

DOCKET FILE COPY ORIGINAL

Mark D. Olson Law Offices

410 W. Badillo Street, Second Floor
Covina, California 91723
Telephone: (818) 915-3333 Fax: (818) 331-1111

July 10, 1997

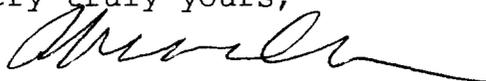
Office of the Secretary
Federal Communications Commission
1919 M Street N.W.
Washington D.C. 20554

RE: Report No. 97-123 (Docket No. CC 95-155)

Dear F.C.C. Secretary:

Please kindly file the enclosed Common Carrier reply comment petition with copies. Please return the extra conformed copy in the self-addressed stamped envelope. Thank you.

Very truly yours,



Mark D. Olson
Attorney at Law

Thank you!

No. of Copies rec'd
List ABCDE

025

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

In the Matter of)
)
RULES PROMOTING)
EFFICIENT USE,)
FAIR DISTRIBUTION)
OF TOLL FREE NUMBERS)
_____)

REPORT NO. CC 97-123
CC DOCKET NO. 95-155

REPLY & FURTHER COMMENTS

As a further comment to our previous petitions, we respectfully submit that: (1) the Federal Communications Commission has not complied in good faith with section 603 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.); (2) the Commission's statutory authority to regulate the "efficient allocation" of toll-free numbers does not give the Commission the authority to monitor and regulate the "efficient use" of lawfully obtained and working toll-free numbers by "telecommunications end-users"; and (3) we agree that the Commission has statutory authority to regulate "warehousing," which governs abuses by statutorily regulated businesses who are entrusted with special, privileged access to the "public switched network" and the public resource of unassigned toll-free numbers; however, the Commission's authority does not extend to the up to nine(9) million small business "toll-free subscribers" who are afforded special statutory protections, including "number portability" and retention rights, under the Telecommunications Act of 1996.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS (RFA)

At first glance, one can be easily fooled by the Commission's RFA analysis. Among the small business entities the Commission identifies, the FCC lists 15 categories of small telephone companies in Standard Industrial Classification (SIC) 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone). However, after identifying and estimating the numbers of these businesses, the Commission's RFA appears completely void of a meaningful discussion of the impact and significant alternatives.

But worse than that, after identifying 15 categories of telephone industry businesses, the Commission then arbitrarily lumps the remainder of small business entities into one massive group it

calls "toll-free subscriber" small businesses, which contains up to nine (9) million small business entities! What in heaven's name is a "toll-free subscriber" small business? What kind of small business classification is this?

The following table has been compiled to illustrate how the Commission's final RFA has attempted to classify small businesses.

CATEGORY OF BUSINESS	FCC-RFA / ESTIMATED IMPACT
1. Small Telephone Companies	"fewer than 3,497"
2. Responsible Organizations	"fewer than 168"
3. Wireless Carriers and Service Providers	"fewer than 2,295"
4. Local Exchange Carriers	"fewer than 1,347"
5. Interexchange Carriers	"fewer than 130"
6. Competitive Access Providers	"fewer than 57"
7. Operator Service Providers	"fewer than 25"
8. Pay Telephone Operators	"fewer than 271"
9. Wireless (Radiotelephone) Carriers	"fewer than 1,164"
10. Cellular Service Carriers	"fewer than 792"
11. Mobile Service Carriers	"fewer than 138"
12. Personal Communications (PCS)	"total of 183"
13. Resellers	"fewer than 260"
14. Cable System Operators	"fewer than 1,439"
15. SMR	Unspecified/less than 200
SUBTOTAL FOR 15 CATEGORIES	= 11,766
16. Toll Free 800 Subscribers	"fewer than 6,987,063"
17. Toll Free 888 Subscribers	"fewer than 2,014,059"
SUBTOTAL FOR TOLL-FREE SUBSCRIBERS	= 9,001,122

This is absolutely absurd, as there is no such thing as a "toll-free subscriber" industry, nor is there a Standard Industrial Classification (SIC) for this Industry. This is also another area where the Commission has demonstrated how "out of touch" they are with the realities of the business world. Careful analysis of the final RFA in Report No. 97-123 reveals that it is seriously flawed and deficient in addressing and discussing the impacts, burdens and significant alternatives imposed upon up to 9 million small business entities, which the Commission recklessly groups together in a "Fictional Industry Classification" (FIC) which they label as "toll-free subscribers."

