

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

In the Matter of	)	
	)	
Telemarketing Rulemaking –	)	FTC File No. R411001
	)	
User Fee Comment	)	
	)	

**COMMENTS OF  
SBC COMMUNICATIONS INC.**

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**I. INTRODUCTION**

1. SBC Communications Inc. (“SBC”) hereby submits its comments in response to the Federal Trade Commission’s (“Commission” or “FTC”) *Notice of Proposed Rulemaking – Telemarketing Sales Rule User Fees* (“User Fee NPRM”).<sup>1</sup> SBC previously filed comments<sup>2</sup> in response to the FTC’s *Notice of Proposed Rulemaking* (“NPRM”),<sup>3</sup> which proposes, among other things, to create a national DNC (“DNC”) list. These comments address the scheme proposed by the Commission in the User Fee NPRM to support the costs of the FTC’s national DNC program.

2. Although SBC believes, based on its experience in operating telephone number-based databases, that the Commission has considerably underestimated the cost of the DNC program, it does not take a position on the amount of the proposed fee.

3. Instead, SBC will comment on the User Fee NPRM so as to respond to a suggestion raised during the FTC’s Telemarketing Sales Rule Forum, held in Washington, D.C., on

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<sup>1</sup> 67 *Fed. Reg.* 37362 (May 29, 2002).

<sup>2</sup> *Telemarketing Rulemaking – Comment*, Comments of SBC Communications Inc., FTC File No. 411001 (April 18, 2002).

<sup>3</sup> *Telemarketing Sales Rule; Proposed Rule*, 67 *Fed. Reg.* 4492 (January 30, 2002) (“Proposed Rule” or “NPRM”).

June 5-7, 2002 (“Forum”), to the effect that, if the Commission decides to impose a reasonable fee on end users that register for the DNC list, telephone companies should collect those fees on their bills. In reply, SBC respectfully submits that:

- Individuals must pay a nominal fee when registering for the national DNC list. A small registration fee would facilitate verification of a registrant’s identity, discourage unauthorized registrations, and defray some of the likely tremendous costs of running an accessible, up-to-date and secure national DNC list. A number of states have imposed a reasonable fee upon consumers who register on state DNC lists.
- The Commission unquestionably lacks the authority to require telecommunications carriers to collect consumer fees via billings for telecommunications services. This would require the FTC to enter into hundreds of billing and collection agreements with each and every telecommunications carrier, cable provider and wireless provider.
- Even if the FTC had jurisdiction, billing format and content are highly regulated by tightly-knit state and federal regulation with which FTC rules would inevitably conflict.
- Finally, state and federal regulations establish the priority of service providers’ claims where individuals fail to pay their bills in full. The FTC would not have a clear remedy for nonpayment of fees. Establishing the FTC’s payment priority would require extensive federal and state efforts.

**II. THE COMMISSION MUST CHARGE A REASONABLE FEE FOR REGISTRATION TO THE “DO NOT CALL” LIST TO ESTABLISH REGISTRANT IDENTITY AND OFFSET POTENTIALLY STAGGERING ADMINISTRATION COSTS**

4. The Commission should charge individual registrants to the DNC list a reasonable fee. This would help to authenticate their identity, discourage improper use of the DNC registry and offset the likely substantial costs of administering the national DNC list. A number of states have imposed a reasonable fee upon consumers who register on state DNC lists.

**A. Individuals Must Pay a Fee to Establish Their Identity and Discourage Unauthorized or Anticompetitive Registrations**

5. SBC agrees with many participants at the Forum that the proposed system for DNC registration must reliably authenticate that the individual registering a number on a DNC list is the owner of the line with responsibility for its control and usage. Absent

authentication, any individual residing in a household, or simply being in the house, without legal claim to a telephone account can opt-out an entire household from lawful telemarketing. In addition, as one panelist pointed out during the Forum, bad actors could manipulate the process by opting-out potential customers from telemarketing by their competitors while facilitating an opt-in to their own telemarketing.<sup>4</sup> The Commission has long recognized the importance of authentication in other privacy contexts; no less is required here.

6. A simple means of authenticating identity and, at the same time, discouraging abuse of the registration procedure is to require individuals to pay a small fee to register on the DNC list. Payment of fees, such as via credit card, will enable verification of individuals' identity and discourage unauthorized and anticompetitive registrations.

**B. Fee Payments By Individuals Would Help Offset the Substantial Costs of Administering the Do Not Call List**

7. Another reason for requiring individuals that receive the benefit of the national DNC list to pay a small fee for that service is to help offset its substantial, and as yet uncertain, cost. Based on its decades-long experience managing large databases of consumer information, SBC continues to believe that the Commission has significantly underestimated the costs of creating and administering a workable, up-to-date and secure DNC list.

