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

In the Matter of	)	**CORRECTED**
	)	
Joint FCC/FTC Policy Statement For the Advertising of Dial-Around And Other Long-Distance Services To Consumers	))))	File No. 00-EB-TCD-1(PS)

POLICY STATEMENT

Adopted by the FCC: February 29, 2000 Released: March 1, 2000
Adopted by the FTC: February 23, 2000

By the Commissions: Commissioner Furchtgott-Roth dissenting and issuing a separate statement.

I. INTRODUCTION

1. In recent years there has been an explosion in competition and innovation in the telecommunications industry. Long-distance customers have reaped substantial benefits in the form of greater choice in deciding which carrier to use and a greater diversity in the prices charged for those calls. For example, dial-around (or "10-10") numbers allow consumers to bypass or "dial-around" their chosen long-distance carrier to get a better rate in certain circumstances. Consumers also can opt for calling plans that offer a fixed per-minute rate during certain hours or on particular days.

2. Numerous carriers, both large and small, promote their services through national television, print, and direct mail advertising campaigns. Because no one plan is right for everyone, advertising plays a critical role in informing consumers about the myriad choices in long-distance calling and, in the case of dial-around services, advertising is generally the only source of information consumers typically have before incurring charges. With accurate information, consumers benefit from being able to choose the particular carrier that meets their long-distance calling needs at the most economical price. However, if consumers are deceived by the advertising claims, they cannot make informed purchasing decisions and ultimately the growth of competition in the long-distance market will be stifled.

3. The proliferation of advertisements for dial-around numbers, long-distance calling plans, and other new telecommunications services, as well as an increase in the number of complaints regarding how these services are promoted, have raised questions about how the principles of truthful advertising apply in this dynamic marketplace. To address these questions the Federal Trade Commission and the Federal Communications Commission issue this Joint Policy Statement.

4. Section 201(b) of the Communications Act of 1934, as amended, requires that common carriers' "practices . . . for and in connection with . . . communications service, shall be just and reasonable, and any such . . . practice . . . that is unjust or unreasonable is hereby declared to be unlawful . . .".[1] The FCC has found that unfair and deceptive marketing practices by common carriers constitute unjust and unreasonable practices under section 201(b).[2] Principles of truth-in-advertising law developed by the FTC under Section 5 of the FTC Act[3] provide helpful guidance to carriers regarding how to comply with section 201(b) of the Communications Act in this context.

5. The FTC's truth-in-advertising law can be boiled down to two common-sense propositions: 1) advertising must be truthful and not misleading; and 2) before disseminating an ad, advertisers must have adequate substantiation for all objective product claims.[4] A deceptive ad is one that contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances about a material fact.[5] Material facts are those that are important to a consumer's decision to buy or use a product. Information pertaining to the central characteristics of the product or service is presumed material. The cost of a product or service is an example of an attribute presumed material.[6]

6. Advertisers are responsible for substantiating all objective express and implied claims that an ad conveys to reasonable consumers, regardless of whether the advertiser intended to

[1] 47 U.S.C. § 201(b).

[2] *Business Discount Plan, Inc.* 14 FCC Rcd 340, 355-358 (1998); *AT&T Corp.*, 71 RR2d 775 (1992).

[3] 15 U.S.C. § 45. Section 5 declares unlawful "unfair or deceptive acts or practices in or affecting commerce."

[4] These principles are articulated in the FTC's Deception Policy Statement and Advertising Substantiation Policy Statement. *See generally* Federal Trade Commission Policy Statement on Deception, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 *et seq.* (1984) ("Deception Statement"); Advertising Substantiation Policy Statement, appended to *Thompson Medical Co*., 104 F.T.C. 648, 839 (1984), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied,* 479 U.S.1086 (1987). The FTC also has authority to challenge unfair trade practices. An unfair practice is one that causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n). The majority of FTC advertising cases are brought pursuant to the FTC's deception authority.

[5] The FCC has taken a similar approach under section 201(b) of the Communications Act: "BDP knew, or should have known, that customers acting reasonably under the circumstances would be misled and confused by misrepresentations regarding the material issue of BDP's identity, and that customers would rely on such misrepresentations to their detriment." *Business Discount Plan*, 14 FCC Rcd at 356.

[6] Deception Statement, 103 F.T.C. at 182.

convey those claims. In determining the claims that an ad conveys, the FTC looks to the "net impression" conveyed to consumers—often described as "the entire mosaic, rather than each tile separately."[7] Even if the wording of an ad may be literally truthful, the net impression conveyed to consumers may still be misleading. The entire advertisement, transaction or course of dealing will be considered. The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deception.

7. An ad may be deceptive by omission. For example, an ad may be deceptive if it fails to disclose qualifying information that, in light of the representations made, would be necessary to prevent consumers from being misled. The failure to disclose is examined in light of expectations and understandings of the typical buyer regarding the claims made.[8]

8. In many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller. Depending on the circumstances, accurate information in the text may not remedy a misleading impression created by a headline because reasonable consumers may glance only at the headline. Written disclosures in fine print may be insufficient to correct a misleading impression. Legalistic disclaimers too complex for consumers to understand may not cure otherwise deceptive messages or practices. Qualifying disclosures must be legible and understandable. The totality of the ad or the practice must be evaluated with questions such as: How clear is the representation? How conspicuous is any qualifying information? How important is the omitted information? Do other sources for the omitted information exist? How familiar is the public with the product or service?

