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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

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REPLY COMMENTS OF BRITISH AIRWAYS PLC
[42 C.F.R. §1.415]

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1. Introduction.

British Airways Plc ("British Airways"), through its counsel, respectfully submits the following reply comments to the Commission's Notice of Proposed Rulemaking ("NPRM"). British Airways is a leader in the air transportation, travel and tour industries, and has made a substantial investment in developing customer alliances, confidence and satisfaction through its "800" vanity numbers, particularly "1-800-AIRWAYS". British Airways has considered some of the third party responses to the NPRM, and offers its comments in support of certain of such responses, as more fully articulated below.

The Commission has proposed two primary alternative schemes for addressing potential conflicts between vanity numbers: (i) a "right of first refusal" for holders of existing "800" numbers, which would accord such holders a superior right as against parties seeking to receive the equivalent "888,"

"877," etc. numbers; and (ii) an assignment of new numbers based upon industrial classification codes, by which a party would be automatically barred from an "888" number if an entity in an overlapping classification already possessed the equivalent "800" number. The Commission has also set out several additional, miscellaneous proposals. Evaluating the two primary proposals, the miscellaneous proposals, and various comments thereto, British Airways advocates adoption of the "right of first refusal" system. British Airways submits its comments in support of those third-party respondents (such as The Hertz Corporation and Avis Rent-A-Car System) who have recommended adoption of the "right of first refusal" scheme.

2. The "Right of First Refusal" System is Superior Because It Will Serve the Public Interest in the Avoidance of Public Deception.

British Airways is a heavy volume user of vanity numbers, and has a substantial commitment to them. In ten years of continuous use, British Airways has invested many millions of dollars in developing customer identification for these numbers through advertisement and promotion. As a result, the public has come to associate these designations with British Airways and the reliable services which it provides. One example is British Airways' "1-800-AIRWAYS" number, which enjoys a tremendous amount of customer good will and popularity.

The vanity numbers of British Airways and other businesses are equivalent to trademarks, and have been recognized

as such by the Commission, the courts and the United States Patent and Trademark Office (the "PTO"). See, e.g., American Airlines v. 1-800-A-M-E-R-I-C-A-N Corp., 622 F. Supp. 673 (N.D. Ill. 1985); U.S. Trademark Registration No. 1,920,189, issued by the PTO on September 19, 1995 to Citgo Petroleum Corporation for "1-800-GO-CITGO".[1] The philosophy behind this recognition is that vanity numbers function in the same way that trademarks do: they are indicia used by the public and trade to distinguish a company's goods or services from those of its competitors. As such, vanity numbers are capable of possessing good will, and the public has the right to be free from unfairly competitive activity which results in consumer confusion.

An augmented "888" system would potentially jeopardize the good will that businesses have developed over the years in their vanity numbers, because, if not carefully regulated, new "888" numbers which are identical or confusingly similar to previously-established "800" vanity numbers could be (and likely will be) assigned to businesses in overlapping fields, with resultant confusion to the public.

Trademark law charges the trademark owner with the affirmative duty to monitor the marketplace for infringements, and to take action against such infringements, so as to shield the consuming public from confusion over deceptively similar designations. (Protection of the public from confusion is the

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[1] On information and belief, the PTO has, to date, registered over 200 of such vanity numbers as federal trademarks.

ultimate goal of trademark law.) British Airways endorses the Commission's "right of first refusal" approach because, inter alia, it would provide an "800" user like British Airways with the most effective means of fulfilling these obligations. In this regard, British Airways submits that it is the "800" number owner itself -- holding a substantial economic stake in its vanity designations -- who can be relied upon to most effectively monitor the marketplace for conflicting numbers likely to result in consumer deception.

The Commission's proposed rules raise issues that are analogous to the trademark interests and concerns of "800" number holders and, in fact, the Commission has recognized the need to create a system that addresses these interests and concerns. By implementing a "right of first refusal" approach, the Commission would be making the proper accommodation to the rights of "800" number owners and, as a consequence, to the rights of the consuming public as well.

British Airways agrees with the other respondents who have suggested that implementation of the "right of first refusal" system would be straightforward and direct. For example, the Commission could establish a procedure whereby "800" number holders wishing to exercise their "right of first refusal" could simply apply to the SMS/800 database administrator to block the equivalent "888" numbers from being offered by carriers to the public. The "888" numbers in question would be removed from the database, and the remaining numbers made available. As

others have suggested, such a procedure would entail minimal overhead. For this reason, British Airways supports (as does respondent Avis Rent-A-Car System) that there be no cost or, at most, a low one-time fee, for the "right of first refusal."[2]

3. The "Industrial Classification" System Will Not Adequately Address the Potential for Consumer Confusion, and Will Cause Administrative Difficulties.

