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

In the Matter of	)	
	)	
Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996	)	CC Docket No. 96-146

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AT&T COMMENTS

Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, AT&T Corp. ("AT&T") hereby comments on the Commission's Order and NPRM[1] proposing regulations and policies to implement Section 228 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("§ 228").

AT&T strongly supports the Commission's efforts to protect consumers from unscrupulous information providers ("IPs"), just as it endorsed the Commission's earlier efforts to control such abuses.[2] Consumers must be able to call information services with confidence that they know what charges will be assessed; otherwise they will become reluctant to call any IP, or

1 Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996, CC Docket No. 96-146, Order and Notice of Proposed Rule Making, FCC 96-289, released July 11, 1996 ("NPRM").

2 See AT&T Comments, filed Oct. 11, 1994, and AT&T Reply Comments, filed Oct. 31, 1994, in Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, CC Docket No. 93-22, Order on Reconsideration and Further Notice of Proposed Rule Making, FCC 94-200, released August 31, 1994; AT&T Comments, filed April 19, 1993, and AT&T Reply Comments, filed May 4, 1993, in id., Notice of Proposed Rule Making and Notice of Inquiry, 8 FCC Rcd. 2331 (1993); AT&T Comments, filed April 24, 1991, and AT&T Reply Comments,

(footnote continued on next page)

even to use toll-free numbers for other purposes. However, some of the proposals in the NPRM should be clarified or modified, in order to ensure that they have their intended effect and do not inadvertently prohibit arrangements that are beneficial for consumers, IPs and carriers alike.

Moreover, AT&T urges the Commission to recognize that careful regulatory drafting alone cannot protect consumers from information services abuses. As the NPRM recognizes, IPs have changed their methods in response to new regulations and enforcement actions,[3] and they will continue to do so. The Commission must be vigilant for evidence of new scams that seek to take advantage of "loopholes" that may be found in the future. Even when a practice is clearly prohibited by law, only the prospect of enforcement will deter violations. With these considerations in mind, AT&T offers the following specific comments in an effort to help the Commission refine and clarify the proposed rules.

I. THE COMMISSION SHOULD CLARIFY ITS PROPOSALS IN SEVERAL RESPECTS

As part of its effort to prevent oral presubscription abuses through issuance of "instant" credit, debit or calling cards, the Commission proposes to add the requirement that "a customer must use a pre-existing credit, charge, or calling card to obtain information services and that an actual card must have been delivered to the party to be billed prior to the assessment of any charges."[4] However, as currently drafted, proposed § 64.1501(b)(2) may not have the desired

(footnote continued from previous page)

filed May 24, 1991, in Policies and Rules Concerning Interstate 900 Telecommunications Services, Report and Order, 6 FCC Rcd. 6166 (1991), recon., 8 FCC Rcd. 2343 (1993).

3 NPRM, ¶ 39.

4 Id. ¶ 43 (emphasis added); see also proposed regulations at § 64.1501(b)(2).

effect. Both § 228 and its implementing regulations define "calling card" simply as "an identifying number or code that is unique to the individual, and that is issued to the individual by a common carrier..."[5] The terms "credit card," "debit card," and "charge card" are not specifically defined but, by analogy, presumably also refer to such identifying numbers.

In light of this definition, unscrupulous IPs could claim that merely assigning a number to a customer over the telephone constitutes delivery of an "actual" calling, credit, charge or debit card -- that is, an actual identifying number. Although such a practice could be deemed to comply with the proposed regulation, it would nevertheless permit IPs to issue "instant cards." In order to close this potential loophole, the Commission should require that "delivery" of a card be in writing, either by mail or through electronic transmission. In addition, the Commission should specify that charges for information services may not be assessed for the same telephone call or electronic transmission in which a card is delivered.

AT&T also supports the NPRM's proposal to prohibit reliance on automatic number identification ("ANI") to bill calls to toll-free numbers, except calls using TDDs.[6] As AT&T has stated in prior proceedings before the Commission, ANI billing of calls to otherwise toll-free NPAs threatens to undermine consumers' perceptions of and confidence in such numbers, denying consumers, carriers and toll-free subscribers the value and benefits of toll-free calling.[7] To permit ANI-based billing also would impede enforcement of the Commission's proposal to modify

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5 47 U.S.C. § 28(c)(11); 47 C.F.R. § 64.1501(c).

