Before the Federal Communications Commission

Washington, D.C.

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	)	FCC File No.: 04-162
IN THE MATTER OF:	)	In
	)	CG Docket No.: 04-244
PAY-PER-CALL	)	CG Docket No.: 98-170
RULE REVIEW	)	
	)	COMMENTS OF HFT
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BACKGROUND

The Federal Communications Commission requested additional public comment concerning the Commission's Notice of Proposed Rulemaking adopted July 1, 2004, and released July 16, 2004, concerning Policies and Rules Governing Interstate Pay-Per-Call, Toll-Free Number Usage and Directly Dialed Calls to International Information Services. These comments are submitted on behalf of HFT, a company providing information services, and are intended to supplement its originally filed Comments dated May 12, 2003, which the Commission has advised need not be re-filed.

The proposed changes include a provision in which the Commission seeks to redefine the Congressional definition of "pay-per-call" services in dragnet fashion to include local, domestic and international long distance services such as those provided by HFT at charges set by the long distance carriers. This proposed redefinition derives from an unconstitutional delegation of legislative authority, in violation of the separation of powers, which severely restricts and handcuffs free speech and free association rights guaranteed by the First Amendment, resulting in an over broad statute that clearly exceeds the scope and intent of the Telecommunications Act of 1996.

The net result assures not only an unconstitutional infringement on First Amendment Free Speech and Association rights, but in addition, an anti-competitive, pro-monopolistic marketplace. This is a clear and undeniable step backwards.

I.

INTRODUCTION.

A. Congress Defines "Pay Per Call"

When Congress enacted the Telephone Disclosure and Dispute Resolution Act ("TDDRA"), it correctly adopted the definition of pay-per-call services found in 47 U.S.C. § 228 (i), set forth as follows:

The term pay-per-call services means any service--

(A) In which any person provides or purports to provide--

(I) Audio information or audio entertainment produced or packaged by such person;

(ii) Access to simultaneous voice conversation services; or

(iii) Any service, including the provision of a product, the charges for which are assessed on the basis of the completion of the call;

(B) For which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call; and

(C) Which is accessed through the use of a 900 number or other prefix designated by the [Federal Communications] Commission in accordance with [47 U.S.C. § 228 (b)(5)]. (Emphasis added.)

B. Pay Per Call Abuses Identified.

In enacting TDDRA, Congress wisely found that many pay-per-call services were convenient to consumers, provided valuable information, increased choices, and provided services which benefited the public. Congress also found, to no one's surprise, that a few unscrupulous interstate pay-per-call businesses engaged in

practices which were misleading to consumers, harmful to the public interest, and contrary to accepted standards of business practice. 15 U.S.C. § 5701.

To put the nature of the complaints in their proper perspective, Congress's overriding and principal concern stemmed from the advertising abuse of 800 numbers, widely understood to be toll-free, which turned out to be expensive calls when certain codes and dialing sequences were inputted by callers without the knowledge that they were being transferred to services with high per-minute charges. This, of course, remains as the single most important abuse issue facing consumers, the complaints numbering over 5,000 in the first half of 2004. FCC NPRM, ¶ 11 (FCC 04-162).

Notwithstanding said complaints, given the hundreds of millions of minutes undoubtedly attributable to audiotext calls on non-800 or 900 dialing patterns in which the charge for the call is limited to the reasonable and customary long distance charge levied by the customer's long distance carrier, the sweeping changes recommended are not justified. This is especially true in light of the burdens, restraints, interference with commerce and first amendment infringements that necessarily flow from the proposed changes as more fully set out in HFT's 2003 filing.

Finally, the limited number of individuals and entities that saw it necessary to file comments in the 2003 NPRM further attests to the fact that there has been a natural weeding out of violators as a natural consequence of the complaint and enforcement process based upon what must be considered effective and efficient rules and regulations. The fact that there remain a few recalcitrant violators does not mean that additional regulation is desirable or warranted. Indeed, the evidence suggests that this is an enforcement issue, not a regulatory one.

