FCBA to substitute for an actual agreement with the person to be billed for the service would undermine the entire purpose of the presubscription agreement exception to the Rule. It would also undermine the Commission's mandate to promulgate TDDRA rules substantially similar to TILA and FCBA.

Allowing such types of payment methods to substitute for an actual agreement with the person to be billed for a service would also encourage the use of so-called "instant" calling cards. Such cards are often issued without any assurance that the caller obtaining the card is authorized to arrange for a purchase to be billed to the telephone number from which the call is being placed. Under the proposed Rule, cards not subject to TILA and FCBA do not constitute presubscription agreements unless they meet the requirements of Section 308.2(j)(1).

For the reasons discussed above, Section 308.2(j)(2) of the proposed Rule retains the language of the original Rule, with only three revisions that are dictated by the Commission's decision to expand coverage of the Rule beyond the "pay-per-call services" offered through the 900-number platform. First, the proposed Rule changes the language relating to the disclosure of a credit card number "during the course of a call to a pay-per-call service," to read "during the course of a call to purchase goods or services, including audio information or audio entertainment

[141] Tr. at 483, 486-87.

[142] Tr. 483-84.

[143] 15 U.S.C. 5721(a)(2).

services." This change is designed to clarify that services billed to a credit card are purchases made pursuant to a presubscription agreement and thus are excluded from the definition of "pay-per-call services."

Second, the proposed Rule deletes the last sentence of 308.2(e)(2) of the original Rule. This sentence made clear that providers are prohibited from charging consumers for calls to presubscribed services unless the consumer either had entered an agreement *before that telephone call*, or was paying for the service with a credit or charge card. This sentence is no longer necessary because the proposed Rule in Section 308.2(j)(1) prohibits providers from charging consumers until the consumer has received, in writing, a PIN and a clear and conspicuous disclosure of all the material terms of the agreement.

Finally, the proposed Rule clarifies that, in order for the Section 308.2(j)(2) credit card alternative to a 308.2(j)(1) presubscription agreement to be available, the credit card must be "the sole method used to pay for the charge." The Commission is aware that some providers request a credit card number from a consumer, but bill the consumer by some other method -- a method that is not subject to the dispute resolution protections of TILA and FCBA.[144] As the text of the original Rule and its Statement of Basis and Purpose make clear, this practice violates the Rule.[145] The Commission proposes adding this clause to remove any possible ground for argument, unpersuasive though it may be, that the Rule could be construed to allow a provider to make use of the presubscription option through the meaningless eliciting of a credit card number without using the card to bill charges.

Relationship to FCC Regulations. Since passage of the 1996 Act, the FCC's regulations enacted under Title I of TDDRA have differed in some respects from the FTC's Rule enacted under Titles II and III of TDDRA. This is because the 1996 Act amended Title I of TDDRA to require the FCC to amend its rules governing the obligations of common carriers with respect to the use of toll-free numbers for audiotext services.[146] These amendments affected what the FCC

---

[144] In one case recently filed by the Commission, a provider was allegedly collecting credit card numbers from consumers purportedly to create a valid presubscription service, but instead allegedly billed the consumers directly, based on ANI. *FTC v. Interactive Audiotext Services, Inc.*, No. 98-3049 CBM (C.D. Calif., filed Apr. 22, 1998).

[145] 58 FR at 42367. *See* Tr. at 472 (NAAG: "I think the proper way to construe the law is to say if you're going to acquire pay-per-call services using a credit card, the charge ought to appear on the credit card.").

[146] On July 11, 1996, the FCC published an Order and Notice of Proposed Rulemaking to amend its Rules in accordance with the amendments to Title I of TDDRA. "FCC Pay-Per-Call Order and Notice," CC Docket Nos. 96-146 and 93-22, and FCC 96-289, 11 FCC Rcd 14738 (1996). The Order portion of this document amended 47 CFR Part 64 (the FCC's pay-per-call rules) in accordance with the mandate of the 1996 Act; the Notice of Proposed Rulemaking portion of the document requested comment

(continued...)

rules require common carriers to include in any tariff or contract relating to the use of toll-free telephone numbers for audiotext purposes. The proposed revision of the FTC's Rule would not conflict with any FCC requirements for what common carriers must include in their tariffs or contracts, and the two sets of regulations would continue to differ with respect to their approach to audiotext services provided over toll-free numbers.

Prior to the 1996 Act, the FCC's regulations pertaining to toll-free numbers were virtually identical to the requirements imposed in Section 308.5(i) of the FTC's original Rule: the use of a toll-free number to charge for information conveyed during a call was prohibited, unless the charges were the result of a presubscription or comparable arrangement, which included (by definition) a charge to any credit card that was covered by TILA and FCBA. With the 1996 amendments, however, the FCC's regulations now differ from the FTC's Rule by requiring common carriers to prohibit the use of toll-free numbers to charge for information or entertainment unless the consumer has entered into a *written* agreement. At the same time, the FCC's new rules are more lenient than the FTC's Rule in that, under the FCC's new rules, common carriers can permit vendors and service bureaus using the carrier's networks to charge consumers for calls made to an 800 number *in the absence of a presubscription agreement*, if the call is charged to, *inter alia*, a debit card, calling card, or prepaid account. Section 701(a) of the 1996 Act is silent as to TILA and FCBA coverage of transactions by these means.

A number of commenters suggested that the Commission amend its original Rule[147] to track the amended FCC regulations.[148] Commenters advanced several arguments in support of a such a modification. Several commenters supported tracking the FCC's amended rules so that the Commission's Rule would allow providers other methods to bill for toll-free audiotext services besides obtaining an explicit "presubscription" agreement or charging the service to a credit card which is subject to TILA and FCBA.[149] Other commenters favored such a modification because it would reinforce the FCC's requirement that presubscription agreements be in writing.[150] Finally,

---

[146](...continued)
on additional proposed changes to the FCC's rules not specifically mandated by the Act.

[147] Specifically, these commenters supported amending Sections 308.2(e) and 308.5(i) of the original Rule -- the provisions dealing with presubscription agreements and the use of toll-free numbers for audiotext purposes.

[148] AT&T at 5; ISA at 31-33; NAAG at 11; PMAA at 4, 15; SW at 3, 10; TSIA at 19.

[149] ISA at 32-33; PMAA at 15.

[150] NAAG at 11; AT&T at 10. SW specifically opposed tracking the new FCC regulations with regard to its allowance of an "electronic" signature. Such a form of written agreement, the commenter argued, would not provide a method of verifying that the execution was by a competent adult who is the person responsible for paying the telephone bill. SW at 5.

some commenters argue that amending the FTC Rule to track the FCC's regulations would serve the goal of regulatory consistency; industry would only need to look to one set of rules.[151]

Regulatory consistency is an important goal. This is one of the primary reasons why, in promulgating the original Rule, the FTC chose, at its own discretion, to adopt a provision that paralleled the analogous FCC provisions regulating the use of 800 numbers[152] and defining "presubscription or comparable arrangement."[153] However, were the FTC to adopt a definition of "presubscription agreement" that tracked the FCC's new definition, or if it were to similarly modify the Rule's provisions governing toll-free numbers, it would not be possible to achieve the explicit purposes of Titles II and III of TDDRA as amended by the 1996 Act.[154]

There is no inherent conflict between the FCC's new regulations and the FTC's original or proposed Rule. The FCC's Title I regulations apply only to common carriers in their role of providing basic dial tone and transport service to service providers that use toll-free numbers, while the FTC's regulations under Title II of TDDRA directly apply to vendors and service bureaus who would be using toll-free numbers to charge a consumer for audio information or entertainment. Furthermore, there is nothing in the FTC's proposed Rule to prevent a vendor from offering to accept payment by means of a card not subject to TILA or FCBA, as long as the vendor reaches a presubscription agreement with the person to be billed for the service and complies with the requirements of proposed Section 308.2(j)(1).[155] Thus, it is entirely possible to use any of the billing mechanisms permitted under Title I of TDDRA, as amended, as long as the provider complies with the additional precautions of proposed Rule Section 308.2(j)(1), which are designed to ensure that the party being billed for the toll-free audiotext service is the same person who agreed to be billed for that service.

---

[151] AT&T at 5-6; ISA at 31-33; PMAA at 4, 15; SW at 3, 10; TSIA at 19.

[152] 58 FR at 42387.

[153] *Id.* at 42367.

[154] In fact, the 1996 Act's amendments to TDDRA virtually mandate divergence between the FTC and FCC regulations. Under Title I of TDDRA, the FCC's regulations continue to operate under the statutory definition of "pay-per-call services" set forth in 47 U.S.C. 228(i). However, under Title II of TDDRA, as amended by the 1996 Act, the Commission may adopt an alternative definition of "pay-per-call services." Thus, after the 1996 Act, the FCC and FTC Rules are now focused on two different categories of "pay-per-call services." In the current legal framework, an attempt to produce parallel Rules under Titles I, II, and III of TDDRA would be futile.

[155] In fact, many of the billing options permitted by the FCC's rule (*e.g.,* a calling card) might easily fall within the Commission's proposed definition of PIN.

It is the mandate of the FTC, acting under Title II and III of TDDRA, to prohibit the use of unfair or deceptive practices in the provision of audiotext services.[156] Title I of TDDRA gives the FCC no similar mandate. The FTC must consider the extent to which any proposed new exemption from the Rule (such as the exemption embodied in the revised FCC rules) would be likely to increase the types of unfair and deceptive practices that prompted enactment of the TDDRA. There is evidence on the record suggesting that audiotext services purchased using these billing methods -- methods that would be permitted if the FTC Rule tracked the revised FCC rules -- are susceptible to the same types of unfair or deceptive practices that are prohibited by the original Rule. To fulfill the mandate of Section 701(b) of the 1996 Act, it is necessary for the FTC's Rule to cover these purchases.[157]

Amending the FTC Rule to parallel the revised FCC rules would also undermine the FTC's mandate under Title III of TDDRA to promulgate rules that impose requirements that are "substantially similar to the requirements imposed, with respect to the resolution of credit disputes, under the Truth in Lending and Fair Credit Billing Acts."[158] The FCC's regulations are not subject to a similar mandate. The Commission believes that it is consistent with the regulatory framework of TDDRA that FCC and FTC regulations differ with respect to the requirement that billing alternatives to presubscription agreements be subject to TILA and FCBA.

(9) Section 308.2(n) -- Service bureau -- Background. One of the more significant changes in the audiotext marketplace since the promulgation of the original Rule is that service bureaus now play an important role for many vendors in providing access to billing and collection systems. Some service bureaus act as "billing aggregators" -- *i.e.*, they act as intermediaries between vendors and LECs in order to get their client-vendors' charges to appear on telephone bills. Other service bureaus bypass the LEC billing system completely and provide their clients with direct billing services. Still other service bureaus have played an essential role in the growth of international audiotext by entering into revenue-sharing agreements with foreign telephone companies, and then providing vendors of audiotext services with international numbers through which their audiotext services can be accessed.[159]

[156] 15 U.S.C. 5711(a)(1), 5711(a)(4), and 5721(a)(1).

[157] *See, e.g.*, NCL at 3-5; FLORIDA at 8, Attachments A44-A60; NAAG at 11; SW at 2, 5-6; Tr. at 194, 471-84, 498-500.

[158] 15 U.S.C. 5721(a)(2).

[159] Some of these new types of service bureaus have played key roles in the new deceptive and unfair practices that have injured consumers. For example, one service bureau providing international audiotext programs to willing vendors proudly boasts "no chargebacks" in its advertisements -- underscoring both the potential harm to consumers caused by international audiotext, as well as the essential role service bureaus play in making international audiotext possible.

Proposed definition of "service bureau." The Commission proposes several changes to the definition of "service bureau" reflecting the fact that the role of the service bureau has expanded since the original Rule was promulgated. The proposed definition of "service bureau" is also more specific than the definition of that term in Section 308.2(i) of the original Rule. The original definition of "service bureau" was open-ended -- *i.e,* it was defined as a person "who provides, *among other things*, access to telephone service and voice storage, to pay-per-call providers."[160] By contrast, the proposed definition will define a service bureau as a person who provides one or more of a finite list of services to vendors. This format will provide better guidance to industry and law enforcement in determining which entities are service bureaus and will clarify that billing aggregators and entities providing access to international audiotext payment systems are covered by the definition.

The proposed definition of service bureau is intended to incorporate all of the essential services that a vendor might need in setting up a business selling products or services through telephone-billed purchases. Section 308.2(n)(1) of the proposed Rule identifies the following services: voice storage, voice processing, call processing, billing aggregation, call statistics (call and minute counts), call revenue arrangements (including revenue-sharing arrangements with common carriers), or pre-packaged pay-per-call investment opportunities (*i.e,* "turn-key programs"). Any person providing one or more of these services to vendors will be covered by the proposed definition of service bureau.

Billing aggregators are explicitly included in the proposed definition of service bureau. As the Commission's enforcement experience has demonstrated, billing aggregators play a key role in providing to vendors -- including unscrupulous ones -- access to a telephone billing and collection system that permits vendors to cost-effectively bill and collect for their services. In many, if not most cases, they are the entity responsible for submitting the charges to the LECs for placement on consumers' telephone bills. Thus, the Rule's purposes would be thwarted unless billing aggregators were brought explicitly within the ambit of the Rule. Similarly, service bureaus that facilitate revenue-sharing arrangements between vendors and foreign telephone companies in connection with international audiotext are included in the proposed definition. This service bureau activity is essential to vendors seeking to sell audiotext in a manner that circumvents the consumer protections guaranteed by Title III of TDDRA.

In the original Rule, the definition of "service bureau" contained an exemption for all common carriers.[161] In its Request for Comment, the Commission asked whether it was still appropriate for the definition to exclude all common carriers, regardless of the activities they

---

160 16 CFR 308.2(i). [Emphasis added.]

161 16 CFR 308.2(i).

perform.[162] Several commenters urged the Commission to reexamine this common carrier exemption, arguing that the service being provided, and not the type of entity that provides the service, should determine whether an entity is subject to the Rule.[163] One commenter argued that the common carrier exemption enabled service bureaus to claim "common carrier" status to evade regulation, thereby gaining a competitive advantage.[164] The Commission is persuaded by these arguments. Therefore, under the proposed Rule, any person, *including a common carrier*, who provides the services listed in 308.2(n)(1) to vendors would be considered a service bureau.

Nevertheless, the Commission recognizes that there is one key service bureau function -- providing access to telephone service to vendors of pay-per-call services -- that cannot be fairly applied to common carriers. This service, which was identified in the original definition of service bureau, is essential to any pay-per-call service. Indeed, it is a key function of those service bureaus who obtain international telephone numbers for vendors who wish to provide international audiotext services. However, a common carrier that merely provides a vendor of pay-per-call services with access to basic telephone service (the essential function of a common carrier) should not be considered a service bureau subject to the Commission's Rule promulgated under Title II and III of TDDRA. Acting as traditional common carriers, these entities are already subject to the regulations of the FCC promulgated under Title I of TDDRA. Therefore, the Commission proposes a limited exemption from the definition of service bureau for common carriers that provide vendors of pay-per-call services with nothing more than access to telephone service. Under proposed Section 308.2(n)(2), any person, *other than a common carrier*, who provides access to telephone service to vendors of pay-per-call services,[165] would be considered a service bureau.

(10) Section 308.2(q) -- Telephone-billed purchase. The term "telephone-billed purchase" defines those products and services that are covered by the dispute resolution provisions of the Rule promulgated under Title III of TDDRA. The term is much broader in scope than the term "pay-per-call services," the category of services covered by Title II of TDDRA. The original Rule's definition of "telephone-billed purchase" comes from Title III of TDDRA,[166] and it currently includes "any purchase that is completed solely as a consequence of the completion of the call or subsequent dialing, touch tone entry, or comparable action of the

[162] 62 Fed. Reg. 11753 (Mar. 12, 1997).

[163] NCL at 4; NAAG at 10; TSIA at 19-20.

[164] TSIA at 19-20.

[165] It is important to note that proposed § 308.2(n)(1), unlike § 308.2(n)(2), applies to *all* vendors, and is not limited to vendors of pay-per-call services.

[166] 15 U.S.C. 5724(1).

caller."[167] The term specifically excludes all local exchange or interexchange telephone services, as well as other services excluded by FCC regulation. Thus, any purchase of a product or service (other than telephone toll service) that results in a charge to a consumer or an account identified by reference to ANI is included in the current definition, and any person billed for such a purchase would be entitled to dispute the charges pursuant to the Commission's Rule.[168]

Background. At the time the original Rule was promulgated, 900-number services were the primary, if not the only, familiar example of telephone-billed purchases. Today, the growing use of ANI as a basis for billing consumers has increased the range of available telephone-billed purchases. Consumers can purchase voice mail, Internet access, telephone equipment, roadside assistance club memberships, and other goods and services and have the charges billed to their telephone bill. Concurrent with this development, there has been a sharp increase in complaints about telephone-billed charges for such goods and services.[169] Consumer organizations, as well as federal and State regulatory and law enforcement agencies, have received a large number of complaints from consumers who have found unclear or unexplained monthly recurring charges on their telephone bills for services that were never authorized, ordered, received, or used.[170] These unauthorized charges (*i.e.*, "cramming" charges), are often purportedly for club memberships, or subscriptions for psychic, personal, travel, or 900-number services. In other instances, the charges involve services such as personal 800 numbers, voice mail, paging, and calling cards.

The common thread in all of these types of cramming charges is that a consumer is identified, and a billing statement is transmitted, based on a telephone number. In other words, in all of these instances, a telephone number was used in the same manner that a credit card account number might have been used in the past.[171] While consumers have for a long time had numerous rights to dispute unauthorized or other incorrect charges to their credit card numbers,[172] until 1992 they had no comparable rights to dispute charges for products and services billed to a telephone number. Title III of TDDRA was specifically designed to address this problem;

---

[167] Section 308.7(a)(6) of the original Rule.

[168] Services provided pursuant to a presubscription agreement are excluded from the definition. 15 U.S.C. 5724(1)(A), 16 CFR 308.7(a)(6)(i).

[169] SW at 7-8; NCL at 4; Tr. at 382-84, 498-504. For example, NCL reported that most of the complaints received by the NFIC that relate to 800 numbers involve calls that the consumer thought were free, but by making them, the consumer had unknowingly signed up for services which resulted in charges (such as voice mail or club memberships).

[170] Tr. at 498-500.

[171] FCC Public Forum on Local Exchange Carrier Billing for Other Businesses (June 24, 1997). Transcript, pp. 232-237.

[172] 15 U.S.C. 1666.

Congress instructed the Commission to prescribe rules establishing a dispute resolution procedure for telephone-billed purchases that are "substantially similar" to the dispute resolution protections afforded credit card users under TILA and FCBA.[173]

Proposed definition of "telephone-billed purchase." The original Rule definition of "telephone-billed purchase" covered all (non-toll) charges resulting from ANI capture. This includes many, but not all, instances of cramming.[174] It does not cover instances of cramming, for example, where a phone call is never made in connection with a charge, yet the charge is billed to the consumer's telephone bill.[175] Proposed Section 308.2(q) expands the definition of telephone-billed purchase to include all purchases that are "charged to a customer's telephone bill," even if the purchase did not involve a telephone call.

Title III of TDDRA was intended to provide telephone-billed purchases the same types of protections afforded to credit card purchases under TILA and FCBA. The telephone number, in telephone-billed purchases, is analogous to the credit card number. To carry the analogy further, instances of "non-ANI cramming," such as a charge resulting from entry of a consumer's telephone number on a sweepstakes entry form, are much like instances where a consumer's credit card number is used in a transaction where the physical card is not itself presented. In the credit card environment (under TILA and FCBA), the fact that a transaction takes place without the presence of the actual card would not affect the cardholder's right to dispute an unauthorized charge. By contrast, in non-ANI cramming, a consumer loses his or her right to dispute the charge simply because the telephone was not actually used in the transaction. In this respect, the Commission's Rule is no longer "substantially similar" to the rights afforded by TILA and FCBA.

---

[173] 15 U.S.C. 5721(a)(2).

[174] As discussed elsewhere in this Notice, the Commission proposes several modifications to the Rule to provide greater protection to consumers who have been "crammed" (for example, proposed §§ 308.2(b)(9)-(11)) and to prohibit vendors, service bureaus, and billing entities from engaging in cramming (proposed § 308.17).

[175] In at least one case where unexplained or unauthorized charges did not result from a telephone call, a deceptive prize promotion allegedly was used to market a voice mail service. Allegedly, consumers were enticed to fill out a sweepstakes form for a chance to win a new vehicle or a sum of cash. The form failed to adequately disclose that the vendor interpreted the submission of a completed entry form as authorization to bill charges for a "membership" to the telephone number listed on the form. In many instances, consumers allegedly were unaware that they had signed up for this "membership"; in other instances, consumers allegedly found they were being billed for services because someone else had filled out the form and put down their telephone number. *FTC v. Hold Billing Services, Ltd.*, No. SA98CA0629 FB (W.D. Texas, filed July 19, 1998).

