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

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In the Matter of	)	
Toll Free Service Access Codes	)	CC Docket No. 95-155

COMMENTS OF DIRECT MARKETING ASSOCIATION

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In this Notice of Proposed Rulemaking ("NPRM") the Commission seeks to develop policies and rules relating to the deployment of a new toll free service access code (888) and to insure that toll free numbers continue to be allocated and used on a fair, equitable and orderly basis. The Direct Marketing Association ("DMA") is the principal trade association representing direct marketing interests; its more than 3,500 members make extensive use of toll free service in their dealings with the public and have a substantial interest in the matters raised in the NPRM. We have elected to confine these comments to the Commission's proposals with respect to "Lag Time" and the procedures proposed to insure adequate protection of vanity and other valuable toll free numbers. Although we believe that the Commission's goals in its treatment of these matters are sound, DMA maintains that the remedies proposed by the Commission require modification and, in some cases, amplification.

SUMMARY OF POSITION

The DMA supports the Commission's basic goal of seeking policies which insure the appropriate availability of a supply of toll free numbers to promote continued growth of this valuable medium of communications, and which avoid warehousing and other artifical constraints on the supply of numbers. Realization of these goals requires recognition of the widespread and diverse uses to which toll free numbers are put and the

adoption of rules which properly balance established uses and practices with the need to manage a limited resource. In two areas the proposals set forth in the NPRM fail to achieve that balance.

The Commission should not require amendment of industry guidelines that exist solely for the benefit of subscribers. The proposal to reduce the time that a number may be held in "reserved" status is unsound: It ignores the lead time associated with marketing applications that use, and depend upon, toll free service as an order taking mechanism; the reserved status enable these marketers to co-ordinate use of the number with the marketing campaign there by avoiding needless costs which would ultimately be borne by consumers. Similarly, the proposal to curtail the "suspend" period ignores the fact that certain uses of toll-free service are seasonal in nature. Neither the reserve nor the suspend category invite artifical withdrawal of numbers from the available supply and should not be materially altered.

The Commission has the power under the Communications Act to adopt measures to protect incumbent holders of vanity and branded numbers, and it must exercise that jurisdiction if its goal of an orderly, efficient and fair number allocation policy is to be achieved. Failure to consider laws which protect first users of vanity and branded numbers threatens to foment litigation and diminish the value of toll free service and is likely to result in the assignment of numbers the use of which is subsequently enjoined under trademark or unfair competition principles. At the minimum, the Commission can and should enable incumbent holders of such numbers to protect themselves against competitive harms and confusion by granting such holders a right of first refusal to

obtain and put the identical number in the new service area code into working status. Such incumbent holders should be permitted to release the identical number upon condition that a particular acronym associated with the number not be used in lieu of exercise of the first refusal right.

I. BALANCED AND EFFECTIVE TOLL-FREE NUMBER ALLOCATION POLICIES MUST REFLECT THE VARIETY OF USES OF THIS SERVICE.

The Commission acknowledges that, since its introduction in 1967, 800 toll free service "has proven successful to businesses." NPRM at 3, fn. 2. While the statement is correct, it fails to reflect the range of applications of toll free service, the importance of the service to the American economy, and the need to devise policies which are reflective of the nature of toll free service and its uses.

One of the primary values of toll free service is that it provides the public with a cost effective and highly efficient means of voluntarily placing orders for goods and services they need and want. The service is not itself a medium of advertising or marketing. It is, rather, used in conjunction with marketing programs and is inextricably interrelated to a broad array of marketing programs. For example, many direct mail marketers -- including catalog companies -- offer toll free service as a means of enabling customers to place orders. Direct response advertisements aired over-the-air, on cable television, and on radio invariably offer a toll free number. Toll free numbers frequently appear in advertisements in newspapers and magazines and are promoted on billboards and the sides of trucks. Retail establishments often offer toll free order taking as a supplement or adjunct to in-store sales. A broad variety of marketers and merchants

invest considerable effort and money to develop good will in their products or services and to identify the toll free order taking mechanism with their companies.