8. In the User Fee NPRM, the Commission proposes that charging telemarketers an annual fee to access the DNC database of \$12 per area code will be sufficient "to recover the full cost to the Federal Government" of providing the DNC service.<sup>5</sup> SBC believes that the costs of the DNC database would prove to be considerably larger than what the Commission now assumes, and that assessing only the proposed fee on telemarketers

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<sup>4</sup> At the Forum, Tyler Prochnow of the American Teleservices Association stated that a Georgia energy company had in fact offered to register individuals for the state DNC list in order to block competitors' telemarketing while allowing for its own.

<sup>5</sup> 67 *Fed. Reg.* at 37363-64.

would result in a serious revenue shortfall. This shortfall should not be borne wholly by the federal Treasury or by telemarketers (who have cautioned the Commission about overly-optimistic cost projections throughout this proceeding). Instead, it would be reasonable to require participating consumers to help to defray the costs of a program allowing them to opt-out of legal and responsible telemarketing.

9. SBC's previous comments on the proposed TSR amendments addressed the likely expenses involved in creating, managing and securing a national DNC database. The Commission is ignoring estimates accepted by the Federal Communications Commission ("FCC") in 1992 that a national DNC list would cost between \$20 million and \$80 million to create and approximately \$20 million annually thereafter to manage.<sup>6</sup> These cost figures are far greater than the FTC's estimate that the national registry would cost approximately \$5 million in its first year and less thereafter.<sup>7</sup> This discrepancy, and other warnings brought to the Commission's attention throughout this proceeding by SBC and others, gives reason to question the estimates submitted by hopeful DNC-service vendors in response to the Commission's "Request for Information."

10. In addition, the Commission or its agents would likely incur substantial costs in providing security for the DNC database. As the Commission acknowledges, the DNC database would be accessed by millions of individuals and thousands of companies seeking to register, update registries or "scrub" telemarketing databases. The sheer size and contents of such a database would create a substantial risk of a "privacy Exxon Valdez," in which the personal information of millions of individuals may be inadvertently disclosed. The FTC must hold itself, its employees and its agents to the same high privacy and security standards to which it holds businesses.

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<sup>6</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8758 (1992) (Report and Order) ("Estimates to start and operate a national database in the first year ranged from \$20 million to \$80 million, with commenters agreeing that operation would cost as much as \$20 million annually in succeeding years.").

<sup>7</sup> 67 *Fed. Reg.* at 37363.

11. It is not unreasonable or unprecedented to ask consumers who would benefit from the national DNC list's service, which would block perfectly lawful telemarketing, to shoulder a portion of the cost of that service. Charging consumers for benefits collateral to telecommunications services is not unusual. Existing federal and state laws require consumers to pay Local Number Portability charges, which help defray of the costs of allowing consumers to maintain their phone numbers when they change carriers, and Universal Service Fund contributions, which subsidize the connectivity of low-income and rural communities and thus increase the value of telephone networks for all customers.

12. Charging consumers a fee for DNC service is a frequent component of state DNC programs. Alaska, Arkansas, California, Florida, Georgia, Idaho, Maine, Oregon, Texas and Wyoming charge their citizens fees, ranging up to \$10 annually per line, for the service of blocking telemarketing calls, whether operated by the state or through use of the Direct Marketing Association's service.<sup>8</sup> Such arrangements are workable and fair according to many participants at the Forum. As it may be reasonable to expect that consumers registering to the national DNC list would receive greater benefits from the national DNC list than state lists, because there is more interstate than intrastate telemarketing, fees higher than \$10 annually per line could be justifiable.

### **III. THE COMMISSION MUST REJECT PROPOSALS TO SHIFT THE BURDEN TO COLLECT "DO NOT CALL" USER FEES TO COMMON CARRIERS**

13. If the Commission decides to seize the authentication and revenue-enhancing advantages of charging individuals a fee to register on the national DNC list, the FTC must nonetheless reject proposals, raised at the Forum and elsewhere, that telecommunications carriers should be required to: (a) report on monthly billing statements whether individuals have registered with state or national DNC lists; (b)

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<sup>8</sup> Alaska Stat. Ann. § 45.50.475; Ark. Code Ann. § 4-99-401; California S.B. 771 (to be codified at Cal. Bus. & Prof. Code § 17590); Fla. Stat. Ann. § 501.059; Ga. Code Ann. § 46-5-27; Idaho Code § 48-1003A; Me. Rev. Stat. § 14716; Or. Rev. Stat. § 646.574; Texas H.B. 472 (to be codified at Tex. Bus. & Com. Code Ann. § 43.0001); Wyo. Stat. Ann. § 40-12-301.

collect, process and forward registration fees to the relevant state or federal DNC administrator; (c) transmit registration information to the DNC registry; and (d) give individuals notice of registrations' expiration dates and an opportunity to re-register. Foisting the burden of DNC administration on local exchange carriers ("LECs") is beyond the Commission's authority, would ignore intractable technical problems and would place LECs in a wholly untenable position. Unfortunately, the net result would be to shift the costs of managing the system to all local telephone customers.