Congress has given the Commission significant flexibility in prescribing regulations that are "necessary or appropriate" to implement the provisions of Title III.[176] The Commission has broad authority to prohibit unfair or deceptive practices that "evade" its dispute resolution rules or otherwise "undermine the rights" Congress gave to consumers under Title III of TDDRA.[177] Non-ANI cramming is such a practice.

The Commission believes that consumers should have equal rights to dispute unauthorized non-toll charges on their telephone bills regardless of whether or not a telephone was used to generate the charges. Even if consumers carefully monitor the use of the telephone, they cannot keep their telephone number secure and private as they would their credit card number. Indeed, consumers may not be aware of the need to keep their telephone numbers secure. The ability to use a telephone number alone to bill a consumer, in the absence of an actual telephone call, represents a tremendous opportunity for fraud.

The Commission believes that in order to provide consumers with rights that are substantially similar to the dispute resolution rights of TILA and FCBA, and in order to prevent unfair or deceptive practices that evade these rights, it is both necessary and appropriate to propose an amendment to the definition of "telephone-billed purchase" to include instances of cramming that do not arise from a telephone call from the consumer's telephone.

Clarification. Proposed Section 308.2(q) also clarifies the definition of "telephone-billed purchase" by adding the phrase "pay-per-call purchase." While the Commission believes that the current language of the Rule clearly encompasses pay-per-call services, this revision will prevent any misinterpretation of the Rule's coverage. This clarification will ensure that persons billed for pay-per-call services will have the full panoply of protections provided by the dispute resolution provisions of the Rule, regardless of the dialing pattern used to access the service. Proposed Section 308.2(q) also clarifies the definition by using the term "presubscription agreement" in place of the term "preexisting agreement," and by specifying that the exemption for presubscription agreements applies only to those purchases where the presubscription agreement satisfies all of the requirements of the proposed Rule.

(11) Section 308.2(r) -- Variable option rate basis. The original Rule used the term "variable rate basis" to describe situations where the rate charged for a pay-per-call service varied depending on the options chosen by the caller. For example, in the course of a pay-per-call program, a consumer might be asked to press a specific number on a touch tone keypad that would access a different program charged at a higher rate. The term "variable rate basis," however, is no longer specific enough to describe the current situation. This is true because, as discussed *infra*, there are now pay-per-call services where the charge to the consumer may vary

---

[176] 15 U.S.C. 5723.

[177] 15 U.S.C. 5721(a)(1). *See also* 15 U.S.C. 5711(a)(2)(J) and (a)(4) (providing similar authority under Title II).

depending on factors other than the options specifically chosen by the consumer -- *e.g.,* services where the rates vary depending on the passage of time.[178] To clarify the specific situations that the original phrase "variable rate basis" was intended to cover (*i.e.,* those that *are* dependent on the options selected by the caller), the Commission proposes substituting the phrase "variable option rate basis." Proposed Section 308.2(r) defines this term to refer to the rate structure of pay-per-call services where the rate billed to the consumer depends on the specific options chosen by the caller during the call.

(12) Section 308.2(s) -- Variable time rate basis. As noted above, new forms of variable rates have become available since the original Rule was promulgated. For example, it is now possible to bill the first minute at one rate while subsequent minutes are billed at a higher or lower rate.[179] Proposed Section 308.2(s) provides a term, "variable time rate basis," to describe instances where charges vary according to the amount of time the caller is on the telephone or according to other factors not determined by the options chosen by the caller. Section 308.4(a)(1)(iii)(B) of the proposed Rule requires that, in advertisements for pay-per-call services billed on a variable time rate basis, the advertisement shall state the cost of each different portion of the call. This same requirement applies to the free preamble message under proposed Section 308.9(a)(2)(iii)(B). These provisions will ensure that consumers receive accurate disclosure of the full cost of the call before a call is placed or before charges are incurred.

(13) Section 308.2(t) -- Vendor. The original Rule uses both the term "vendor" and the term "provider of pay-per-call services." Under the original Rule, a "provider of pay-per-call services" was a specific type of vendor -- a vendor who happened to sell pay-per-call services. The proposed Rule discontinues the use of the term "provider of pay-per-call services" because the Commission does not believe there is any value to maintaining a separate term for those vendors who sell pay-per-call services. The proposed Rule therefore uses the term "vendor" to refer to both providers of pay-per-call services as well as sellers of other telephone-billed goods or services.

SUBPART C -- PAY-PER-CALL SERVICES

Section 308.3 General Requirements for Advertising Disclosures.

Section 308.3 of the original Rule contained the provisions relating to disclosures of cost and other material information in the advertising of pay-per-call services. As discussed earlier, the proposed Rule has broken the former single Section 308.3 ("Advertising of pay-per-call services") into several shorter sections, each dealing with a discrete subject.

---

[178] *See, e.g.,* ISA at 22; PMAA at 10-12; TSIA at 17-18.

[179] *Id.*

Section 308.3 of the proposed Rule, entitled "General Requirements for Advertising Disclosures," retains the language from Section 308.3(a) of the original Rule. This section sets forth the "minimum standards" applicable to disclosures required in advertisements under the Rule.[180] The only proposed modification to this section is the addition of a new requirement relating to any advertising medium not specifically addressed in the Rule.

Internet and online advertisements. In its Request for Comment, the Commission sought information and views on whether the advertising regulations of the original Rule should set forth specific requirements for advertising that appears on the Internet or online. In general, the commenters, both in writing and in the discussion at the workshop, expressed the view that the regulation of Internet and online advertising is an issue best suited for another rulemaking proceeding in which comment can be solicited from a much broader array of online advertisers.[181] Several participants at the workshop cautioned that this proceeding may not be an appropriate forum for setting such advertising standards,[182] but nevertheless were troubled by the prospect of the Internet becoming the next haven for deceptive pay-per-call advertising. These participants suggested that some type of general standard for advertising might be necessary in order to ensure that this scenario did not occur.[183]

The Commission agrees that standards for Internet or online advertising would best be considered in a proceeding focusing more narrowly on business practices in the newer types of electronic commerce. In fact, the Commission has begun this process by requesting comment on the applicability of many of its rules and guides to electronic media.[184]

Nonetheless, the Commission shares the concerns of those who fear that, absent some specific provision in this Rule, unscrupulous vendors might use the Internet to sell pay-per-call services without providing consumers with the cost disclosures that are required of pay-per-call vendors using the traditional print and broadcast media specifically addressed in the original Rule. Accordingly, Section 308.3(g) of the proposed Rule requires that, in any advertising medium not specifically addressed elsewhere in the Rule, the required advertising disclosures must be clear and conspicuous *and* made in a manner in which they cannot be avoided by consumers acting

---

[180] *See*, discussion in the Statement of Basis and Purpose of the original Rule, 58 FR at 42369.

[181] PMAA at 14; ISA at 28-31; AT&T at 11-12, 32; USWEST at 2; Tr. at 560-75. One commenter suggested that the Commission specify reasonable requirements for clear and conspicuous disclosures for pay-per-call services advertised on the Internet or online. (NCL at 5).

[182] In general, commenters argued that since online advertisements are still in their infancy, any comprehensive treatment of the topic in this forum might have an undesired impact on the entire online industry.

[183] Tr. at 569-74.

[184] 63 FR 24996 (May 6, 1998).

reasonably. A vendor must ensure that in any Internet or online advertisement, a consumer will not receive the information required to make the purchase (*i.e.*, the telephone number of the pay-per-call service), unless a consumer also receives the required disclosures, displayed clearly and conspicuously. This will usually mean that the disclosures must appear adjacent to the disclosure of the telephone number itself, and that the consumer must not be required to "click through" or "scroll down" to see the disclosures. This proposed change is consistent with the proposal contained in the Commission's Request for Comment regarding the applicability of its rules and guides to electronic media, referred to above.[185]

Section 308.4 Advertising Disclosures.

Proposed Section 308.4 incorporates the provisions set out the following sections of the original Rule: 308.3(b) (Cost of the call); 308.3(c) (Sweepstakes; games of chance); 308.3(d) (Federal programs); and 308.3(f) (Advertising to individuals under the age of 18). Each of these provisions deal with specific, substantive disclosure and advertising requirements. The Commission has decided to group these requirements together in their own separate section in order to give them more prominence.[186]

In addition to placing these requirements together in a separate section, the proposed Rule clarifies the term "variable rate basis" that was used in Section 308.3(b)(1)(iii) of the original Rule. As discussed, the Commission originally intended this term to cover situations where the rate charged would vary depending on the options chosen by the caller. However, technological advances since the original Rule was promulgated now allow other forms of variable rates, such as billing the first minute at one rate and billing subsequent minutes at a lower or higher rate.[187] Thus, Section 308.4(a)(1)(iii)(A) now uses the term "variable *option* rate basis" (emphasis added) in order to denote the type of cost disclosure to be made when the cost of the call varies depending on the options chosen by the caller.

The Commission believes that consumers should know, in advance of placing a call, that the rates may vary as time passes. Consumers must be given sufficient information to make judgments about how much time they wish to spend listening to a pay-per-call service and how much money they want to spend for it. Accordingly, the Commission proposes a new provision [308.4(a)(1)(iii)(B)] to specify the cost disclosures to be made in instances where charges vary according to the amount of time the caller is on the telephone or to other factors unrelated to

---

[185] 63 FR at 25002-04.

[186] Original Section 308.3(e) (Prohibition on advertising to children) appeared adjacent to these provisions in the original Rule. However, this Section is not a substantive disclosure requirement for pay-per-call advertisements. Instead, it implements TDDRA's mandate to prohibit most pay-per-call advertisements to children under 12 (15 U.S.C. 5711(a)(2)(C)). This provision has been incorporated in the proposed Rule in Section 308.5 (Advertising to children prohibited).

[187] *See, e.g.*, ISA at 22; PMAA at 10-12; TSIA at 17-18.

options chosen by the caller. The Commission intends for these situations to be encompassed by the term "variable *time* rate basis" (emphasis added).

Section 308.6 Misrepresentation of Cost Prohibited.

Proposed Section 308.6(a) is a new provision that specifies that it a deceptive practice for a vendor to misrepresent the cost of a pay-per-call service. In many respects, this deceptive practice is already prohibited by the original Rule: the original Rule requires cost disclosures[188] and prohibits the vendor from making representations in advertising that are "contrary to, inconsistent with, or in mitigation of" the cost and other required disclosures.[189] Nevertheless, the Commission believes that the importance of the disclosure of cost warrants a separate provision explicitly prohibiting this type of misrepresentation. Importantly, unlike existing Rule provisions, proposed Section 308.6(a) will not only address misrepresentations of cost that appear in advertising, but it will also address misrepresentations that occur during the pay-per-call transaction itself. For example, proposed Section 308.6 will address situations where the recorded or live audiotext program misleads a caller into staying on the line by misrepresenting that charges on the pay-per-call service have stopped.

The Commission continues to believe, as it did when the original Rule was published, that callers should be left with no doubt as to when they must hang up to avoid being charged for the call.[190] The original Rule requires a signal or tone at the end of the free preamble[191] or after any free time following the preamble.[192] Proposed Section 308.6(b) makes clear that if *any* portion of a telephone call is free, regardless of where it occurs in the program, the vendor shall provide a clearly discernible signal or tone indicating the end of the free time. Several workshop participants indicated that some pay-per-call services would experience technical difficulties in

---

[188] 16 CFR 308.3(b).

[189] 16 CFR 308.3(a)(5).

[190] This is especially important, given that the advertisements of some providers obscure the amount of "free" time a consumer will receive. For instance, Commission staff has observed some deceptive advertisements promising "10 free minutes," when in reality the caller will not receive all of these free minutes in one call -- the caller might receive only two free minutes in five different calls to the service. A caller who failed to read the fine print may believe it is safe to stay on the telephone line for ten minutes before charges accrued. The requirement of a signal or tone clearly indicating the end of the free time will be an important tool in curbing the harm to consumers from this type of advertising.

[191] 16 CFR 308.5(a)(3) and (b).

[192] *See* December 18, 1996, opinion letter from Eileen Harrington, Associate Director, Division of Marketing Practices, Federal Trade Commission, to Barry J. Cutler, Esq., McCutcheon, Doyle, Brown & Enerson. (This letter is appended to several comments. *See, e.g.,* Exhibit 3 of AT&T comment or Appendix H of ISA comment.)

inserting a tone at the end of the free period of time.[193] Other participants stated their belief that the original Rule did not require a tone at the end of the free portion of the call and that it was not necessary because consumers could watch their clocks and know when the free time expired.[194] Similar opinions were expressed in several of the written comments.[195] Conversely, one written comment specifically supported a requirement for a tone at the end of the free time to alert consumers to the fact that the free portion of the call was coming to an end.[196] That sentiment was echoed at the workshop by law enforcement officials who had received complaints from consumers who had actually timed calls themselves to stay within the "free" time but were charged anyway.[197] Proposed Section 308.6(b) would ensure that callers receive adequate notice of when charges begin, regardless of where in the program the free time is offered.

Section 308.7 Other Advertising Restrictions.

Section 308.7 of the proposed Rule incorporates several sections of the original Rule that deal with advertising restrictions and adds three new subsections.

Use of electronic tones and referral to toll-free numbers. The proposed Rule retains the prohibition in the original Rule against using electronic tones in advertising.[198] It also retains the original prohibition against referring to toll-free telephone numbers in an advertisement if the toll-free number is used in a manner that violates the prohibitions in proposed Section 308.13.[199]

Disclosures in telephone message. The original Rule required any telephone message that solicits calls to a pay-per-call service to disclose the cost of the call in a slow and deliberate manner and in a reasonably understandable volume.[200] Section 308.7(b) of the proposed Rule retains that requirement and clarifies that the term "telephone message" includes telephone

---

[193] Tr. at 522-25.

[194] Tr. at 528-29.

[195] PMAA at 9-12; TSIA at 17-18; ISA at 20-23.

[196] AT&T at 16-17.

[197] Tr. at 532.

[198] 16 CFR 308.3(g). The Commission believes this provision will play an important role in stopping scam artists from using the "modem hijacking" techniques that allegedly formed the basis of the scheme targeted in the Commission's complaint in *FTC v. Audiotex Connection*. Internet advertisements that "emit electronic tones" via a modem and cause such modems to disconnect and redial a pay-per-call service will violate this provision.

[199] 16 CFR 308.3(i).

[200] 16 CFR 308.3(h).

messages conveyed during calls placed by a consumer, as well as those conveyed during calls placed by the vendor or its agent. The Commission added this clarifying language in order to ensure that consumers receive the necessary disclosures regardless of who places the telephone call and regardless of whether the message the consumer receives is the result of an inbound or an outbound call.

Disclosures in facsimile message. New Section 308.7(c) of the proposed Rule clarifies that any facsimile message soliciting calls to a pay-per-call service must include all disclosures required by the Rule. Since the original Rule was promulgated in 1993, consumers have had increased access to facsimile machines at work and in the home -- either as stand-alone machines or as part of a personal computer system. The Commission has received complaints from consumers regarding instances where consumers have received deceptive facsimiles soliciting calls to expensive international audiotext services.[201] Vendors who solicit calls to pay-per-call services by using this technology should be governed by the same disclosure requirements as those providers who advertise in other printed media. Therefore, this proposed section clarifies that pay-per-call service information transmitted to consumers via facsimile must make all the relevant disclosures required by the Rule, and that such disclosures must be provided in the manner required for print advertisements in proposed Sections 308.3 and 308.4(a)(2)(ii).

FCC regulations ban *unsolicited* facsimile advertisements.[202] The FTC's proposed Rule should not be read to permit unsolicited facsimile messages or any other practice that would be in violation of the FCC's rules. Therefore, Section 308.7(f) states that the FTC's proposed Rule should not be construed to permit any conduct or practice that the FCC otherwise has prohibited.

Use of pagers to solicit calls. New Section 308.7(d) of the proposed Rule clarifies that any beeper or pager message that solicits calls to a pay-per-call service must include all disclosures required by the Rule. The practice of soliciting calls in this manner has been the subject of numerous complaints over the past several years.[203] In some instances, consumers report receiving a page from a pay-per-call service that simply listed an area code and seven-digit number as the return number to call. The number flashed on the pager did not use a 900- or 976-number dialing pattern and thus could not be identified by the consumer as an audiotext service. Absent any explanation for the call, consumers reasonably assume that such pages indicate an urgent call from someone known personally or professionally. Upon dialing the number given on the pager and after later receiving a bill containing an expensive charge for the call, however, the consumer discovers that he or she has called an international audiotext service. Several

---

[201] *See, e.g.*, "Phone, E-Mail & Pager Messages May Signal Costly Scams," *FTC Alert* (Dec. 1996).

[202] 47 CFR 64.1200(a)(3).

[203] "Sexy Calls are a Headache for Pager Users," *Memphis (TN) Commercial Appeal,* (March 2, 1995) p. 14-1. *See also,* "Phone, E-Mail & Pager Messages May Signal Costly Scams," *FTC Alert* (Dec. 1996).

commenters urged the Commission to design particular rules to prevent this practice and to prohibit all unsolicited messages left on pagers.[204] One commenter urged the Commission to prohibit more narrowly unsolicited pay-per-call advertisements on pagers.[205]

Given current pager technology, in all likelihood it is not possible for most pager solicitations to comply with the Rule's advertising disclosure requirements. Nevertheless, the Commission is not inclined to prohibit completely this method of advertising so long as such advertisements are not deceptive. Therefore, proposed Section 308.7(d) makes it clear that pager messages soliciting calls to a pay-per-call service will be treated like any other advertisement and thus must contain all relevant advertising disclosures required by the Rule. Vendors using this method of promoting their pay-per-call services are responsible for ensuring that all required disclosures are *actually displayed* by the consumer's beeper or pager; it is not sufficient to merely transmit this information with the hope that the recipient's beeper or pager is sophisticated enough to display all of the relevant disclosures.

FCC regulations prohibit the use of automatic dialers to call a number assigned to a paging service.[206] The FTC's proposed Rule should not be read to permit the use of automatic dialers to disseminate pay-per-call advertisements on beepers or pagers, or to permit any other practice that would be in violation of the FCC's rules. Therefore, Section 308.7(f) states that the FTC's proposed Rule should not be construed to permit any conduct or practice that the FCC otherwise has prohibited.

Section 308.9 Preamble Message.

Proposed Section 308.9 incorporates the provisions previously contained in Sections 308.5(a)-(e) of the original Rule, setting out the requirements relating to the introductory disclosure message (or "preamble") that must be provided without charge to callers to a pay-per-call service. The Commission proposes two substantive changes to this section. First, the proposed Rule requires specific disclosures for services billed on a "variable time rate basis." Second, the proposed Rule adjusts the "nominal cost" exemption to the preamble requirement.

Variable option versus variable time rate basis. The proposed provision retains most of the language from the original provision, although the Commission added clarifying language to two of the subsections. Proposed Section 308.9(a)(2)(iii) details the manner in which the cost disclosure must be given, depending on whether the call is billed on a variable option rate basis or on a variable time rate basis. These changes parallel the proposed changes for disclosures in

[204] SW at 3; NCL at 5.

[205] NCL at 5.

[206] 47 CFR 64.1200(a)(1)(iii).

advertisements in proposed Section 308.4(a)(1)(iii). As in proposed Section 308.4(a)(1)(iii), the preamble cost disclosure for calls billed on a variable option rate basis are the same as those in the original Rule. In those instances where the call is billed on a variable time rate basis, however, the Commission has proposed that the preamble must state the cost of each different portion of the call (*e.g.*, "The first five minutes are $5.99 per minute; thereafter, you will be charged $3.99 per minute").[207]

Nominal cost calls. Currently, the Rule allows a vendor to provide a pay-per-call service without a free preamble if the entire cost of the call is $2.00 or less.[208] The comments suggest that this figure may be too low to encourage vendors to provide these low cost services to consumers.[209] Section 308.9(c) of the proposed Rule thus raises the maximum charge for a "nominal cost" call to $3.00.

Parental permission advisory. Both TDDRA[210] and the original Rule[211] require the preamble to state that anyone under the age of 18 must have the permission of a parent or legal guardian in order to call. Numerous commenters from industry urged that the Commission recommend to Congress that TDDRA be amended to change the parental consent requirement to reduce consumer confusion and to discourage minors from accessing adult-oriented material.[212]

To discourage minors from calling their services, some information providers prefer that the preamble present a stronger message -- *i.e.*, that no one under 18 may place the call and that anyone under that age must hang up. The Commission agrees that such a statement is stronger than the warning required by the statutory language. Because it is stronger than the required warning, the statement subsumes the mandated statutory language. For this reason, the Commission believes that such statements would comply with the requirement for a parental consent disclosure.[213]

---

[207] Proposed Section 308.9(a)(1)(iii)(B).