9. At the outset, it is important to note that these fundamental principles apply across the board. For example, a misrepresentation or omission of material information in an advertisement for a dial-around service would likely be deceptive if the same misrepresentation or omission occurred in an ad for a long-distance calling plan. Furthermore, the same standards of truthfulness apply regardless of the medium advertisers choose to communicate their message to consumers. Although the most effective method for disclosing information to consumers may vary depending on the medium, the principles of truth and accuracy apply to advertisements conveyed via television, radio, magazines, newspapers, direct mail, telemarketing, the Internet, or oral representations made by customer service operators.[9]

[7] *Id.* at 179, *quoting FTC v. Sterling Drug, Inc.*, 317 F.2d 669,674 (2d Cir. 1963).

[8] The law does not require that every item of information that might be useful or interesting to consumers be disclosed in advertising. Only information necessary to prevent consumer deception on a matter of importance to them must be disclosed. *See International Harvester Co.*, 104 F.T.C. 949, 1059-60 (1984).

[9] The FTC's Telemarketing Sales Rule, ("TSR"), 16 C.F.R. Part 310, provides specific provisions on what constitute material misrepresentations in the context of telemarketing, and what material information must be disclosed in order to avoid deceiving consumers through telemarketing. The TSR covers all "telemarketing" -- defined as any plan, program, or campaign to sell goods or services through interstate telephone calls. It applies to all telemarketers, regardless of on whose behalf they are calling or what product or service they are selling, even telemarketing companies that call on behalf of organizations whose activities are exempt from FTC jurisdiction. Coverage of the Rule extends both to calls placed to and received from consumers, so long as the calls are part of a plan, program, or campaign to sell goods or services through interstate telephone calls.

10. In issuing this Policy Statement, the FCC and the FTC hope to provide guidance for carriers who market long-distance service. As a matter of clarification, we note that this Policy Statement does not preempt existing state law.

II. DISCUSSION

A. MISREPRESENTATIONS IN ADVERTISEMENTS FOR LONG-DISTANCE CALLING SERVICES

11. As a general matter, advertisers are free to highlight whatever attribute of their products or services they choose—quality, convenience, customer service, availability, price, or other benefit. However, once an advertisement makes an implied or express objective claim that conveys a material representation to reasonable consumers, the advertiser is responsible for the truthfulness of the representation and for substantiating the representation, regardless of whether the advertiser intended to convey those messages to consumers. If a claim is false, a disclosure that provides contradictory information is unlikely to cure the deception.

> **Example # 1:** The headline of a direct mail ad for a dial-around service reads, "All day. All night. All calls. 10¢ a minute." In fact, the rate is applicable only for state-to-state calls after 7:00 p.m. and on weekends. Even an otherwise prominent disclosure to that effect will likely not be sufficient considering that the disclosure directly contradicts the express, and false, representations in the headline.

B. MATERIAL INFORMATION THAT SHOULD BE DISCLOSED IN ADVERTISEMENTS FOR LONG-DISTANCE CALLING SERVICES

12. In situations where an advertisement makes claims that are not directly false but might be misleading in the absence of qualifying or limiting information, advertisers are responsible both for making any necessary disclosures and for ensuring that they are clear and conspicuous. The following are some of the types of disclosures that may be necessary to prevent price claims in long-distance telephone advertising from deceiving customers.

1. Minimum Per-Call Charges, Monthly Fees, And Other Cost-Related Information

13. The central characteristic touted in most long-distance advertising is price. As noted above, price representations are presumptively material to consumers. What matters to consumers is not just the per-minute rate, but rather how that rate, along with all additional fees and charges,

will ultimately be reflected in the charges they see on their monthly phone bills.[10] Therefore, advertisers should exercise the greatest care in ensuring the accuracy of their claims related to price, including the clear and conspicuous disclosure[11] of information such as minimum per-call charges, monthly fees, fees for additional minutes beyond the initial calling period, and other information that significantly affects the total charge of a particular call or calling plan or service.

> **Example #2 -- Minimum Charges:** An advertisement conveys the message that long-distance calls cost 10¢ a minute. In fact, all calls are subject to a 50¢ minimum charge. Given that reasonable consumers would likely conclude from the "10¢ a minute" representation that a one-minute call would cost 10¢, and would not expect there to be a substantial additional charge, the advertiser's failure to clearly and conspicuously disclose the minimum fee in the ad would likely be deceptive.
>
> **Example #3 -- Monthly Fees:** An advertisement says that long-distance calls cost 10¢ a minute. In fact, that rate is only available if customers pay a $5.95 monthly fee. Because the imposition of the monthly fee would significantly increase the consumer's per-minute charge, the advertiser's failure to clearly and conspicuously disclose the monthly fee in the ad would likely be deceptive.
>
> **Example #4 -- Cost After Initial Promoted Calling Period:** A company advertises "all calls up to 20 minutes for only $1.00," but charges 10¢ for each additional minute. Consumers are likely to be misled by the affirmative claim in the absence of a disclosure about the significantly higher rate after 20 minutes. Because many consumers will make calls that last longer than 20 minutes, the cost of each minute beyond the first 20 minutes' duration of a call is information that likely would be material to consumers considering whether to use the service. Thus, the advertiser's failure to clearly and conspicuously disclose in the ad the per-minute rate for calls longer than the initial calling period would likely be deceptive.

2. Time Restrictions or Limitations on the Availability of the Advertised Rate

[10] For example, if a consumer paying 10¢ a minute and a $5.95 monthly fee places 100 minutes of calls per month, his or her total would be $15.95 a month or almost 16¢ per minute. This figure would contrast sharply with the "10¢ a minute" rates prominently touted in typical ads for long-distance calling plans.

[11] See Section III for a discussion of the factors to consider in assessing whether a disclosure is "clear and conspicuous."

14. Given the importance of price information, any significant conditions or limitations on the availability of the advertised rates should also be clearly and conspicuously disclosed. Examples of such restrictions would include limitations on the time of day or day of the week that the rate applies or the fact that the rate is good only during a limited promotional or sale period.

