Enjoy!
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634-1816

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

CC
FCC 85-97
35543

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

Second Notice of Proposed Rulemaking

Adopted: March 1, 1985 Released: March 8, 1985

By the Commission:

1. This Second Notice of Proposed Rulemaking solicits additional comments on regulations the Commission is under mandate to adopt pursuant to Section 223 of the Communications Act of 1934, as amended, 47 U.S.C. § 223. Section 223, inter alia, imposes fines on those who use telephone facilities to transmit obscene or indecent messages to individuals under eighteen years of age. It also requires the Commission to promulgate regulations which, in effect, restrict access of minors to such services. 1/ In a Report and Order adopted June 4, 1984, 49 Fed. Reg. 24,996 (June 19, 1984), the Commission promulgated a regulation after reviewing comments and reply comments submitted in response to a Notice of Inquiry (NOI) 2/ and a Further Notice of Inquiry and Notice of Proposed Rulemaking (NPRM). 3/ On November 2, 1984, the United States Court of Appeals for the Second Circuit found the Commission had failed

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1/ More specifically, Section 223(b) imposes fines, not to exceed $50,000 per day, upon those who, for commercial purposes, use their telephone or allow others to use telephone facilities under their control to transmit obscene or indecent messages to individuals under eighteeen years of age. The Commission is under mandate to develop a regulation restricting access by minors to "dial-a-porn" services. 47 U.S.C. § 223(b)(2). A defendant may defend against prosecution under the statute by attempting to restrict access in accordance with the Commission's regulation. Section 223(b)(2) is set out at note 6, infra. See also note 5, infra.

2/ 48 Fed. Reg. 43,348 (September 23, 1983).

3/ 49 Fed. Reg. 2,124 (January 18, 1984).

to justify the regulation. 4/ In this Second Notice we seek further public comment on proposals to restrict minors' access to obscene or indecent telephone communications, in response to the Court's Decision.

Background

2. On September 9, 1983, the Commission adopted its NOI, which focused on the scope of the Commission's authority to take action against

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4/ See Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984), [hereinafter referred to as the "Court Decision"].

"dial-a-porn" services under Section 223 of the Act 5/ and on the extent to which the Commission ought to exercise its discretion to use any such authority. Meanwhile, Congress amended Section 223 of the Act and answered some of the questions raised in the NOI, such as the authority of the Commission to impose fines for violations. The amendment did not answer certain other questions, however. Accordingly, the Commission issued its NPRM to permit public comment on the issues raised in the NOI with reference to amended Section 223, and to solicit comments and suggestions on the rules and

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5/ In our NOI, we described the "dial-a-porn" service that resulted in passage of the legislation as follows:

> High Society Magazine, Inc. and Car-Bon Publishers obtained the Dial-It number in a lottery for Dial-It numbers conducted by New York Telephone in January 1983. The number was thereafter advertised in "High Society Live!" magazine and, in February 1983, operation of the service commenced. When the number is dialed, the caller hears a description or depiction of actual or simulated sexual behavior. The messages, which are changed at least once daily, are available to any caller, twenty-four hours a day, every day. As the local common carrier, New York Telephone does not operate the message service but provides the Dial-It service capability pursuant to an intrastate tariff filed with the Public Service Commission of New York. That tariff, which applies to all New York Telephone Dial-It services, explicitly provides that the subscriber has exclusive control over the content and quality of the messages recorded and that the telephone company assumes no liability therefor.
>
> The Dial-it number operated by High Society has apparently been widely disseminated and called. Sources calculate that the service receives up to 500,000 calls a day, yielding approximately $10,000 for High Society and $35,000 for New York Telephone per day before costs. (Citations omitted and emphasis added.)

(Footnote 5 continued)

As was further explained,

> Pursuant to the local tariff for Dial-It services, prior to May 1983 High Society received 2¢ for each local call while New York Telephone received 7¢ (of which 6.96¢ is estimated as New York Telephone's cost). As of May 1983, High Society continued to receive 2¢ per call, but New York Telephone's revenue per local call increased to 13¢ (and its average cost to 11.4¢). See New York Telephone P.S.C. Tariff No. 900 13 at 25. High Society also receives 2¢ for each long distance call. The long distance carriers and local carriers divide the remaining long distance revenues.