Some estimate of the importance of toll free service to the sale of goods and services in the American economy is to be found in data recently developed by the DMA. Our studies establish that total sales of goods and services generated in response to direct mail marketing exceeded $350 billion in 1994. A very substantial percentage -- probably more than half -- of these orders were placed by consumers using 800 numbers. See also, In Re Mail or Telephone Order Merchandise, 58 Fed. Reg. 49096 (September 21, 1993). And, direct mail is only one of the marketing forms with which 800 service is associated.

Toll free numbers are also widely used for customer service. In this context, as well, the service cannot be viewed in isolation from the functions with which it is associated. Toll free 800 service is offered by financial institutions to enable customers to resolve questions and concerns about their bank accounts, mortgage statements and deposits. It is offered by appliance manufacturers, including computer manufacturers and providers of software, for trouble shooting and assistance. Suppliers of dry goods also offer 800 service to consumers as a means of learning more about, and making better use of, products. A number of governmental agencies, including the Department of Education and the Internal Revenue Service, maintain 800 numbers to assist citizens in dealing with those agencies. Many companies that use toll free service for order taking purposes provide a separate number for customer service, to avoid confusing the two functions.

While there is no means of directly measuring the dollar value to the economy from the use of 800 toll free numbers for customer service, it is plain that the widespread practice of offering a low cost, convenient and easy to use means for customers to interact with merchants, marketers, businesses and government is important to a healthy economy.

In this proceeding, the Commission is understandably focused upon the need to expand the supply of toll free numbers, to insure continued growth of this valuable medium of communications, and to avoid wasteful use of the service. DMA supports these objectives. It is imperative, however, that this growth be accomplished in a way that does not disrupt the existing uses of toll free services in the 800 service access code and does not cause harm or add cost to public uses of both the existing and the new service access codes. The need for public awareness regarding the deployment of the new toll free service access code is, as the Commission has recognized, important. NPRM at 31. But this is not enough: the substantive standards governing the allocation and use of numbers in the new and the existing service access codes must, themselves, reflect the fact that 800, 888 and future 8xx toll free services are means to ends and are used for by a variety of businesses for similar but specifically defined purposes; those policies must appropriately balance established uses and practices against the need to manage this "limited resource." NPRM at 28. In two areas, the Commission's proposals fail to appropriately reflect that balance.

II. THE COMMISSION'S LAG TIME PROPOSALS FAIL TO REFLECT THE NEEDS OF TOLL FREE SUBSCRIBERS.

The Commission's proposal to change industry guidelines with respect to the length of time that toll free numbers can remain in a status other than "working" is designed to prevent artificial, and therefore wasteful, withdrawal of numbers from the supply of numbers otherwise available for allocation to RespOrgs and their subscribers. Certain of the proposals advanced by the Commission--e.g. shortening the "aging process"-- may serve that goal. Two of the proposals, however, will serve only to make it more difficult or costly for subscribers to obtain or efficiently use 800 and 888 service, to the detriment of the American public.

A. Industry Guidelines Regarding Reserved Status Should Not Be Changed.

The "reserved" status provided for in the industry guidelines[1/] is not designed for the benefits of RespOrgs. Instead, it is designed for the benefit of subscribers. A reasonable period of reserved status is, in many marketing applications, a critically important component of the effective and efficient use of toll free service.

For example, the preparation of even a small, highly specialized catalog -- or other mailing piece -- is a logistically complex process that can take several months from inception to actual mailing. The process of reserving the number and putting it into working status must be closely coordinated with the preparation and mailing of the promotion with which the number is to be associated. The number must be reserved sufficiently advance of the mailing date in time to permit preparation, printing and

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1/ Industry Guidelines at Para. 2.4.3.

mailing. Thus, mail marketers tend to order a toll free number as early as they are permitted to do so under industry guidelines and to put the number into working status in conjunction with the mailing of the piece. If the Commission, by regulation, compresses the permissible time during which a number can remain in reserved status, the marketer would be compelled either to accelerate the development of the promotional piece with which the number is associated -- at a cost ultimately born by consumers--or to prematurely put the number into working status, which also carries a cost ultimately born by consumers.