[208] 16 CFR 308.5(c).

[209] ISA at 26 ("a review of approximately 40,000 current 900 number applications revealed that only 725 of the these applications (many of which involved polling) were priced at $2.00 or below. The ISA expects, that if the FTC increased the threshold to $3.00, more [vendors] would consider offering services at or about $3.00 per call. As a result, the number of low-priced services available to the public should increase.").

[210] 15 U.S.C. 5711(a)(1)(E) and 5711(a)(2)(A)(iv).

[211] 16 CFR 308.5(a)(4).

[212] *See, e.g.*, TPI at 4-5; ISA at 23-24; PMAA at 12-13; Tr. at 190-91 and 550-53.

[213] This statement is intended to supersede the position set out in the FTC staff opinion letter,
(continued...)

Section 308.10 Deceptive Billing Practices.

Section 308.10(a) -- Deceptive billing for services in violation of the Rule. This section of the proposed Rule replaces the "billing limitations" provision contained in Section 308.5(f) of the original Rule, which: (1) prohibited vendors from billing consumers in excess of the amount stated in the preamble for those services; and (2) prohibited billing for any services provided in violation of any section of the Rule. Proposed Section 308.10(a) treats each of these two prohibitions in separate subparagraphs and, for greater clarity and precision, substitutes the phrase "collect or attempt to collect" for the original phrase, "billing consumers." This proposed modification is meant to ensure that the Rule protects not only those consumers who have already paid their bill, but also those who have not yet paid but who have received a bill containing a charge for services that violate the Rule. In addition, the proposed provision would prohibit a vendor from engaging in these collection activities either "directly or indirectly." This is meant to clarify that the proposed Rule does not permit a vendor or service bureau to evade this provision by filtering the charges through a third party, such as a billing aggregator.

Finally, proposed Section 308.10(a) reformulates the prohibitions of 308.5(f) of the original Rule, specifying that they are deceptive practices. Attempting to collect charges for services that violate the Rule is a deceptive practice because the bills received by the consumer falsely indicate that the consumer must pay for these services when, in fact, the consumer is not legally obligated to do so. These are material misrepresentations that are likely to mislead reasonable consumers. Proposed Section 308.10(a) prohibits this deceptive practice, and has been re-titled to clarify the purpose of the provision.

Section 308.10(b) -- Deceptive billing for time-based charges after disconnection by the caller. Section 308.5(g) of the original Rule required the provider of pay-per-call services to "stop the assessment of time-based charges immediately upon disconnection by the caller." Section 308.10(b) of the proposed Rule contains this same provision and reformulates it to specify that this constitutes a deceptive practice. Charging a consumer for more time than the consumer actually used is appropriately designated to be a deceptive practice. Vendors are in the best position to accurately measure the amount of time a consumer spends using a pay-per-call service. Charging a consumer for more than this time misrepresents the amount of time a consumer spent using the service, and is likely to mislead reasonable consumers into paying for more time on the service than they actually used. Thus, the practice of charging a consumer for time-based charges after a consumer has hung up the telephone is a deceptive practice.

In the Statement of Basis and Purpose accompanying the original Rule, the Commission recognized that "time-sensitive billing is accomplished in one-minute increments, and that any

---

[213](...continued)
dated May 17, 1994, from Heather L. McDowell, staff attorney, Federal Trade Commission, to William W. Burrington of the Interactive Services Association.

portion of a minute will be billed as full time."[214] The Commission also stated then that billing in such a manner would "not be considered a violation of this provision." In the Rule review, the Commission asked whether billing in fractions of minutes was now possible.[215] Comments revealed that fractional minute billing is now possible and is accomplished by some providers.[216] Although several commenters requested that they be permitted to use business discretion when choosing whether or not to use one-minute billing or to implement fractional minute billing, the Rule as mandated by Congress does not allow for such discretion. Title II of TDDRA requires that the Commission promulgate rules requiring providers of pay-per-call services to "stop the assessment of time-based charges *immediately* upon disconnection by the caller."[217] Based on the current information contained in the record, the Commission believes that technology has made it possible to bill in increments smaller than one minute.[218] Thus, under the proposed Rule, billing in one-minute increments will no longer be acceptable.

Section 308.12 Prohibition Concerning Toll Charges.

As discussed, *supra*, the Commission proposes extending the definition of "pay-per-call services" to include all audiotext services, regardless of the dialing pattern used to access the service.[219] The proposed definition would include many services offered over international or other long-distance numbers. By expanding the definition to cover these services, the Commission intends that the Rule should apply equally to all providers of audiotext, regardless of the dialing pattern used to access those services. The proposed Rule does *not* require that pay-per-call services be offered only over 900 numbers; rather, the Rule requires that, regardless of the telephone number used to access a service, the vendor and the service bureau must provide the service in a manner that complies with the Rule.

There was considerable discussion at the workshop relating to the issue of whether many of the basic consumer protections required by the Rule are technologically available in the international audiotext context.[220] In written comments, one commenter pointed out that international audiotext services could not comply with the Rule's cost disclosure requirements

---

[214] 58 FR 42387 (August 9, 1993).

[215] 62 FR 11754 (March 12, 1997).

[216] AT&T at 14; US WEST at 6-7.

[217] 15 U.S.C. 5711(a)(2)(D). [Emphasis added].

[218] The Commission solicits comment on this determination.

[219] Excluding calls resulting in only *de minimis* payments to information or entertainment providers, presubscription agreement services, calls utilizing telecommunications services for the deaf, and tariffed directory services provided by a common carrier. Proposed Sections 308.2(g)(2)-(3).

[220] Tr. at 393-460.

because vendors cannot determine this information in advance.[221] Several participants suggested that free preambles could not be inserted in international audiotext services because the international toll charges begin immediately upon connection, and because exact cost information could not be provided in the advertising or in a preamble due to the multitude of factors that affect the cost of an international telephone call (*e.g.,* the caller's carrier, calling plan, time of day called, origin of call).[222] Several LECs that bill for pay-per-call services indicated that currently it is impossible to ensure that calls to international audiotext services appear on a separate section of the telephone bill, as required by the original Rule,[223] because there is no identifiable dialing pattern associated with international audiotext services.[224] In addition to these important protections which are guaranteed by Titles II and III of TDDRA, international audiotext services, as a discrete category, cannot be blocked under Title I of TDDRA; *i.e.,* consumers can choose to block calls to all international telephone numbers or none at all, but cannot block calls only to selected international numbers that access audiotext services.[225] Moreover, a block on international dialing will not block calls to the Caribbean countries where many of these services terminate, because those countries are part of the North American Numbering Plan.[226]

These apparent technological difficulties in applying the Rule's consumer protections to international audiotext services prompted some commenters to suggest that, if the Commission were to extend the definition of pay-per-call services to cover international audiotext services, then the Commission should exempt these services from having to comply fully with the Rule.[227] On the other hand, one consumer organization condemned the notion that businesses that choose to offer audio information and entertainment services via international dialing patterns should be permitted to do so without providing all of the consumer protections contemplated by TDDRA.[228]

---

[221] ISA at 27.

[222] TSIA at 20-21; Tr. at 345, 393.

[223] 16 CFR 308.5(j)(1).

[224] Tr. at 440-41.

[225] *See, e.g.,* ALLIANCE at 2-3.

[226] Tr. at 432.

[227] ISA at 27.

[228] Tr. at 418 (NCL: "What I am really hearing is that it is probably technically feasible to give consumers the same types of protections but it is not currently economically feasible, but nobody is forcing information providers to use international numbers to provide their services. That's a choice that they are consciously making. We're being asked essentially to countenance this choice to use these numbers and to not give consumers the same protections that we felt so strongly they were entitled to with 900 numbers, because it would be too expensive for the companies to do so, resulting in what -- what we have seen as

(continued...)

Several commenters and participants supported the idea of requiring international pay-per-call services to be offered through 900 numbers, so that all of the consumer protections required by TDDRA and the Rule could be applied to such services.[229]

Based on the record and on the Commission's enforcement experience,[230] the Commission believes that the practice of disguising audiotext charges as long-distance or other telephone toll charges is inherently inconsistent with the protections set forth by Congress in Titles II and III of TDDRA. This is true for several reasons. First, billing statements containing these charges do not accurately identify the charges, nor do they meet the Rule's requirement in Section 308.5(j)(1)[231] that the charges be displayed in a portion of the bill that is "identified as not being related to local and long-distance telephone charges."

Second, international audiotext services cannot accurately disclose the costs callers will incur when they access the service.[232] It is insufficient to disclose that "long-distance rates apply"[233] or even that the rates are much higher than rates to some of the more familiar international destinations. TDDRA mandated that pay-per-call services disclose in advertising "the total cost or the cost per minute."[234]

Third, according to the discussion at the workshop, current technology does not allow international audiotext to operate in such a way as to provide two of the other important protections intended by TDDRA: (1) a free preamble message that provides the caller with cost disclosures and the opportunity to hang up without incurring a charge; and (2) the ability to block access to these services without blocking access to other, non-audiotext, international numbers.[235]

---

[228](...continued)
tremendous harm, economic harm, to consumers.")

[229] SNET at 2; SW at 2; AT&T at 29-30; Tr. at 344, 369.

[230] *See, e.g., FTC v. Daniel B. Lubell*, No. 3-96-CV-8200 (S.D. Iowa, filed Dec. 17, 1996) and *FTC v. Interactive Audiotext Services, Inc.*, No. 98-3049 CBM (C.D. Calif., filed April 22, 1998).

[231] This provision is found in 308.18(a) of the proposed Rule.

[232] *See, e.g.*, ISA at 27; ITA at 11-12.

[233] *See, e.g., Interactive Audiotext Services* and *Daniel B. Lubell*.

[234] 15 U.S.C. 5711(a)(1)(A) and (2)(A)(ii).

[235] Tr. at 429-32. There seemed to be some disagreement between at least one of the common carriers and the international audiotext providers as to whether free preambles could be provided at the beginning of international audiotext services. The MCI representative suggested that international services could be offered via a 900 number and that would enable a free preamble to be provided. Tr. at 345-46. In
(continued...)

Fourth, consumers who receive charges for international pay-per-call are not able to exercise their dispute resolution and other rights guaranteed by TDDRA. Long-distance toll charges are expressly excluded from the statutory definition of "telephone-billed purchase" and thus are not covered by the billing and collection protections of Title III of TDDRA.[236] By concealing a pay-per-call charge within an international telephone toll charge, a vendor effectively evades the requirement to fulfill the consumers' dispute resolution rights under Title III. By relying on a billing and collection system for toll charges -- a system designed to guarantee payment to carriers for telecommunications transport services they provide -- international audiotext service providers remain safely insulated from injured consumers who have no means to pursue refunds for international audiotext charges that may be incurred as a result of deceptive practices.[237] Domestic long-distance carriers sometimes forgive these charges as a means of cultivating consumer goodwill, but in doing so they are willingly forfeiting payment for services rendered -- *i.e.*, long-distance transport of the call. Prohibiting vendors from disguising charges for information or entertainment services as toll charges will prevent consumers and common carriers from having to bear this loss.

In sum, the Commission believes that concealing a pay-per-call charge within a telephone toll charge is a practice that is inherently deceptive because it evades all of the important protections intended by TDDRA that are set out in the original Rule. The Commission intends for consumers to receive all the protections of Title II and Title III of TDDRA when using any pay-per-call service. The practice of hiding the cost of an audiotext call within the cost of a toll charge represents a serious threat to this goal.

Congress realized that it could not anticipate all provisions that might be necessary to prevent unfair, deceptive, or abusive practices that would undermine the rights afforded to consumers by TDDRA. Therefore, Section 5711(a)(2)(J) of TDDRA gave the Commission the flexibility to prescribe "such additional standards" as may be needed "to prevent abusive practices." Additionally, in Title II of TDDRA, Congress directed the Commission to include in its Rules provisions to:

---

[235](...continued)
any event, the FCC has no jurisdiction over *foreign* common carriers to require them to implement TDDRA-like blocking on their audiotext lines.

[236] 15 U.S.C. 5724(1)(B).

[237] Tr. at 443-61. *See also, e.g., Daniel B. Lubell*. In fact, one advertisement for an international audiotext service bureau boasts that vendors who use their services suffer "No Chargebacks!" *InfoText Magazine* (May/June 1996), front cover.

> prohibit unfair or deceptive acts or practices that evade such rules or undermine the rights provided to customers . . ., *including the use of alternative billing or other procedures* [emphasis added].[238]

Similarly, Title III of TDDRA directs the Commission to include provisions in its Rules to:

> prohibit unfair or deceptive acts or practices that evade such rules or undermine the rights provided to customers under [Title III of TDDRA].[239]

The record developed in this matter leaves little doubt that the practice of concealing a charge for audio information or entertainment services within a regulated toll charge has eroded the vital consumer protections provided by TDDRA.[240] Thus, proposed Section 308.12 provides that a vendor may not offer a pay-per-call service that would result in the consumer receiving a charge for a toll call. The most frequent example of this practice is international audiotext, where the consumer is billed for an international long-distance call and a portion of the long-distance charge paid by the consumer is shared with the provider of the audio information or entertainment.[241] In addition, the Commission is aware of other situations where consumers have been assessed "toll" charges that are, in fact, charges for information or entertainment programs, not transmission of telecommunications.[242]

Much of the language from Section 308.12 is taken from the TDDRA definition of "telephone-billed purchase." This will ensure that the proposed Rule will prohibit precisely those types of pay-per-call services that would not be covered by the dispute resolution protections guaranteed by Title III of TDDRA. The Commission believes that this is essential in order to

---

[238] 15 U.S.C. 5711(a)(4).

[239] 15 U.S.C. 5721(a)(1).

[240] As one commenter stated: "The financial impact of pay-per-call service abuses which occur over non-900 dialing patterns is staggering. Unsuspecting consumers run up huge amounts of debt, especially for international calls. Even authorized users are taken aback at the high dollar amounts charged to call these numbers." SW at 4.

[241] *See, e.g., Daniel B. Lubell*; *FTC v. Interactive Audiotext Services, Inc.*, No. 98-3049 CBM (C.D. Calif., filed April 22, 1998). *See also, Wisconsin v. Top Communications, Inc.*, No. 95 CV 200 (Cir. Ct., filed Jan. 10, 1997).

[242] *See* letter dated September 1, 1995, to Ronald J. Marlowe of Cohen, Berke, Bernstein, Brodie, Kondell & Laszlo, from John B. Muleta, Chief, Enforcement Division, Common Carrier Bureau, Federal Communications Commission, regarding the legality of providing information and entertainment programs through calls to long-distance numbers, which would be reached by dialing a 10-XXX number, a 500-number, or a 700-number. The FCC concluded that such arrangements would violate "both the letter and the spirit" of TDDRA and Section 228 of the Communications Act of 1934, as amended.

protect the rights afforded to consumers by TDDRA. Whenever a consumer is billed for pay-per-call services that result in a toll charge, the vendor of that pay-per-call service will have violated the proposed Rule.[243]

Section 308.13 Prohibitions Concerning Toll-Free Numbers.

Section 308.13 of the proposed Rule retains the provision in Section 308.5(i) of the original Rule prohibiting any person from using a toll-free number to provide access to or delivery of pay-per-call services. Sections 308.13(a) through (d) of the proposed Rule have been modified to clarify and emphasize that a consumer cannot be held responsible for charges resulting from a presubscription agreement into which he or she did not enter. In addition, Section 308.13(c) clarifies that no consumer may be charged for information or entertainment conveyed during a call to a toll-free number, unless that consumer has agreed to be charged for the information or entertainment by entering into a presubscription agreement that satisfies the requirements of the proposed Rule.

The Commission also proposes changing the language of 308.13(d) to provide that the prohibition applies to all incoming calls for which there is a charge, regardless of whether or not they are characterized as "collect" calls.[244] The Commission also proposes modifying the language of proposed Sections 308.13(c) and (d) to clarify that the prohibitions against charging for the content of an outbound or inbound call include *entertainment* services as well as information services. This will more effectively implement the Congressional mandate set forth in Title II of TDDRA that the Commission prohibit vendors "from providing pay-per-call services through an 800 number or other telephone number advertised or widely understood to be toll-free."[245] Since pay-per-call services include *entertainment* services in addition to information services, this section also should include entertainment services.

Section 308.14 Monthly or other recurring charges.

Section 308.14 of the proposed Rule prohibits a vendor from providing a pay-per-call service that results in a monthly or other recurring charge to a consumer, unless that vendor and consumer have entered into a presubscription agreement that authorizes such monthly or other recurring charges. The proposed Rule also states that the presubscription agreement must meet the requirements of § 308.2(j).

---

[243] In all likelihood, the service bureau will have violated this provision as well because the service bureau "should have known" of this violation.

[244] The Commission uses the term "collect call" in its most general sense to refer to any instance where a consumer incurs a charge by virtue of answering or accepting a telephone call.

[245] 15 U.S.C. 5711(a)(2)(F).

There was discussion at the workshop concerning unexpected and unauthorized recurring pay-per-call service charges on consumers' telephone bills, often in connection with "psychic" services.[246] Consumer organizations have received numerous complaints about such unauthorized recurring monthly charges.[247] Several participants described scenarios where a consumer had made a call to an 800 number and then unexpectedly began to incur monthly charges on his or her phone bill.[248] Several commenters and participants suggested that the problem of unauthorized recurring charges could best be remedied by requiring a presubscription agreement for all such charges.[249]

The Commission agrees that such an approach is appropriate. The Commission believes that, when compared to the one-time purchase of an audiotext program, the continuing business relationship between a provider and a caller that is involved in long-term membership would likely entail more terms and conditions (and more complicated terms and conditions), as well as higher long-term costs. A presubscription agreement, with its requirements for written terms and a PIN, is therefore a more appropriate, and likely a more effective, format for disclosures of this information about telephone-billed purchases that involve recurring charges than is a preamble. As noted above, in most cases, the Commission believes that a vendor is justified in assuming that a call from a consumer's telephone to a 900-number service (and ensuing charges for the service) have been authorized by that consumer, since the consumer could have easily blocked the call and avoided the charges. Such an assumption is not justified, however, where a single call to a pay-per-call service results in charges, not only for the initial call, but monthly or other recurring charges that cannot be blocked, even though the initial call could have been. A single call to a pay-per-call service from a consumer's home is simply not an adequate basis for recurring charges. Thus, under the proposed Rule, a presubscription agreement would be required for all such arrangements.

Section 308.16 Service Bureau Liability.

Proposed Section 308.16 retains the provision of the original Rule which held service bureaus liable where they knew or should have known of violations of the Rule by vendors of pay-per-call services. However, where the original Rule contemplates service bureau liability only in those instances where its "call processing facilities" are used,[250] the proposed Rule expands the circumstances under which a service bureau may be found to be indirectly liable -- *i.e.,* where a law-violating vendor has availed itself of *any* of the services offered by a service bureau. Since

[246] Tr. at 382-84, 498-505.

[247] *See, e.g.,* NCL at 4.

[248] Tr. at 498-500.

[249] NCL at 5; FLORIDA at 8; NAAG at 11; TSIA at 16-17; Tr. at 498.

[250] 16 CFR 308.5(l).

adoption of the original Rule, the capabilities and offerings of service bureaus has greatly expanded to include services such as voice processing, call processing, billing aggregation, call statistics (call and minute counts), call revenue arrangements (including revenue-sharing arrangements with common carriers), and pre-packaged pay-per-call investment opportunities ("turn-key operations").[251] Some of these newly-available service bureau functions (*e.g.*, acting as an aggregator for billing and collection) have given rise to many consumer complaints about cramming. Service bureaus that perform these functions are in the best position to know the practices of their client vendors because they contract directly with these vendors and because they are often the first point of contact for consumer complaints about charges for their client-vendors' services or products. While the original Rule contemplated that a service bureau would be liable only for violations of a vendor when the vendor of pay-per-call services had used its call processing facilities, experience has demonstrated there is no reason to distinguish those services from any others provided by service bureaus. Thus, the proposed Rule imposes liability on a service bureau regardless of the service it provides a rule-violating vendor, if the service bureau knew or should have known of the violation.[252]

SUBPART C -- PAY-PER-CALL SERVICES AND OTHER TELEPHONE-BILLED PURCHASES

Section 308.17 Express authorization required.