C. Congress Authorizes Action

Congress directed the Federal Trade Commission ("FTC"), not the FCC, to prescribe rules to prohibit unfair and deceptive acts and practices in the advertisement of pay-per-call services. Congress delineated a number of areas of concern to which it directed the Commission to address rules, in addition to granting the FTC the authority to enact rules which require pay-per-call providers to comply with additional standards as the Commission may prescribe to prevent abusive practices. 15 U.S.C. § 5711. In administering TDDRA, the FTC is governed by the Federal Trade Commission Act (15 U.S.C. § 41 et seq.). 15 U.S.C. § 5713. Pursuant to 15 U.S.C. § 45, subdivisions (a) and (n), the FTC has not been granted any authority whatsoever to declare an act or practice unlawful ***unless*** the act or practice:

> (1) causes or is likely to cause substantial injury to consumers; (2) ***which is not reasonably avoidable by consumers themselves*** and (3) is not outweighed by countervailing benefits to consumers or to competition. (Emphasis added.)

In any event, this power, limited as it is, below, was ***not*** granted to the FCC.

D. Congress Delegates Authority to Legislate

Finally, Congress delegated to the FTC the authority to redefine the statutory meaning of pay-per-call services. Section 5714 ostensibly permits the Commission to extend the definition of pay-per-call services to other "similar services" providing audio information or audio entertainment if the Commission determines[1] that such services are susceptible to the unfair and deceptive practices that are prohibited by the rules that

[1] Section 5714 provides no guidance or standards by which even the FTC must act in making its determination. The wholesale delegation of authority to make this critical and entirely subjective determination leaves the FTC **totally** unchecked.

are prescribed pursuant to 15 U.S.C. § 5711 (a). The FTC has proposed that in addition to, and in direct conflict with, the definition of pay-per-call services contained in 47 U.S.C. § 228 (I), pay-per-call services should also mean:

> Any service that provides, or that is purported to provide, audio information or audio entertainment, including simultaneous voice conversation services, where the action of placing a call, receiving a call, or subsequent dialing, touch-tone entry, or comparable action of the caller results in a charge to a customer, and where all or a portion of such charge results in a payment, directly or indirectly, to the person who provides or purports to provide such information or entertainment services. (*In the Matter of Pay-Per-Call Review, FTC File No. R6111016.)*

The FTC, for reasons that might be found in the comments filed in response to that proposed rulemaking, has not acted thereon. In any event, the FCC, as briefed in HFT's 2003 comments, lacks the authority to tamper with the Pay-Per-Call definition. 15 U.S.C. § 45 (a).

II.

THE PROPOSED RE-DEFINITION OF PAY-PER-CALL WOULD

VIOLATE THE SEPARATION OF POWERS.

That the route which the Commission seeks to follow is more efficient for Congress is no excuse for unconstitutional action. For the Commission to propose to enact a rule which effectively nullifies a statute enacted by Congress and signed into law by the President is a gross abuse of power in direct assault upon the separation of powers. That Congress and the President have acquiesced to such action is wholly irrelevant. Clinton v. New York, ---U.S.--- (1998). I.N.S. v. Chadha, 462 U.S. 919, 942, n. 13 (1983).

A. Presentment

Every Bill which shall have passed the House of Representatives *and* the Senate, *shall*, before it becomes a law, be presented to the President of the United States. . . . Article 1, § 7, cl. 2. *Every* Order, Resolution, or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary (except on the question of adjournment) *shall be* presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, *shall be* repassed by two thirds of the Senate and House of Representatives. . . . Article 1, § 7, cl. 3. These provisions of Article I are integral parts of the constitutional design for the separation of powers, not simply abstract generalizations in the minds of the Framers of Constitution. I.N.S. v. Chadha, 462 U.S. at 945-946.

The principles laid down by the Presentment Clauses were uniformly accepted by the Framers. Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. The Framers believed that the powers conferred on Congress were to be most carefully circumscribed. Lawmaking was clearly a power to be shared by both Houses and the President. The President's role in the lawmaking process also reflects the Framers' efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures. It may be, at some times, on some subjects, that the President elected by all the people is more representative of them than are the members of either body of the Legislature whose constituencies are local and not countrywide. Id. at 946-948.

B. Bicameralism

Bicameralism was no less important to the Framers than the Presidential veto. The requirement that the nation's laws be considered and voted upon by the nation's elected officials was seen as a restraint on legislative despotism. Alexander Hamilton argued that a Congress comprised of a single House was antithetical to the very purposes of the Constitution and a sure path to the tyranny from which the Framers has recently freed themselves. In a single house there is no check, but the inadequate one, of the virtue and good sense of those who compose it. Id. at 948-949. **What possible good could be said, then, of a single administrative body which proposes to enact a rule which would eviscerate law passed by both Houses of Congress and signed into law by the President of the United States?**

The Framers were acutely conscious that the requirements of bicameralism and presentment would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinct bodies assured that the legislative power would be exercised after only opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto, thereby precluding final arbitrary action of one person. These procedures represent the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure. Id. at 951.