The reserved status neither promotes nor does it permit warehousing. Marketers and their service bureaus have reasons wholly unrelated to the fact that toll free numbers are a limited resource to put those numbers into working status as quickly as possible. The value to the marketer from toll free service does not arise because it possesses a number, but because the number enables the marketer to receive orders for its goods or services. Ignoring the lead time that is associated with the launch of certain marketing applications that use toll free service would serve only to penalize the marketer and ultimately its customers. The situation might be different if subscribers were permitted to retain numbers in reserved status indefinitely. But, that is not the case under the existing industry guidelines.

The 60 day reserve status period specified in the existing industry guidelines has worked quite well for a number of years. It is DMA's view that it should not be changed. In any event, a 45 day period should represent the absolute minimum time that a number can be held by a RespOrg for a subscriber. Any shorter period of time would serve only

to make it more difficult, and, in some cases impossible, for marketers to efficiently and effectively provide this order taking mechanism to customers, thereby increasing the cost and diminishing the value of toll free service and the business activities with which it is associated.

B. The "Suspend" Period Should Not Be Changed.

As the NPRM points out, a number previously assigned and put into working service may be temporarily disconnected ("Suspend") at the request of the subscriber for a maximum of twelve months.[2/] The Commission proposes to reduce the "assigned" status from 12 to 4 months, and implies that it may similarly reduce the period during which a number may, at the request of a subscriber, be kept in "suspend" status. NPRM at 15.

This proposal, too, ignores the workings of the marketplace in which toll free service operates and the reasons that businesses have found this medium to be such an effective means of interconnecting with customers. Many applications of toll free usage are seasonal in character. It is a well recognized phenomenon, for example, that the heaviest volume of direct mail marketing occurs during the last four months of the year; the actual usage of toll free numbers associated with these campaigns also occurs during the same period or season. Other forms of marketing also occur on a seasonal basis.

Whether or not seasonal marketers have a vanity number, it is of substantial convenience (and cost saving) to them (and their customers) to be able to use the same

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2/ Id. at Para.2.4.8.

toll free number from year-to-year and to withdraw the number from working status during periods when usage is low or non-existent. A reduction of the maximum "suspend" from twelve to four months would mean that marketers would not be able to reuse the same toll free number in connection with seasonal marketing efforts unless those efforts happened to occur quarterly. The only alternative would be for the marketer to keep the number in working status (and pay minimum usage charges) during periods when there is little or virtually no demand for the service.

There is no reason to penalize seasonal users of 800 service and their customers in this fashion. The "suspend" category exists for the convenience of subscribers and their service bureaus, and is unrelated to artificial restrictions -- number brokering -- on the available supply of numbers. A shortening of the "suspend" period is neither necessary nor appropriate to the realization of the Commission's goals.

III. THE RULES MUST PROVIDE ADEQUATE PROTECTION FOR VANITY AND BRANDED NUMBERS.

The NPRM quite properly recognizes that the opening of the 888 service access code poses potentially serious problems of consumer confusion, and loss of good will, to incumbent users of vanity or branded numbers in the 800 code. NPRM at 24-25. DMA maintains that the Commission not only has the power but must, as a matter of sound policy, adopt procedures that enable these incumbent users to protect themselves against competitive misuse of acronyms associated with particular number combinations ("vanity numbers") and, particularly for heavy volume, national, subscribers, against innocent confusion with respect to numbers which do not carry an acronym but are closely associated with the subscribers business or use of the number ("branded numbers"). We

show that all incumbent users of 800 service should be given the right of first refusal on the identical number in the 888 code, and should also be given the right to release that number for use by another on condition that a particular acronym associated with the number not be promoted or used.