Section 308.17 of the proposed Rule specifies that the "express authorization of the person to be billed" is required for a telephone-billed purchase that is not blockable by TDDRA blocking. The proposed section also specifies that it is a deceptive practice and a Rule violation for any vendor, service bureau, or billing entity to collect or attempt to collect payment, directly or indirectly, for a telephone-billed purchase that was not TDDRA blockable, where the vendor, service bureau, or billing entity knew or should have known that the purchase was not authorized by the person from whom payment is being sought.

Requirement of authorization. Generally, purchases of goods or services require some form of authorization from the purchaser -- that is, the purchaser must indicate some intent or

---

[251] *See, e.g., FTC v. Hold Billing Services, Ltd.*, No. SA98CA0629 FB (W.D. Texas, filed July 19, 1998); *FTC v. International Telemedia Associates, Inc.*, No. 1-98-CV-1935 (N.D. Ga., filed July 10, 1998); and *FTC v. Interactive Audiotext Services, Inc.*, No. 98-3049 CBM (C.D. Calif., filed April 22, 1998). *See also*, "9th Annual Service Bureau Review," *InfoText Magazine* (July/August 1997).

[252] In some circumstances, a service bureau will always be in a position where it should know of a vendor's violation. For example, service bureaus should know if they are providing services to vendors of pay-per-call services that result in toll-charges. In such instances, a vendor will be in violation of proposed Section 308.12, and a service bureau providing services to that vendor will be liable under proposed Section 308.16 (Service bureau liability).

desire to make the purchase.[253] 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 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.[254]

Meaning of the term "express authorization." As explained in the discussion of the proposed new billing error in section 308.2(b)(10) of the proposed Rule, the Commission uses the term "express authorization" to indicate that the authorization contemplated by the proposed Rule cannot be inferred from the fact that a telephone call came from a specific telephone. "Express" authorization requires that the person to be billed for the service *actually* agree to make the purchase. For example, a tape recording of the person to be billed for the service being informed of the material terms of the agreement and then agreeing to make the purchase on those terms and pay the charge, would constitute evidence of express authorization.[255] Similarly, an agreement

---

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

[254] This was illustrated in two of the Commission's recent cases. *FTC v. Interactive Audiotext Services, Inc.*, No. 98-3049 CBM (C.D. Calif., filed April 22, 1998); and *FTC v. International Telemedia Associates, Inc.*, No. 1-98-CV-1935 (N.D. Ga., filed July 10, 1998). These situations can easily be distinguished from a consumer's obligation to pay for any tariffed charges for basic telecommunications service resulting from calls made from his or her telephone. First, basic telecommunications services are most often purchased from an entity with whom the consumer has a pre-existing and voluntary relationship. More importantly, consumers accept basic telecommunications services on terms and conditions that are regulated by the FCC, from carriers that are under a statutory duty to ensure that the services provided to consumers in a manner that is deemed "just and reasonable." 47 U.S.C. 201.

[255] It is important to reiterate that the recording must show that the *person to be billed for the*
(continued...)

containing a non-deceptive statement of material terms and conditions and signed by the person to be billed for the service, would be evidence of express authorization. If a valid PIN (as that term is defined by the proposed Rule), were used by the caller, after hearing all the material terms of the agreement, that would also constitute evidence of express authorization.[256]

Deceptive billing practice. A consumer is not legally obligated to pay charges for a telephone-billed purchase that falls within the Rule's enumerated billing errors. As discussed above, the proposed Rule would include within the term "billing error" charges arising from unauthorized, non-blockable telephone-billed purchases. Therefore, a representation to a consumer that he or she owes a charge for a telephone-billed purchase that was not, in fact, expressly authorized by that consumer is likely to mislead a reasonable consumer into paying a charge that is not collectible under the Rule. Proposed Section 308.17 thus prohibits vendors, service bureaus, or billing entities from collecting or attempting to collect charges that result from an unauthorized, non-blockable telephone-billed purchase, if the vendor, service bureau, or billing entity knew or should have known that such charges were not authorized by the person from whom payment is being sought.

Limited applicability -- "Knew or should have known." Proposed Section 308.17 applies where the vendor, service bureau, or billing entity "knew or should have known" that the charge was not authorized by the person from whom payment is being sought. This standard encompasses not only those circumstances where a vendor, service bureau, or billing entity had actual knowledge that a particular consumer was charged without authorization, but also circumstances where the vendor, service bureau, or billing entity should have known that numerous consumers were likely to have been billed without authorization.

The Commission believes that it is unnecessary to impose strict liability on the vendor, service bureau, or billing entity for each time an attempt is made to collect an unauthorized charge. The Commission believes that in most cases, the dispute resolution provisions of proposed Section 308.20 should supply an adequate remedy for consumers who receive these types of unauthorized charges on their telephone bills. Therefore, the Commission proposes limiting the applicability of this section to those circumstances where a vendor, service bureau, or billing entity "knew or should have known" of the lack of authorization.

Parties affected -- Vendors, service bureaus, and billing entities. Proposed Section 308.17 would apply to vendors and service bureaus because these entities are responsible for structuring and offering the underlying service, and they are in a position to know, with respect to any particular offering, whether sufficient steps were taken to ensure that express authorization

[255](...continued)
service authorized the charge.

[256] For example, if a LEC were to issue a secure PIN to subscribers, the LEC could require subscribers to use this PIN when ordering enhanced services.

has been obtained. Vendors are most directly in control of how their own transactions are conducted and the procedures used to secure authorization. They are in a position to know whether or not those procedures are effective in securing actual authorization from the person who will be billed for the service. Service bureaus are in a similarly strong position to demand (by contract or otherwise) that responsible procedures be used by the vendor to secure express authorization, and are in an excellent position to monitor vendors to ensure that adequate precautions are being followed.

In addition to covering vendors and service bureaus, proposed Section 308.17 also applies directly to billing entities.[257] These entities (in most cases LECs) play a unique and critical role in the billing of products and services on telephone bills. They are frequently in a position to know if the wrong consumer has been billed, because often they are the first point of contact for consumer complaints. Any billing entity that receives complaints from consumers who are being charged without their express authorization is on notice of the problem, and should take immediate action to stop the unlawful billing or risk violating proposed Section 308.17.[258]

Section 308.18 Disclosure Requirements for Billing Statements.

Section 308.18 of the proposed Rule is a revised version of Section 308.5(j) of the original Rule. The original provision applied only to billing statements for pay-per-call services, whereas the proposed revision requires disclosures to be placed on billing statements for all telephone-billed purchases.

Subsection 308.18(c) identifies those disclosures that will still be required only in billing statements for pay-per-call purchases. This subsection includes the substance of section 308.5(j)(2) of the original Rule, but also requires that the billing statement list the actual telephone number dialed for any pay-per-call purchase. Representatives from the LECs and other common carriers reported at the workshop that it was not uncommon for calls to be represented as having been made to one number when the consumer had actually dialed some other number.[259] The Commission's enforcement experience confirms this. This practice of misrepresenting on a billing statement the number purported to have been dialed (and giving rise to the charge) is likely to mislead the consumer in attempting to understand his or her bill. It is also confusing to the LEC

---

[257] Where a common carrier is also a billing entity, liability may already exist under Title I of TDDRA where the carrier knew or should have known of the violation. 47 U.S.C. 228(e)(1). Billing entity liability under proposed Section 308.17 would complement this Title I provision.

[258] The Commission supports the efforts of the LECs and the FCC in developing "best practices" guidelines to prevent cramming. Proposed Section 308.17 should work in complementary fashion to fight this harmful practice.

[259] Tr. at 159-62 (SW reported that companies had submitted charges for 900 numbers that were never dialed.). *See also,* Tr. at 203-05; 233-38 (PILGRIM reports that calling card calls and calls to 800 numbers are reported on consumers' billing statements as 700 numbers).

when it tries to identify a disputed call. The practice deprives consumers of material information about the actual nature of the charges allegedly owed.[260] Therefore, the Commission believes that it is necessary that a billing statement accurately reflect the telephone number dialed by the caller. This information, coupled with the date, time, and duration of the call, should be sufficient information for both the consumer and the LEC to identify a particular call in the event of a dispute.

Subsection 308.18(d) of the proposed Rule modifies the requirements of Section 308.5(j)(3) of the original Rule by expanding the provision to cover all telephone-billed purchases, not just pay-per-call purchases. The proposed provision retains the requirement that billing statements display a local or toll-free telephone number where consumers can obtain answers to questions and information about their billing rights and obligations in connection with telephone-billed purchases. The revised section also retains the requirement that consumers must be able to obtain the name and mailing address of the vendor by *calling that number*. In addition, the proposed Rule specifies that the consumer must be able to *readily* obtain this information when he or she calls the number listed on the statement.

Several commenters and participants in the workshop reported widespread complaints from consumers who were unable to obtain information from LECs or billing aggregators about charges or about the identity of the vendor.[261] In some instances (*e.g.*, international pay-per-call services), a consumer can only get the name of the foreign telephone company from his or her long-distance provider, but not the identity of the audiotext service provider with whom the foreign carrier splits the revenues collected from the consumer.[262] In some cases, consumers who call a listed customer service 800 number are unable to get through, and often give up in frustration or write to consumer or law enforcement agencies.

NAAG recommended that the bill list the name of the actual vendor so consumers can take a dispute directly to that party in the first instance instead of going through the LEC and/or the third-party billing and collection entity.[263] Industry representatives countered that many vendors do not have the capability to respond to routine billing inquiries; furthermore, industry

---

[260] For example, consumers who receive bills that do not accurately reflect the telephone number dialed will not be able to compare the charges on the bill to the charges disclosed in an advertisement soliciting calls to a specific telephone number.

[261] NAAG at 12-13; Tr. at 114-16, 173-74, 262-65. One of the NAAG representatives described the frustration consumers often feel when attempting to inquire about charges on their telephone bills in this way: "By the time consumers get to us . . . they are tremendously angry, and part of this anger comes from having to go through this maze to discover, if they can, who put the charges on the bill." Tr. at 173-174. The Commission's enforcement experience confirms this observation.

[262] Tr. at 115.

[263] NAAG at 13. *See also*, Tr. at 255, 263-64.

noted that there are limitations on the amount of information that can be printed on the bill.[264] In the alternative, NAAG recommended that the entity whose name and number appear on the bill must have ultimate authority for handling disputes and issuing refunds or credits.[265] In response, industry countered that billing and collection entities already have full authority to satisfactorily resolve any dispute.[266]

The Commission believes that it is important that billing entities and vendors be accountable to their customers. However, the Commission also is mindful that such protections must be balanced against the cost to industry. The Commission does not believe that it is necessary to list the name of the vendor on the bill, as long as the entity listed on the bill is the party with authority to answer questions and to resolve disputes, including authorizing a refund or credit.

Section 308.19 Access to information.

The proposed Rule retains the requirement from Section 308.6 of the original Rule that common carriers who provide telecommunications services to any provider of pay-per-call services must make available to the Commission, upon request, any records and financial information maintained by such carrier relating to the arrangements between the two entities. However, the proposed Rule expands that requirement to include records and financial information relating to arrangements with vendors of other telephone-billed goods or services, as well as to arrangements with service bureaus.

The rapid growth of telephone-billed purchases (other than pay-per-call), and the rapid growth of problems associated with such purchases has shown that there is no rationale for limiting this requirement as the original Rule did. Whenever a common carrier provides telecommunications services to a vendor that offers any type of telephone-billed goods or services (including pay-per-call), it should provide to the Commission, upon request, any records and financial information relating to its arrangements with those vendors. In addition, since the original Rule was promulgated, it has become clear to the Commission that, in most cases, the business arrangement exists between the common carrier and the service bureau, and not directly between the carrier and the vendor. Thus, on a practical level, a requirement limited to information regarding vendors will not result in meaningful information when, in many cases, the carrier will only possess the relevant information with respect to the service bureau.

---

[264] Tr. at 258-59.

[265] Tr. at 263-64.

[266] Tr. at 265.

Section 308.20 Dispute Resolution Procedures.

Section 308.20 of the proposed Rule is a revision of Section 308.7 of the original Rule, which was titled "Billing and collection for pay-per-call services." The proposed Rule changes the title to "Dispute Resolution Procedures" because the Commission believes this title more accurately reflects the substance of the section.[267] Although much of the language in the original section has been retained, the Commission has revised several provisions in this section to clarify the responsibilities of the parties, enhance consumer protections by closing loopholes, and increase the efficiency of the billing process, thus reducing the burden on industry.

TDDRA requires that the Commission impose requirements that are substantially similar to the requirements imposed under TILA and FCBA with respect to the resolution of credit disputes.[268] TDDRA also directs the Commission to consider the extent to which the regulations should diverge from the requirements of TILA and FCBA in order to protect consumers as well as be cost effective to billing entities.[269] The proposed Rule preserves, wherever feasible, the balance struck by the original Rule. However, as described in more detail, *infra*, there are a number of instances where the Commission now believes that some additional divergence from TILA and FCBA may be necessary to protect consumers.

Definitions. As discussed *supra*, the definitions contained in Section 308.7(a) of the original Rule have been moved to Section 308.2 of the proposed Rule and have been incorporated alphabetically into the other definitions.

Clarification of the 60-day time limit to initiate a billing review. In proposed Sections 308.20(a) and 308.20(m), the Commission has clarified the meaning of the time limit within which the consumer may initiate a billing review. The original Rule provided:

> A customer may initiate a billing review . . . by providing the billing entity with notice of a billing error *no later than 60 days* after . . . the first billing statement that contains [the charge]. (emphasis added) [308.7(b)]

Many industry members interpreted that provision to mean that the billing entity (generally the LEC) was prohibited from allowing any challenges to a bill containing charges for telephone-billed purchases after the 60-day period had ended.[270] Conversely, the LECs understood the provision to mean that they were required to give the consumer at least 60 days to dispute a

---

[267] Proposed Section 308.20 implements Title III of TDDRA, 15 U.S.C. 5721-5724.

[268] 15 U.S.C. 5721(a)(2).

[269] 15 U.S.C. 5721(d)(10).

[270] Tr. at 25, 44, 63-64, 271-78.

charge, but that they were not prohibited from giving the consumer more time.[271] The Commission did not intend that the original Rule require a billing entity to refuse to honor a dispute raised after 60 days. Rather, consumers must raise a dispute within 60 days in order to preserve their rights under this section, including the right to an investigation and protection against further collection activity while the dispute is under investigation.[272] In order to clarify this, the Commission has added an explanatory phrase at the beginning of proposed Sections 308.20(a) and (m) indicating that a consumer must initiate a billing review within 60 days of receiving the bill "in order to be guaranteed the protections provided by the Rule." This language, however, does not prohibit the LECs from honoring disputes (and providing refunds) raised *after* the 60-day period has expired.[273]

Facilitating the reporting of a billing error. Consumers should be able to report billing errors easily. The Commission does not intend that any consumer waive his or her right to invoke the dispute resolution protections guaranteed by the Rule simply because he or she used the wrong words in a billing error notice. Therefore, Section 308.20(a) of the proposed Rule modifies the language of original Section 308.7(b) to clarify the consumer's burden with respect to reporting a billing error. Under proposed Sections 308.20(a)(2) and (a)(3), a billing error notice need not indicate a belief that there is a "*billing error*" (as that term is defined by proposed Section 308.2(a)); rather, it need only indicate a belief that there is an error *of some kind*. The purpose of the consumer's notice is to alert the billing entity of a potential problem, *not* to fully assert a list of facts, which if true, would constitute a "billing error." Notices that would satisfy the proposed requirement include but are not limited to statements such as: "There is something wrong with my bill," "Nobody was at home that day," "I did not order these services," "I did not make these calls," "I do not know what these charges are for," "This is not what I paid for," or "These were supposed to be free."

After receiving a notice from the consumer indicating that there is some sort of problem or error with the billing statement, the billing entity then has the burden under proposed Section 308.20 to determine whether there was, in fact, a "billing error." Until it makes such a determination, a billing entity may not attempt to collect the disputed charges. It is the billing entity, not the consumer, who bears the responsibility of knowing the potential billing errors that may be involved in a given telephone-billed purchase. For example, if a billing entity has charged a customer for a "telephone-billed purchase . . . that would not have been avoided by that customer's election of blocking pursuant to 47 U.S.C. 228(c)" as described by proposed 308.2(b)(10), and the customer subsequently submits a billing error notice, the billing entity is

---

[271] Tr. at 49-50, 101-03.

[272] Tr. at 245, 248, 274-75.

[273] As discussed *infra*, the proposed Rule also imposes new restrictions on the billing entities (generally the LECs) who initially deal with consumers. These new restrictions are designed to address vendors' complaints that they experience difficulty obtaining timely customer information from LECs.

obligated to provide some supporting evidence that the customer being billed had "expressly authorized" that purchase in advance (*e.g.*, by the voice recording or signature of the person being billed, reliably indicating authorization to bill for a specified product or service).

Requirement that a reasonable investigation be conducted if collection attempted on disputed charge. Several commenters expressed concern that in many, if not most, circumstances where a consumer has submitted a billing error notice, no one (neither the billing entity, the vendor, nor the service bureau) provides supporting evidence to the consumer showing that a disputed charge is in fact valid.[274] NAAG stated that, in many instances, the vendor or its agent simply sends a form letter stating that the call originated from the consumer's phone number and, thus, the consumer must pay the charge.[275] The Commission believes that a consumer who disputes a telephone-billed purchase charge under the Rule should not have to pay that charge unless a billing entity conducts a reasonable investigation of the validity of the charge and determines that there was no billing error. The Commission also believes that the consumer who disputes the charge should be entitled to documentary evidence of the charge's validity, and a written explanation of the billing entity's conclusion that no billing error occurred. Section 308.20(f) of the proposed Rule requires that, once a customer has submitted a billing error notice to a billing entity, the customer need not pay the charge until a reasonable investigation of the charge has been conducted, and until the customer has received the written explanation and documentary evidence setting forth that no billing error has occurred.

Secondary collection activities by billing entities other than the one designated to receive and respond to billing errors. If a billing entity receiving the billing error notice decides to respond to that notice by forgiving the disputed charge, it has no further obligation to conduct a reasonable investigation. In these circumstances, the billing entity generally passes the charge back to the vendor, who often tries to collect on its own or through the services of some third party. Under the original Rule, only one billing entity was obligated to comply with the dispute resolution provisions of the Rule. This meant that these secondary collection efforts by later billing entities were not subject to the Rule's dispute resolution process -- the consumer who has raised a billing dispute may continue to be pursued for collection, but never have the right to receive evidence that a valid debt was owed.[276]

---

[274] Tr. at 149-50; SNET at 7; FLORIDA at 2-3, 11; SW at 3, 8-10.

[275] Tr. at 150. *See also*, *FTC v. Hold Billing Services, Ltd.*, No. SA98CA0629 FB (W.D. Texas, filed July 19, 1998); *FTC v. International Telemedia Associates, Inc.*, No. 1-98-CV-1935 (N.D. Ga., filed July 10, 1998); and *FTC v. Interactive Audiotext Services, Inc.*, No. 98-3049 CBM (C.D. Calif., filed April 22, 1998).

[276] This situation should be compared to the protections provided under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. 1692 *et seq.*, to a consumer who disputes a debt. Under the FDCPA, once the consumer notifies the debt collector that the debt is disputed, the debt collector must cease attempting to collect the debt until the debt collector obtains verification of the debt and sends a copy of the
(continued...)

In order to address this problem, the Commission proposes a modification of former Section 308.7(o). Proposed Section 308.20(n)(2) specifies that, once a billing entity has forgiven a disputed telephone-billed purchase charge, no billing entity may attempt to sustain charges for a telephone-billed purchase unless a reasonable investigation has been conducted and the consumer has received a written explanation of the charges and evidence of the debt. The proposed revision brings within the scope of the provision those situations involving multiple billing entities when a vendor (or its agent) attempts to collect after a LEC has forgiven a charge without providing any explanation.

The proposed revisions will prevent consumers from being subjected to secondary collection efforts without ever receiving any explanation or proof that the charges are valid. Although the proposal goes marginally further than the analogous requirements set out in TILA and FCBA, the Commission believes the revisions are appropriate. In several recent cases, the Commission has addressed the issue of vendors or billing entities attempting to collect charges from a consumer without providing any evidence that those charges were valid, other than the fact that the charges purportedly were accessed or received on the consumer's telephone line.[277]

Proposed section 308.20(f) prohibits collection activity by a billing entity once the charge has been disputed with *any* billing entity, regardless of whether the two entities are the same. This means that, where there are multiple billing entities, an entity should not attempt to collect a charge before verifying with the other entities that, if a billing error notice has been sent by the consumer, a reasonable investigation of the charge has been conducted.[278] If such verification is not possible, a billing entity should not engage in secondary collection activities unless it first conducts the reasonable investigation of the validity of the charge, and provides the written explanation to the consumer in accordance with the 308.20(c)(2) of the proposed Rule.

