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REGULATING COMMERCIAL TELEPHONE SOLICITATIONS*

Walter S. Baer

My name is Walter S. Baer. I am a physicist at The Rand Corporation, Santa Monica, California. However, my testimony today reflects my own personal views, which are not necessarily shared by Rand or its research sponsors.

In August 1977, along with the Citizens Communication Center of Washington, D.C., I petitioned the Federal Communications Commission (FCC) to begin an inquiry into the use of automatic dialing-announcing devices for commercial solicitations over the public telephone network. Our petition asked that the FCC consider rules to prevent abuses and invasions of privacy resulting from uncontrolled commercial use of these machines. We also proposed that telephone subscribers be given the right to indicate if they do not want to receive commercial advertising calls, whether from machines or from human salesmen. That is the position I am recommending today to this Commission as well.

I do not believe that either the state or the federal government should prohibit all commercial advertising calls. Advertisers have rights to free speech, and some consumers, I am told, don't mind answering the phone to hear a commercial sales pitch. But I strongly believe that subscribers who do not want to be interrupted by commercial sales messages should be able to avoid them without having to buy an expensive answering machine or pull the phone plug out of the wall.

* Testimony presented before the California Public Utilities Commission, March 22, 1978.

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Our petition proposed that the telephone directory include a special symbol, such as an asterisk next to the names of subscribers who don't want to receive commercial sales calls. Telephone tariffs would then prohibit commercial solicitation of subscribers who had so indicated they did not want to be disturbed. This is not a new idea. Although I did not know it when we submitted the petition to the FCC, a very similar proposal was made in 1965 to this Commission by Morey McDaniel, then a student at Stanford Law School. That petition was denied, in part because the PUC was subject to intense pressure from business advertisers and the telephone companies who did not want to see telephone solicitation regulated; and in part because there was little additional consumer support for Mr. McDaniel's position. But times have changed. Consumers are more sophisticated today, aware of their rights, and willing to take action to defend their interests. Regulatory agencies are more responsive to consumer interests than they were a decade ago. And, regrettably for those of us who value privacy at home, telephone solicitation has become a more pervasive, and more intrusive practice.

DIMENSIONS OF THE UNSOLICITED SALES CALL PROBLEM

I know of no reliable, independent survey of commercial telephone solicitation, but one industry source reports that more than 7 million telephone sales calls are made each business day in the U.S. This would imply that California residents now receive more than 200 million such calls annually. Again, according to industry

sources, the number of commercial sales calls is growing at more than 15 percent annually.

This growth rate could accelerate further through the use of automatic dialing-announcing machines. Relatively few of these machines apparently have been sold in California, but as we stated in our FCC petition, they represent a "potentially serious nuisance, annoyance, and invasion of privacy. The widespread use of [these] devices by advertisers could bring a barrage of unsolicited phone calls to random homes at any hour of the day or night, with no means of controlling or stopping them." Unlisted telephone numbers provide no protection, since these devices can call numbers at random or in some numerical sequence.

The news accounts since our petition was filed last August have emphasized the problem of subscribers not being able to use their phones after hanging up on a machine until the recording has finished. This obviously can create a serious problem in the event of a medical crisis or other emergency. Technically, the problem arises not from the automatic dialing machines themselves, but from the older, step-by-step switching equipment installed in some telephone exchanges. This equipment keeps the subscriber's line engaged until the calling party hangs up. Newer switching equipment, particularly the electronic switches now being installed in many metropolitan exchanges, disconnects after either one of the parties has hung up.

COSTS TO IMPLEMENT A "NO COMMERCIAL SOLICITATION" SYMBOL

The telephone companies, in response to our FCC petition and in this inquiry, have brought up many of the same arguments against giving subscribers the right to refuse commercial advertising calls that they made in 1965. They have stated that placing an asterisk by subscribers' names who do not want to receive commercial solicitation calls would be "unduly burdensome"; that it would not effectively give subscribers the hoped-for privacy; and that it "could lead to insistent demands from other groups and organizations for the use of individualized directory symbols for their particular purposes." None of these arguments holds up well under scrutiny.

Inserting asterisks next to subscribers' names would entail some one-time initial costs, but it is doubtful that the costs "would be exceedingly high," as AT&T has suggested in its formal response to our FCC petition. Certainly the cost of an asterisk would be less than the cost to add a second name in a directory listing, which the telephone companies have offered to do at no charge to the subscriber this past year.

Dual name listings have followed the same procedure that we suggest for the "no commercial solicitation" symbol. The subscriber who wants a dual name listing fills in a form sent by the telephone company in the monthly statement, encloses it with his or her payment, and the name is added when the directory is next compiled. The same approach can be adopted for subscribers who do not want commercial solicitation calls. It is difficult to see how adding an asterisk would be "unduly burdensome," when the telephone companies have been offering the more complex, dual listing change for free.

