

Before The

**Federal Trade Commission
Washington, D.C. 20580**

Pay-Per-Call Rule)

16 C.F.R. Part 308)

FTC File No. R611016

SUPPLEMENT TO THE RECORD

**JACQUELENE MITCHELL
FOR THE
COALITION TO ENSURE RESPONSIBLE BILLING**

Gary D. Slaiman, Esq.
Kristine DeBry, Esq.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500

Its Attorneys

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The Coalition to Ensure Responsible Billing (“CERB”), submits these supplementary comments in response to issues raised at the Federal Trade Commission (“Commission”) forum on proposed changes to its pay-per-call rules, May 20-21, 1999 in Washington, D.C. As an initial matter, CERB notes that Eileen Harrington directed the participants not to present arguments on the Commission’s jurisdiction during the forum. CERB thus uses this opportunity to note, for the Record, its desire to preserve its rights with regard to jurisdictional issues. As to the issues discussed during the forum, first, CERB urges that the Commission’s proposed liability standard for unauthorized charges is unreasonably vague, and must be modified or the local telephone bill will cease to be a viable billing platform. Further, CERB rebuts arguments made during the forum that local exchange carriers (“LECs”) should receive a special exemption from “should have known” liability for ancillary product charges that appear on the bill. LECs perform many of the same functions as billing clearinghouses, and thus should not be subject to a different level of liability. Second, CERB clarifies for the Record, that Bell Atlantic’s planned bill blocking feature is intended only to block the charges of third parties from appearing on the bill, while Bell Atlantic specifically exempts its own ancillary services from blocking. CERB also submits into the Record evidence that demonstrates that consumers have been -- and could potentially continue to be -- crammed by LECs for LEC services. Third, CERB supplements the Record with evidence indicating that consumer inquiries related to charges on the local telephone bill have decreased, not increased as claimed by some participants during the forum. Fourth, CERB objects to arguments made during the forum that “billing name and address” or “BNA” information, supplied by the LECs, can be an effective tool for use in creating alternative billing platforms. BNA, as it is currently offered, is inadequate because it is slow, expensive, and incomplete. Finally, CERB argues that the “designated billing entity” provision in the proposed rule is flawed. That provision could result in billing clearinghouses losing their ability to perform customer inquiry service, a critical component of their businesses.

1. “Should Have Known” Liability

During the forum, many witnesses addressed the need to mitigate “should have known” liability under Section 308.17 of the proposed rule. As a general matter, CERB urges the Commission to recognize that an indeterminate liability standard could result in the end of third party billing, which serves tens of millions of consumers who prefer to be billed for telecommunications-related purchases on their local phone bills. Such a result would run counter to the Commission’s mandate under TDDRA to, as Eileen Harrington noted, “ensure the integrity and vitality of pay-per-call and telephone-billed purchases.” (Forum transcript at p.232).

Third party charges on consumers’ local telephone bills are made possible in two ways: (1) by arrangements between LECs and the vendors with whom they have direct contracts; or (2) by arrangements between LECs and billing clearinghouses representing vendors who are often too small to enter into direct contracts with LECs. During the discussion, some witnesses urged the Commission not to apply “should have known” liability to LECs. While the sentiment at the Commission’s forum indicated that an indeterminate liability standard could force LECs to cease billing third party charges, the same danger applies equally to clearinghouses. Relieving LECs of liability, as suggested by some at the forum, while maintaining liability for billing clearinghouses, risks driving clearinghouses out of business or causing them to refuse billing for legitimate new services. In the face of uncertain liability, clearinghouses will be hesitant to enter billing contracts for innovative new services that, while untested, are entirely legitimate and could provide valuable competitive services to consumers. This would result in even greater harm as it would deprive small, new competitors of access to consumers’ local telephone bills at the very time that powerful LECs, which continue to control access to end users, will be able to leverage their market power in the local exchange to garner markets for a variety of new telecommunications services. Such a result is contrary to the broader Commission role also noted by Ms. Harrington that “protecting competition is a fundamental form of consumer protection.” (Forum transcript at p. 233).