Scope of "reasonable investigation." The Commission proposes modifying original Section 308.7(d)(2) to remedy a somewhat awkward requirement of the original Rule. Under this section, a billing entity that received a billing error notice may either (i) correct the error and credit the customer's account, or (ii) conduct a reasonable investigation of the legitimacy of the charge, and transmit an explanation to the customer setting forth the reasons why the billing entity

---

[276](...continued)
verification to the consumer. 15 U.S.C. 1692g.

[277] In these cases, the Commission made clear that it is deceptive and unfair to misrepresent that a consumer is obligated to pay for services, when that consumer did not access or purchase those services or was not a party to any purported agreement to purchase such services. *Hold Billing Services*; *International Telemedia Associates;* and *Interactive Audiotext Services*.

[278] The proposed Rule should ensure that such verification is possible. Proposed Section 308.20(c)(3)(i) requires the billing entity that handled the initial dispute to "notify the appropriate providing carrier, vendor, or service bureau as applicable" of a decision to forgive a disputed charge.

has determined that no billing error has occurred "or that a different billing error occurred from that asserted" by the customer. Under a literal reading, this creates the bizarre result that a billing entity conducting a reasonable investigation would be required to articulate to a customer that a billing error did occur, but the billing entity would not be required to correct the error and credit the customer's account. This provision could be read to require the customer to once again transmit a billing error notice specifically listing the error cited by the billing entity, and then wait for the billing entity to correct the error and credit the account. In revising this Section, the Commission intends to make it clear that these additional steps are not required.

Under the proposed Rule, a billing entity is not obligated to tell the customer exactly what billing error did or did not occur. Instead, under proposed Section 308.20(c)(2), in response to a billing error notice, a billing entity may either (i) correct *any* billing error and credit the customer's account, or (ii) conduct a reasonable investigation into the legitimacy of the charge, and transmit a written explanation (including documentary evidence) that the charge is indeed valid (*i.e.*, that "*no* billing error" occurred). The effect of this change will be to clarify a billing entity's obligations under the Rule.

Finally, the proposed Rule specifies that a reasonable investigation and written explanation address every relevant billing error, and "address with particularity" the facts asserted by the customer in the billing error notice. These revisions are designed to clarify that billing entities must do more than merely send the customer a non-responsive form letter to reply to a billing error notice. A response to a billing error notice must provide evidence to the customer that the charge is valid (*i.e.*, that "no billing error" occurred). The statement cannot be sent to a customer automatically or by rote -- it must be preceded by a *bona fide* investigation to gather the information showing the validity of the charge. Under the proposed Rule, this investigation, where necessary, should include contacting the *customer* for further details in addition to contacting the vendor, service bureau, or providing carrier.

Limitation on the rebuttable presumption created by documentary records. The proposed Rule also amends the footnote previously found in Section 308.7(d)(2)(ii), now Section 308.20(c)(2)(ii) of the proposed Rule. The original footnote established a rebuttable presumption that goods or services were actually delivered if the billing entity produced documents showing the date on, and place to, which the goods or services were transmitted or delivered (*e.g.*, an ANI record). The Commission is aware that, in many instances, vendors are not allowing consumers the opportunity to rebut this presumption. If a consumer provides sufficient evidence to rebut the presumption that the provider's ANI records are valid, however, then the presumption must fall. The proposed Rule modifies the footnote to make this clear.

Additionally, the footnote lists a specific method by which consumers may rebut the presumption of ANI validity: a declaration signed under penalty of perjury.[279] For example, if a

[279] This proposed provision is comparable to the steps a card issuer may take in the credit card (continued...)

consumer disputes a charge for a telephone-billed purchase on the ground that a particular phone call was not made from his or her phone, and the billing entity submits ANI records showing that a call *was* placed to the disputed number from the consumer's telephone number on the date and at the time indicated, a rebuttable presumption is raised that the charge is valid. However, the consumer can rebut this presumption by submitting a declaration, signed under penalty of perjury, that the documentary information upon which the bill was based is not correct and that the call could not have been made from the consumer's phone. Although this declaration can rebut the presumption of validity of ANI, it may not be enough to prevent collection activity in the face of more reliable evidence -- *i.e.*, evidence showing more than merely "the date on, and the place to, which the goods or services were transmitted or delivered." If the vendor or service bureau can show *additional* reliable evidence of delivery of the goods or services (such as a true and accurate tape recording, a signature, or other evidence that the goods or services were actually delivered), then, depending on the facts of a given transaction, a billing entity's investigation might still conclude that no billing error occurred.

The revised footnote further adds that the Commission can rebut the presumption with evidence indicating that, in *numerous instances*, the goods or services were not actually transmitted or delivered. It is not necessary to show that each and every consumer did not receive the goods or services, but only that numerous consumers did not receive the goods or services. For example, the Commission may introduce evidence showing that, while ANI records may indicate that calls were placed from the phones of particular consumers, in fact, the calls could not have been placed from those phones because the phones had a 900-number block in place, or there was other compelling evidence that no one could have made the call from within the home.

New time limits within which the investigation must be conducted; modification of other time limits established in the original Rule. One of the major complaints from industry members has been the length of time it takes to learn from the LECs about chargebacks or refunds the LECs have granted.[280] TSIA maintained that businesses had been destroyed when "chargebacks came back that were a year, year and a half, and two years old."[281]

In order to address this problem, the Commission has proposed several modifications to Section 308.7 of the original Rule (now proposed Section 308.20). First, in proposed Section 308.20(c)(3), the time period within which a billing entity must conduct an investigation and either sustain or forgive a charge has been shortened from 90 to 60 days. In the event that the LEC forgives the charge or is otherwise unable to collect it, the shorter time frame will enable

---

[279](...continued)
context while conducting a reasonable investigation of a charge disputed on the basis of unauthorized use. 12 CFR Part 226, Supplement 1, § 12(b)-(3).

[280] *See, e.g.*, GORDON at 2; ISA at 10-12, 17-18; PMAA at 13; TPI at 5, 6; TSIA at 10-12; Tr. at 20, 25, 43-44, 68, 224-27.

[281] Tr. at 25.

vendors to receive more expeditiously the information they need to initiate collection on their own.

Second, in proposed Section 308.20(c)(3)(i), the Commission has added a new requirement that, within 30 days of determining *not* to sustain a charge, a billing entity (usually a LEC) must provide sufficient information to the vendor or service bureau to allow it to identify the customer account at issue. This provision addresses industry's complaint that when the LECs forgive charges, they do not provide the vendors and service bureaus with the timely information needed to initiate collection on their own.[282] This provision should be viewed in conjunction with the new language requiring that a "reasonable investigation" be conducted before a vendor or its agent can engage in secondary collection activities to collect an alleged debt. The Commission believes that consumers are entitled to an investigation and supporting evidence that a debt is valid. However, the Commission also believes that consumers must be held accountable for the valid debts they incur and that industry is entitled to attempt to collect such debts. Given this balance of interests, it seems fair to allow vendors and service bureaus the information they need to attempt their own collections, and to require that information be provided in a timely manner.

Finally, several commenters asked that the Commission take steps to remedy the current LEC practice of writing off a charge after a lengthy period of attempting to collect.[283] In some instances, a consumer may fail to provide notice of a billing error that the LEC can investigate; instead, the consumer, without explanation, simply withholds from his payment the amount of a particular charge. In the absence of a formal notice of a billing error from the consumer explaining the reason for non-payment, the LEC has no way to know whether payment is withheld because of a disputed charge, and thus continues to attempt to collect the debt. Apparently, after a lengthy period of time, the LEC may determine the debt to be uncollectible and charge the debt back to the vendor. In these instances, the vendor generally learns of the disputed charge only after it is too late to undertake its own collection effort. To remedy this situation, the Commission has proposed adding a new subsection 308.20(n)(4) requiring that a billing entity (usually the LEC) shall notify the vendor or service bureau of an unpaid charge no later than 120 days after the original bill was sent to the consumer, if a consumer has neither paid such charges nor initiated a billing error review within the allotted 60-day time period. The billing entity must provide the vendor or service bureau with notice of the failure to pay, the amount of the unpaid charge, and sufficient information to identify the customer's account.

Revision of the Notice of Billing Error Rights to simplify the language and to clarify the meaning of the 60-day time limit by which the consumer must give notice. A number of commenters asked the Commission to revise the wording of the Notice of Billing Error Rights set out in Section 308.7(n) of the original Rule to enhance consumers' understanding that they have the obligation to pay for any valid pay-per-call charges and that failing to pay valid charges may

---

[282] PILGRIM - FCC comment at 6-7, 9; PILGRIM - FCC Reply comments at 20.

[283] GORDON at 2; TSIA at 10-11; Tr. at 25, 43-44, 63-64.

subject them to debt collection efforts.[284] Some commenters maintained that consumers have abused their rights under the Rule to dispute billing errors and have refused to pay valid charges.[285]

The Commission agrees that it is important for consumers to understand both their rights *and* their obligations when they are billed for pay-per-call services or telephone-billed purchases. In order to further consumers' understanding of their rights and obligations, the proposed Rule simplifies the requirements regarding the notice of customers' billing rights. Under Section 308.20(m) of the proposed Rule, such a notice of billing rights must be provided with *each* billing statement that contains charges for a pay-per-call service or for a telephone-billed purchase; the annual notice option is no longer permitted.[286] If each billing statement that contains charges for a telephone-billed purchase also contains a notice of billing error rights, customers will be assured of timely notice of their rights and obligations in the event that a billing dispute arises. The proposed Rule retains the requirements that the notice set forth the procedure the customer must follow to notify the billing entity of a billing error, that the notice must disclose the customer's right to withhold payment of any disputed amount, and that any action to collect that amount will be suspended pending the billing review. The proposed Rule would add the disclosure that, in order to be guaranteed the protections under the dispute resolution provisions of the Rule, the consumer must give notice of a billing error dispute within 60 days.

Two commenters suggested language for the notice that would advise the consumer of the consequences that may occur if the consumer fails to pay a valid charge, even if the charge was forgiven by the LEC.[287] In the original Rule, the Commission declined to mandate specific language for the Notice of Billing Error Rights in order to give the billing entity the flexibility to fashion its own notice and to arrange and disclose the material information in a more cost-effective manner.[288] The Commission believes this approach is still appropriate. As the Commission explained in the Statement of Basis and Purpose to the original Rule, the Rule does not preclude a billing entity from including additional information on the notice, as long as it does not confuse or mislead the consumer or obscure or detract from the required disclosures, which must appear separately and above any other information.[289] The Commission still believes that vendors, service bureaus, and billing entities are in the best position to negotiate among

---

[284] GORDON at 2-3; ISA at 6-9; PMAA at 3, 13; TSIA at 12-13; Tr. at 27-28, 68, 126-45.

[285] AT&T at 20-21; Tr. at 8, 25-26, 128.

[286] The Commission is not aware of many instances where the annual statement format was being used.

[287] ISA at 7-9; GORDON at 2-3.

[288] 58 FR 42364, 42397 (August 9, 1993).

[289] 58 FR 42364, 42398 (August 9, 1993).

themselves to provide any additional information to consumers regarding their liability for telephone-billed purchases. Several workshop participants agreed that the Rule need not be changed to accommodate specific language, and that it would be sufficient to provide additional sample language in the Commission's Compliance Guides.[290]

Direct liability under the dispute resolution requirement extended to service bureaus in addition to vendors, providing carriers, and billing entities. Under the original Rule, billing entities, providing carriers, and vendors are all directly liable for compliance with the requirements of Section 308.20. Where appropriate, the proposed Rule adds 'service bureau' to the parties who will be held directly liable for compliance with the provisions of this section. Thus, under the proposed Rule, service bureaus are directly liable for compliance with the following provisions of Section 308.20: 308.20(f) - Limitation on collection action; 308.20(g) - Prohibition on charges for initiating billing review; and 308.20(h)(1) - Prohibition on adverse credit reports.

The proposed Rule extends direct liability to service bureaus in these instances because the service bureau often is the entity handling the dispute resolution process, as well as the party with whom the billing entity has a contract. Additionally, as aggregators or as entities developing "turn-key" pay-per-call service operations, service bureaus are often in the best position to make sure that the services are offered and provided in a non-deceptive manner that complies with the Rule.

Clarification of the forfeiture of right to collect. Section 308.7(j) of the original Rule provided that any billing entity, vendor, or service bureau that failed to comply with the requirements of the dispute resolution section would forfeit the right to collect any amount the customer has disputed in a notice of a billing error. Proposed Section 308.20(i) adds language to clarify that this forfeiture relates only to charges that are legitimate charges that the entity would otherwise be entitled to collect. If an entity does not comply with proposed Section 308.20, it must forgive even legitimate charges. However, this provision does *not* limit liability to provide refunds or credits for charges that are in error, nor does it affect liability for civil penalties for violations of proposed Section 308.20, or for violations of other provisions of the Rule.

Requirement for identifying information to be disclosed at time of billing. Section 308.20(b) of the proposed Rule clarifies and expands the requirements in current section 308.7(c) to disclose certain identifying information to the customer on the billing statement or in other material accompanying the billing statement. In addition to disclosing the method by which the customer can provide a billing error notice (required by the current Rule), under the revised provision, the billing statement must also disclose the name of the billing entity designated to receive and respond to billing error notices and how to contact that entity. For example, if the customer must submit written notice of a billing error, the disclosure must include the mailing address to which the notice should be sent; if the customer may submit notice orally, the disclosure must contain a local or toll-free number that is *readily* available for customers to call in

[290] Tr. at 141-42.

the event of a billing error. The billing entity and vendor may agree to a single telephone number to satisfy both the requirements of this section as well as the requirements of proposed Section 308.18(d).

This section is intended to ensure that consumers are able to reach a responsible party when they submit a billing error notice, and has been included to address the problems consumers reportedly encounter when they attempt to assert a billing error. Consumer groups at the workshop described the frustration consumers often feel when they attempt to inquire about charges on their telephone bills. Instead of reaching a helpful customer service representative, they often find themselves navigating a maze to find the entity to whom the billing error should be reported. Consumers reportedly get passed from one entity to another, are placed on hold for long periods of time, or the telephone numbers they are told to call are disconnected, perpetually busy, or are not answered at all.[291] Under the proposed Rule, these types of practices will constitute a violation of Section 308.20(b).

Clarification that all billing entities must comply with the Rule's requirements. Where a telephone-billed purchase involves more than one billing entity, section 308.20(n)(1) of the proposed Rule requires them to agree which one of them will be responsible for receiving and responding to billing errors. Furthermore, proposed Section 308.20(b) requires that this designation be clearly and conspicuously disclosed on the billing statement. This will ensure that unscrupulous billing entities will not pass responsibility from one to another, leaving a consumer without an effective means of exercising his or her dispute resolution rights. Furthermore, the proposed Rule modifies the language of Section 308.7(o)(2) of the original Rule, which allowed multiple billing entities to agree among themselves which billing entity was responsible for compliance with the Rule. The Commission believes that *all* billing entities are under an obligation to comply with the proposed Rule's requirements, regardless of which entity is designated to give disclosures and respond to billing error notices. Thus, each billing entity that attempts to sustain a charge for a telephone-billed purchase must comply with the requirement that it conduct a reasonable investigation and provide proof of the debt before collection attempts are made.

Deceptive statements to billing entities by vendors, service bureaus, and providing carriers. Section 308.20(p) of the proposed Rule specifies that it is a deceptive act or practice for any vendor, service bureau, or providing carrier to provide false or misleading information to a billing entity conducting an investigation of a disputed telephone-billed purchase charge. One of the cornerstones of the Rule is that once a consumer disputes the validity of a charge, a billing entity cannot attempt to collect the disputed charge until an investigation of the validity of the charge has been conducted and the consumer has been provided documentary evidence of the charge, and an explanation of why the investigating billing entity has determined that no billing error has occurred. The proposed Rule provides that, in conducting the investigation, the billing entity should contact (where appropriate) the vendor, service bureau, or providing carrier. False

[291] ISA at A4; NAAG at 12-13; Tr. at 114-16, 173-74, 262-65.

or misleading statements to the investigating billing entity by the vendor, service bureau, or providing carrier would undermine the investigation of a disputed charge, and would be likely to mislead reasonable consumers into paying money that is not actually owed. The proposed Rule will prohibit such false or misleading statements.

SUBPART D -- GENERAL PROVISIONS

Section 308.22 Actions by States.

TDDRA grants the States authority to enforce the rules that the Commission promulgates pursuant to 15 U.S.C. 5711. The original Rule did not contain a provision that detailed the procedures the States should follow in bringing actions under the Rule. The Commission's enforcement experience with its Telemarketing Sales Rule, 16 CFR Part 310, indicates that such procedures are helpful in promoting consistency and in coordinating law enforcement activity in order to maximize the impact of such actions. Therefore, the proposed Rule adds Section 308.22, which outlines the procedures that State law enforcement officials should use in bringing actions under the Rule. The language in Section 308.22 tracks the language and procedures set out in Section 310.7 of the Telemarketing Sales Rule.

Section 308.22 also closely tracks the statutory language of TDDRA which provided for such State action.[292] Since Section 5712 of TDDRA gives States the authority to enforce only the rules promulgated under 15 U.S.C. 5711 (*i.e.*, Title II of TDDRA), the proposed Rule delineates those provisions that are not enforceable by the States because they have been proposed under the rulemaking authority granted in other sections of TDDRA. Thus, it specifies that States can bring actions only where a violation of the Rule relates to the provision of pay-per-call services, since this is the subject matter of the Commission's rulemaking authority under Title II of TDDRA.[293] In addition, proposed Section 308.22(a) specifies that States may not enforce Section of 308.20, because that section is promulgated under the rulemaking authority granted under Title III of TDDRA.[294]

Rulemaking review requirement.

The original Rule required that a rule review proceeding be commenced within four years of the effective date of the Rule. The proposed Rule does not have an equivalent provision. The Commission has a policy of reviewing all of its rules and guides on a periodic basis to ensure that they continue to meet the goals and provide the protections that were intended when they were promulgated. This periodic review also examines the economic costs and benefits of the

---

[292] 15 U.S.C. 5712.

[293] 15 U.S.C. 5711.

[294] 15 U.S.C. 5721 - 5724.

particular rule or guide under review. The Commission believes that this periodic review should be sufficient for any final Rule, and that it is not necessary to include a specific deadline within the text of the Rule.

Section D. Invitation to Comment

All persons are hereby given notice of the opportunity to submit written data, views, facts, and arguments concerning the proposed changes to the Commission's 900-Number Rule. The Commission invites written comments to assist it in ascertaining the facts necessary to reach a determination as to whether to adopt as final the proposed changes to the Rule. Written comments must be submitted to the Office of the Secretary, Room 159, Federal Trade Commission, Sixth Street and Pennsylvania Avenue, N.W., Washington, DC 20580, on or before January 8, 1999. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and Commission Rules of Practice, on normal business days between the hours of 9:00 a.m. and 5 p.m. at the Public Reference Section, Room 130, Federal Trade Commission, Sixth Street and Pennsylvania Avenue, N.W., Washington, DC 20580. Comments submitted in electronic form will be made available on the Commission's web site at www.ftc.gov.

Section E. Public Workshop

The FTC staff will conduct a public workshop to discuss the written comments received in response to the *Federal Register* notice. The purpose of the workshop is to afford Commission staff and interested parties a further opportunity to discuss issues raised by the proposal and in the comments, and, in particular, to examine publicly any areas of significant controversy or divergent opinions that are raised in the written comments. The workshop is not intended to achieve a consensus among participants or between participants and Commission staff with respect to any issue raised in the comments. Commission staff will consider the views and suggestions made during the workshop, in conjunction with the written comments, in formulating its final recommendation to the Commission regarding amendment of the 900-Number Rule.

Commission staff will select a limited number of parties from among those who submit written comments, to represent the significant interests affected by the issues raised in the notice. These parties will participate in an open discussion of the issues, including asking and answering questions based on their respective comments. In addition, the workshop will be open to the general public. The discussion will be transcribed and the transcription placed on the public record.

To the extent possible, Commission staff will select parties to represent the following interests: advertisers, billing entities, vendors, service bureaus, local exchange carriers, long-distance carriers, consumer groups, federal and State law enforcement and regulatory authorities; and any other interests that Commission staff may identify and deem appropriate for representation.

Parties who represent the above-referenced interests will be selected on the basis of the following criteria:

1. The party submits a written comment during the comment period.
2. During the comment period the party notifies Commission staff of its interest in participating in the workshop.
3. The party's participation would promote a balance of interests being represented at the workshop.
4. The party's participation would promote the consideration and discussion of a variety of issues raised in this notice.
5. The party has expertise in activities affected by the issues raised in this notice.
6. The number of parties selected will not be so large as to inhibit effective discussion among them.