> **<u>Example #5 -- Time Restrictions</u>:** A company's advertisements prominently feature the phrase "10¢ a minute." In fact, the 10¢ a minute rate is good only between 7:00 p.m. and 7:00 a.m. Consumers are likely to view this time limitation as a significant restriction on the availability of the advertised 10¢ a minute rate. The advertiser's failure to clearly and conspicuously disclose the limited hours in the ad would likely be deceptive.

> **<u>Example #6 -- Promotional Rates</u>:** A company's advertisements prominently feature the phrase "5¢ a minute." Peel-off stickers, intended to be placed on the phone, featuring the "5¢ a minute" offer accompany the advertisement. In fact, the 5¢ a minute rate is a special promotional offer good only for 60 days. Consumers are likely to view the limited duration of the 5¢ a minute rate as a significant qualification. The advertiser's failure to clearly and conspicuously disclose this limitation in the ad would likely be deceptive. Furthermore, in this instance, the use of peel-off stickers advertising the 5¢ a minute rate without adequate disclosure of the limited duration of the offer would likely be deceptive because the stickers would remain on consumers' telephones long after the promotional rate had expired.

3. <u>Geographic Restrictions</u>

15. Another important qualification that would likely be material to consumers and necessary to disclose to avoid deception is a significant geographic restriction on the applicability of an advertised rate. For example, many long-distance services and plans are limited to state-to-state calls. The disclosure of this information is particularly important because in-state long-distance rates are often substantially more expensive than state-to-state rates, a fact that may be surprising and significant to reasonable consumers. Where reasonable consumers may be deceived about such significant differences in price between in-state and state-to-state calls, the advertiser should clearly and conspicuously disclose whether the advertised service includes in-state calls, and the fact that such calls are charged at a higher rate, if such is the case.

> **<u>Example #7 -- Geographic Restrictions</u>:** A company advertises a "10¢ a minute" rate. In fact, that rate is good only for state-to-state calls, and in-state calls may be charged at a significantly higher rate. The failure to clearly and conspicuously disclose in the ad, for example, that "in state

rates may be higher," would likely be deceptive.

4. The Use of the Phrase "Basic Rates"

16. Advertisers should also exercise care to adequately explain phrases such as "basic rates" in their ads. The meaning of an ad is evaluated from the point of view of the "reasonable consumer"—the typical person looking at the ad. A telecommunications professional may understand the term "basic rate" to refer to a specific class of tariffed service, which may be billed at the most expensive rates. However, the typical consumer would likely interpret the phrase differently, concluding that it refers to the discounted rates he or she is normally charged by his or her selected carrier. Therefore, when making claims using such terms as "basic rates" or "regular rates," advertisers should be mindful that those terms will be evaluated from the point of view of the reasonable consumer, and may be deceptive.

> **Example #8 -- "Basic Rates":** A company offers consumers a directory assistance service for 99¢. According to the television ad, callers who use this service can be connected to the requested number at no additional charge. In fact, consumers who opt to be connected to the requested number are connected via the advertiser's network and are billed at the advertiser's expensive per-minute rates. This information is disclosed only by a superscript reading "basic rates apply." Reasonable consumers would expect to pay the promoted 99¢ charge, but would not likely expect to pay a charge greater than the amount their selected long-distance carrier would charge for a call to the requested number. Because the consumer will be charged a rate higher than the consumer's presubscribed rate, use of the term "basic rates apply," even if clearly and conspicuously disclosed, would not likely be sufficient to avoid deception. The advertiser's failure to disclose that the consumer will be charged a rate higher than the consumer's presubscribed rate would likely be deceptive.

5. Comparative Price Claims

17. A technique commonly employed in long-distance advertising is the comparison of an advertiser's price to the prices of its competitors. By representing a competitor's rates, an advertiser is making an implied claim that these rates are reasonably current. As in the case of any other objective claim, the advertiser must have a reasonable basis for this representation. The time elapsing between the creation of an ad and the distribution of the ad to the public may vary, depending upon the medium in which the ad appears. This is a consideration in determining whether an advertiser possesses a reasonable basis for a claim that compared rates are reasonably current.

<u>Example #9 -- Comparative Price Claims</u>: In an advertisement in a daily newspaper, an advertiser conveys the message that its rates are the lowest, using a chart that compares its per-minute rate to the rates offered by two competitors. The stated rates of one of the competitors are three months old, and the stated rate of the other is eight months old. By representing the competitors' rates, the advertiser is implying that those rates are reasonably current. If the information upon which the ad is based is outdated and the rates have changed materially, the ad would likely be deceptive.

<u>Example #10 -- Comparative Price Claims</u>: An advertisement in a monthly magazine states that the advertiser's rates are better than those of another competitor. In January the advertiser verified that the competitor was offering the rate as stated in the ad. When the ad is published in February, it clearly and conspicuously discloses that the competitor's rate is as of January of this year. This disclosure is likely to be sufficient to avoid deception.