For that reason, CERB does not agree with those who argued that LECs should be treated differently from other billing entities in the application of “should have known” liability. The Commission instead should assign liability based on the function or functions that an entity performs.

Billing entities – both LECs and billing clearinghouses – perform several valuable consumer functions as they pre-screen vendors, reject charges for services that have not been approved, and moderate the actions of vendors through their contractual relationships. Potentially imposing liability on some entities while exempting others would create loopholes that could be exploited to the detriment of consumers. Further, imposing disparate liability would create a competitive advantage for those entities that perform the same function but do not bear the burden of complying with the rules. CERB’s position is that “should have known” liability is too vague a standard to impose as an initial matter, but whatever standard the Commission ultimately adopts should apply equally to all entities that perform the same function.

LECs and billing clearinghouses perform at least four parallel functions that help to protect consumers from cramming. CERB submits that where entities perform the same functions, it is unreasonable to treat them disparately under a Commission rule.

First, both LECs and billing clearinghouses perform thorough pre-screening of both the vendors and the products and services those vendors seek to place on the local telephone bill. Pre-screening includes a review of the marketing and promotional materials used to sell those products and services to consumers, as well as a review of the “text phrase” that will appear on consumers' bills, to ensure that it is not confusing or misleading. Vigorous pre-screening reduces the incidence of unauthorized charges being placed on the local telephone bill. Thus, these pre-screening efforts should be encouraged.

It bears emphasizing that, while billing clearinghouses are often the first line of defense against unaffiliated vendors, LECs also thoroughly screen those vendors. Furthermore, LECs are the first line of defense with regard to those vendors with whom the LECs have direct contracts.

Here, the LECs' relationships with these vendors parallel the billing clearinghouses' relationships with their vendors. Both the LECs and the clearinghouses perform a consumer protection screening function, and both should be treated the same with regard to liability.

Second, to enforce these essential pre-screening functions, both LECs and clearinghouses provide a check against the charges for products and services submitted by vendors. When the vendors submit charges that are destined for consumers' telephone bills, it is critical to ensure that vendors' charges are allowed only for products and services that have been approved during the pre-screening process. This is achieved by employing software to reject charges for products and services whose text phrases have not been approved before these charges ever appear on consumers' telephone bills.

Both LECs and billing clearinghouses employ an enforcement mechanism to reject vendors' charges for products and services that have not been approved through the pre-screening process. LECs and clearinghouses can maintain lists and tables of active, approved text phrases and should not accept charges for products and services with text phrases that have not been approved during pre-screening. Although this process is not perfect, it is an important tool that LECs and billing clearinghouses can use to ensure that unscrupulous vendors do not bypass the pre-screening process.

Third, LECs, billing clearinghouses and vendors all perform an inquiry monitoring function. This function includes fielding telephone calls from consumers who need information about their bill or wish to lodge a complaint. Billing clearinghouses often serve as the primary point of contact to answer inquiries on behalf of their vendor clients, pursuant to their contracts with those vendors. In addition, because of their control over the consumer's local telephone bill, LECs answer calls from consumers who need information about a third-party charge and simply prefer to contact their local telephone company even though a separate toll-free number is supplied on the bill. In addition, vendors perform customer inquiry service in those cases where they have not contracted with a billing clearinghouse or a LEC to do so. Thus, LECs, billing

clearinghouses and vendors all perform an inquiry function of some type, and furthermore they all may learn about potential or real service problems through performance of that function.

On a related note, CERB is compelled to respond to the suggestion of one witness, made during the forum, that billing clearinghouses should be subject to “should have known” liability because they provide inquiry service and in many cases decline to pass consumers down the line to the vendor. Communications Venture Services asserted that, by entering into arrangements where the billing clearinghouse agrees not to transfer a consumer telephone call to a vendor (this would be called a “hot transfer”), billing clearinghouses somehow take on a degree of knowledge and control that would subject them to “should have known” liability. As with some of the other functions noted above, LECs, as well as clearinghouses, often respond to consumer inquiries without passing the call along to the next party in the chain. LECs and clearinghouses do, however, pass along the information related to the consumer inquiry. For both LECs and clearinghouses, this practice is favorable to the consumer who does not wish to be passed along to resolve an inquiry.