The workshop will be held on February 25 and 26, 1999. Prior to the workshop, parties selected will be provided with copies of the comments from all other participants selected to participate in the workshop.

Section F. Communications by Outside Parties to Commissioners or Their Advisors

Pursuant to Commission Rule 1.26(b)(5), communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner advisor during the course of this rulemaking shall be subject to the following treatment. Written communications, including written communications from members of Congress, shall be forwarded promptly to the Secretary for placement on the public record. Oral communications, not including oral communications from members of Congress, are permitted only when such oral communications are transcribed verbatim or summarized at the discretion of the Commissioner or Commissioner advisor to whom such oral communications are made and are promptly placed on the public record, together with any written communications and summaries of any oral communications relating to such oral communications. Oral communications from members of Congress shall be transcribed or summarized at the discretion of the Commissioner or Commissioner advisor to whom such oral communications are made and promptly placed on the public record, together with any written communications or summaries of any oral communications relating to such oral communications.

Section G. Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act (PRA), as amended, 44 U.S.C. 3510-3520, the FTC has current approval from the Office of Management and Budget (OMB) for 3,241,200 total burden hours associated with certain reporting and disclosure requirements under the 900-Number Rule (control number 3084-0102, which expires on December 31, 1999). The Commission is seeking to extend this approval for the existing Rule requirements and to obtain such approval for certain additional or amended disclosure requirements being proposed by the Commission.

The FTC has previously estimated that approximately 25 common carriers routinely maintain certain business records and make them available to the Commission under the Rule, at an average annual burden of 5 hours per submission, for a total reporting burden of 125 hours. Based on a 12 percent estimated growth of the industry since 1995 (when the last burden was calculated), the Commission estimates that the current burden would be 140 hours. The Commission is not proposing to change this reporting requirement in a manner that would increase the compliance burden.

The Rule further requires that advertisements for pay-per-call services contain certain disclosures mandated by TDDRA as to the cost of the telephone call. The Commission has previously estimated that these requirements apply to approximately 20,000 vendors, who must make additional disclosures if the advertisement is directed to individuals under 18 (50 percent of the ads) or relates to pay-per-call services for sweepstakes or information on federal programs (30 percent of the ads). The Commission has estimated that each disclosure mandated by the Rule, whether cost or otherwise, requires approximately one hour of compliance time. Based on three advertisements per vendor, or a total of 60,000 ads, 80 percent of which would require a disclosure in addition to the cost disclosure, the Commission has estimated that approximately 110,000 burden hours are needed for vendors to comply with these requirements. Based on the estimated growth of the industry, the Commission now calculates the current burden to be 123,000 hours. The Commission is proposing to amend the advertising disclosure section of the Rule (proposed Section 308.4(a)(1)(iii)(B)) to require that advertisements for pay-per-call services billed on a variable time rate basis disclose the cost of each portion of the call. Assuming that 20 percent of the 67,200 (adjusted from 60,000 for 12 percent growth) pay-per-call services will be required to make the new disclosure, the Commission estimates that the additional burden associated with the proposed change will be 12,240 hours, assuming one hour for each disclosure. The Commission is also proposing that a new disclosure (*i.e.*, a signal indicating the end of free time typically used to market pay-per-call services) be included in proposed Rule Section 308.7(b). Based on an assumption that 25 percent of the 67,200 pay-per-call services will be required to include the new signal, the additional burden associated with this proposed change is calculated to be 16,800 hours, again assuming one new burden hour for each disclosure.

In addition, the Commission has previously estimated that approximately 60,000 pay-per-call services are required to make disclosures in the preamble to the pay-per-call service, at an average burden of 10 hours for each preamble, resulting in a total burden estimate of 600,000 hours. Based on the estimated growth of the industry, the Commission now calculates the current burden to be 672,000 hours. The Commission's proposal to amend the preamble requirements of the Rule (proposed Section 308.9(a)(2)(iii)(B)) would further require the preamble to disclose the cost of each portion of a telephone call to a pay-per-call service billed on a variable time rate basis. Assuming that 30 percent of the 67,200 pay-per-call services would be required to make the new disclosure in the preamble, the Commission estimates that the new burden associated with the proposed change would be 20,160 hours, if each new disclosure requires one additional hour of compliance.

The Commission's Rule also requires that vendors ensure that certain disclosures appear on each billing statement that contains a charge for a call to a pay-per-call service. Because these disclosures appear on telephone bills already generated by the local telephone companies, and because the carriers are already subject to nearly identical requirements pursuant to the FCC's rules, the Commission estimated that the burden to comply would be minimal. At most, the only burden on the vendor may be to conduct spot checks of telephone bills to ensure that the charges are displayed in the manner required by the Rule. Staff estimated that only 10 percent of the 20,000 vendors would monitor billing statements in this manner and that it would take 12 hours each year to conduct such checks, for a total of 24,000 burden hours. Based on the estimated growth of the industry, the Commission calculates the current burden to be 26,880 hours. The Commission is not proposing to amend this disclosure requirement section in a way that will increase the burden of compliance.

The Commission's Rule imposes certain disclosure requirements relating to billing and dispute resolution. In particular, the Rule requires billing entities to notify pay-per-call service customers in writing of their rights and obligations with respect to pay-per-call service charges. The FTC has previously estimated that it would take 7,000 hours for billing entities to provide such notice to customers, based on approximately 1,400 billing entities spending 5 hours to review, revise, and provide the disclosures annually. Based on the estimated growth of the industry, the Commission estimates the current burden to be 7,840 hours. Proposed Rule Section 308.18(m)(1), if adopted, would make this requirement mandatory with each billing notice, rather than annually. There should be no additional burden hours associated with this proposed change because most, if not all, entities already disclose customer rights and obligations in each billing statement that contains such charges. The Commission is also proposing to amend paragraphs (i) and (j) of proposed Section 308.2 of the Rule to require certain disclosures to customers regarding the personal identification numbers requested by and issued to such customers, and the material terms and conditions governing the use of such numbers. Assuming that 50,000 different audiotext services are provided via toll-free numbers and will be required to comply with these proposed new disclosure requirements, the Commission estimates that the additional burden will be 50,000 hours, based on 1 hour per service.

The Commission has separately estimated that the compliance burden associated with the existing dispute resolution requirements of the Rule is, on average, about one hour per each billing error, and that approximately 5 percent of the estimated 50,000,000 calls made to pay-per-call services each year would involve such a billing error, for a total burden of 2,500,000 hours. Based on the estimated growth of the industry, the Commission calculates the current burden to be 2,800,000 hours. The Commission proposes to expand the disclosure requirements that apply to billing entities in the resolution of billing disputes, as set forth in the proposed amendments to proposed Sections 308.18(n)(2) (notice to customer when attempting to collect charge that was forgiven by another billing entity), and 308.18(n)(4) (notice to vendor or service bureau of certain customer information by the billing entity designated to receive and respond to alleged billing errors). Assuming again that 5 percent of the 56,000,000 calls (adjusted for 12 percent growth) require billing entities to respond to billing errors, the Commission estimates that the new burden associated with these two new disclosure requirements will be 1,400,000 hours, based on an additional ½ hour of compliance time required for both disclosures.

Based on the above figures, the total PRA burden under the existing requirements of the Rule was estimated to be approximately 3,241,125 hours, comprising 125 hours for reporting requirements, with the remainder attributable to requirements for disclosures in advertising (110,000), preamble (600,000), billing statement disclosures (24,000), and billing dispute resolution (2,500,000 and 7,000). Based on estimated growth of the industry, the Commission calculates the current burden to be 3,630,060 hours. The Commission calculates that the new burden associated with all of the proposed changes described above will be 1,499,200 additional burden hours for industry to comply with the proposed Rule. Of course, the Commission seeks comment to determine whether its calculation of burden hours is accurate.

Section H. Regulatory Flexibility Act

The provision of the Regulatory Flexibility Act requiring an initial regulatory flexibility analysis (5 U.S.C. 603) does not apply because it is believed that these Rule amendments, if adopted, will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605). This notice also serves as certification to the Small Business Administration of that determination.

It appears that some vendors may be small entities, but the Commission, on the basis of information currently available to its staff, does not believe the number of such entities is clearly substantial when compared to the number and size of other businesses covered by the Rule (*e.g.*, service bureaus, common carriers, and billing entities). Furthermore, to the extent that the Rule's requirements are expressly mandated by TDDRA, the Commission has no discretion to adopt alternative provisions that would reduce any significant impact that such requirements might have on small entities, as the Commission noted when the Rule was originally promulgated.

Nonetheless, to ensure that no significant economic impact on a substantial number of small entities is overlooked, the Commission hereby requests public comment on the effect of the proposed Rule amendments on costs, profitability, competitiveness, and employment on small entities. After considering such comments, if any, the Commission will determine whether preparation of a final regulatory flexibility analysis (pursuant to 5 U.S.C. 604) is required.

Section I. Questions for Comment on the Proposed Rule

The Commission seeks comment on various aspects of the proposed Rule. Without limiting the scope of issues on which it seeks comment, the Commission is particularly interested in receiving comments on the questions that follow. In responding to these questions, include detailed, factual supporting information whenever possible.

General Questions:

Please provide comment, including relevant data, statistics, consumer complaint information, or any other evidence, on each different proposed change to the Rule. Regarding each proposed modification commented on, please include answers to the following questions:

(a) What is the effect (including any benefits and costs), if any, on consumers?
(b) What is the impact (including any benefits and costs), if any, on individual firms that must comply with the Rule?
(c) What is the impact (including any benefits and costs), if any, on industry?
(d) What changes, if any, should be made to the proposed Rule to minimize any cost to industry or consumers?
(e) How would those changes affect the benefits that might be provided by the proposed Rule to consumers or industry?
(f) How would the proposed Rule affect small business entities with respect to costs, profitability, competitiveness, and employment?

Questions on Proposed Specific Changes:

In response to each of the following questions, please provide: (1) detailed comment, including data, statistics, consumer complaint information and other evidence, regarding the problem referred to in the question; (2) comment as to whether the proposed changes do or do not provide an adequate solution to the problems they were intended to address; and (3) suggestions for additional changes that might better maximize consumer protections or minimize the burden on industry.

1. *Unauthorized charges.* Viewed together, do the new billing error and express authorization sections (proposed 308.2(b) and 308.17) of the proposed Rule adequately address the problem of consumers being charged for unauthorized telephone-billed purchases? Is the "knew or should have known" standard for vendors, service bureaus, and billing entities sufficient to address the deceptive practices that the Rule intends to prevent?

2. *PIN number.* Does the requirement that a PIN, as defined in proposed 308.2(i), be used in connection with a presubscription agreement adequately address the problem of controlling access to audiotext services provided through toll-free numbers?

3. *Presubscription agreement.* Do the proposed changes to the definition of "presubscription agreement"(proposed 308.2(j)), together with the provision relating to prohibitions concerning toll-free numbers (proposed 308.13), adequately address the problem of

consumers receiving charges on their telephone bills under presubscription agreements to which they were not a party?

4. *Service bureau.* The proposed definition of “service bureau” (proposed 308.2(n)) is designed to include billing aggregators, and to prevent an entity from escaping liability under the Rule by hiding behind “common carrier” status. Does the revised definition include the appropriate entities? Are there other entities that should be included?

5. *Pay-per-call service.* Does the proposed definition of “pay-per-call service”(proposed 308.2(g)) rely on the appropriate criteria to identify a pay-per-call service? Are the exemptions to the proposed definition of pay-per-call service appropriate? Are there additional exemptions that should be included?

6. *De minimis threshold for pay-per-call services.* Does the proposed $.05 per minute or $.50 per call *de minimis* threshold strike the appropriate balance between services that should be considered pay-per-call and services that should not be considered pay-per-call? Should the proposed threshold be higher or lower? Will some vendors be required to undertake additional record keeping in order to demonstrate their exemption? Is there a more efficient alternative to the *de minimis* approach?

7. *Rebuttable presumption of payment to a vendor.* In the absence of direct evidence of payment, is a rebuttable presumption the best method of determining whether remuneration has been provided to a vendor? If so, has the Commission described the appropriate circumstances under which it should presume that payment has been made to a vendor? If not, what is a more appropriate method of determining whether remuneration has been provided to a vendor? Are there other circumstances under which payment should be presumed?

8. *Misrepresentation of cost.* Does the proposed provision governing misrepresentation of cost (proposed 308.6) adequately address the problem of consumers being misled regarding the cost of services?

9. *Beepers and pagers.* Is there any non-deceptive way in which beepers or pagers are used or could be used to solicit calls to a pay-per-call service? Is the restriction in proposed 308.7 appropriate? Is it possible to make adequate disclosures in beeper or pager solicitations? Would it be appropriate to prohibit these types of solicitations altogether?

10. *Nominal cost calls.* Do the data suggest that $3.00 is an appropriate threshold for designation of “nominal cost calls” (proposed 308.9) for which no preamble is necessary? If not, what “nominal cost” threshold does the data support? Should the “nominal cost” figure be adjusted for inflation?

11. *Fractional minute billing.* Under what circumstances are telecommunications calls or services currently billed in increments of less than one minute? In what increments are these calls

or services billed? What billing increments are technologically feasible? What costs, if any, would be associated with requiring pay-per-call services to bill in increments of less than one minute?

12. *Toll charges.* Does the proposal to prohibit audiotext services from being billed as toll charges (proposed 308.12) adequately address the problem of consumers being charged for audiotext services in a manner that does not provide them with all of the TDDRA-mandated protections? Are there other, less restrictive, means to address the problem?

13. *Express authorization.* What costs would be associated with obtaining express authorization from consumers for non-blockable telephone-billed purchases (proposed 308.17)? Are there methods of obtaining express authorization that would impose lower costs than those methods described in the Notice? Is the proposed Rule sufficiently flexible to accommodate technological developments that may make it easier to obtain express authorization?

14. *Billing statement disclosures.* Do the modifications regarding the disclosures on billing statements (proposed 308.18) adequately address the problem of consumers being unable to reach the entity whose telephone number is listed on the phone bill for billing inquiries? Does the provision adequately address the problem that consumers often cannot reach the entity with the authority to provide refunds or credits?

15. *Service bureau liability.* What effect will the additional direct liability of service bureaus pursuant to proposed 308.17 and 308.20 have on industry? Will it increase the level of industry's accountability to consumers? What effect will it have on cramming?

16. *Billing entity liability.* What effect will the additional liability of billing entities pursuant to proposed 308.17 and 308.20 have on industry? Will it increase the level of industry's accountability to consumers? What effect will it have on cramming?

17. *Information necessary to collect debts.* Does the proposed Rule adequately address in proposed 308.20(n)(4) the need of vendors and service bureaus to obtain sufficient information from the LECs to continue collection activities against customers who refuse to pay valid charges?

18. *Reporting times.* If the period of time that LECs or other billing entities have to respond to a billing error notice is shortened from 90 to 60 days, what effect, if any, would this have on billing entities? Would this impose additional costs? Do the changes in the proposed 308.20 of the Rule that shorten the times by which the LEC must provide information to the vendor or service bureau sufficiently expedite the process so that vendors or service bureaus will be able to pursue collection of valid debts in a timely manner? Are these deadlines feasible?

19. *Chargebacks.* Are the proposed changes to the dispute resolution section the most cost effective and appropriate ways to deal with industry concerns regarding the chargeback process?

20. *Reasonable investigation.* Does the proposed Rule adequately address in proposed 308.20 the problem of consumers becoming the target for a collection action without ever receiving an explanation or evidence that the alleged debt is in fact valid?

21. *Evidence of debt.* What evidence (other than ANI information) is currently created or maintained that would show the delivery of telephone-billed purchases? If no such evidence is created or maintained, what would be the costs, if any, associated with creating and maintaining such evidence. What would be the benefits?

22. *TDDRA blocking.* What records do LECs maintain with respect to 900-number blocking? Do these records indicate the date a consumer-requested block became effective? What measures do LECs take to ensure that blocks are not turned off by someone other than the subscriber? Do LECs make blocking information available to billing entities who are conducting "reasonable investigations" of disputed charges for telephone-billed purchases? Should LECs be required to do so? What would be the costs and benefits associated with such a requirement?

23. *Applicability to third-party debt collectors.* The proposed definition of "billing entity" does not include an exemption for third-party debt collectors attempting to collect debts for telephone-billed purchases. Should there be such an exemption? What, if any, costs or benefits would be associated with such an exemption?

Questions Relating to the Paperwork Reduction Act:

The Commission solicits comments on the reporting and disclosure requirements above to the extent that they constitute "collections of information" within the meaning of the PRA. The Commission requests comments that will enable it to:

1. Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.*, permitting electronic submission of responses).

Section J. Proposed Rule

List of Subjects in 16 CFR Part 308

Advertising, 900 telephone numbers, Pay-per-call services, Telephone, Telephone-billed purchases, Toll-free numbers, Trade practices.

Accordingly, it is proposed that part 308 of title 16 of the Code of Federal Regulations, be amended to read as follows:

PART 308 -- RULE CONCERNING PAY-PER-CALL SERVICES AND OTHER TELEPHONE-BILLED PURCHASES

SUBPART A -- SCOPE AND DEFINITIONS

Sec.
308.1 Scope of regulations in this part.
308.2 Definitions.

SUBPART B -- PAY-PER-CALL SERVICES

308.3 General requirements for advertising disclosures.
308.4 Advertising disclosures.

308.5 Advertising to children prohibited.
308.6 Misrepresentation of cost prohibited.
308.7 Other advertising restrictions.
308.8 Special rule for infrequent publications.
308.9 Preamble message.
308.10 Deceptive billing practices.
308.11 Prohibition on services to children.
308.12 Prohibition concerning toll charges.
308.13 Prohibitions concerning toll-free numbers.
308.14 Monthly or other recurring charges.
308.15 Refunds to customers.
308.16 Service bureau liability.

SUBPART C -- PAY-PER CALL SERVICES AND OTHER TELEPHONE-BILLED PURCHASES

308.17 Express authorization required.
308.18 Disclosure requirements for billing statements.
308.19 Access to information.
308.20 Dispute resolution procedures.

SUBPART D -- GENERAL PROVISIONS

308.21 Severability.
308.22 Actions by States.

Authority: Pub. L. 102-556, 106 Stat. 4181 (15 U.S.C. 5701, et seq.); Pub. L. 104, 701, 110 Stat. 56 (1996).

Source: 58 FR 42400, Aug. 9, 1993, unless otherwise noted.

SUBPART A -- SCOPE AND DEFINITIONS

§ 308.1 Scope of regulations in this part.

This Rule implements Titles II and III of the Telephone Disclosure and Dispute Resolution Act of 1992, in relevant part at 15 U.S.C. 5711-14, 5721-24, as amended by the Telecommunications Act of 1996, Pub. L. 104, § 701, 110 Stat. 56 (1996).

§ 308.2 Definitions.

(a) *Billing entity* means any person who transmits a billing statement or any other statement of debt to a customer for a telephone-billed purchase, or any person who assumes responsibility for receiving and responding to billing error complaints or inquiries.

(b) *Billing error* means any of the following:

(1) A reflection on a billing statement of a telephone-billed purchase that was not made by the customer nor made from the telephone of the customer who was billed for the purchase or, if made, was not in the amount reflected on such statement.

(2) A reflection on a billing statement of a telephone-billed purchase for which the customer requests additional clarification, including documentary evidence thereof.

(3) A reflection on a billing statement of a telephone-billed purchase that was not accepted by the customer or was not provided to the customer in accordance with the stated terms of the transaction.

(4) A reflection on a billing statement of a telephone-billed purchase for a call made to an 800, 888, 877, or other toll-free telephone number.

(5) The failure to reflect properly on a billing statement a payment made by the customer or a credit issued to the customer with respect to a telephone-billed purchase.

(6) A computation error or similar error of an accounting nature on a billing statement of a telephone-billed purchase.

(7) Failure to transmit a billing statement for a telephone-billed purchase to a customer's last known address if that address was furnished by the customer at least twenty (20) days before the end of the billing cycle for which the statement was required.

(8) A reflection on a billing statement of a telephone-billed purchase identified in a manner that violates the requirements of § 308.18.

(9) A reflection on a customer’s billing statement of a charge incurred pursuant to a purported presubscription agreement that does not meet the requirements of 308.2(j).

(10) A reflection on a customer’s billing statement of a telephone-billed purchase not blockable pursuant to 47 U.S.C. 228(c) that was not expressly authorized by that customer.

(11) A reflection on a billing statement of a charge that is inconsistent with any blocking option chosen by a customer pursuant to 47 U.S.C. 228(c).

(c) *Bona fide educational service* means any pay-per-call service dedicated to providing information or instruction relating to education, subjects of academic study, or other related areas of school study.