A. The Commission Has Authority to Protect Against Misuse of Vanity and Branded Numbers.

The question whether the Commission has the requisite "statutory authority" (NPRM at 28) to protect vanity and branded numbers must be answered in the affirmative. The NPRM itself points out that Title I and Title II of the Communications Act empowers the Commission to promote the allocation of all telephone numbers in an "efficient, fair, and orderly manner." NPRM at 11; see, also, e.g., Ameritech Order, 10 FCC Rcd. 4596 (1995). It has long been recognized that the term "fair" in the context of the Communications Act has two meanings. First, it means that the Commission must see to it that telephone service -- of which telephone numbers are an indispensable ingredient -- is reasonably accessible by all who wish to use it. Second, the term "fair" obligates the Commission to take account of the competitive consequences of its regulatory decisions, not merely upon those entities that are directly subjected to its jurisdiction, but upon subscribers. The basic policies of the Act oblige the Commission to fashion rules which are protect subscribers against "confusion and deception.". See e.g., North America Telecommunications Ass'n. v. FCC, 772 F.2d 1282, 1287 (7th Cir. 1985). It necessarily follows that the Commission has the power to take reasonable and appropriate measures to protect the legitimate interests of incumbent holders of vanity or

branded 800 numbers, and of such numbers in succeeding service access codes as they are brought into service.

The NPRM asks whether "Federal trademark law alone will sufficiently protect" the current holders of 800 vanity or branded numbers. NPRM at 27. We submit that this misstates the issue. It is certainly true that the Commission cannot expand or contract intellectual property and competition law principles. However, it is equally plain that the Commission cannot ignore these principles in its formulation of toll-free number allocation policies, for two basic reasons.

First, the failure to take account of these protections will serve only to foment litigation based upon trademark or unfair competition claims; and the cost of this litigation will adversely affect the price consumers indirectly pay for toll-free service, and the value of the service itself. Secondly, the failure to harmonize the number allocation rules with principles of trademark and unfair competition will itself disrupt the goal of orderly and efficient allocation and use of the numbers. The allocation of a number in the 888 code, the use of which is thereafter enjoined or curtailed by the courts does not serve the goal of an orderly, effective, and efficient toll-free number allocation system.

The Commission states that "[i]n the end," the question of vanity and branded numbers entails "balancing" the incumbent holder's interest "against the need to manage a limited resource." NPRM at 28. This poses a false conflict: it is the very need to manage this limited resource that compels the formulation of policies and rules appropriately reflecting the protections accorded to incumbent holders under laws protecting fair competition. The Commission must harmonize its procedures regarding

toll-free number allocation with protections accorded users of vanity and branded numbers under other laws in order to achieve its basic goals.[3/]

B. Incumbent Holders of Vanity and Branded Numbers Should be Granted The Right of First Refusal To Use of the Identical Number in the 888 Service Access Code and the Right to Release That Number on Condition that the Associated Acronym Not Be Used.

The Commission's number allocation policies can be harmonized with the rights accorded to first users of vanity and branded numbers under other laws by the adoption of two interrelated policies. First, and at the minimum, all 800 number holders should be given the right to obtain -- and use -- the same number in the new toll free service access code. Second, the incumbent user should be allowed to release the same number in the new service access code, on condition that an associated acronym not be used; and breach of the condition should result in forfeiture of the number by the second user.

The Commission states that "a term spelled out by a vanity number may be protected as a trademark or service mark, provided that it meets the statutory requirements for trademark protection." NPRM at 27. The statement is accurate but incomplete. The case law makes very clear that a vanity or other number uniquely associated with the business and products and services of a particular company can be protected even when it does not meet the statutory requirements for trademark protection.

3/ The NPRM suggests that it may be necessary for the Commission to take account of foreign laws in the formulation of its policies. We do not agree. Certainly, it is important to insure interoperability of the 10 digit numbering system used in the United States with other numbering systems used abroad. But, the fact is that the overwhelming majority of 800 calls are made from callers in the United States and to entities which are located in the United States. It is therefore domestic laws and policies that should determine the measures of protection accorded to incumbent users.

In Dial-A-Mattress Franchise Corp. v. Page, 880 F.2d 675 (2d Cir. 1989), the Second Circuit Court of Appeals explicitly recognized that the acronym embodied in the plaintiff's (first user) telephone number did not qualify for trademark protection because it was generic.[4/] Nonetheless, the court upheld restrictions imposed on the defendant's use of the same number in a different service access code, on the fundamental grounds that a competitor is not free

> "to confuse the public with the telephone number or the letters identifying that number that its unacceptably similar to those of a first user."

