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FEDERAL COMMUNICATIONS COMMISSION

Item Number:
Agenda Title: General
Meeting Date: December 14, 1983
Print in FCC Reports: Yes No
Type of Meeting: Open Closed

Agenda Item

Date: December 6, 1983

From: General Counsel

Subject: Further Notice of Inquiry and Notice of Proposed Rulemaking in the Matter of Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials

Administrative Resource Impact: Cost of Printing in Federal Register: \$680.00

Recommended Action: Adopt the attached Further Notice of Inquiry and Notice of Proposed Rulemaking

I. FACTUAL SUMMARY

On September 9, 1983, the Commission adopted a notice of inquiry regarding the enforcement of prohibitions against using common carrier facilities to transmit obscene materials. A large portion of the inquiry focused on the Commission's role in enforcing the prohibition in Section 223 of the Communications Act against using the telephone to make obscene or indecent statements in the context of "dial-a-porn" services. These services permit a caller to hear pre-recorded pornographic messages when certain numbers are dialed.

On November 18, 1983, both houses of Congress passed a bill that amends Section 223. The President has until December 10 to sign or veto the bill. ^{1/} The amendment answers some of the questions raised in our notice of inquiry, but leaves others unanswered. The amended bill also requires the Commission, within 180 days of the bill's enactment, to prescribe rules and regulations that would curtail access to dial-a-porn services by children, while retaining access by persons 18 years of age or older.

^{1/} In the event the bill does not become law, this item will be withdrawn from the December 14 agenda.

It is pursuant to amended Section 223(c)'s requirement that the Commission adopt rules and regulations that we propose that the Commission adopt the attached Notice. The rulemaking portion of the Notice sets forth some possibilities for rules that would curtail access to dial-a-porn services by children and asks for comment on the technical feasibility of our suggestions. We also solicit suggestions from the public for other workable and constitutional restrictions. ^{2/} At the same time, we are proposing to issue a request for additional comments on our notice of inquiry, in order to give commenters an opportunity to respond to the questions raised in our initial inquiry with reference to the amended Section 223 rather than the old Section 223.

II. ISSUE

Should the Commission adopt the attached Notice of Further Inquiry and Notice of Proposed Rulemaking?

III. Options

1. Issue the proposed Notice.
2. Modify the proposed Notice.

IV. RECOMMENDATION

The Office of General Counsel recommends that the attached Notice be adopted as drafted. Adoption of the further notice of inquiry will permit full consideration of all relevant issues in our ongoing inquiry in this matter, while adoption of the notice of proposed rulemaking will permit the Commission to undertake its statutory rulemaking duty under Section 223(c).



Bruce E. Fein
Bruce E. Fein
General Counsel

Noted:

Jack Smith
Chief, Common Carrier Bureau

Attachment

Diane L. Silberstein
Rm 610 632-2587

^{2/} It is our interpretation of the amendment that the Commission is only required to adopt rules insofar as they both achieve their intended purpose and avoid constitutional infirmities.

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of)
)
Enforcement of Prohibitions) Gen Docket No. 83-989
Against the Use of Common)
Carriers for the Transmission)
of Obscene Materials)

FURTHER NOTICE OF INQUIRY AND
NOTICE OF PROPOSED RULEMAKING

Adopted: 1983; Released: 1983

By the Commission:

1. On September 9, 1983, the Commission adopted a Notice of Inquiry ("NOI") in the above-referenced docket. A large part of the inquiry focused on the scope of the Commission's authority to take action against "dial-a-porn" services under Section 223 of the Communications Act, 47 U.S.C. § 223,¹ and the extent to which the Commission ought to exercise its discretion to use any such authority. The comment period closed on December 1~~9~~¹⁶, 1983.

2. On December 6, 1983, a bill that amends section 223 became law. (A copy is attached to this Notice.) The amendment answers some of the questions raised in the Notice of Inquiry regarding the Commission's authority, ¹ but leaves other questions unanswered. ² It also requires the Commission to prescribe, within 180 days of the bill's enactment, rules and regulations that ~~curtail~~ ^{restrict} access to the telephone communications

²1/ For example, the amendment seems to answer the questions raised in ¶ 11 of the Notice of Inquiry by its prohibition of obscene or indecent communications via dial-a-porn services when the obscene or indecent communications are made to persons under eighteen years of age or to unconsenting adults -- unless a defendant has attempted to restrict minors' access in accordance with FCC rules and regulations. The bill also gives the Commission explicit authority to impose fines for violations.

Although in his remarks inserted into the Congressional Record Congressman Bliley proffers his answers to the questions raised in the NOI, ~~we respectfully believe that comment from the rest of the public is warranted on all questions not explicitly answered by the statutory language.~~

at issue by persons under 18 years of age, while retaining adult access. ^{3/} We issue this further notice of inquiry in order to permit and encourage the public to comment on the issues raised in the NOI with reference to the amended section 223 rather than the old section 223, where pertinent. We issue this notice of proposed rulemaking in order to solicit comments and suggestions on the rules and regulations that the Commission must adopt pursuant to section 223(c) if practicable.