(d) *Commission* means the Federal Trade Commission.

(e) *Customer* means any person who acquires or attempts to acquire goods or services through a telephone-billed purchase, or who receives a billing statement for a telephone-billed purchase.

(f) *Pay-per-call purchase* means any attempt to purchase, or any actual purchase of pay-per-call services.

(g) *Pay-per-call service* means:

(1) Any service covered by the definition of "pay-per-call services" provided in Section 228(i) of the Communications Act of 1934, as amended;[1] or

(2) Any service that provides, or that is purported to provide, audio information or audio entertainment, including simultaneous voice conversation services, where the action of placing a call, receiving a call, or subsequent dialing, touch-tone entry, or comparable action of the caller results in a charge to a customer, and where all or a portion of such charge results in a payment, directly or indirectly, to the person who provides or purports to provide such information or entertainment services.

(3) Services meeting the criteria of § 308.2(g)(2) will not be considered pay-per-call services if:

(i) the provider of the audio information or an audio entertainment service demonstrates that the person from whom payment is being sought has entered into a presubscription agreement, meeting the requirements of § 308.2(j), to be charged for the information or service;

(ii) the provider of audio information or audio entertainment services demonstrates that, on average, the payment to the providers of audio information or audio entertainment services will not exceed $0.05 per minute or $0.50 per call for that particular service; or

(iii) the services provided are calls utilizing telecommunications services for the deaf, or are tariffed directory services provided by a common carrier or its affiliate;

(4) Nothing in this definition shall be construed to permit any conduct or practice otherwise precluded or limited by regulations of the Federal Communications Commission.

---

[1]Section 228(i) of the Communications Act of 1934, as amended by Section 701 of the Telecommunications Act of 1996, states:

(1) The term pay-per-call services means any service--

(A) In which any person provides or purports to provide--

(i) Audio information or audio entertainment produced or packaged by such person;

(ii) Access to simultaneous voice conversation services; or

(iii) Any service, including the provision of a product, the charges for which are assessed on the basis of the completion of the call;

(B) For which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call; and

(C) Which is accessed through use of a 900 telephone number or other prefix or area code designated by the [Federal Communications] Commission in accordance with subsection (b)(5) (47 U.S.C. 228(b)(5)).

(2) Such term does not include calls utilizing telecommunications devices for the deaf, or directory services provided by a common carrier or its affiliate or by a local exchange carrier or its affiliate, or any service for which users are assessed charges only after entering into a presubscription or comparable arrangement with the provider of such service.

(h) *Person* means any individual, partnership, corporation, association or unincorporated association, government or governmental subdivision or agency, group, or other entity.

(i) *Personal identification number* means a number or code unique to the individual, that is not valid unless it (1) is requested by a consumer; (2) is provided exclusively to the consumer who will be billed for services provided pursuant to that presubscription agreement; and (3) has been delivered, in writing, to the consumer who will be billed for the agreement, simultaneously with a clear and conspicuous disclosure of all material terms and conditions of the presubscription agreement, including the service provider's name and address, a business telephone number which the consumer may use to obtain additional information or to register a complaint, and the rates for the service.

(j) (1) *Presubscription agreement* means a contractual agreement to purchase goods or services, including audio information or audio entertainment services, in which:

(i) The service provider clearly and conspicuously discloses to the consumer who will be billed for the service, all material terms and conditions associated with the use of the service, including the service provider's name and address, a business telephone number which the consumer may use to obtain additional information or to register a complaint, and the rates for the service;

(ii) The service provider agrees to notify the consumer who will be billed for the service of any future rate changes;

(iii) The consumer who will be billed for the service agrees to utilize the service on the terms and conditions disclosed by the service provider; and

(iv) The service provider requires the use of a valid personal identification number to prevent unauthorized charges by persons other than the person who will be billed for the service.

(2) Disclosure of a credit card or charge card number, along with authorization to bill that number, made during the course of a call to purchase goods or services, including audio information or audio entertainment services, shall constitute a presubscription agreement if the credit or charge card is subject to the dispute resolution requirements of the Fair Credit Billing Act and the Truth in Lending Act, as amended, and if the credit or charge card is the sole method used to pay for the charge.

(k) *Program-length commercial* means any commercial or other advertisement fifteen (15) minutes in length or longer or intended to fill a television or radio broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer.

(l) *Providing carrier* means a local exchange or interexchange common carrier providing telephone services (other than local exchange services) to a vendor for a telephone-billed purchase that is the subject of a billing error complaint or inquiry.

(m) *Reasonably understandable volume* means at an audible level that renders the message intelligible to the receiving audience, and, in any event, at least the same audible level as that principally used in the advertisement or the pay-per-call service.

(n) *Service bureau* means (1) any person, including a common carrier, who provides one or more of the following services to vendors: voice storage, voice processing, call processing, billing aggregation, call statistics (call and minute counts), call revenue arrangements (including revenue-sharing arrangements with common carriers), or pre-packaged pay-per-call investment opportunities; or (2) any person, other than a common carrier, who provides access to telephone service to vendors of pay-per-call services.

(o) *Slow and deliberate manner* means at a rate that renders the message intelligible to the receiving audience, and, in any event, at a cadence or rate no faster than that principally used in the advertisement or the pay-per-call service.

(p) *Sweepstakes,* including games of chance, means a game or promotional mechanism that involves the elements of a prize and chance and does not require consideration.

(q) *Telephone-billed purchase* means any pay-per-call purchase or any purchase that is either charged to a customer's telephone bill, or that is completed solely as a consequence of the completion of the call or a subsequent dialing, touch tone entry, or comparable action of the caller. Such term does not include:

(1) A purchase pursuant to a presubscription agreement that meets the requirements of § 308.2(j);

(2) Local exchange telephone services or interexchange telephone services or any service that the Federal Communications Commission determines by rule--

(i) Is closely related to the provision of local exchange telephone services or interexchange telephone services; and

(ii) Is subject to billing dispute resolution procedures required by Federal or State statute or regulation; or

(3) The purchase of goods or services that is otherwise subject to billing dispute resolution procedures required by Federal statute or regulation.

(r) *Variable option rate basis* refers to the rate structure of a pay-per-call service where the rate billed to the customer depends on the specific options chosen by the caller during the call.

(s) *Variable time rate basis* refers to the rate structure of a pay-per-call service where the rate billed to the customer changes during the call due to passage of time or due to other factors unrelated to specific options chosen by the caller.

(t) *Vendor* means any person who sells or offers to sell a pay-per-call service or who sells or offers to sell goods or services via a telephone-billed purchase. A person who provides only transmission services or only billing and collection services shall not be considered a vendor.

SUBPART B -- PAY-PER-CALL SERVICES

§ 308.3 General Requirements for advertising disclosures.

The following requirements apply to disclosures required in advertisements under §308.4:

(a) The disclosures shall be made in the same language as that principally used in the advertisement.

(b) Television, video, and print disclosures shall be of a color or shade that readily contrasts with the background of the advertisement.

(c) In print advertisements, disclosures shall be parallel with the base of the advertisement.

(d) Audio disclosures, whether in television or radio, shall be delivered in a slow and deliberate manner and in a reasonably understandable volume.

(e) Nothing contrary to, inconsistent with, or in mitigation of, the required disclosures shall be used in any advertisement in any medium; nor shall any audio, video, or print technique be used that is likely to detract significantly from the communication of the disclosures.

(f) In any program-length commercial, required disclosures shall be made at least three (3) times (unless more frequent disclosure is otherwise required) near the beginning, middle, and end of the commercial.

(g) In any advertising medium not specifically addressed in this Rule, all advertising disclosures must be clear and conspicuous and not avoidable by consumers acting reasonably.

§ 308.4 Advertising disclosures.

(a) *Cost of the call.* (1) The vendor shall clearly and conspicuously disclose the cost of the call, in Arabic numerals, in any advertisement for the pay-per-call service, as follows:

(i) If there is a flat fee for the call, the advertisement shall state the total cost of the call.

(ii) If the call is billed on a time-sensitive basis, the advertisement shall state the cost per minute and any minimum charges. If the length of the program can be determined in advance, the advertisement shall also state the maximum charge that could be incurred if the caller listens to the complete program.

(iii)(A) If the call is billed on a variable option rate basis, the advertisement shall state, in accordance with §§ 308.4(a)(i) and (ii), the cost of the initial portion of the call, any minimum charges, and the range of rates that may be charged depending on the options chosen by the caller;

(B) If the call is billed on a variable time rate basis, the advertisement shall state, in accordance with §§ 308.4(a)(1)(i) and (ii), the cost of each different portion of the call;

(iv) The advertisement shall disclose any other fees that will be charged for the service.

(v) If the caller may be transferred to another pay-per-call service, the advertisement shall disclose the cost of the other call, in accordance with §§ 308.4(a)(i), (ii), (iii), and (iv).

(2) For purposes of § 308.4(a), disclosures shall be made "clearly and conspicuously" as set forth in § 308.3 and as follows:

(i) In a television or videotape advertisement, the video disclosure shall appear adjacent to each video presentation of the pay-per-call number. However, in an advertisement displaying more than one pay-per-call number with the same cost, the video disclosure need only appear adjacent to the largest presentation of the pay-per-call number. Each letter or numeral of the video disclosure shall be, at a minimum, one-half the size of each letter or numeral of the pay-per-call number to which the disclosure is adjacent. In addition, the video disclosure shall appear on the screen for the duration of the presentation of the pay-per-call number. An audio disclosure shall be made at least once, simultaneously with a video presentation of the disclosure. However, no audio presentation of the disclosure is required in (A) an advertisement fifteen (15) seconds or less in length in which the pay-per-call number is not presented in the audio portion, or (B) an advertisement in which there is no audio presentation of information regarding the pay-per-call service, including the pay-per-call number. In an advertisement in which the pay-per-call number is presented only in the audio portion, the cost of the call shall be delivered immediately following the first and last delivery of the pay-per-call number, except that in a program-length commercial, the disclosure shall be delivered immediately following each delivery of the pay-per-call number.

(ii) In a print advertisement, the disclosure shall be placed adjacent to each presentation of the pay-per-call number. However, in an advertisement displaying more than one pay-per-call number with the same cost, the disclosure need only appear adjacent to the largest presentation of the pay-per-call number. Each letter or numeral of the disclosure shall be, at a minimum, one-half the size of each letter or numeral of the pay-per-call number to which the disclosure is adjacent.

(iii) In a radio advertisement, the disclosure shall be made at least once, and shall be delivered immediately following the first delivery of the pay-per-call number. In a program-length commercial, the disclosure shall be delivered immediately following each delivery of the pay-per-call number.

(b) *Sweepstakes; games of chance.* (1) The vendor that advertises a prize or award, or a service or product, at no cost or for a reduced cost, to be awarded to the winner of any sweepstakes, including games of chance, shall clearly and conspicuously disclose in the advertisement the odds of being able to receive the prize, award, service, or product at no cost or reduced cost. If the odds are not calculable in advance, the advertisement shall disclose the factors used in calculating the odds. Either the advertisement or the preamble required by § 308.9 for such service shall clearly and conspicuously disclose that no call to the pay-per-call service is required to participate, and shall also disclose the existence of a free alternative method of entry, and either instructions on how to enter, or a local or toll-free telephone number or address to which customers may call or write for information on how to enter the sweepstakes. Any description or characterization of the prize, award, service, or product that is being offered at no cost or reduced cost shall be truthful and accurate.

(2) For purposes of § 308.4(b) disclosures shall be made "clearly and conspicuously" as set forth in §308.3 and as follows:

(i) In a television or videotape advertisement, the disclosures may be made in either the audio or video portion of the advertisement. If the disclosures are made in the video portion, they shall appear on the screen in sufficient size and for sufficient time to allow customers to read and comprehend the disclosures.

(ii) In a print advertisement, the disclosures shall appear in a sufficient size and prominence and such location to be readily noticeable, readable, and comprehensible.

(c) *Federal programs*. (1) The vendor that advertises a pay-per-call service that is not operated or expressly authorized by a Federal agency, but that provides information on a Federal program, shall clearly and conspicuously disclose in the advertisement that the pay-per-call service is not authorized, endorsed, or approved by any Federal agency. Advertisements providing information on a Federal program shall include, but not be limited to, advertisements that contain a seal, insignia, trade or brand name, or any other term or symbol that reasonably could be interpreted or construed as implying any Federal government connection, approval, or endorsement.

(2) For purposes of § 308.4(c), disclosures shall be made "clearly and conspicuously" as set forth in § 308.3 and as follows:

(i) In a television or videotape advertisement, the disclosure may be made in either the audio or video portion of the advertisement. If the disclosure is made in the video portion, it shall appear on the screen in sufficient size and for sufficient time to allow customers to read and comprehend the disclosure. The disclosure shall begin within the first fifteen (15) seconds of the advertisement.

(ii) In a print advertisement, the disclosure shall appear in a sufficient size and prominence and such location to be readily noticeable, readable, and comprehensible. The disclosure shall appear in the top one-third of the advertisement.

(iii) In a radio advertisement, the disclosure shall begin within the first fifteen (15) seconds of the advertisement.

(d) *Advertising to individuals under the age of 18.* (1) The vendor shall ensure that any pay-per-call advertisement directed primarily to individuals under the age of 18 shall contain a clear and conspicuous disclosure that all individuals under the age of 18 must have the permission of such individual's parent or legal guardian prior to calling such pay-per-call service.

(2) For purposes of § 308.4(d), disclosures shall be made "clearly and conspicuously" as set forth in § 308.3 and as follows:

(i) In a television or videotape advertisement, each letter or numeral of the video disclosure shall be, at a minimum, one-half the size of each letter or numeral of the largest presentation of the pay-per-call number. The video disclosure shall appear on the screen for sufficient time to allow customers to read and comprehend the disclosure. An audio disclosure shall be made at least once, simultaneously with a video presentation of the disclosure. However, no audio presentation of the disclosure is required in (A) an advertisement fifteen (15) seconds or less in length in which the pay-per-call number is not presented in the audio portion, or (B) an advertisement in which there is no audio presentation of information regarding the pay-per-call service, including the pay-per-call number.

(ii) In a print advertisement, each letter or numeral of the disclosure shall be, at a minimum, one-half the size of each letter or numeral of the largest presentation of the pay-per-call number.

(3) For the purposes of this regulation, advertisements directed primarily to individuals under 18 shall include any pay-per-call advertisement appearing during or immediately adjacent to programming for which competent and reliable audience composition data demonstrate that more than 50% of the audience is composed of individuals under 18, and any pay-per-call advertisement appearing in a periodical for which competent and reliable readership data demonstrate that more than 50% of the readership is composed of individuals under 18.

(4) For the purposes of this regulation, if competent and reliable audience composition or readership data do not demonstrate that more than 50% of the audience or readership is composed of individuals under 18, then the Commission shall consider the following criteria in determining whether an advertisement is directed primarily to individuals under 18:

(i) Whether the advertisement appears in publications directed primarily to individuals under 18, including, but not limited to, books, magazines, and comic books;

(ii) Whether the advertisement appears during or immediately adjacent to television programs directed primarily to individuals under 18, including, but not limited to, mid-afternoon weekday television shows;

(iii) Whether the advertisement is broadcast on radio stations that are directed primarily to individuals under 18;

(iv) Whether the advertisement appears on a cable or broadcast television station directed primarily to individuals under 18;

(v) Whether the advertisement appears on the same videotape as a commercially-prepared videotape directed primarily to individuals under 18, or preceding a movie directed primarily to individuals under 18 shown in a movie theater; and

(vi) Whether the advertisement, regardless of when or where it appears, is directed primarily to individuals under 18 in light of its subject matter, visual content, age of models, language, characters, tone, message, or the like.

§ 308.5 Advertising to children prohibited.

(a) The vendor shall not direct advertisements for such pay-per-call services to children under the age of 12, unless the service is a bona fide educational service.

(b) For the purposes of this regulation, advertisements directed to children under 12 shall include any pay-per-call advertisement appearing during or immediately adjacent to programming for which competent and reliable audience composition data demonstrate that more than 50% of the audience is composed of children under 12, and any pay-per-call advertisement appearing in a periodical for which competent and reliable readership data demonstrate that more than 50% of the readership is composed of children under 12.

(c) For the purposes of this regulation, if competent and reliable audience composition or readership data do not demonstrate that more than 50% of the audience or readership is composed of children under 12, then the Commission shall consider the following criteria in determining whether an advertisement is directed to children under 12:

(1) Whether the advertisement appears in a publication directed to children under 12, including, but not limited to, books, magazines, and comic books;

(2) Whether the advertisement appears during or immediately adjacent to television programs directed to children under 12, including, but not limited to, children's programming as defined by the Federal Communications Commission, animated programs, and after-school programs;

(3) Whether the advertisement appears on a television station or channel directed to children under 12;

(4) Whether the advertisement is broadcast during or immediately adjacent to radio programs directed to children under 12, or broadcast on a radio station directed to children under 12;

(5) Whether the advertisement appears on the same video as a commercially-prepared video directed to children under 12, or preceding a movie directed to children under 12 shown in a movie theater;

(6) Whether the advertisement or promotion appears on product packaging directed to children under 12; and

(7) Whether the advertisement, regardless of when or where it appears, is directed to children under 12 in light of its subject matter, visual content, age of models, language, characters, tone, message, or the like.

§ 308.6 Misrepresentation of cost prohibited.

(a) *Deceptive representation of cost.* It is a deceptive act or practice, and a violation of this Rule for any vendor to misrepresent the cost of a pay-per-call service.

(b) *Signal indicating end of free time.* If any portion of a telephone call to a pay-per-call service is offered as free, the vendor shall provide a clearly discernible signal or tone indicating the end of the free time, and shall inform the caller that to avoid charges, the call must be terminated within three (3) seconds of such signal or tone.

§ 308.7 Other advertising restrictions.

(a) *Electronic tones in advertisements.* The vendor is prohibited from using advertisements that emit electronic tones that can automatically dial a pay-per-call service.

(b) *Telephone solicitations.* The vendor shall ensure that any telephone message conveyed during an inbound or outbound call that solicits a person to place a call to a pay-per-call service discloses the cost of the call in a slow and deliberate manner and in a reasonably understandable volume, in accordance with §§ 308.4(a)(1)(i)-(v).

(c) *Solicitations via facsimile machine.* The vendor shall ensure that any facsimile message that solicits calls to a pay-per-call service contains all the relevant disclosures required by this Rule, and that such disclosures are provided in the manner required for print advertisements in §§ 308.3 and 308.4(a)(2)(ii).

(d) *Solicitations via beeper, pager, or similar device.* The vendor shall ensure that any beeper or pager message that solicits calls to a pay-per-call service contains all the relevant disclosures required by this Rule, and that such disclosures are provided in the manner required for print advertisements in §§ 308.3 and 308.4(a)(2)(ii).

(e) *Referral to toll-free telephone numbers.* The vendor is prohibited from referring in advertisements to an 800, 888, or 877 number, or any other telephone number advertised as or widely understood to be toll-free, if that number is used in a manner that violates the prohibition concerning toll-free numbers set forth in § 308.13.

(f) Nothing in this Section shall be construed to permit any conduct or practice otherwise precluded or limited by regulations of the Federal Communications Commission.

§ 308.8 Special rule for infrequent publications.

(a) The vendor that advertises a pay-per-call service in a publication that meets the requirements set forth in § 308.8(c) may include in such advertisement, in lieu of the cost disclosures required by § 308.4(a), a clear and conspicuous disclosure that a call to the advertised pay-per-call service may result in a substantial charge.

(b) The vendor that places an alphabetical listing in a publication that meets the requirements set forth in § 308.8(c) is not required to make any of the disclosures required by §§ 308.4(a)-(d) in the alphabetical listing, provided that such listing does not contain any information except the name, address, and telephone number of the vendor.

(c) The publication referred to in § 308.8(a) and (b) must be:
(1) Widely distributed;
(2) Printed annually or less frequently; and
(3) One that has an established policy of not publishing specific prices in advertisements.

§ 308.9 Preamble message.