We are here faced with a situation in which both Houses of Congress and the President of the United States have already spoken on the topic of how pay-per-call services should, at their core, be defined. The overriding evil occurs when consumers unknowingly wind up paying **excessive** charges for the content of the information or entertainment services received. Now the Commission seeks to define its authority as including services **provided at reasonable and customary toll rates**, *with no premium whatsoever on the content of the message*. The fact that providers are able to remain profitable when services are provided to consumers for only the cost of the call underscores the tremendous need and demand for these services.

Enacting the proposed rule will ensure that consumers most in need of affordable services will be least able to afford them, if the service provided by HFT and others similarly situated are forced into the 900 arena. For the Commission to so define its own authority and to water down the meaning of the pay-per-call statute without the majority of both Houses or the President agreeing to this de facto repeal is an affront to the constitutional principles laid out by the Framers. The Commission not only exercises legislative power abdicated by Congress, it retains the functional equivalent of an override to a veto which the President was never afforded the opportunity to exercise. That such power could be exercised by a body which so proudly boasts of its prosecutorial and adjudicatory power, as well, is a sure recipe for the tyranny the Framers feared so much, and rightly so.

III

900 IS NOT A VIABLE OPTION

If the Commission were serious about making 900 a viable and attractive option

to audiotext providers, it would seriously consider some of the highly inappropriate and unwarranted restrictions and limitations that otherwise prohibits widespread 900 usage. For instance, there is no rational basis for preventing the portability of 900 numbers. The cries of disaster that preceded the approval of portability for both regular and wireless communications all proved to be unfounded and motivated by greed and anti-competitive interests. Number portability is essential for any company that seeks to enter or expand into new markets, and is especially important to small business because they are otherwise dependent upon the likes of AT&T and other carriers who have pulled put of the 900 industry.

Non-accessibility to wireless users is another completely unacceptable limitation on the use of 900 numbers. The wide proliferation of wireless technology has reached the point where almost everybody owns one, or at least has access to one. The rational behind this restriction is a mystery, and is no more applicable to land-line phones that it is to wireless communications. This is purely a matter of policy lagging behind technology, and must be addressed immediately.

The Commission must also address, if it genuinely wishes to advance the cause of 900 use, the fact that UNE-P providers, local re-sale providers, CLECs and wireless carriers are not required to carry 900 calls, rendering these calls second class status. Without a mandate from the FCC that the ubiquity of the telecommunications network depends on all calls being transported, including 900 calls, we will never achieve an acceptable level of 900 utilization. The same goes for those companies that refuse to provide BNA (billing name and address of callers) information so that the provider can properly and accurately bill for the call.

The bottom line is that the lack of 900 viability has lead to the emaciation of the 900 call volume. AT&T has pulled out of the 900 industry; a company with all the resources in the world to make it work, if it was at all workable. HFT has seen a 90% reduction in call volume in its 900 division after the FCC allowed AT&T to pull out of the 900 market, despite a 15 year investment in the marketing and advertising of its 900 numbers. 900 is a dead issue with decisive action by the Commission to deal with the above limitations.

IV

THE PRESUMPTION THAT PAYING COMMISSIONS IS EVIL IS UNFOUNDED

In an ill conceived attempt to restrict the ability of audiotext providers to serve their customers, the Commission seeks to justify its tentative conclusion that a call is pay-per-call (because it meets that part of the section 228 requirement that addresses calls in which the caller pays a per-call or per-time interval charge greater than or in addition to the "charge for the transmission of the call") by utilizing a "presumption" that " . . . any form of remuneration between a carrier and audiotext information services provider constitutes per se evidence that the charge levied actually exceeds the charge for the transmission".

This "per se" rule is flawed, as it fails to address other similar compensation mechanisms that many providers (audiotext and others) utilize to obtain customers and generate call revenue. For instance, many companies pay outside consultants commissions and other fees for attracting new customers, or attracting existing customers to new products or calling patterns which increase call minutes or other

usage. Certainly, such payments, whether in the form of commissions or other fees, cannot be strictly construed as part of the "charge for the transmission of the call". Neither does commissions or incentives to in-house sales representatives for generating additional traffic or usage. In fact, neither does advertising or promotional costs. If the real test is the precise costs to simply transport the call, none of the every day marketing, promotion or incentive -based commissions, salaries or bonuses that all phone companies utilize to increase their revenue could be included in the formula, and all calls who's charges include one or more of these elements would meet the "per se" definition of "pay-per-call".