While the Commission may have the outward appearance of "connecting the dots" by going through the RFA checklist, the Commission's analysis and conclusions are faulty and not supported by record evidence of the facts. In performing its RFA, the Commission completely ignores the impact and effect on millions of small business entities who are lumped together into a meaningless category that is labeled as "toll-free subscribers." There is absolutely no analysis or discussion of the types of businesses in this macro-class. There is no discussion of telephone service bureaus, advertising agencies, public relations firms, advertising cooperatives, "shared-use providers" (the hottest new area of telemarketing), placement houses, telemarketing consultants, businesses whose entire trade identity is based upon a Vanity 800 or easy-to-dial 800 number, or regular-ordinary-everyday businesses that are NOT telephone companies, but are nonetheless significantly and adversely impacted by this rule and need "more than one toll-free number."

In crafting its rules and analysis, the Commission displays some nominal concern for discussing the impact and significant alternatives for the "fewer than 11,766" small business telephone companies in 15 subcategories. But, any meaningful analysis for the 9 million small business entities is completely missing!

When it comes to the up to nine (9) million small business "toll-free subscribers" that the Commission has so unceremoniously lumped together into one group, it appears that no attempt is made whatsoever to discuss or even consider the burdensome impact of the rules upon the various subcategories of legitimate small businesses that should be readily apparent to the Commission. And yes, these rules do significantly impact millions of small business "toll free subscribers", especially when the Commission begins to implement section 52.107, the arbitrary and capricious "rebuttable presumption" that a small business with "more than one toll-free number" is presumed to be illegally "hoarding" numbers.

We must point out that, in its rulemaking, the Commission appears to go to great pains so as not to create unduly burdensome certification and compliance procedures for the Responsible Organizations, for which the Commission states there are "fewer than 168." In discussing the needs of RespOrgs, the Commission appears to be so thoughtful and concerned about how the rules would adversely impact these 168 small business entities, and appears so kindly in determining an easier alternative to reduce the burden of certifying compliance with the rules.

In sharp contrast, the Commission does not bother to try to explore other reasonable alternatives for the up to 9 million

small business entities categorized as 800 & 888 "toll-free subscribers", nor does the Commission acknowledge the fact that the 11,000 small telephone company businesses are under a completely different classification of regulated conduct prescribed by the Telecommunications Act of 1996.

At this point, it should be emphasized again that there is no such thing as a small business that can be categorized as a "toll free subscriber." Nobody makes money being a "toll free subscriber" and there is no Standard Industrial Code (SIC) or SBA standard for small businesses in the business of being a "toll-free subscriber." But even if we accept this as an SBA/FCC classification, the Commission ignores any discussion regarding the fact that "toll free subscribers" are not governed by the same laws that govern small business telephone companies. Small business telephone companies are regulated by the FCC to serve telecommunications end-users. Let us not pass rules that make it appear that it's the other way around!

The Commission appears to completely ignore the fact that the millions of small businesses who employ "more than one number" consist of a vast array of non-telephone company small entities that are dispersed in virtually every category of the Standard Industrial Code system. The Commission has completely failed to address the needs of this legitimate group of small business entities as entities that are customers, and are not regulated utilities, telephone companies, or common carriers. The Commission has failed to consider the needs of these up to 9 million businesses, important needs which are completely separate and apart from the needs of the "fewer than 11,000" small telephone company entities in which the Commission focuses their primary discussion and analysis.

The Commission also completely ignores any discussion of the "chilling effect" this rule has already had on the capital markets, who now refuse to invest in small business ventures in which the primary marketing component is a particularly valuable toll-free "vanity" 800 number. Since the Commission has created a regulatory environment where a toll-free subscriber is now "rebuttably presumed" to be an illegal "hoarder," subject to having its "vanity" 800 telephone numbers summarily disconnected and forfeited, small and start-up businesses are now being denied access to venture capital and bank financing. This means that new telecommunications business ventures are now being discouraged when they seek financing, in direct contravention with the spirit and intent of Congress when it passed the Telecommunications Act of 1996. Maybe the Commission can put this fact in its next report to Congress.