(a) The vendor shall include, in each pay-per-call message, an introductory disclosure message (“preamble”) in the same language as that principally used in the pay-per-call message, that clearly, in a slow and deliberate manner and in a reasonably understandable volume:
(1) Identifies the name of the vendor and describes the service being provided;
(2) Specifies the cost of the service as follows:
(i) If there is a flat fee for the call, the preamble shall state the total cost of the call;

(ii) If the call is billed on a time-sensitive basis, the preamble shall state the cost per minute and any minimum charges; if the length of the program can be determined in advance, the preamble shall also state the maximum charge that could be incurred if the caller listens to the complete program;

(iii)(A) If the call is billed on a variable option rate basis, the preamble shall state, in accordance with §§ 308.9(a)(2)(i) and (ii), the cost of the initial portion of the call, any minimum charges, and the range of rates that may be charged depending on the options chosen by the caller;

(B) If the call is billed on a variable time rate basis, the preamble shall state, in accordance with §§ 308.9(a)(2)(i) and (ii), the cost of each different portion of the call;

(iv) Any other fees that will be charged for the service shall be disclosed, as well as fees for any other pay-per-call service to which the caller may be transferred;

(3) Informs the caller that charges for the call begin, and that to avoid charges the call must be terminated, three (3) seconds after a clearly discernible signal or tone indicating the end of the preamble;

(4) Informs the caller that anyone under the age of 18 must have the permission of a parent or legal guardian in order to complete the call; and

(5) Informs the caller, in the case of a pay-per-call service that is not operated or expressly authorized by a Federal agency but that provides information on a Federal program, or that uses a trade or brand name or any other term that reasonably could be interpreted or construed as implying any Federal government connection, approval, or endorsement, that the pay-per-call service is not authorized, endorsed, or approved by any Federal agency.

(b) *No charge to caller for preamble message.* The vendor is prohibited from charging a caller any amount whatsoever for such a service if the caller hangs up at any time prior to three (3) seconds after the signal or tone indicating the end of the preamble described in § 308.9(a). However, the three-second delay, and the message concerning such delay described in § 308.9(a)(3), is not required if the vendor offers the caller an affirmative means (such as pressing a key on a telephone keypad) of indicating a decision to incur the charges.

(c) *Nominal cost calls.* The preamble described in § 308.9(a) is not required when the entire cost of the pay-per-call service, whether billed as a flat rate or on a time sensitive basis, is three (3) dollars or less.

(d) *Data service calls.* The preamble described in § 308.9(a) is not required when the entire call consists of the non-verbal transmission of information.

(e) *Bypass mechanism*. The vendor that offers to frequent callers or regular customers to such services the option of activating a bypass mechanism to avoid listening to the preamble during subsequent calls shall not be deemed to be in violation of § 308.9(a), provided that any such bypass mechanism shall be disabled for a period of no less than thirty (30) days immediately after the institution of an increase in the price for the service or a change in the nature of the service offered.

§ 308.10 Deceptive billing practices.

(a) *Deceptive billing for pay-per-call services in violation of the Rule.* It is a deceptive act or practice and a violation of this Rule for any vendor to collect or attempt to collect, directly or indirectly:

(1) Charges for pay-per-call services in excess of the amount described in the preamble for such pay-per-call services; or

(2) Charges for pay-per-call services that are provided in violation of this Rule.

(b) *Deceptive billing for time-based charges after disconnection by the caller.* It is a deceptive practice and a violation of this Rule for the vendor to fail to stop the assessment of time-based pay-per-call service charges immediately upon disconnection by the caller.

§ 308.11 Prohibition on services to children.

The vendor shall not direct pay-per-call services to children under the age of 12, unless such service is a bona fide educational service. The Commission shall consider the following criteria in determining whether a pay-per-call service is directed to children under 12:

(a) Whether the pay-per-call service is advertised in the manner set forth in §§ 308.5(b) and (c); and

(b) Whether the pay-per-call service, regardless of when or where it is advertised, is directed to children under 12, in light of its subject matter, content, language, featured personality, characters, tone, message, or the like.

§ 308.12 Prohibition concerning toll charges.

The vendor shall not offer a pay-per call service that would result in any customer being assessed a charge for any local exchange telephone service or interexchange telephone service or any service that the Federal Communications Commission determines by rule--

(a) Is closely related to the provision of local exchange telephone services or interexchange telephone services; and

(b) Is subject to billing dispute resolution procedures required by Federal or State statute or regulation.

§ 308.13 Prohibitions concerning toll-free numbers.

Any person is prohibited from using an 800, 888, or 877 number, or any other telephone number advertised as or widely understood to be toll-free in a manner that would result in:

(a) Any customer being assessed, by virtue of a caller completing the call, a charge for the call;

(b) The caller being connected to an access number for, or otherwise transferred to, a pay-per-call service;

(c) Any customer being charged for information or entertainment conveyed during the call, unless that person has entered into a presubscription agreement, meeting the requirements of § 308.2(j), to be charged for the information or entertainment; or

(d) Any person being charged for a call back for the provision of audio or data information services, entertainment services, simultaneous voice conversation services, or products.

§ 308.14 Monthly or other recurring charges.

The vendor is prohibited from providing a pay-per-call service that results in a monthly or other recurring charge, unless the vendor and the person to be billed for the service have entered into a presubscription agreement, meeting the requirements of § 308.2(j), that authorizes monthly or other recurring charges for that service.

§ 308.15 Refunds to customers.

The vendor shall be liable for refunds or credits to customers who have been billed for pay-per-call services, and who have paid the charges for such services, pursuant to pay-per-call services that have been found to have violated any provision of this Rule or any other Federal rule or law.

§ 308.16 Service bureau liability.

A service bureau shall be liable for violations of the Rule by any vendor of pay-per-call services using its call processing facilities or other services where the service bureau knew or should have known of the violation.

SUBPART C -- PAY-PER-CALL SERVICES AND OTHER TELEPHONE-BILLED PURCHASES

§ 308.17 Express authorization required.

Any telephone-billed purchase, other than a pay-per-call purchase that is blockable pursuant to 47 U.S.C. 228(c), requires the express authorization of the person to be billed for the purchase. It is a deceptive act or practice and a violation of this Rule for any vendor, service bureau, or billing entity to collect or attempt to collect, directly or indirectly, payment for such a telephone-billed purchase where the vendor, service bureau, or billing entity knew or should have known that the charge was not expressly authorized by the person from whom payment is being sought.

§ 308.18 Disclosure requirements for billing statements.

The vendor shall ensure that any billing statement for its charges shall:

(a) Display any charges for telephone-billed purchases in a portion of the customer’s bill that is identified as not being related to local and long-distance telephone charges;

(b) For each telephone-billed purchase charge so displayed, identify the type of service or product and the amount of the charge;

(c) For each pay-per-call purchase charge so displayed, accurately specify the telephone number dialed by the caller, as well as the date, time, and, for calls billed on a time-sensitive basis, the duration of the call; and

(d) Display the local or toll-free telephone number where customers can readily obtain answers to their questions and information on their rights and obligations with regard to their telephone-billed purchases, and can obtain the name and mailing address of the vendor.

§ 308.19 Access to information.

Any common carrier that provides telecommunication services to any vendor or service bureau shall make available to the Commission, upon written request, any records and financial information maintained by such carrier relating to the arrangements (other than for the provision of local exchange service) between such carrier and any vendor or service bureau.

§ 308.20 Dispute resolution procedures.

(a) *Initiation of billing review.* To be guaranteed the protections provided under § 308.20, a customer shall initiate a billing review with respect to a telephone-billed purchase by providing the billing entity with notice of a billing error no later than sixty (60) days after the billing entity transmitted the first billing statement that contains the disputed charge. If the billing error is the reflection on a billing statement of a telephone-billed purchase not provided to the customer in accordance with the stated terms of the transaction, the 60-day period shall begin to run from the date the goods or services are delivered or, if not delivered, should have been delivered, if such date is later than the date the billing statement was transmitted. The customer’s billing error notice shall:

(1) Set forth or otherwise enable the billing entity to identify the customer's name and the telephone number to which the charge was billed;

(2) Indicate the customer's belief that the statement contains an error, and the date and amount of such error; and

(3) Set forth the reasons for the customer's belief, to the extent possible, that the statement contains an error.

(b) *Disclosure of method of providing notice; presumption if oral notice is permitted.* A billing entity shall clearly and conspicuously[2] disclose on each billing statement or on other material accompanying the billing statement:

(1) The method (oral or written) by which the customer may provide a billing error notice in the manner set forth in § 308.20(a);[3]

(2) The name of the billing entity designated to receive and respond to billing errors;

(3) If written notice is required, the mailing address to which notice should be sent;

(4) If oral notice is permitted, a local or toll-free telephone number that is readily available for customers to submit a billing error notice. The billing entity and the vendor may, by agreement, select a single telephone number to satisfy the requirements of this Section as well as § 308.18(d).

(c) *Response to customer notice.* A billing entity that receives notice of a billing error as described in § 308.20(a) shall:

(1) Send a written acknowledgment to the customer including a statement that any disputed amount need not be paid pending investigation of the billing error. This shall be done no later than forty (40) days after receiving the notice, unless the action required by § 308.20(c)(2) is taken within such 40-day period; and

(2)(i) Correct any billing error and credit the customer's account for any disputed amount and any related charges, and notify the customer of the correction. The billing entity also shall disclose to the customer that collection efforts may occur despite the credit, and shall provide the names, mailing addresses, and business telephone numbers of the vendor, service bureau, and providing carrier, as applicable, that are involved in the telephone-billed purchase, or provide the customer with a local or toll-free telephone number that the customer may call to readily obtain this information directly. However, the billing entity is not required to make the disclosure concerning collection efforts if the vendor, its agent, or the providing carrier, as applicable, will not collect or attempt to collect the disputed charge; or

(ii) Conduct a reasonable investigation (including, where appropriate, contacting the customer, vendor, service bureau, or providing carrier), after which it shall transmit a written explanation to the customer, setting forth the reasons why it has determined that no billing error occurred, make any appropriate adjustments to the customer's account, and provide copies of documentary evidence of the customer's indebtedness. The reasonable investigation and written

---

[2]The standard for "clear and conspicuous" as used in this Section shall be the standard enunciated by the Board of Governors of the Federal Reserve System in its Official Staff Commentary on Regulation Z, which requires simply that the disclosures be in a reasonably understandable form. See 12 CFR part 226, Supplement I, Comment 226.5(a)(1)-1.

[3] If oral notice is permitted, any customer who orally communicates an allegation of a billing error to a billing entity shall be presumed to have properly initiated a billing review in accordance with the requirements of 308.20(a).

explanation shall, in every case, address each potential billing error, and shall address with particularity the relevant facts asserted by the customer.[4]

(3) The action required by §308.20(c)(2) shall be taken no later than sixty (60) days after receiving the notice of the billing error and before taking any action to collect the disputed amount, or any part thereof. After complying with §308.20(c)(2), if the billing entity has determined that any disputed amount is in error, or has for other reasons determined not to sustain the disputed charge, the billing entity shall:

(i) Within thirty (30) days of such determination, notify the appropriate providing carrier, vendor, or service bureau as applicable, of its disposition of the customer's billing error and the reasons therefor, and provide sufficient information for the appropriate entity to identify the customer account at issue; and

(ii) Promptly notify the customer in writing of the time when payment is due of any portion of the disputed amount determined not to be in error and that failure to pay such amount may be reported to a credit reporting agency or subject the customer to a collection action, if that in fact may happen. The billing entity shall allow the longer of ten (10) days or the number of days the customer is ordinarily allowed (whether by custom, contract, or State law) to pay undisputed amounts.

(d) *Withdrawal of billing error notice.* A billing entity need not comply with the requirements of § 308.20(c) if the customer has, after giving notice of a billing error and before the expiration of the time limits specified therein, agreed that the billing statement was correct or agreed to withdraw voluntarily the billing error notice.

(e) *Limitation on responsibility for billing error.* After complying with the provisions of § 308.20(c), a billing entity has no further responsibility under that Section if the customer continues to make substantially the same allegation with respect to a billing error.

(f) *Customer's right to withhold disputed amount; limitation on collection action.* Once the customer has submitted notice of a billing error to a billing entity, the customer need not pay, and no billing entity, providing carrier, service bureau, or vendor may try to collect, any portion of any required payment that the customer reasonably believes is related to the disputed amount until the billing entity receiving the notice has complied with the requirements of § 308.20(c) and until the customer has received the written explanation and documentary evidence setting forth that no billing error has occurred, pursuant to 308.20(c)(2)(ii) or

---

[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 and maintained 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 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.

308.20(n)(2). The billing entity, providing carrier, service bureau, or vendor are not prohibited from taking any action to collect any undisputed portion of the bill, or from reflecting a disputed amount and related charges on a billing statement, provided that the billing statement clearly states that payment of any disputed amount or related charges is not required pending the billing entity's compliance with § 308.20(c).

(g) *Prohibition on charges for initiating billing review.* A billing entity, providing carrier, service bureau, or vendor may not impose on the customer any charge related to the billing review, including charges for documentation or investigation.

(h) *Restrictions on credit reporting*--(1) *Adverse credit reports prohibited.* Once the customer has submitted notice of a billing error to a billing entity, a billing entity, providing carrier, service bureau, vendor, or other agent may not report or threaten directly or indirectly to report adverse information to any person because of the customer's withholding payment of the disputed amount or related charges, until the billing entity has met the requirements of § 308.20(c) and allowed the customer as many days thereafter to make payment of any amount determined not to be in error, as prescribed by § 308.20(c)(3)(ii).

(2) *Reports on continuing disputes.* If a billing entity receives further notice from a customer within the time allowed for payment under § 308.20(h)(1) that any portion of the billing error is still in dispute, a billing entity, providing carrier, vendor, or other agent may not report to any person that the customer's account is delinquent because of the customer's failure to pay that disputed amount unless the billing entity, providing carrier, vendor, or other agent also reports that the amount is in dispute and notifies the customer in writing of the name and address of each person to whom the vendor, billing entity, providing carrier, or other agent has reported the account as delinquent.

(3) *Reporting of dispute resolutions required.* A billing entity, providing carrier, vendor, or other agent shall report in writing any subsequent resolution of any matter reported pursuant to § 308.20(h)(2) to all persons to whom such matter was initially reported.

(i) *Forfeiture of right to collect disputed amount.* Any billing entity, providing carrier, vendor, or other agent who fails to comply with the requirements of §§ 308.20(b), (c), (f), (g), or (h) forfeits any right to collect from the customer the amount indicated by the customer, under § 308.20(a)(2), to be in error, and any late charges or other related charges thereon, up to fifty (50) dollars per transaction. Nothing in this Section shall be construed to limit the liability of any billing entity, providing carrier, or other agent with respect to: (A) providing full refunds or credits for charges that are in error; (B) civil penalties for violations of § 308.20; or (C) liability for violations of any other provision of this Rule.

(j) *Prompt notification of returns and crediting of refunds.* When a vendor other than the billing entity accepts the return of property or forgives a debt for services in connection with a telephone-billed purchase, the vendor shall, within seven (7) business days from accepting the return or forgiving the debt, either:

(1) Mail or deliver a cash refund directly to the customer's address, and notify the appropriate billing entity that the customer has been given a refund; or

(2) Transmit a credit statement to the billing entity through the vendor's normal channels for billing telephone-billed purchases. The billing entity shall, within seven (7) business days after receiving a credit statement, credit the customer's account with the amount of the refund.

(k) *Right of customer to assert claims or defenses.* Any billing entity or providing carrier who seeks to collect charges from a customer for a telephone-billed purchase that is the subject of a dispute between the customer and the vendor shall be subject to all claims (other than tort claims) and defenses arising out of the transaction and relating to the failure to resolve the dispute that the customer could assert against the vendor, if the customer has made a good faith attempt to resolve the dispute with the vendor or providing carrier (other than the billing entity). The billing entity or providing carrier shall not be liable under this paragraph for any amount greater than the amount billed to the customer for the purchase (including any related charges).

(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 in good faith rights provided by this Section.

(m) N*otice 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.

(2) *General disclosure requirements.* (i) The disclosures required by § 308.20(m)(1) shall be made clearly and conspicuously and may be made on a separate statement or on the customer's billing statement. If any of the disclosures are provided on the back of the billing statement, the billing entity shall include a reference to those disclosures on the front of the statement.

(ii) At the billing entity's option, additional information or explanations may be supplied with the disclosures required by § 308.20(m), but none shall be stated, utilized, or placed so as to mislead or confuse the customer or contradict, obscure, or detract attention from the information required to be disclosed. The disclosures required by § 308.20(m) shall appear separately and above any other disclosures except those required under 47 CFR 64.1510(a)(2)(i).

(n) *Multiple billing entities.* (1) If a telephone-billed purchase involves more than one billing entity, only one set of disclosures need be given, and the billing entities shall agree among themselves which billing entity must receive and respond to billing error notices.

(2) If any billing entity has forgiven a disputed charge for a telephone-billed purchase, no other billing entity may attempt to collect such charge without first conducting the reasonable investigation and providing the customer with the written explanation and documentary evidence as specified by § 308.20(c)(2)(ii).

(3) If a billing entity other than the one designated to receive and respond to billing errors receives notice of a billing error as described in § 308.20(a), that billing entity shall either:

(i) Promptly transmit to the customer the name, mailing address, and business telephone number of the billing entity designated to receive and respond to billing errors; or

(ii) Transmit the billing error notice within fifteen (15) days to the billing entity designated to receive and respond to billing errors. The time requirements in § 308.20(c) shall not begin to run until the billing entity designated to receive and respond to billing errors receives notice of the billing error, either from the customer or from the billing entity to whom the customer transmitted the notice.

(4) If a customer fails to pay for a telephone-billed purchase and fails to initiate a billing review within the sixty (60) days provided under § 308.20(a), the billing entity that transmitted the first billing statement containing the unpaid charge shall, no later no later than one hundred and twenty (120) days after such statement was transmitted, provide the vendor or service bureau with:

(i) notice of the failure to pay;

(ii) the amount of the unpaid charge; and

(iii) sufficient information to identify the customer's account.

(o) *Multiple customers.* If there is more than one customer involved in a telephone-billed purchase, the disclosures may be made to any customer who is primarily liable on the account.

(p) *Deceptive statements to billing entities by vendors, service bureaus, and providing carriers.* It is a deceptive act or practice and a violation of this Rule for any vendor, service bureau, or providing carrier to provide false or misleading information to a billing entity conducting an investigation of a telephone-billed purchase charge under 308.20(c) or 308.20(n).

SUBPART D -- GENERAL PROVISIONS

§ 308.21 Severability.

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

§ 308.22 Actions by States.

(a) As provided by 15 U.S.C. § 5712, whenever an attorney general of any State has reason to believe that the interests of the residents of that State have been or are being threatened or adversely affected because any person has engaged or is engaging in a pattern or practice which violates any section of this Rule relating to the provision of pay-per-call services, other than § 308.20, the State may bring a civil action on behalf of its residents in an appropriate district court to enjoin such pattern or practice, to enforce compliance with this Rule (except for § 308.20), or to obtain such further and other relief as the court may deem appropriate.

(b) Any attorney general or other officer of a State authorized by the State to bring an action under this Rule shall serve written notice on the Commission, if feasible, prior to its initiating such action. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580, and shall include a copy of the complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the State shall serve the Commission with the required notice immediately upon instituting its action.

(c) Nothing contained in this Section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(d) Nothing contained in this section shall prevent the attorney general from exercising the powers conferred on the attorney general by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(e) Whenever the Commission has instituted a civil action for violation of any provision of this Rule, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for violation of any provision as alleged in the Commission's complaint.

By direction of the Commission.

Donald S. Clark,
Secretary

Appendix
List of Commenters and Acronyms

Acronym	**Commenter**
ALLIANCE	Alliance of Young Families
ALLIANCE-2	Supplemental comments (May 23, 1997) of Alliance of Young Families
AARP	American Association of Retired Persons
AMERITECH	Ameritech
ATN	Atlantic Tele-Network
ATN-2	Supplemental comments (September 3, 1997) of ATN
AT&T	AT&T
AT&T-2	Supplemental comments (August 8, 1997) of AT&T
AUDIOTEX	Audiotex Connection Inc.
BELL	W. Marie Bell
CINCINNATI	Cincinnati BBB
CVS	Communications Venture Services, Inc.
CU	Consumers Union
DMA	Direct Marketing Association
FLORIDA	Florida Public Service Commission
GORDON	Honorable Bart Gordon, U.S. House of Representatives
GORDON-2	Supplemental comments (September 4, 1997) of Honorable Bart Gordon
HFT	HFT and LO-AD Communications Corp.
UK	Independent Committee for the Supervision of Standards of Telephone Information Services
ISA	Interactive Services Association
ITA	International Telemedia Association
MCI	MCI Telecommunications Corporation
NAAG	National Association of Attorneys General
NCL	National Consumers League
PILGRIM	Pilgrim Telephone, Inc.
PMAA	Promotion Marketing Association of America
SNET	Southern New England Telephone Company
SW	Southwestern Bell and Pacific Bell
TPI	Tele-Publishing, Inc.
TSIA	TeleServices Industry Association
TSIA-2	Supplemental Comments (July 24, 1997) of TSIA
TURJANICA	William L. Turjanica
US WEST	U S West, Inc.
WISCONSIN	Wisconsin Department of Justice