British Airways cannot support the Commission's alternative proposal of conflict avoidance based upon industrial classification. The industrial classification system is, by its very nature, imprecise, and cannot be relied upon to adequately address the potential for consumer confusion which may arise from the assignment of identical or similar vanity numbers. To illustrate, airlines, travel agencies and rent-a-car services may have different SIC numbers, but they are clearly related from a consumer perception standpoint. As a consequence, deception

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[2] British Airways acknowledges the Commission's concern that a plethora of new "888" numbers might be taken off the market due to exercise of the first refusal right, thereby perpetuating the very shortage of toll-free numbers which the "888" system is designed to remedy. British Airways submits that this scenario is unlikely. Just as there is a lot of "dead wood" on the PTO's Trademark Registers (i.e., many marks not in active use), British Airways suspects that many "800" numbers are not in sufficiently active use, or are not of sufficient commercial importance to their owners, to warrant the wholesale coopting of myriads of "888" numbers through exercise of the first refusal right. Indeed, the very fact that, as the Commission notes, there has been little business response to the Commission's previous inquiries on vanity number usage, validates British Airways' expectation. British Airways proposes that if shortages do develop, they be addressed by further study, and consideration of appropriate procedures (e.g., the implementation of fees as part of the first refusal process) designed to prevent them.

could result from the assignment of identical or similar vanity numbers to these various entities.

Again, an analogy can be drawn to trademark law. The PTO places different products and services in different classes. However, in evaluating competing marks for purposes of registration, the PTO recognizes that the potential for consumer confusion transcends these classes. To illustrate, the PTO places "motion picture exhibition services" in Class 41, and "home video recordings" in Class 9. Despite these different classes, the PTO would not allow two different entities to register the same mark in each of them, because it understands that the public would (correctly) regard these products and services as inherently related.

The PTO is staffed by experienced trademark professionals who are trained to carefully make these often subjective "consumer confusion" determinations. Were the Commission to adopt an assignment system based upon industrial classification, it would need to develop its own expertise in this area, above and beyond its present expertise in telecommunications matters. British Airways doubts that the administrative cost of such development can be justified in the face of the much more efficient "right of first refusal" system.

In addition, British Airways agrees with those respondents (such as 1-800-FLOWERS SM, Inc.) who believe that major administrative problems will be caused by the assignment of "888" numbers based upon the industrial classification system.

For the reasons described above, the classification approach is likely to engender large, industry-wide disputes over the classifications drawn and the grouping methods used. This problem will be particularly acute for diversified companies such as British Airways, which provides many different travel-related services, all accessible by the same "800" numbers.

4. The "Right of First Refusal" System is Also Preferable to the Commission's Miscellaneous Approaches.

The "right of first refusal" procedure is also superior to the other, miscellaneous proposals set out in the NPRM. The Commission has suggested, as one alternative option, the release of "888" equivalent numbers at the end of the assignment pool. British Airways advocates against such a plan, as do other respondents. In contrast to the "right of first refusal," a plan to merely delay the issuance of certain vanity numbers would provide no guarantee that the equivalent numbers would not be given to other parties in overlapping fields, yet it would require an administratively burdensome mechanism for placing the equivalent numbers at the back of the assignable list.

As a second miscellaneous proposal, the Commission has sought comment on whether the carriers could provide a "transitional gateway intercept," such that when a consumer called either an "800" number or its "888" equivalent, the caller would first reach an intercept message requiring identification by the caller of the particular entity whom (s)he wished to reach. Apart from the technical feasibility of such a system

(which MCI Telecommunications Corporation has stated is unworkable), the intercept proposal would only add to consumer confusion and complaints. Under this system, even a consumer who knew precisely the number and party whom (s)he was calling would be forced into the annoying intercept juncture, further delaying his/her call's completion. Furthermore, if the intercept message were in the form of a recording asking the caller, "Do you want company X or company Y?", this would only foster a connection between the two businesses in the mind of the consumer, thereby exacerbating confusion, rather than dispelling it. Such a system would thus create negative consumer perceptions, impair companies' good will, and ultimately hurt, not help, business.

The Commission has further suggested, as a third miscellaneous proposal, the partitioning of toll free services, such as by segregating certain user groups (e.g., personal or pager use groups) and assigning them specific toll free codes. While such a system may offer some advantages, British Airways feels that further study is required to, for example, identify those user groups which would be segregated, and to assess whether there still would be problematic overlaps of "800"-"888" equivalent numbers even with these groupings. If so, at least some first refusal right may still be necessary to alleviate confusing overlaps even with these radical groupings.

5. Conclusion.

For the foregoing reasons, British Airways respectfully supports the comments of those respondents who favor adoption of the Commissioner's "right of first refusal" system.

Respectfully submitted,

BRITISH AIRWAYS Plc

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