14. The Commission acknowledges that it does not have jurisdiction over LECs.<sup>9</sup> This fact alone prevents the agency from forcing LECs to bear the burdens listed above. Moreover, the FCC has stated, in the context of a proceeding concerning the content of billing statements, that "the FTC does not have jurisdiction over the activities of common carriers."<sup>10</sup> Rather, the FCC has asserted jurisdiction over both interstate and intrastate communications with respect to billing (although states may have concurrent jurisdiction in some respects) because billing "is an integral part of [a] carrier's communication service."<sup>11</sup> In the FCC's *Truth in Billing Proceeding*, the FTC implicitly acknowledged the FCC's exclusive jurisdiction by submitting comments to that agency.

15. In addition, a suggestion made at the Forum that the Commission could require LECs to collect DNC fees via telephone bills utterly ignores long-standing federal and state rules that comprehensively regulate the format and content of telephone billing statements.<sup>12</sup> Line items may not appear on a bill unless they conform to all applicable orders from the FCC or state regulatory commissions. For example, as recently as 1999, the FCC provided comprehensive guidance regarding telephone billing in a proceeding to simplify and clarify billing statements. To this end, the FCC has rejected using telephone

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<sup>9</sup> See, e.g., NPRM, *supra* nt. 2, at 4519, nt. 265.

<sup>10</sup> *Truth-in-Billing and Billing Format*, 14 FCC Rcd 7492, 7508 (1999) (First Report and Order and Further Notice of Proposed Rulemaking)(1999).

<sup>11</sup> *Id.* at 7506.

<sup>12</sup> See, e.g., 47 C.F.R. § 64.2400 (the "Truth in Billing" rules).

service billing statements as vehicles unrelated to the provision of telecommunications services. Additionally, the bill statements would also have to comply with various state rules regarding truth in billing, bill verification, and anti-cramming regulations.

16. For example, these rules would require a LEC that includes any DNC information/notification on the bill to retain information sufficient to verify that the customer was properly on the DNC. Since only the FTC would have this verification, LECs would look to the FTC for indemnification from claims by customers.

17. More generally, no LEC should be required to bill DNC fees or otherwise administer DNC registrations based on information received from third party sources, such as third parties that might offer “do not call” registrations services for individuals or from vendors managing the national DNC list, unless the information sufficiently identifies individuals.<sup>13</sup> As Mr. Scruggs of SBC pointed out at the Forum, this would require, at a minimum, that the national list contain not only telephone numbers, but also billing name and address information. This is because when a LEC would make a representation on a bill in reliance on third-party information, the LEC risks violating extensive federal and state truth-in-billing regulations. Rules designed to prevent cramming and slamming<sup>14</sup> set a high bar for accuracy that LECs cannot meet if they are dependent on unverifiable information related to DNC registrations.

18. Finally, well-established federal and state telecommunications regulations establish the payment priority for various service providers in the event bills are not paid in full. Regulated telecommunications services normally are paid first; DNC registries are not

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<sup>13</sup> Although Alaska’s program for opting-out of telemarketing does require LECs to give consumers an opt-out opportunity through a billing statement insert and to process opt-out fees, a LECs is merely required to place a “black dot” next to consumers’ name *in the LEC’s own telephone directory*. In addition, LECs are not required to process fees for individuals other than their own customers. Thus, the Alaska program is not strictly a state DNC list. The Alaska law is a wholly inappropriate model for the administration of a national DNC list, which would involve many times more individuals, carriers, telemarketers and much more complex database and associated administrative issues.

<sup>14</sup> “Cramming” refers to the inclusion of unauthorized charges on bills. “Slamming” refers to the authorized change of a person’s presubscribed interexchange carrier.



even “in line” for payment at this time. Thus, to ensure a priority higher than last place, the Commission would be forced to engage in extensive, tedious proceedings with FCC and state public utility commissioners, and the outcomes could differ from state to state. It would also be necessary to determine whether non-payment of a DNC registration fee would justify removal from the DNC list, and what authority LECs possess to accomplish that removal.

## VIII. CONCLUSION

19. For the foregoing reasons, if the Commission establishes a DNC registry, the Commission should impose a reasonable fee on consumers to register for the national DNC list. At the same time, the Commission must also reject suggestions that telecommunications carriers could be required to collect and process such fees. The Commission lacks authority to take such action, and could not do so without creating unfair and conflicting obligations on telecommunications carriers.

Respectfully submitted,

/s/

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