Further, to apply this "per se" rule ***only*** to audiotext providers who receive all or part of their revenue from the carrier in the form of a commission would be an unlawful and discriminatory trade practice. To regulate calls based upon how the provider generates its income (ie by commission as opposed to the cost to transport the call) when the obvious effect is to chill the free exchange of ideas is an unconstitutional content based restriction on free speech. As a consequence, the "per se" rule must fail. If the FCC feels a carrier's rates are excessive it has the authority to regulate those rates.

V

RECORDING CALLS DOES REDUCE COMPLAINTS

The suggestion that calls be recorded is not a new one. HFT has, in the past, recorded calls to reduce the amount of fraud it experiences from consumers. This process proved to be prohibitively expensive, did not reduce fraud, and when consumers were told that calls were going to be recorded, they often times refused the

services, further reducing revenue. Even in the face of recordings, the consumers who had denied all knowledge of the calls, simply hung up on the HFT billing representative once the recording was played. Due to the overall cost of collections of bad debt, the usual small dollar amount of the debt, and the low collection rate, it simply isn't worth attempting to collect on these debts. When someone complains about their bill, HFT simply credits the caller's phone bill and block's their phone number to further reduce the fraud. Since the FCC has allowed consumers the ability to get one free ride, the information providers are the ones stuck holding the bag. Recordings are not the solution.

VI

ARE THE CURRENT RULES SUFFICIENT

The FCC seeks comments on whether the existing rules governing billing specifically for pay-per-call services and those for charges billed through toll-free numbers, in combination with the Truth-in-Billing rules and guidelines, are sufficient to address any current billing concerns. The simple answer is, yes. There are millions of minutes every month and frankly for the amount of traffic, there aren't that many complaints.

The vast majority of those complaints are from people who are simply unwilling to take responsibility for supervising the use of their telephones. There are not that many crossed lines in the U.S. People don't sneak into houses or connect up telephones at the demarc (the side of someone's house). The excuses hold little, if any weight. If the FCC applied the same rules against credit card companies, allowing one time recharges, the credit card companies would be out of business. Because of the one

time credit that each caller is entitled to under the current rules, the overall collection rate is a dismal 30%. Enough is enough.

Like any emerging industry, the audiotext industry has had its fair share of growing pains. We have seen over the past twenty years a weeding out of the opportunistic and unscrupulous participants, who were obviously in it for the short term and the quick buck. In this still developing industry, the carrier and the billing agents who are and have been in it for the long haul have developed internal policies, practices and procedures to police and protect for their own economic interests the very consumers who they consider their bread and butter customer base. The industry doesn't want predator companies undermining the entire system that has worked admirably, considering the amount of minutes that are generated each month.

What the industry does not need is another layer of unnecessary redundant consumer protection that will only serve to destroy rather than strengthen the industry. While we do realize that many of the complaints that the FCC receives have merit , the FCC also receives thousands of complaints from consumers that are simply gaming the system. As you are aware, when there is a complaint, quite often there are charges from multiple information providers, multiple carriers and multiple billing companies on the same consumer's bill. This points to a problem on the customer's end, not with all those independent information providers and billing companies.

In addition, we tend to find that once a complaint is filed, the calls have already stopped coming from the consumers line. This leads us to the conclusion that once the bill comes and the calls are discovered, the culprit realizes that he or she act has been discovered and stops making the calls. Nevertheless, the industry credits the callers bill

once we receive a complaint from the caller directly or from the FCC. Calls from that number are then blocked. The fact is, information providers have an economic incentive to reduce caller refunds and block customers that complain about, and do not pay, their bills. Since the cost of transport and billing and collection fees alone exceed fifty cents a minute, caller refunds can mean the difference between making money and going out of business.

In short, the current regulations, along with the economic incentives of the industry, have allowed a natural and progressive maturing of the industry that has resulted in fewer complaints, fewer predatory companies attempting to "work" the system, and a greater number of industry participants providing a wider variety of services to an ever-more accepting customer base. While there are still examples of both customer and provider abuse, better enforcement of our current rules, not another layer of redundant and possibly crippling regulations is all that the industry needs. It is also all that it can economically bear.

Dated: November 15, 2004

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