Finally, both LECs and billing clearinghouses enter into direct contracts with vendors, and thus are in a position to moderate the behavior of those vendors to some degree. In short, both LECs and clearinghouses are capable of terminating -- and often do terminate -- contracts with vendors who do not uphold high standards of practice.

Not only do LECs and billing clearinghouses perform many of the same functions with regard to outside vendors, LECs also perform these functions with regard to their own affiliated services. In these cases, LECs perform the function of supplying the service, submitting the charge to the bill, and delivering the bill to the consumer. If consumers are to be protected equally from carelessness and misdeeds of *any* party that places charge on consumer bills -- including LECs -- LECs must be held to the same standard of liability for each of these functions as independent parties that perform the same functions.

2. Discriminatory Bill Blocking

During the forum, Bell Atlantic told the Commission that it plans to institute a blocking function whereby consumers may request that no charges from third parties be placed on their bills. CERB would like to clarify, for the Record, that Bell Atlantic plans to exempt from this blocking function its own ancillary services. (See attached letter.) Thus, a consumer could block third party charges for services such as caller ID or voice mail, but that consumer could not block Bell Atlantic from adding its own comparable services. The consumer thus is not protected from an unauthorized charge by Bell Atlantic. Moreover, this discriminatory bill blocking raises a serious competitive concern: when the consumer decides to order a service from a competing provider, he must call Bell Atlantic to have the block lifted. Consumers who order Bell Atlantic services will not have to overcome this hurdle. Further, when the consumer calls Bell Atlantic to request that the block be lifted, Bell Atlantic can solicit the consumer to buy the competing Bell Atlantic product. CERB urges the Commission to investigate this anticompetitive practice and to refrain from imposing any regulations that would endorse or help facilitate discriminatory bill blocking.

CERB further clarifies for the Record that, contrary to implications made during the Commission's forum, LECs are capable of committing marketing abuses, including cramming. PacBell is currently the subject of an inquiry by the California Public Utilities Commission (CPUC) as a result of a barrage of complaints that PacBell misled consumers and pressured them into buying add-on phone services that they did not want; and in 1986, PacBell was ordered to refund \$63 million to consumers who were misled by its sales programs. (See attached Los Angeles Times article, Jan.16, 1999.) Further, in 1993, PacBell was fined \$16.5 million by the CPUC for marketing abuses involving charges for unauthorized services. GTE has been the subject of similar complaints and in 1998 reached a \$13.2 million settlement in an action arising from its alleged failure to accurately inform the CPUC about marketing abuses, which had originally led to a \$3.2 million fine. (See attached California Public Utilities Commission Opinion, Dec. 17, 1999.) That fine was imposed for abuses such as charging non-English

speaking consumers for optional services, such as call waiting or call forwarding, which the consumers did not order.

3. Complaint Levels Are Declining

CERB and the LECs have strong evidence to suggest that complaints about cramming are decreasing. During the forum, however, the Florida Public Service Commission and ACUTA suggested otherwise. CERB thus would like to supplement the Record with data gathered from the billing clearinghouses. Several billing clearinghouses submitted to CERB a comparison of the number of consumer calls received by their inquiry centers at the beginning of CERB's anticramming efforts (July, August and September of 1998), compared with the most recent months for which data is available (February, March and April of 1999). The CERB members reported declines of 30 to 75 percent in the number of consumer inquiries they received between those two time periods.