6. <u>The Effect of the Use of Toll-Free Numbers and Other Alternate Sources of Information</u>

18. The fact that information about significant limitations or restrictions on advertised prices may be available by calling a toll-free number or a clicking on a Web site is generally insufficient to cure an otherwise deceptive price claim in advertising. Advertisers are encouraged to use customer service numbers and Internet sites to offer consumers more information, but these sources cannot cure misleading information in the ad itself.[12]

19. Dial-around services are unique in that consumers typically incur charges for using them before receiving any information other than what is conveyed in the dial-around service's advertising. This underscores the importance that significant restrictions and limitations on price claims be disclosed in the ad itself; users of those services must rely on the information contained in the ad as the basis for determining whether to choose a particular service. However, even if the use of an advertised service requires a consumer to interact further with the advertiser—for example, if a consumer must call a toll-free customer service number to switch to a different calling plan—it would still be deceptive if the advertisement failed to disclose significant restrictions necessary to

---

[12] *See generally General Motors Corp.*, 123 F.T.C. 241 (1997); *American Honda Motor Co.*, 123 F.T.C. 262 (1997); *American Isuzu Motor Co.*, 123 F.T.C. 275 (1997); *Mitsubishi Motor Sales of America, Inc.*, 123 F.T.C. 288 (1997); *Mazda Motor of America, Inc.*, 123 F.T.C. 312 (1997) (consent orders) (complaint alleging that ads touting "zero down" are deceptive even though fine print disclosures and/or point of sale or other sources make clear that significant costs apply at lease inception; order defining clear and conspicuous disclosure of terms in ads for car leases as "readable [or audible] and understandable to a reasonable consumer").

qualify representations made in the ad.

> **<u>Example #11 -- Use of Toll-Free Numbers</u>:** A television advertisement for a long-distance calling plan prominently features the phrase "10¢ a minute" as a graphic and in the narration read by the spokesperson. The ad gives a toll-free number and tells consumers "call now to switch." In fact, the 10¢ a minute rate is good only between 7:00 p.m. and 7:00 a.m. The inclusion of a superscript that reads "call for restrictions" would not likely be effective to qualify the claim.

C. PRINCIPLES RELATED TO THE CLEAR AND CONSPICUOUS DISCLOSURE OF MATERIAL INFORMATION IN ADVERTISEMENTS FOR LONG-DISTANCE CALLING SERVICES

20. When the disclosure of qualifying information is necessary to prevent an ad from being deceptive, that information should be presented clearly and prominently so that it is actually noticed and understood by consumers. Disclosures should be effectively communicated to consumers. A fine-print disclosure at the bottom of a print ad, a disclaimer buried in a body of text unrelated to the claim being qualified, a brief video superscript in a television ad, or a disclaimer that is easily missed on an Internet Web site is not likely to be effective. To ensure that disclosures are effective, advertisers should use clear and unambiguous language, avoid small type, place any qualifying information close to the claim being qualified, and avoid making inconsistent statements or using distracting elements that could undercut or contradict the disclosure.

21. In some cases, the FTC has specified the precise fashion in which qualifying disclosures must be conveyed.[13] However, more frequently, the FTC has used the term "clear and conspicuous" to describe a general performance standard flexible enough to take into account both the consumer's right to accurate information necessary to make an informed purchase decision and the many ways that creative advertisers can effectively convey that information.[14] Because the FTC considers the disclosure in the context of all of the elements of the ad, the focus is not on the wording of the specific disclosure in isolation, but rather on the overall or "net" impression that the entire advertisement—including the disclosure—conveys to reasonable consumers.[15]

22. Ordinarily, a disclosure is "clear and conspicuous," and therefore is effectively communicated, when it is displayed in a manner that is readily noticeable, readable and/or audible,

---

[13] *See, e.g.*, Regulations Under the Comprehensive Smokeless Tobacco Health Education Act of 1986, 16 C.F.R. § 307.

[14] The FTC has also used phrases such as "clear and prominent" and "of sufficient clarity and conspicuousness" to articulate the same concept. 63 Fed. Reg. 25002, FTC's Notice Seeking Comment on the Interpretation of FTC Rules and Guides for Electronic Media (May 6, 1998).

[15] Deception Statement, 103 F.T.C. at 175-76. *See also American Home Products*, 98 F.T.C. 136, 374 (1981), *aff'd,* 695 F.2d 681 (3d Cir. 1982).

and understandable to the audience to whom it is disseminated. Factors that the FTC considers in evaluating the effectiveness of disclosures include:

- ***the prominence of the qualifying information***, especially in comparison to the advertising representation itself;

- **the proximity and placement of the qualifying information** vis-a-vis the representation that it modifies;

- ***the absence of distracting elements***, such as text, graphics, or sound that may distract a consumer's attention away from the disclosure; and

- ***the clarity and understandability of the text of the disclosure.***[16]

23. Reference to an existing regulatory scheme provides considerable guidance. In 1992 Congress passed the Telephone Disclosure and Dispute Resolution Act ("TDDRA"), directing the FCC and the FTC to issue regulations governing, among other things, the advertising and marketing of pay-per-call services. TDDRA was enacted in response to a history of fraudulent or abusive practices. In adopting its Pay-Per-Call Rule (previously called the 900-Number Rule),[17] the FTC provided very specific provisions on how to make effective disclosures of material cost information in the context of advertising telephone-based entertainment or information programs that are billed to consumers' telephone bills. The basic principles embodied in the advertising provisions of the Rule show how the FTC determines whether a particular disclosure of cost information is clear and conspicuous in the context of advertising for pay-per-call services. According to the Rule's provisions governing the advertising of those services, the provider must "clearly and conspicuously" disclose in the advertisement the total cost of the call. If there is a flat fee for the call, the ad must state the total cost. If the call is billed on a time-sensitive basis, the ad must state "the cost per minute and any minimum charges." If the call is billed on a variable rate basis, the ad must state the cost of the initial portion of the call, any minimum charges, and the range of rates that may be charged for the service including any other fees that will be charged for the service. Regardless of how the service is billed, the Rule requires that "the advertisement shall disclose any other fees that will be charged for the service."