Dial-A-Mattress, 880 F.2d at 676. This is simply an application of the principle that an attempt to trade on the goodwill of a competitor by 'passing off' the company (or products) as those of the competitor's is actionable under common law and the Lanham Act. The principle that "a confusingly similar use of a telephone number can constitute either trademark infringement or unfair competition" (Murrin v. Midco Communications, Inc., 726 F. Supp. 1195, 1200 (D.Minn. 1991) (emphasis supplied)), has been applied in a number of cases. See e.g., Express Mortgage Brokers, Inc. v. Simpson Mortgage, Inc., 31 U.S.P.Q.2d (BNA) 1371 (E.D. Mich. 1994); Holiday Inns, Inc. v. 800 Reservation, Inc., 838 F. Supp. 1247 (E.D.Tenn 1993); American Airlines, Inc. v. 1-800-A-M-E-R-I-C-A-N Corp., 662 F. Supp. 673 (D. Ill. 1985).

Thus, Commission policies should not turn on whether a particular acronym or number is itself eligible for trademark, but upon whether the use of the same number or

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4/ The acronym was "M-A-T-T-R-E-S-(S)." The defendant was using exactly the same acronym in a different service access code.

acronym poses a risk of confusing similarity. The fact that the same number or acronym is used in two different service access codes is not, of itself, sufficient to make the acronym dissimilar. See Dial-A-Mattress, 880 F.2d at 678.

Plainly, neither this Commission nor RespOrgs should be put in the position of deciding issues of "confusing similarity." There are, however, means for the Commission to harmonize its number allocation policies with the principle of protecting first users against confusingly similar uses of the number or acronym without embroiling the agency or RespOrgs in these kinds of disputes.[5/]

First. Incumbent users of vanity or branded numbers should be granted the right of first refusal on the same number in the 888 code. This is an appropriate means for implementing the "confusing similarity" test without cumbersome and costly administrative rules. It allows the incumbent holder to decide that the use of the same number and/or acronym in the 888 and succeeding toll-free service access codes is likely to result in confusion.

The NPRM expresses concern that this approach will enable incumbents to "block" an indeterminate amount of the numbers available in the 888 code, thus accelerate the need for successive deployment of 8XX codes. NPRM at 28. We do not

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5/ The proposal to bar issuance of the identical number in the 888 area code to a subscriber which has the same SIC code as an incumbent holder of that number in the 800 code (NPRM at 28-29) is, in a loose sense, reflective of this principle. It is, however, likely to prove ineffective since SIC codes are simply not designed to prevent confusing similarity; and the fact that the code would be self selected by the second user invites abuse. The use of an "intercept" (NPRM at 30) may be effective after confusion has arise or been created (see, Dial-A-Mattress, supra.) but the purpose of the Commission's rules should be to minimize confusion and competitive misuse before it arises. Thus, an intercept policy may be appropriate as a transitional mechanism but is not substitute for a permanent policy protecting against confusing similarity.

read the numerous letters the Commission has received requesting a right of first refusal in this way. Those letters make clear that an incumbent holder of an 800 vanity or branded number that exercises its right of first refusal must put that number into working status and keep it in working status, as provided in industry guidelines. For this reason, granting incumbent holders of 800 numbers a right of first refusal on the identical number in the 888 service access code will not artificially or wastefully "exhaust" the available supply. Id. Rather, the incumbent user will incur costs -- including the fees associated with obtaining a number, and increases in usage charges -- that will serve as a marketplace constraint upon exercise of the right of first refusal in circumstances where it is not warranted. At the same time, the right of first refusal will enable the incumbent user of an 800 number-- whether or not it is a vanity number -- to efficiently protect itself against both unfair, competitive misuse of the identical number in the 888 (or succeeding service access codes) and innocent confusion. The right of first refusal is consistent with the basic principle that incumbent holders are entitled to protection against "confusing similarity."

Second. In lieu of exercising the right of first refusal, the incumbent holder of a number in the 800 service access code should be allowed to release the identical number in 888 code on the condition that a particular acronym derived from that number not be promoted or used by the second (888) user. The rule should provide that upon receipt of proof that the condition has been violated, the RespOrg must terminate service under that number. We recognize that this procedure is unsuitable for branded numbers where the

potential for misuse is a function of the number itself. That is why a right of first refusal is essential to a proper policy.