Moreover, should this program prove in practice to be an intolerable cost burden, the Commission could then permit a nonrecurring charge to recover costs. But the burden of showing that the cost to implement this program is excessive should clearly rest on the telephone carriers.

WOULD A SPECIAL SYMBOL AFFORD PROTECTION?

Another argument presented by the telephone companies is that the asterisk approach would not effectively protect subscribers from commercial solicitation calls. Several reasons are offered.

For example, asterisks would not appear for unlisted numbers, which telephone solicitors might call through sequential or random dialing. This problem is easily remedied by forbidding solicitation of unlisted numbers, as well as those listed with asterisks.

AT&T has also argued that "Sophisticated users of the unsolicited call method of advertising frequently do not rely on telephone directories, but instead resort to specialized directories and lists compiled by outside 'mailing list' firms, arranged according to various demographic and other classifications." Yet this is hardly an argument against the asterisk approach. The telephone directory is a public document; it is available for consultation by advertisers, if their "special directories and lists" do not contain this information. Advertisers who did not consult the telephone book would be subject to penalty, just as mailers of sexually-oriented materials today are subject to penalty if they do not consult the Postal Service's Reference List of those who have indicated they don't want to receive such mailings. Arguing against a "no commercial solicitation" symbol because some advertisers wouldn't consult the

telephone directory is like contending there should be no penalty in football for roughing the passer because some onrushing linemen won't look to see who has the ball.

A related argument states that current automatic dialing devices can't recognize an asterisk in the phonebook and thus can't be programmed to avoid calling those subscribers who don't want advertising messages. This is indeed true, and precisely the reason why some controls on machine-made telephone solicitations are necessary. It seems important today to set reasonable ground rules, so that the next generation of machines can include logic to avoid telephone numbers marked by an asterisk, or to implement whatever method the Commission rules to protect subscribers' privacy. I am convinced that engineers who are clever enough to invent machines which can recognize a busy signal and call back in an hour, can also develop devices that recognize a "no commercial solicitation" symbol in the telephone book or on a magnetic tape listing of telephone sales prospects. If current machines cannot do the job, their designers should go back to the drawing board until they come up with machines that can. Technical devices should be adapted to meet human needs, not the other way around.

ENFORCEMENT

If this approach were adopted, the Commission would have to stipulate penalties such as a fine or removal of telephone service for commercial advertisers who continued to call subscribers after their names were listed with an asterisk in the telephone directory.

This clearly brings up questions of enforcement, since unlike mail solicitations, those who receive unwanted commercial sales calls have no physical evidence to retain. However, enforcement does not appear to be unduly difficult. I would suggest adopting an approach such as that contained in the legislation introduced in Congress last Fall by Representative Aspin and Senator Anderson. Their bill provides that a commercial advertiser could be penalized only if ten different subscribers with "no commercial solicitation" symbols submitted written complaints within a two week period. This would seem to avoid potential problems of harassment or frivolous complaints against responsible advertisers.

Of course, the purpose of our proposal is not to penalize or harass advertisers, but rather to provide a simple system whereby consumers' preferences can be identified and protected. I expect that there would be very few fines, removals of telephone service, or other penalties actually applied to telephone solicitors as a result of this program. The vast majority of commercial advertisers would respect the privacy of those who had indicated with an asterisk their desire not to receive commercial sales calls. It would simply be in advertisers' business interest to do so; today they are wasting their time and money with these unwanted calls.

Some industry spokesmen contend that this proceeding is an over-reaction against a virtually nonexistent problem since so few automatic dialing-announcing devices are currently in use. But that is precisely the reason why regulations are needed now, before such devices are well

entrenched. Establishing reasonable ground rules today will permit responsible development that can serve the public interest; rather than, as so often happens, force the public to adjust to an already developed technology.

SUMMARY

I recognize that this issue raises complex questions concerning the constitutionality of a ban on machine-made solicitations versus problems in drafting and enforcing a more selective approach such as I have suggested.

A clear conflict exists between communications senders' rights of free speech and receivers' rights to privacy. I am not an attorney, so I cannot give an expert legal opinion on where the line should be drawn. I do have personal views as a private citizen. I believe that placing responsibility and choice on telephone subscribers is preferable to any outright ban; that the choice should extend to permitting refusal of all commercial solicitation calls, not just those made by machines; and that a distinction can and should be drawn between commercial solicitations and those for non-commercial or political purposes.

In my opinion, a "no commercial solicitation" symbol in the telephone directory would save time and psychic energy for everyone concerned. It would provide advertisers an easy way to recognize those who are unlikely to buy products or services sold over the telephone. It would remove an increasingly annoying and intrusive aspect of

daily telephone use, which can only be in the best interests of the telephone companies. And by giving consumers a choice, it would protect the privacy of those who did not want commercial sales calls without preventing others from receiving them. I hope the Commission will seriously consider adopting rules to implement this approach.

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