---

[16] *See generally General Motors Corp.*, 123 F.T.C. 241 (1997); *American Honda Motor Co.*, 123 F.T.C. 262 (1997); *American Isuzu Motor Co.*, 123 F.T.C. 275 (1997); *Mitsubishi Motor Sales of America, Inc*., 123 F.T.C. 288 (1997); *Mazda Motor of America, Inc*., 123 F.T.C. 312 (1997) (consent orders) (complaint alleging that ads touting "zero down" are deceptive even though fine print disclosures and/or point of sale or other sources make clear that significant costs apply at lease inception; order defining clear and conspicuous disclosure of terms in ads for car leases as "readable [or audible] and understandable to a reasonable consumer"). See also *United States v. Mazda Motor of America, Inc.*, (C.D. Cal. Sept. 30, 1999) (consent decree) ($5.25 million total civil penalty for violations of FTC and state orders related to disclosures in car leasing advertising).

[17] 16 C.F.R. § 308.

24. To ensure that consumers understand the central factor in the transaction—the cost of the call—the Rule specifies that all necessary disclosures must be made clearly and conspicuously. Initially, the Rule specifies that these disclosures must be made in the same language as the advertisement; for print disclosures, "in a color or shade that readily contrasts with the background of the ad"; and for oral disclosures, "in a slow and deliberate manner and in a reasonably understandable volume." However, the Rule outlines with more specificity the required type size of these disclosures, their proximity to the triggering information, and the necessity of both oral and visual disclosures for television ads.

25. In print advertisements, the FTC Rule requires:

1) that the cost of the call shall be placed adjacent to each presentation of the pay-per-call number; and

2) that each letter or numeral of any necessary price disclosures shall be, "at a minimum, one-half the size of each letter or numeral of the pay-per-call number to which the disclosure is adjacent."

26. For television advertisements, the FTC Rule requires:

1) that a visual disclosure shall appear adjacent to each visual presentation of the pay-per-call number;

2) that each letter or numeral of any necessary price disclosures shall be, "at a minimum, one-half the size of each letter or numeral of the pay-per-call number to which the disclosure is adjacent;"

3) that a visual disclosure shall appear on the screen for the duration of the presentation of the pay-per-call number; and

4) that an oral disclosure shall be made at least once, simultaneously with a visual presentation of the disclosure.

27. The measures that the FTC thought were necessary to ensure that cost disclosures were clear and conspicuous in the context of pay-per-call services—the prominent disclosure of important cost information adjacent to the central feature of the ad—are certainly relevant to price advertising by dial-around services and long-distance calling plans. While not every single aspect of the Rule may be appropriate or required to ensure truthful, nondeceptive advertising by the long-distance telephone industry, the Rule nonetheless offers guidance and a set of "best practices" to advertisers of dial-around and other long-distance telephone services.

1. <u>Prominence</u>

28. Disclosures that are large in size, are emphasized through a sharply contrasting color, and, in the case of television advertisements, remain visible and/or audible for a sufficiently long duration are likely to be more effective than those lacking such prominence. The FTC's experience consistently demonstrates that fine-print footnotes and brief video superscripts are often overlooked. For example, in concluding that a television superscript was insufficiently clear and conspicuous to qualify a nutritional claim in a food ad, the FTC stated, "[g]enerally recognized marketing principles suggest that, given the distracting visual and audio elements and the brief appearance of the complex superscript in the middle of the commercial, it is unlikely that the visual disclosure is effective as a corrective measure."[18]

29. The FTC's analysis focuses not just on whether the type size of the disclosure is large enough to be *readable* when read in isolation, but rather whether the disclosure itself is prominent enough so that typical consumers will actually *read* and *understand* it in the context of an actual ad. Although the FTC has not, as a general rule, required disclosures to be identical in size and repeated the same number of times as the triggering representation, substantial disparities between the two reduce the likelihood that a disclosure will be clear and conspicuous.

> **Example # 12:** In a full-page newspaper ad for a long-distance calling plan, the phrase "10¢ a minute" appears in 70-point type at the top of the page. In fact, the advertised 10¢ a minute rate applies only with a $3.95 monthly fee. The fee is disclosed in the body of the ad in 12-point type. Given the disparity in type size between the "10¢ a minute" claim and the $3.95 monthly fee, it is unlikely that the disclosure of the monthly fee is sufficiently clear and conspicuous to avoid deception.

> **Example # 13:** In a 30-second television ad for a dial-around service, the phrase "10¢ a minute" is used four times by the narrator and appears as a graphic twice. A superscript appearing on the bottom of the screen for three seconds reads "Rate available from 7:00 p.m. until 7:00 a.m., Monday through Friday and all day weekends." In fact, calls before 7:00 p.m. cost 25¢ per minute. Given the prominence of the "10¢ a minute" claim and the complexity and small print of the superscript, it is unlikely that the disclosure of the time restrictions is sufficiently clear and conspicuous to avoid deception.

> **Example # 14:** In a full-page newspaper ad for a long-distance calling plan, the phrase "10¢ a minute" appears in 70-point type at the top of the

[18] *Kraft, Inc.* 114 F.T.C. 40, 124 (1991), aff'd, 970 F.2d 311 (7th Cir. 1992), *cert. denied,* 479 U.S. 1086 (1987). *See Thompson Medical Co.,* 104 F.T.C. 648, 797-98 & n. 22 (1984), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied,* 479 U.S. 1086 (1987); Deception Statement, 103 F.T.C. at 180.

page. Immediately under it, the phrase "plus \$3.95 monthly fee" appears in 35-point type. Given the proportional similarity in type size between the "10¢ a minute" claim and the \$3.95 monthly fee and their proximity, the disclosure of the monthly fee is likely to be sufficient to avoid deception.