See NOI, 48 Fed. Reg. at 43,349, n. 7.

> We note that it is more accurate to refer to the "Dial-It" service as the Mass Announcement Network Service, but the parlance has become accepted and is used throughout this proceeding. It should also be noted that all Mass Announcement Services in the State of New York are on a 976 exchange and can be accessed locally or through an interexchange carrier. Report and Order, 49 Fed. Reg. 24,996, n. 6.

regulations that the Commission must adopt, if practicable, under the mandate of the new amendment. 6/ The Commission sought ideas and comments on rules and regulations that are technically and economically feasible which could limit dial-a-porn access to adults, including approaches such as operator intervention, blocking technology, hour limitations, and limitations on advertisements.

3. After analyzing the comments submitted in response to its NOI and NPRM, the Commission issued its Report and Order, which promulgated the following regulation:

> It is a defense to prosecution under Section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 223(b) (1983), that the defendant has taken either of the following steps to restrict access to communications prohibited thereunder:
>
> (a) Operating only between the hours of 9:00 p.m. and 8:00 a.m. Eastern Time, or
>
> (b) Requiring payment by credit card before transmission of the message(s).

49 Fed. Reg. at 25,003. Subsection (a), referred to as a "time-channeling" restriction because it puts restraints on the time of day during which access is permitted, was intended to regulate prerecorded dial-a-porn services; subsection (b) was intended to regulate live telephone services providing sexually explicit conversation, which generally require payment by charge or credit card and which the Commission found, by the very nature of payment, generally would limit access to adults. As discussed in greater detail below, the United States Court of Appeals for the Second Circuit set aside the Commission's regulation because, in the court's view, the record did not show that the time-channeling regulation was the least restrictive available. Court Decision at 122. 7/ In response to the Court Decision, the Commission now proposes to adopt a revised regulation to accomplish the mandate of Congress to prevent access to dial-a-porn services by minors. First, however, we will carefully review the Court Decision.

6/ The Commission is required to adopt regulations pursuant to Section 223(b)(2). Section 223(b)(2) provides that:

> It is a defense to a prosecution under this subsection that the defendant restricted access to the prohibited communication to persons eighteen years of age or older in accordance with procedures which the Commission shall prescribe by regulation.

7/ The Court Decision was based on the content of subsection (a) of the Commission's regulation. See Court Decision at 120 and n. 11.

The Court Decision

4. While the court did not reach the constitutionality of the underlying statute, it did find that the Commission's time-channel regulation failed to meet the high standard of review appropriate for a content-based regulation. 8/ According to the court, a content-based regulation must be reviewed under stricter scrutiny than the mere reasonableness test articulated by the United States Supreme Court in Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) (plurality opinion). In the court's view, the proper standard of review, found in Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980), requires that the regulation be narrowly drawn to further a compelling state interest. Court Decision at 121. Although the court indicated that the governmental interest in protecting minors from obscene or indecent material is quite compelling, it determined that we failed to demonstrate adequately that the regulatory scheme is narrowly drawn or that it is the least restrictive means of protecting minors. The court stated:

> The FCC expressly rejected certain alternatives, but the record provides minimal explanation for why screening or blocking or using access numbers would not be both more effective in limiting the dial-it audience to those over the age of eighteen and less restrictive of adults' freedom to hear what they want when they want to hear it.

Court Decision at 122. 9/ On this basis the court set aside the Commission's regulation.

8/ The court did observe, however, that the Commission's regulation was not arbitrary or capricious. Moreover, the court explained that the Commission's regulation was content-based because it did not apply to all "dial-it" services, only those transmitting obscene or indecent material. Court Decision at 118, 121.

9/ The court further stated that:

> [T]he [time-channel] regulation [adopted by the Commission] denies access to adults between certain hours, but not to youths who can easily pick up a private or public telephone and call dial-a-porn during the remaining hours. . . . [and] a young person needs to be unsupervised for only about ninety seconds in order to dial the number and hear the message."