6 NPRM, ¶ 45.

7 See AT&T Verified Complaint, AT&T Corp. v. MCI Telecommunications Corp., No. E-95-2, filed Oct. 14, 1994.

§ 64.1504 of its regulations to ensure that § 228's protections for toll-free calling apply not only to "callers," but also to the subscriber to the line used to place a call, particularly in cases in which the subscriber is an aggregator.[8]

AT&T also endorses the Commission's proposal to require that all presubscription agreements for these purposes be in writing.[9] Without such a restriction, unscrupulous IPs could seek to exploit § 228's provision excepting calls to toll-free numbers for "any purchase of goods or of services that are not information services"[10] from the written presubscription requirements of § 228(c)(7)(C).[11] IPs might attempt scams such as offering a purportedly "free" information service, but billing the calling line for some item of nominal value shipped by mail. Such practices could cause tremendous problems, particularly for aggregators. Although previous Commission guidance provides that a caller has no power to bind the subscriber to an originating line to a contract to which the subscriber has not consented,[12] subscribers would nevertheless be faced with the difficulty and expense of proving that they had not agreed to an oral presubscription for "goods

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8 See NPRM, ¶ 44-45; Letter from Gregory A. Weiss, Acting Chief, Enforcement Division, Common Carrier Bureau, to Randal R. Collett, Executive Vice President, Association of College and University Telecommunications Administrators, 9 FCC Rcd. 2819 (1994).

9 NPRM, ¶ 42.

10 47 U.S.C. § 228(c)(8)(D)(iii).

11 In order to clarify both the current Part 64 regulations and those proposed in the NPRM, the final regulations should explicitly reference the statutory definition of "information services" found at 47 U.S.C. § 153(20). In addition, the NPRM for the ongoing rule making in CC Docket No. 96-149 seeks comment as to "what services are included in the statutory definition of information services," and may help to further define that term. Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, CC Docket No. 96-149, Notice of Proposed Rule Making , FCC 96-289, released July 18, 1996, ¶ 42. By providing additional specificity concerning the scope of the term "information services," the Commission could assist IPs and carriers in conforming their conduct to the law.

12 See Letter to Randal R. Collett, supra note 8.

and services." In order to prevent scams of this sort, the Commission should adopt a policy requiring a written presubscription whenever the same toll-free call offers both a non-information "good" or "service" for which the caller is charged a fee, and an information service.

II. REMUNERATION FROM OR BETWEEN A CARRIER AND AN INFORMATION PROVIDER SHOULD CREATE ONLY A REBUTTABLE PRESUMPTION THAT § 228 HAS BEEN VIOLATED

The NPRM proposes to deem "any form of remuneration" from a carrier to an IP or entity advertising an information service, or "any reciprocal arrangement between such entities" as per se evidence that the charge levied for a interstate call to an IP "exceeds the charge for transmission."[13] AT&T supports the goal of this provision: to prohibit scams in which carriers file unjustifiably high tariffs, and then pass a portion of their proceeds to an IP that ostensibly provides a "free" information service. However, the proposal sweeps too broadly because it would prohibit not only abusive practices, but also arrangements that are both benign and economically efficient.

For example, AT&T and other carriers have entered into terminating switched access arrangements ("TSAAs") with many subscribers that receive a large volume of incoming calls over the carrier's network. In such arrangements, the called party provides its own link to an IXC's POP. The called party thus becomes an access provider, and levies access charges that are in all cases lower than those that would be charged to the IXC by the LEC that otherwise would provide terminating switched access. If a TSAA customer were an IP, then a TSAA arrangement might be deemed a "form of remuneration" from a carrier to an information provider, in violation of the proposed prohibition.

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13 NPRM, ¶ 48.

There is no basis automatically to deem TSAA arrangements as violations of § 228, because such arrangements are categorically different from the types of practices the Commission seeks to address. Prior Commission guidance on the subject of carriers' remuneration to IPs has indicated that a carrier should not "acquire an interest in promoting the delivery of calls to a particular number for the provision of a particular communication," because to do so would be inconsistent with its duties as a common carrier.[14] Similarly, a common carrier serving an IP should not "limit access to that number to callers using its transmission services" by blocking access via other carriers.[15] In TSAA arrangements, however, a carrier cannot be said to "acquire an interest in promoting" calls to a particular number. Instead, the parties each realize the benefits of efficiencies achieved through a mutual arrangement. The benefit to both parties does increase as call volume increases, but only in direct relation to the IXC's savings over LEC access charges.

Further, TSAA arrangements do not result in higher charges to consumers for information services. All AT&T customers pay the same tariffed rates for the same services, regardless of whether or not those services are terminated over TSAAs. The Commission's prior guidance makes clear that the touchstone of whether a carrier's relationship to an IP is improper is not merely the exchange of some form of compensation, but rather the nature and sources of that remuneration.[16] In particular, remuneration that reflects the value or cost of service provided to the carrier would likely be proper and economically efficient. It would be both arbitrary and

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14 Letter from John B. Muleta, Chief, Enforcement Division, Common Carrier Bureau, to Ronald J. Marlowe, 10 FCC Rcd. 10945 (1995).