2. Proximity and Placement

30. In addition to their size and duration, the proximity and placement of disclosures are important factors in determining whether they are clear and conspicuous. The effectiveness of disclosures is ordinarily enhanced by their proximity to the representation they qualify, because reasonable consumers do not necessarily read an ad in its entirety.[19] The placement of qualifying information away from the triggering representation—for example, in footnotes, in margins, or on a separate page of a multi-page promotion—reduces the effectiveness of the disclosure.[20] Furthermore, when significant qualifying information about the cost of a long-distance plan or service is necessary to prevent the ad from misleading consumers, the use of an asterisk will generally be considered insufficient to draw a consumer's attention to a disclosure placed elsewhere in an ad.[21]

Example #15: A full-page newspaper advertisement for a company's long-distance calling plan features in 70-point type the statement, "7¢ a minute all the time" followed by an asterisk. A 12-point disclosure at the bottom of the page states, "*\$5.95 monthly fee applies." Given the disparity in prominence and location between the two lines of text, it is unlikely that the disclosure of the monthly fee is sufficiently clear and conspicuous.

Example # 16: A dial-around company promotes its services via a three-page direct mail letter sent to consumers. The envelope includes a

[19] Deception Statement, 103 F.T.C. at 180-81.

[20] *See, e.g., Dell Computer Corp.,* C-3888 (Aug. 6, 1999) (consent order); *Micron Electronics, Inc.*, C-3887 (Aug. 6, 1999) (consent order); *Häagen-Dazs Co.,* 119 F.T.C. 762 (1995) (consent order); *Stouffer Foods Corp.,* 118 F.T.C. 746, 802 n.10 (1994).

[21] *See, e.g., Frank Bommartino Oldsmobile, Inc.,* C-3774 (Jan. 5, 1998) (consent order); *Archer Daniels Midland Co.,* 117 F.T.C. 403 (1994) (consent order).

depiction of a nickel surrounded by the phrase "long-distance calls for just 5¢ a minute," a depiction repeated on the first page of the letter. In fact, the 5¢ a minute rate is good only for state-to-state calls 20 minutes or longer. That information is prominently disclosed only on the last page of the letter. The disclosure of these material conditions on the third page of the letter would likely be ineffective.

Example # 17: In a 60-second television ad, a company wants to promote both its domestic and international dial-around service. In the first 50 seconds of the ad, the spokesperson refers to the company's rate as "7¢ a minute" three times with an accompanying graphic. In the last 10 seconds of the ad, the spokesperson says, "And call 878-555-0000 to find out about our low international rates." During the 10-second segment in which the spokesperson discusses the company's international rates, the superscript appears "7¢ a minute rate applies after 7:00 p.m. Monday-Friday and all day weekends." Given the lack of proximity between the "7¢ a minute" claim and the disclosure of the material time restriction, the superscript would likely not be considered clear and conspicuous.

Example # 18: A company wants to promote its international long-distance service by reducing its regular prices during a special promotional period. The print ad features the prominent headline, "Big holiday sale! Call between November 1, 2000, and December 31, 2000, and save on all international calls." The ad also features a box listing ten foreign cities. The list, prominently headed "sale prices good through December 31, 2000" gives the cost per minute to each of the advertised cities. Considering the close proximity between the promotional per-minute rates and the prominently displayed information that the advertised rates are good only until December 31, 2000, the disclosure would likely be effective.

3. Absence of Distracting Elements

31. Even if a disclosure is large in size and long in duration, other elements of an advertisement may distract consumers so that they may fail to notice the disclosure. As the FTC has held, consumers may be "directed away from the importance of the qualifying phrase by the acts or statements of the seller."[22] Advertisers should take care not to undercut the effectiveness of disclosures by placing them in competition with other arresting elements of the ad.

[22] Deception Statement, 103 F.T.C. at 180-81.

<u>Example #19</u>: A 30-second television advertisement for a dial-around service features a famous movie star as a spokesperson. On three occasions, the celebrity states that calls completed through this service cost 10¢ a minute. The ad closes with a quick-cut montage of the celebrity talking on the telephone in front of the Grand Canyon, Niagara Falls, Golden Gate Bridge, and other visually arresting national landmarks. In fact, calls are subject to a 50¢ minimum. This information is disclosed only through a visual superscript appearing at the bottom of the screen during the montage. Given the likelihood that consumers will focus on the quick-cut montage rather than on the superscript, it is unlikely that the disclosure would be considered clear and conspicuous.

4. Factors Relating Specifically to Television Ads

32. In television ads, the same factors of prominence, proximity, and absence of distractions determine whether material information is disclosed in a manner that consumers notice and understand. Other considerations specific to television ads include volume, cadence, and placement of any audio disclosures.[23] Disclosures generally are more effective when they are made in the same mode (visual or oral) in which the claim necessitating the disclosure is presented. Furthermore, research suggests that disclosures that are made simultaneously in both visual and audio modes generally are more effectively communicated than disclosures made in either mode alone.[24] For example, the FTC's Pay-Per-Call Rule requires that the price of a call to a 900-number service be disclosed in both the video and audio in a television ad. Thus, for television ads for long-distance services, a disclosure that includes both a sufficiently large superscript and a voice-over statement is likely to be more effective than a superscript alone.

<u>Example #20</u>: A 30-second television advertisement for a long-distance calling plan features a spokesperson who on three occasions states that

[23] *See generally General Motors Corp.*, 123 F.T.C. 241 (1997); *American Honda Motor Co.*, 123 F.T.C. 262 (1997); *American Isuzu Motor Co*., 123 F.T.C. 275 (1997); *Mitsubishi Motor Sales of America, Inc.*, 123 F.T.C. 288 (1997); *Mazda Motor of America, Inc*., 123 F.T.C. 312 (1997) (consent orders) (complaint alleging that ads touting "zero down" are deceptive even though fine print disclosures and/or point of sale or other sources make clear that significant costs apply at lease inception; order defining clear and conspicuous disclosure of terms in television and other ads for car leases as "readable [or audible] and understandable to a reasonable consumer"). *See also United States v. Mazda Motor of America, Inc*., (C.D. Cal. Sept. 30, 1999) (consent decree) ($5.25 million total civil penalty for violations of FTC and state orders related to disclosures in car leasing advertising); *Kraft, Inc.*, 114 F.T.C. 40, 124 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Thompson Medical Co.*, 104 F.T.C. 648, 797-98 (1984), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