3. We thus seek comment on all questions and issues raised in the notice of inquiry that are affected, but not answered, by the amendment. In addition, we seek ideas and comments on rules and regulations that are technically feasible which could limit access to adults. In this regard, we note that many of these message services are "dial-it" services which permit multiple callers to access the same recording simultaneously. Requiring an operator to take a credit card number would therefore not be technically feasible in the case of dial-it services. We seek comments, however, on whether some variation of a screening device might be feasible, such as an access code that requires no operator assistance (in much the same way that long distance service access codes do not).^w With respect to non dial-it message services, should the same system be used or could a credit card be required? Because access codes or credit cards are unavailable to minors except when provided to them by a parent, we propose that such screening devices would meet the requirements of amended section 223(b)(2). We seek comments, therefore, as to what is technically feasible and state our intention to adopt a rule requiring such a device if practicable.

4. Another possible regulation would limit the hours of operation of these telephone services to those hours of the day when a majority of parents can be expected to be home and therefore responsible for their children's behavior. In FCC v. Pacifica Foundation, 483 U.S. 726 (1978), the Supreme Court suggested that the daypart could affect whether certain conduct was prohibited by the obscenity laws. We seek comment on whether limiting the hours of operation from 8 A.M. to 9 P.M. Eastern Time (to encompass 8 A.M. to 6 P.M. in all Continental U.S. time zones) plus 8 A.M. to 6 P.M. in Hawaii and Alaska, would be a reasonably effective restriction.

^{3/} As the legislative history notes, the Commission is, of course, limited by the constraints of what is practicable and constitutional. See ¶ 6, infra. Thus, although we intend to make every effort to fashion rules that serve their intended purpose while being both practicable and constitutional, we note that if no such rules can be found then we do not interpret the amendment to require us to act in a manner that would result in constitutional infirmities.

5. Other possible restrictions could focus on limiting advertisements of the telephone number, viz., restricting advertisements to the inside pages of the magazines available only to persons over eighteen. However, the Commission may not have authority to impose restrictions on any medium other than broadcast and related services. We further solicit comment on whether any advertising restrictions by the Commission would be permissible under the criteria for permissible governmental restrictions on commercial speech, as set forth by the Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980).

6. In addition, we seek suggestions from the public as to other time, place and manner regulations that would permit adults to have access to these services, while restricting access by children. It would seem necessary that any regulation we adopt give adults continued access to these services, lest we risk violating Butler v. Michigan, 352 U.S. 380 (1957). In Butler, the Court struck down as unconstitutional a statute that had the effect of preventing adults from having access to materials that were judged to have a potentially deleterious influence on children. Id. at 382-83. The Court refused to reduce the adult population to reading what was fit for children. Id. at 383. We see no reason why that same principle would not apply here. If, therefore, there are no feasible restrictions that permit adult access while limiting children's access, then ~~less restrictive measures rather than broader restrictions will have to suffice to avoid any constitutional infirmity.~~

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7. We ask commenters to be as specific as possible, in their initial suggestions and in any criticisms of other suggestions. We also ask that commenters not merely criticize but, if possible, suggest solutions to their perceived problems. Because of the 180-day deadline imposed on the Commission for adopting regulations pursuant to amended section 223(c), we do not anticipate granting any extensions of time for the filing of comments or reply comments.

8. As required by section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of the proposed rule changes on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as ~~responses to the regulatory flexibility analysis.~~ The Secretary shall cause a copy of the Notice, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 50 U.S.C. § 601 et seq. (1982)).

9. For the purposes of the non-restricted notice and comment rulemaking portion of this docket (as distinguished from the notice of inquiry portion), members of the public are advised that ex parte contacts are permitted from the time the Commission adopts a Notice of Proposed Rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an ex parte presentation is any written or oral communication (other than formal written comment/pleading and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written ex parte presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral ex parte presentation addressing matters not fully covered in any previously filed written comments for the proceeding must prepare a written summary of that presentation; and, on the day of oral presentation, must serve that written summary on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each ex parte presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it related. See generally, section 1.1231 of the Commission's Rules, 47 CFR § 1.1231.

10. This Notice of Proposed Rulemaking is issued pursuant to authority contained in sections 4(i) and 223(c) of the Communications Act of the 1934, as amended. Interested parties may file comments on or before January 23, 1984 and reply comments on or before March 1, 1984. ^{4/} All relevant and timely comments filed in response to this Notice will be considered by the Commission. In accordance with the provisions of section 1.419 of the Commission Rules, an original and five copies of all comments, replies, briefs and other documents filed in this proceeding shall be furnished to the Commission. Further, members of the general public who wish to participate informally in the proceeding may submit one copy of their comments, specifying the docket number in the heading. All comments should be submitted to the Commission's Secretary. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided the fact of the Commission's reliance on such information is noted in the Report and Order.

^{4/} The January 26 deadline for filing reply comments on our initial notice of inquiry is hereby supplanted by these new filing deadlines.

11. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

12. For further information concerning this proceeding, contact Diane L. Silberstein, Office of General Counsel, (202) 632-2587.

FEDERAL COMMUNICATIONS COMMISSION

William Tricarico
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

1. Reason for Action: Section 223(c) of the Communications Act, as amended, 47 U.S.C. § 223(c), requires the Commission to adopt rules and regulations limiting access to "dial-a-porn" types of services to persons 18 years of age or older.

2. Objectives: The Commission proposes to adopt rules that will curtail children's access to these services while retaining reasonable access for adults. The Commission has suggested certain possibilities but requires comment as to the technical feasibility of its suggestions before deciding whether to adopt them.

3. Legal basis: Action proposed herein is taken pursuant to sections 4(i) and 223(c) of the Communications Act, as amended.

4. Description of potential impact and number of small entities affected. This action will have primary effect on sponsors of dial-a-porn types of services. It is unclear how many such sponsors there are when all kinds of message services (rather than dial-it services only) are included. To a lesser degree, telephone companies could be affected by this action. Although not subject to liability under the statute, the rules adopted pursuant to this action could reduce the amount of revenues earned by the carriers if the volume of calls is reduced. That amount cannot be estimated, however, without knowing which of the proposed rules will be adopted and to what extent the volume will be reduced. We therefore ask small entities to comment on the impact they foresee of the rules we have proposed and of any others suggested.

5. Recording, record keeping and other compliance requirements. None.

6. Federal rules which overlap, duplicate or conflict with this rule. None.

7. Any significant alternatives minimizing impact on small entities and consistent with the stated objective. None.

LIST OF REPRESENTATIVES WHO SIGNED THE PETITION ON "DIAL-PORN"

Bill Archer, (R-Texas)
JIM BATES, (D-Cal.)
Thomas J. Bliley, Jr., (R-Va.)
JAMES T. BROYHILL, (R-N.C.)
Dan Coats, (R-Indiana)
Baltasar Corrada, (D-P.R.)
Dan Daniel, (R-Virginia)
William E. Dannemeyer, (R-Cal.)
Butler Derrick, (D-S.C.)
Wayne Dowdy, (D-Miss.)
Dennis E. Eckart, (D-Ohio)
Jack Fields, (R-Texas)
Hamilton Fish, Jr., (R-N.Y.)
Bill Frenzel, (R-Minn.)
Benjamin A. Gilman, (R-N.Y.)
Ralph M. Hall, (D-Texas)
Marjorie S. Holt, (R-Md.)
Earl Hutto, (D-Fla.)
James M. Jeffords, (R-Vt.)
MICKEY LELAND, (D-Texas)
Norman F. Lent, (R-N.Y.)
Bob Livingston, (R-La.)
Barbara A. Mikulski, (D-Md.)
* Clarence E. Miller, (R-Ohio)
CARLOS J. MOORHEAD, (R-Calif.)
* Robert J. Mrazek, (D-N.Y.)
Howard C. Neilson, (R-Utah)
Solomon P. Ortiz, (D-Texas)
MICHAEL G. OXLEY, (R-Ohio)
Stan Parris, (R-Va.)
MATTHEW J. RINALDO, (R-N.J.)
Don Ritter, (R-Pa.)
F. James Sensenbrenner, (R-Wis.)
Richard C. Shelby, (D-Ala.)
Paul Simon, (D-Ill.)
THOMAS J. TAUKE, (R-Iowa)
W.J. (Billy) Tauzin, (D-La.)
Barbara F. Vucanovich, (R-Nev.)
Doug Walgren, (D-Pa.)
G. William Whitehurst, (R-Va.)
Larry Winn, Jr. (R-Kansas)
Frank R. Wolf, (R-Va.)
George C. Wortley, (R-N.Y.)
Ron Wyden, (D-Ore.)
Tom Corcoran, (R-Ill.)
Bob Whitaker (R-Kans)

ALL CAPS DENOTES COMMUNICATIONS SUBCOMMITTEE MEMBER.

* denotes Appropriations Subcommittee member.

P R E A M B L E

AGENCY: Federal Communications Commission

ACTION: Further Notice of Inquiry and Notice of Proposed Rulemaking

SUMMARY: The Commission requests further comment on the issues raised in its notice of inquiry in Docket 83-989 in light of the recent amendments to Section 223, 47 U.S.C. § 223. The Commission also proposes to adopt rules and regulations in accordance with amended Section 233(c), which requires the Commission to adopt rules within 180 days curtailing access to "dial-a-porn" types of services by children, while permitting access by adults. The further notice of inquiry permits full consideration of all relevant issues in the Commission's ongoing inquiry in Docket 83-989, while the notice of proposed rulemaking permits the Commission to undertake its statutory rulemaking duty under Section 223(c).

DATES: Comments must be received on or before January 23, 1984.
Reply Comments must be received on or before March 1, 1984.

Address: Federal Communications, Washington, D.C. 20554

FOR FURTHER INFORMATION CONTACT: Diane L. Silberstein, Office of
General Counsel, (202) 632-2587