CERB would also like to add to the Record some of the factors which can account for a disparity of results in cramming statistics. First, assuming the desired statistic is whether complaints are presently rising or falling, it is critical to account for the time lag between when a charge is submitted to a bill and when an inquiry or complaint is recorded. Second, it is essential to distinguish between complaints and mere inquiries. Many entities, including some LECs, count every consumer call as a complaint. The import of this distinction is best illustrated by the extremely high volume of calls generated by the Federal Communications Commission's ("FCC's") universal service charges. Although there was a dramatic increase in the number of calls to inquire about those charges, which were confusing to many consumers, that increase did not reflect an increase in *complaints*. At the same time that industry anti-cramming initiatives are clearly working, greater public awareness of the problem sometimes generates increasing calls to billing entities and vendors. Many of these calls are resolved by simply explaining to a consumer the nature of a charge. These calls do not necessarily indicate an increase in unauthorized charges.

4. Availability of BNA

Some participants in the forum suggested that billing clearinghouses and vendors could use alternative billing platforms, rather than consumers' local telephone bills, by utilizing "billing name and address" or "BNA." For a variety of reasons, BNA is not a viable alternative to the LEC bill. First, it is prohibitively expensive. Second, it has limited practical value. One billing clearinghouse reports, for example, that BNA does not include unlisted numbers, which in some areas, can be a majority of households. Additionally, while clearinghouses have limited experience with BNA, we understand from the LECs that BNA's use is significantly restricted and cannot be shared with vendors. Third, the information is often outdated and does not always reflect actual numbers and addresses, which are constantly changing. Furthermore, even if billing clearinghouses or vendors were to use BNA, they would still suffer a competitive disadvantage compared with the LECs with whom vendors already (and will increasingly) compete in offering a variety of telecommunications-related services to consumers. Because LECs maintain the BNA databases, they have access to information that is more complete, less expensive, and more timely.

Finally, the discussion of whether BNA is viable misses the point: consumers prefer a consolidated telephone bill for all their telecommunications purchases. LECs often note this fact, and if unaffiliated providers are denied access to the bill, LECs will certainly market their "one-stop-shop" bill to the detriment of the myriad vendors who would have to send individual bills to consumers.

5. Multiple Billing Entities

CERB submits these brief supplementary comments on the “designated billing entity” provision in response to the corresponding agenda item, which was not discussed during the forum. In spite of testimony by LEC participants at the forum that they consider customer inquiry a burden they would like to avoid, it is the experience of CERB members that LECs strongly prefer to be the party that satisfies customers who inquire or complain about charges.

As CERB suggested in its comments, when a billing clearinghouse and a vendor contract for the clearinghouse to provide customer inquiry service for that vendor, the billing clearinghouse should also be the billing entity designated to receive and respond to all billing error notices related to charges by that vendor. The proposed rule provides that multiple billing entities “shall agree” among themselves to designate a single entity to receive and respond to billing error notices. Due to an imbalance of power, however, LECs could “negotiate” to win this role and thus would become the point of contact for all billing error notices.

LECs have an interest in becoming the point of contact. First, they can gain good will from customers by crediting a charge -- whether or not there was an actual error -- at no cost to themselves. Second, this good will inures to them when they attempt to sell their own competing products. Third, LECs may have an incentive to give automatic credits to customers who buy services from providers with whom the LECs directly compete. The costs of these credits undermines those competitive businesses. At the same time, LECs could be more judicious in meting out credits for customers who subscribe to LEC services.

In addition to these concerns, where a billing clearinghouse has contracted to perform customer service, consumers receive the best support through the clearinghouse. Clearinghouses have an interest in protecting their contracts with the LECs, and they have an incentive to treat consumers fairly. Clearinghouses also have the resources to field consumer inquiries quickly, efficiently, and in a consumer-friendly way. Moreover, whereas LECs have an interest in reversing charges regardless of the nature of the inquiry, and vendors have a financial interest in

sustaining the charge, clearinghouses have more balanced interests and thus can operate as a neutral arbitrator between the vendor, the LECs, and the consumer.

Conclusion

CERB urges the Commission to consider the arguments presented herein, and in CERB's comments in this proceeding, and to protect consumers while avoiding actions that could harm the growth of competition in the telecommunications industry.

Respectfully submitted,

Gary D. Slaiman
Kristine DeBry
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7707
Counsel for the Coalition to Ensure Responsible Billing

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