Id. at 121.

5. In accordance with the guidance set forth in the court's decision, the Commission will now embark on a second rulemaking proceeding through which it will attempt to develop a comprehensive record. 10/

Discussion

6. We have found in this proceeding that there are three practicable approaches by which access to dial-a-porn services by minors may be restricted: screening and blocking, access and identification codes, and limiting operational hours. As we observed in our Report and Order, each approach may entail a variety of workable schemes, and some schemes may impose simultaneous requirements on the subscriber, the telephone company, and/or the dial-a-porn service provider. One approach we have not discussed but upon which we seek comment responds directly to the need of parents to police the use of their telephones. Under this approach, telephone companies would be required to report on monthly bills to their subscribers any local or long distance calls made to 976-type numbers. Dial-a-porn service providers would be required to reimburse the administrative costs experienced by the telephone companies. One problem, of course, is the effect of such an approach on other dial-it service providers not offering obscene or indecent subject matter. We seek comment on the practicability and adequacy of implementing this kind of approach, including the extent to which it would serve as a viable defense under Section 223(b)(2). 11/

10/ Earlier in this proceeding we proposed and evaluated schemes such as advertisements, disclaimers, and a goal-oriented approach. See Report and Order at 25,000 (paras. 30-33). Should any party commenting on issues in this Second Notice choose to comment further on any of those schemes, we ask that only new information directly related to the issues specifically delineated herein be offered. Further, without intimating our views on such a possibility, we are cognizant that, after due analysis consistent with the standards set forth by the court, we may find no solution more practicable than the regulation we adopted in our earlier Report and Order, or that no regulation at all is practicable. See 105 Cong. Rec. E 5966-67 (remarks by Congressman Kastenmeier)(December 14, 1983).

11/ We note that some telephone companies are already charging subscribers separately for calls to 976 transport service numbers, e.g., C&P Telephone Company in Maryland and Washington, D.C. The Maryland Public Service Commission requires all recorded message services on the 976 exchange to preface each recording with a 10 second message informing callers that they will be charged for the call if they stay on the line. In addition, the service provider is required to retain all messages transmitted over its service for 90 days. This restriction became effective on January 22, 1985. We seek comment as to whether this approach by itself or in combination with another proposal would effectively fulfill our statutory mandate.

7. Screening and blocking. "Blocking" essentially refers to a technical methodology by which access to one or more preselected telephone numbers can be prevented. This generally may be achieved by the installation of specialized equipment at the local telephone company's central office, through either software modifications in the case of ESS (electronic switching system) equipped central offices or hardware changes where electromechanical switching is employed, or by deployment of call-blocking technology in the subscriber's terminal equipment. In our Report and Order, 49 Fed. Reg. at 24,998-99 (paras. 19-26), we discussed both methods. We noted that these methods are analogous to the postal service's accommodation of those who request non-delivery of "erotically arousing or sexually provocative" materials, where the burden of implementation lies with the offeror and subscriber, not the government or the carrier. Id. Based on the record, we concluded that blocking or screening would require time to develop and could entail costs that would outweigh the benefits to be obtained. We found, for example, that central office switching equipment currently in use is incapable of selectively screening or blocking on an entire seven or ten digit basis. Similarly, we rejected a blocking device installed in telephone equipment at the customers' premises because it required the development and installation of new equipment.

8. The court noted that the Commission did not refer to the technical option of simply blocking all "976" calls, i.e., blocking an entire exchange, rather than blocking individual numbers. The court observed that blocking an entire exchange raises the problem of preventing legitimate calls to, for example, weather dial-it, but it nevertheless suggested that this option would at least offer the subscriber a choice and warranted consideration. Court Decision at 122, n. 14.