15 Id.

16 Id.

inefficient to prohibit TSAA arrangements -- particularly in light of the fact that such relationships would remain perfectly lawful for called parties that are not IPs.

The Commission also should recognize that IPs' arrangements with IXCs are not the only potential sources of abusive compensation-sharing. The NPRM proposes to ban only arrangements in which there is some form of remuneration between the carrier that charges a telephone subscriber for a call to an interstate information service -- that is, an IXC -- and an IP or an entity advertising the IP's services.[17] However, any prohibition on compensation sharing must extend not only to arrangements between IPs and IXCs, but also to dealings between IPs and LECs or CAPs.

For example, AT&T has been the victim of arrangements in which an IP establishes a chat line in the service area of a LEC with unusually high terminating access rates, and then advertises the availability of that service at ordinary long distance rates. When end-users call the chat line, the LEC assesses the IXC over whose network the call was completed a terminating access charge per minute that in many instances standing alone exceeds the IXC's total revenue for the call, and far exceeds the LEC's true cost of providing access. The LEC then shares a portion of its inflated access revenues with the IP, giving the LEC and IP a shared, direct financial interest in promoting calls to that information service.[18] In sharp contrast to TSAA contracts, these schemes create no efficiencies for the participating IP or LEC. The flow of compensation from LEC to IP in such arrangements is in no way based on avoided costs, but is simply a kickback.

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17 NPRM, ¶ 48.

18 Of course a LEC, unlike an IXC, need not take any steps to block access to its services via other carriers, as it is virtually always a monopoly provider of local access.

Some IPs have engaged in still another scam that also relies on inflated access charges. In this scheme, a chat line provider files an access tariff under the guise that it is a CAP. The IP then purports to assess its own "access" charges on IXCs delivering calls to its service, in addition to the traditional LEC access charges for handling that same traffic as it passes through the LEC's switches to the IP's chat bridge. Alternatively, an IP may enter into an alliance with a separate entity purporting to be a CAP, in which the parties similarly share bogus "access" charges which the CAP collects from IXCs.

In the situations described above, AT&T believes that the Commission's proposed ban on remuneration from carriers to IPs equally forbids the imposition and sharing of such purported "access" charges, because these payments represent concealed compensation for an information service. Although these schemes may not directly increase charges to callers, they permit IPs to avoid providing consumers with the safeguards required by TDDRA and the Commission's regulations by claiming that they are not offering pay-per-call services. Further, because these scams increase IXCs' costs of doing business, they ultimately cause consumers to bear higher charges for all long distance calls. Accordingly, an IXC should be relieved of any obligation to pay such sham access charges to a LEC or CAP, and AT&T asks the Commission to adopt this interpretation expressly in its final rules.

AT&T suggests that the NPRM's proposed per se ban on reciprocal payment arrangements be modified to permit an element of flexibility. Arrangements between carriers and their customers take myriad forms, and will likely take on new patterns with the advent of local competition, many of which are economically efficient and do not lead to abuses. Therefore, any flow of remuneration from a carrier (including LECs and CAPs, as well as IXCs) to an IP or party advertising an information service, or a reciprocal arrangement between those entities, should create only a rebuttable presumption that § 228 has been violated. A party accused of a violation could meet its burden of proof by demonstrating that it had not "acquire[d] an interest in promoting the delivery of calls to a particular number" -- for example, by showing that it was simply passing along a portion of its own cost savings achieved through a mutually beneficial arrangement, by demonstrating that its transaction with an IP is not materially different from similar arrangements it has made with non-IPs, or by demonstrating that its payments to an IP properly reflect the cost or value of services actually provided to the carrier.

Finally, the NPRM's proposal to prohibit improper remuneration between carriers and IPs refers to prohibiting such arrangements for calls "to an interstate information service."[19] However, as the NPRM recognizes, parties seeking to exploit the former statutory exception for tariffed services frequently conspired with IPs located abroad.[20] Because 47 U.S.C. § 153(22) defines "interstate communication" and "interstate transmission" to exclude calls that terminate in a foreign country, the Commission should clarify that its proposed prohibition applies to international as well as interstate calls, and should rely expressly on its authority under 47 U.S.C. § 201 to ensure that common carriers providing interstate or foreign communications service do so in a manner that is just and reasonable.[21]

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19 NPRM, ¶ 48.

20 Id. ¶¶ 9-10.

21 See Letter to Ronald J. Marlowe, supra note 14.

CONCLUSION

For the reasons stated above, the Commission's proposed regulations implementing § 228 of the Telecommunications Act of 1996 should be modified or clarified prior to adoption.

Respectfully submitted,

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