However, first users should be allowed this more narrow measure of protection to deal with situations in which the exercise of the first refusal right is not necessary. There may well be circumstances in which the incumbent user is not concerned about the possibility of innocent confusion on the part of the public resulting solely from the fact that there are two identical numbers in two different service access codes. In those cases, the incumbent should not be forced to exercise the right of first refusal and bear the costs of that step. However, in some of these cases, the incumbent user may be very concerned about competitive effects (as well as confusion) resulting from the marketing, promotion and use of a confusingly similar (or identical) acronym. Allowing incumbent users to release the identical number in the 888 service access code on condition that a particular acronym derivable from it is not promoted or used permits the incumbent holder to protect the trademark or competitive value of the acronym without restricting the use of the number. At the same time this conditional release option makes the number available for use (without the acronym) by new entrants. Of course, the new entrant can refuse to accept the number because of the limiting condition. That would tend to prove that the incumbent holder's concerns regarding trademark infringement or unfair competition were well founded. See American Airlines Inc. v. 1-800-A-M-E-R-I-C-A-N Corp., 622 F. Supp. at 686 (as long as the defendant refused to refrain from the "misleading use" of the acronym, it was enjoined from "any use of the telephone number"). If the second user

accepts the limiting condition and then breaches it, the RespOrg should be required to terminate service to the second user under that number.

The right of first refusal and the related conditional release of the identical number are not alternative remedies.[6/] They work in tandem to harmonize the goal of an efficient number allocation policy with the basic principles of trademark law and unfair competition. They allow first users of vanity or branded numbers a means of protecting against confusing similarity. At the same time, these procedures serve the Commission's goals of a fair, efficient and orderly allocation of toll-free numbers by providing new entrants access to numbers in the 888 service access code in ways which will cause neither confusion to the public nor harm to competition.

C. Incumbent Users of Toll-Free Service Must be Given Adequate Notification of the Protections Accorded to Them.

If these procedures are to work, it is plainly important that all affected existing users be given adequate notice of the options provided to them for protecting their interests in vanity or branded numbers, and the consequences of their exercise (or failure to exercise) those rights. That is, all subscribers need to be told before the 888 service is deployed, that: they have a right of first refusal to take the same number in the 888 service access code; that the number must be put into working status within the interval defined under the industry guidelines; and that exercise of a first refusal entails certain

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6/ These procedures are entirely consistent with "partitioning" of toll-free service codes by types of users. That approach may independently have merit, but the protective measures we have argued should be adopted in any case.

fees and costs. All such subscribers must all also be told that they may, in lieu of exercising the right of first refusal, conditionally release the number in the 888 code and that breach of the restrictive condition can result in revocation, but that responsibility for seeing to it that the second user adheres to the condition does not rest with service providers or RespOrg. While it is proper for RespOrgs to treat a failure to respond to such notification within a reasonable period as an unconditional release of the number, it is critically important that all incumbent users of 800 services receive individual notification.

Technically speaking, a first refusal would not normally arise (and notification should not be given) until the identical number is about to be released in the new service access code. The DMA recognizes that this may impose substantial ongoing burdens on RespOrgs and that, therefore, a single notification to all incumbent holders of 800 numbers may be unavoidable. It is, however, imperative that this notice be given in a timely fashion, not more than sixty days before RespOrgs begin assigning numbers in the new service access code. DMA recognizes that this type of notification procedures carries a cost. That cost will be borne by incumbent users. In our view, the cost of notification is, however, less substantial than the alternative methods of protecting against confusion suggested in the NPRM.

CONCLUSION

The DMA urges the Commission to frame its policies with respect to the deployment of a new toll-free service access code in light of the variety of uses to which toll-free services is put and the importance of this service to marketing and other

consumer transactions. The Commission should not alter industry guidelines that are designed primarily for the benefit of subscribers. It can and should adopt appropriate procedures to protect the legitimate interests of incumbent holders of vanity or branded numbers.

Respectfully submitted,

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