Of the approximately 11,000 small telephone companies that the Commission recognizes to be impacted by this rule, these small telephone companies all have one major thing in common: they are regulated telephone companies that have special and privileged access to the "public switched" telephone network. Therefore, because of their special, privileged access to the toll-free number database, we agree that they should be subjected to FCC regulations that insure the "fair, equitable and efficient allocation" of these resources. But these same rules should not apply to small business "telecommunications end-users," (aka- "toll-free subscribers"). We believe the Commission has exceeded its statutory authority by attempting to regulate the "efficient use" of toll-free numbers by the consuming public.

EFFICIENT ALLOCATION VS. EFFICIENT USE

Except for a few limited areas prescribed by Congress, the Congress has neither expressed or implied that the Commission is empowered to regulate the "efficient use" of toll-free numbers by "telecommunications end-users." Neither does the Commission have the right to examine a telecommunications end-user's books, records, financial statements, or the like. In fact, once allocated, the Federal Trade Commission and the court system are the only appropriate venues for regulating abuses of toll-free numbers, such as occurs with Vanity 800 trademark infringement, unfair competition complaints, and frauds perpetrated upon the public with toll-free numbers.

In the Initial Regulatory Flexibility Analysis performed by the Commission in Appendix A of Docket No. 95-155, the FCC states that its objective is "to assure that, in the future, toll free numbers are allocated on a fair, equitable and orderly basis." Yet, this rule goes far beyond that objective. Instead, the Commission has proposed to take away the toll-free numbers of existing subscribers, under the legal fiction that having "more than one number," despite clear business realities and necessities, constitutes unlawful "hoarding" of toll-free numbers. By this action, the Commission appears to be attempting to extend its power into new areas, not previously regulated, that the Congress has clearly asked the FCC to "forbear" from unnecessary regulation. It should also be noted that the Commission also stated in its IRFA that its further objective was to not disrupt existing customers. In no way, shape, form or manner does 47 CFR 52.107 further that objective!

It appears the Commission has confused its regulatory authority over the "allocation" of toll-free numbers with an imaginary authority to regulate the lawful use of toll-free numbers.

However, it is our contention that, once lawfully assigned and employed by the "telecommunications end-user," the Commission has no statutory authority, either expressed or implied, to terminate an end-user's toll-free service or to convert a toll-free subscriber's legitimate working telephone numbers for the unjust enrichment of others. Such an illegal taking of property, in this case the bundle of intellectual property and goodwill created only by the efforts of the bill paying telecommunications end-user, would constitute the most horrendous and anti-competitive environment the telecommunications industry has ever seen...and definitely would not be in the public interest!

IMPROPER NOTICE TO MILLIONS OF TOLL-FREE SUBSCRIBERS

It should also be noted that the Commission did not use readily available methods to alert the millions of small business entities of its NPRM and pending rulemaking in this matter. Under normal circumstances, as when an NPA geographic area code is proposed to be split, all telephone customers usually receive a "bill insert" public notice that explains the proposed rulemaking, how to file comments, and where public hearings will be held. These bill inserts are usually sent for numerous months ahead of any proposed action, with the idea in mind of making sure that the public is adequately informed and has full opportunity to comment and object. We believe that this should have been done with this rulemaking, and that if this had been done, the Commission would have been flooded and inundated with protests and complaints. Therefore, it appears that the special public notice procedures that are mandated by the Small Business Regulatory Flexibility Act have not been complied with.

CONCLUDING DISCUSSION: THE COMMISSION DOES NOT HAVE THE SAME STATUTORY AUTHORITY OVER THE UP TO NINE (9) MILLION TOLL-FREE SUBSCRIBERS WHO ARE NOT REGULATED PUBLIC UTILITIES, COMMON CARRIERS OR RESPORGS.

We ask the Commission to consider that there are millions of small business entities that need multiple toll-free numbers and cannot afford the undue burden of proving "legitimate use," a standard that is clearly vague and subject to constitutional challenge. These small business entities, of which the Commission admits there are perhaps as many as 9 million, do not have special privileged access to the toll-free number database that the other 11,000 small telephone companies do to the "public switched network" and toll-free number database.