[24] Maria Grubbs Hoy & Michael J. Stankey, *Structural Characteristics of Televised Advertising Disclosures: A Comparison with the FTC Clear and Conspicuous Standard,* J. Advertising, June 1993, at 47, 50; Todd Barlow & Michael S. Wogalter, *Alcoholic Beverage Warnings in Magazine and Television Advertisements,* 20 J. Consumer Res. 147, 151, 153 (1993); Noel M. Murray, *et al*., *Public Policy Relating to Consumer Comprehension of Television Commercials: A Review and Some Empirical Results*, 16 J. Consumer Pol'y 145, 164 (1993).

calls on the plan are "10¢ a minute anytime." In addition, a graphic reading "10¢ a minute anytime" is depicted twice during the ad. In fact, the 10¢ a minute rate requires the payment of a $5.95 monthly fee. The only disclosure of the monthly fee is through a visual superscript at the end of the ad. Especially because the triggering representation—that calls on the plan are "10¢ a minute anytime"—was made both orally and visually, the visual superscript would likely be less effective in disclosing the monthly fee than had the same information been conveyed both orally and visually.

III. ORDERING CLAUSE

33. Accordingly, IT IS ORDERED THAT this Policy Statement IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

FEDERAL TRADE COMMISSION

Donald S. Clark
Secretary

DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long Distance Services to Consumers File No. (Rel. March 1, 2000).

Today's action marks another unfortunate stop in the majority's self-defined jurisdictional mission to "do good." Regardless of how tenuous our statutory authority may be, or the potential adverse collateral consequences, the majority boldly goes where no Commission has gone before in an effort to "do good." Such an agile jurisdictional approach makes it politically difficult to dissent. Needless to say, I am not against doing "good." More specifically, I am not against efforts to eliminate fraudulent or misleading advertising. Yet our inquiry simply cannot stop with whether we are doing "good"-- to do so would be to abdicate our responsibility to the American people. We were hired to do a pretty daunting job: administer and enforce the Communications Act. When we act outside our job description, our "moonlighting" is not only questionable as a matter of law, it shortchanges the American people on the job they hired us to do.

An Effort to Do Good

Certain carriers' marketing may be confusing, misleading, or even fraudulent. I share the desire to see this advertising curtailed. I also understand that the Federal Trade Commission lacks authority over advertising practices by certain industries, including common carriers, under 15 U.S.C. §§ 45, 46. [1] In light of the perceived problem and the lack of FTC authority, the majority is responding to a perceived "gap" in federal regulatory authority over common carrier advertising. However, it is not obvious that this "gap" is filled by the plain language of the Communications Act. It is possible that there are many instances when pressing issues are not addressed by current federal law. But it is the exclusive responsibility of Congress, not the FCC, to assess these issues and to fill in any "gaps" by changing the law.

The FCC's Tenuous Jurisdiction Over Advertising

The Statement asserts FCC authority over advertising based on 47 U.S.C. § 201(b). That Section "requires that common carriers' practices . . . for and in connection with . . . communication service, shall be just and reasonable . . . ." The Statement then contends that advertising qualifies as a "practice" under the statute. As an initial matter, the plain meaning of the term "practices" taken

[1] 15 U.S.C. §§ 45(a)(2), 46(a), 46 (b). This enabling statute otherwise empowering the FTC clearly has exceptions regarding regulation of common carriers. The case of *FTC v. Miller*, 549 F.2d 452 (7 th Cir. 1977), squarely applied this exception to misleading advertising by common carriers.

in the context of Section 201 does not clearly reach advertising. This is particularly true in light of Congress' ability and practice of crafting explicit "advertising" jurisdiction over common carrier services when its desires such jurisdiction. For example, Congress has specifically granted the FTC jurisdiction over "advertisement[s] for pay-per-call services." [2] In the end, if the majority reads "practices" to include advertising, it is difficult to discern what the term does not include. For example, are telephone company labor and employment policies "practices" under the Act? What about the use of energy efficient equipment, is that a "practice"?

The questionable nature of our authority in this area is best illustrated by our own experiences. Despite the statute's sixty-five years on the books, the Statement cites only two cases in which the Commission has equated "practices" with advertising. [3] This lack of precedent alone demonstrates what a significant step these guidelines represent in expanding the reach of the Commission's authority. [4] It is one thing to nibble on the edges of advertising regulation (as these cases arguably did); it is quite another to enter into that arena full stride after sixty-five years of dormancy. [5]

Courts Have Been Reluctant to View Section 201's "Practices" Language to Include Advertising

Courts have also called into doubt the majority's interpretation of Section 201. Although the jurisdictional issue has never been squarely presented, courts have examined the scope of the FCC's advertising authority in the context of various state preemption cases. While the legal analyses in these cases are distinguishable, the decisions illustrate the facial weaknesses in our jurisdictional assertions. For example, a federal district court in New Jersey concluded that "Sections 201, 202, and 203 of the Communications Act impose no duty on common carriers to make accurate and

2 See 15 U.S.C. § 5711.

3 Both cases were within the last ten years, and neither was appealed on this issue. As shown below, both cases may be best described in terms other than as advertising complaints.

4 The first case cited by the item is the *Business Discount Plan* decision from last year. 14 FCC Rcd 340 (1998). That decision represents the only clear assertion of Commission authority over advertising under Section 201. However, even in that case, the advertising claim arose out of telemarketing based slamming complaints – an area in which we have clear jurisdiction under 47 U.S.C. § 258. I believe *Business Discount Plans* can best be interpreted as an indication that deceptive advertising that results in illegal activity may aggravate such conduct. However, it is a different exercise to suggest that we will now monitor all advertising – an area in which we have little, if any expertise -- and punish any misleading conduct as conduct alone. The second case cited in the Statement, *AT&T* 71 RR2d 775 (1992) is even weaker. *AT&T* did not find any violation of Section 201(b) and the "letter of admonishment" was issued under Section 4(i).

5 I also continue to object to the agency's persistent use of "Policy Statements" rather than rules to implement new regulatory policies. By removing these issues from the rigors of the Administrative Procedure Act, we eliminate the opportunity for interested parties to participate in the policy development process and shield these decisions from judicial review.

authentic representations in their promotional practices. . . " [6] In holding that state law advertising claims could go forward against a carrier, the Second Circuit similarly held that "while the [Communications Act] does provide some causes of action for customers, it provides none for deceptive advertisement and billing." [7] That court concluded that the Act "does not indicate a uniquely federal interest . . . in preventing a carrier from misrepresenting the nature of its rates to its customers." [8] The Seventh Circuit's message to the FTC in *Miller* is equally applicable to the FCC here: "The regulatory approach articulated by the Commission, while it may be a desirable one, is not the one Congress appears to have adopted." [9]

Although I am heartened by the Statement's assertion that it "does not preempt existing state law," I am also concerned that today's decision may cast doubt on state authority in this area. As one district court held, "[t]he savings clause of the Communications Act must be read to preserve only state claims that address obligations different from those created by the Communications Act." [10] Our action today suggests that the Communications Act creates an obligation regarding truthful advertising – potentially creating uncertainty regarding state law claims in this area.

I also want to point out that it appears that the states have done an adequate job in this area. Thus, it is not clear from a policy or consumer perspective that our intervention is necessary.

The Pay-Per-Call Experience

Recent Congressional action further illustrates the misguided nature of today's action. In 1992, Congress passed the "Telephone Disclosure and Dispute Resolution Act" to address the problems created by 900 pay-per-call services. Those issues were not unlike the

---

6 *Weinberg v. Sprint Corp*, 165 F.R.D. 431 (D. N. J. 1996), *appeal dismissed*, Civ. No. 96-354 (AMW)(May 23, 1996). Similarly, other courts have held that the Communications Act does not provide a remedy for failure of advertising to fully disclose certain components of services, or even fraudulent advertising. *See DeCastro v. AWACS*, 935 F. Supp. 541 (D.N.J. 1996); *In re Long Distance Telecommunications Litig.*, 831 F.2d 627 (6th Cir. 1987).

7 *Marcus v. AT&T*, 138 F.3d 46, 54 (2d Cir. 1998).

8 *Id.*

9 *FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977) (holding the FTC had no authority to regulate common carriers who were then regulated by the Interstate Commerce Act.) So, under *Miller* the FTC has no authority in the area of common carriers and under the Communications Act the FCC does not have clear authority either. Joint statements from the impotent agencies cannot resolve this conundrum.

10 *See Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1168 (S.D.N.Y. 1996), aff'd, 138 F.3d 46 (2d Cir. 1998); *see also Comtronics Inc. v. Puerto Rico Telephone Company,* 553 F.2d 701, 707 n.6 (1st Cir. 1977). The Commission has recently affirmed the availability of state claims in this area. *See Southwestern Bell Mobile Systems*, FCC 99-356 (Nov. 24, 1999).

customer concerns that today's Statement is designed to address. Yet when Congress sought to solve problems created by 900 service advertising, it specifically assigned that duty to the FTC, while assigning carrier regulation to the FCC. [11] Why? Because Congress understood that the FTC may lack authority over 900 services' advertising under the "common carrier" exemption yet the FTC had the requisite expertise to address advertising abuses. In doing so, Congress gave the FCC distinct regulatory responsibilities over pay-per-call services, but not for these services' advertising. If the FCC had authority over "advertising," it does not appear as if Congress knew about it. In my view, similar explicit Congressional action would be required before we should enter the advertising regulation arena.

A Zero Sum Game

The drafting of this Statement has already consumed substantial resources. Interpreting and implementing it and its potential progeny will demand significant additional energy. Moreover, the agency's lack of expertise and the wide array of entities who advertise or market these services further exacerbate these resource demands.

Inherent in the resources this initiative may consume is the majority's implicit decision to move resources away from other activities in order to regulate advertising. Our budget is a zero sum game. Resources for advertising regulation are resources taken away from other Commission activities. In a period of hiring freezes and travel moratoria, I cannot support the diversion of resources to advertising supervision. We have explicit, and in many cases exclusive, authority over a number of consumer protection initiatives, including interstate obscene and harassing phone calls (§ 223), unsolicited interstate fax advertisements (§ 227), slamming (§ 258) and radio interference (§ 302). Unlike the advertising issues addressed in the Statement, states are generally not in a position to address these consumer concerns. In my view, and apart from my legal concerns, our resources would be better deployed in areas where the FCC has clear (and often sole) jurisdiction to protect consumers. Too often we do not have the resources to promptly and comprehensively address consumer concerns in these core jurisdictional areas. I believe our job is to fully and completely do the "good" Congress charged us with under the statute long before we turn our attention to issues outside of our clear authority.

Regardless of the precision or persuasiveness of my legal and policy views, there will be those who ask: "How could you be against the FCC's protection of consumers from fraudulent advertising?" My answer is also a question: "How could you be against the FCC fully staffing and funding our primary and explicit statutory responsibilities?"

---

11 See 15 U.S.C. § 5711-5724. Congress also passed Section 228 of the Communications Act to give the FCC additional tools to combat 900 services' abuses.

Based on the foregoing, I respectfully dissent.