Therefore, it is arbitrary and capricious that up to nine (9) million "toll-free subscribers" should be lumped together with the less than 11,000 small business telephone entities. Small telephone companies are statutorily required to submit to the regulations prescribed in the Telecommunications Act as part of their responsibility to afford the "fair, equitable and efficient ALLOCATION" of number resources. No such regulatory authority should exist with "telecommunications end-users." It should be unlawful to force or coerce end-users to surrender their multiple toll-free numbers.

We also ask the Commission to keep in mind that the Congress has afforded all "telecommunications end-users" with specific statutory protections, including the right to retain our valuable telephone numbers. In light of this, we think it seems rather irrational that, on the one hand, the Commission has no problem allowing business entities to "hoard" radio and televisions stations (if "hoarding" can be defined as having "more than one"), but on the other hand, it is illegal to have more than one toll-free number! We want to know if the Commission is saying that "it is legal to have 100+ radio stations" (of which there are only about 11,000 available ones and its perfectly legal to sell them), but "it is illegal to have more than one toll-free number" (of which over 14 million are available and you can make 7 million more every time you open up a new toll free area code)? Where is the rationale for this discrepancy in national telecommunications policy, and how do these rules faithfully reflect and implement the spirit and intent of Congress? Does the Telecommunications Act of 1996 and the Small Business Regulatory Flexibility Act really mean what it says? Millions of small business entities want to know.

Therefore, as stated in previous petitions, we believe the Commission's rulemaking regarding "hoarding" and "brokering" violates the intent of Congress, is anti-competitive, is an arbitrary and capricious abuse of the Commission's authority and discretion, does not serve the "public interest," and is disruptive to existing toll-free customers, therefore further violating the objectives stated in the Commission's initial RFA.

It also appears that the Commission also failed to discuss the useful benefit that has been provided to the Telecommunications Industry over the past 30 years by the hundreds of small business entrepreneurs that specialize in developing Vanity 800 number marketing programs. While none of our members engage in brokering numbers, we still find it objectionable for the Telephone Industry Cartel to brush aside these small businesses, labeling so many of these honest, hard working and creative people as "800 pirates", "hoarders" and "unscrupulous number brokers." Despite all of the rhetoric and name-calling, there is

absolutely no record evidence that this group of entrepreneurs are in any way responsible for "number exhaustion." In fact, we question whether this whole issue is nothing more than a false dilemma and legal fiction to create an excuse for powerful phone companies and big business subscribers to steal valuable 800 numbers from small business entities. There is no record evidence of a crisis, or that anyone has been denied a toll free number or toll free service simply because entrepreneurs employ "more than one toll free number" in their business ventures.

In truth, the major carriers, RespOrgs and paging companies, not "number brokers", are the ones who have salted away MILLIONS of toll-free numbers that are not even in use today! To that extent, we agree with the Commission that "warehousing" is a real problem...and it is a problem that we believe is clearly within the Commission's jurisdictional authority. We agree that the Commission can and should regulate the fair, equitable and efficient "allocation" of unassigned toll-free numbers, which rightfully includes the authority to prohibit RespOrgs and Carriers, as quasi-public trustees of the public switched network, from the abusive practice of "warehousing." If the Commission would enforce this aspect of its rulemaking, there would be no need for chilling regulations that allow the confiscation of the intellectual property, business goodwill, and "vanity" 800 numbers of law abiding telecommunications end-users.

Therefore, on behalf of its members, and as a friend of the FCC, we ask that 47 CFR 52.107 be completely and irrevocably rescinded and reversed.

Respectfully submitted,

NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS END-USERS

("NATE")

DATED: July 10, 1997

By: 

Mark D. Olson
Attorney & Executive Officer
National Association of
Telecommunications End-Users

ADDRESS ALL CORRESPONDENCE TO:

NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS END-USERS
c/o MARK D. OLSON ATTORNEY
P.O. BOX 268
COVINA, CALIFORNIA 91723

CC:

U.S. Small Business Administration
Office/Chief Counsel for Advocacy
Attn: Mr. Jerry Glover
409 Third Street SW
Washington, DC 20416