9. In order to augment the record on this issue, we ask interested parties to comment on the technical practicability of offering an exchange blocking service through the central office. A variant might involve telephone company provision of a screening subscription service by which equipment installed in the central office would automatically block all dial-it or, alternately, only dial-a-porn calls unless the subscriber paid a tariffed fee. Those commenting should include a detailed examination of the estimated costs associated with such schemes and assess those costs against other screening or blocking schemes, and other approaches generally. Interested parties are also asked to comment on possible solutions to the constitutional issue arising out of an exchange blocking scheme, viz., blocking access to non-obscene or indecent dial-it services.

10. Since the telephone companies filed their comments in this proceeding, there have been significant changes in the telephone industry, including initial implementation of equal access to local exchange service by interexchange carriers. 12/ One concomitant technical development we understand may be underway involves the inter or intra-network transfer of ten digit (interexchange) calling number information, i.e., the transfer of the telephone number of the calling party to a network location at or near the call destination. Such number reporting may already exist among or between originating line (subscriber), originating interoffice trunk, originating access line, terminating access line, terminating (incoming) interoffice trunk, or terminating line (destination) locations. It is possible as well that screening at the originating central office is tenable.

11. The screening of calls within the network from particular numbers to particular numbers may be more readily accomplished if the mechanism for number reporting is in place. The availability of calling party numbers could be used as a data base for screening. Thus, the extent to which number reporting exists or is planned may suggest a viable option to the approaches already before us in this proceeding to prevent minors from accessing dial-a-porn services. Accordingly, we ask that interested parties, particularly telephone companies, comment on the current and planned state of this number reporting, including timetable(s) for implementation, a detailed description of the system(s), and problems (including estimated costs) and recommended solutions associated with adaptation of any such systems to screening access to specific dial-a-porn service numbers from specific numbers.

12. Similarly, comparable seven digit calling number reporting may exist or be planned in connection with the provision of intraLATA facilities, interoffice trunks, access lines, terminating lines, or interLATA trunks. Parties should comment on the state of these capabilities and include timetables and estimated costs for these plans as well. One additional variant involves reporting calling number information directly to the dial-a-porn operator, perhaps by separate order wire or interexchange carrier if necessary. By this scheme the dial-a-porn operator would be able to implement a blocking or screening procedure. Commenting parties should discuss the technical and legal problems associated with implementing any of these screening schemes, and include possible solutions to the problems raised.

12/ See Modification of Final Judgment, United States v. American Tel. and Tel. Co., 552 F.Supp. 131, 230-31 (D.D.C. 1982), aff'd, sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

13. With regard to a blocking device installed in telephone equipment at the calling customer's premises, we concluded in our Report and Order that "no existing commercial device has a screening capability that could be deployed within the subscriber's terminal equipment." Report and Order, 49 Fed. Reg. at 24,999. The court noted, however, that certain federal buildings have installed equipment that blocks all outgoing 976 calls. Court Decision at 122 and n. 15. 13/ The court suggested that a regulation could be promulgated to provide the message provider with a defense to Section 223(b) were it to provide (or possibly pay for) a blocking device to telephone customers who request it. Id. at n. 16.

14. In responding to these concerns, we note at least one related factor that may have an impact on the feasibility of implementing a subscriber-located blocking option. There is currently in place an efficient means by which devices of this nature, should they be manufactured, may be quickly approved for direct network interconnection. Since initial implementation of Part 68 of the Commission's rules in 1976, which preemptively permits the installation of customer-provided terminal equipment without the interposition of telephone company-provided protective apparatus, some 24,000 models of telephone terminal equipment have been registered by

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13/ We note that such blocking may be optional on certain centrex services, but is not generally used.

over 2,000 registrants. 14/ It is plain that there is considerable competition among terminal equipment suppliers, and it follows that there is an incentive among manufacturers, presumably eager for new opportunities, to develop a device that blocks outgoing calls from a subscriber's premises. We believe, therefore, that there exists a ready means of supplying such a device.

15. Accordingly, there would appear to be no patently insurmountable obstacle to development of, for example, a simple electronic device with a locking cover that would allow a subscriber to block one or a series of telephone numbers -- even an entire exchange -- from being dialed from his or her premises. It seems a system could be designed to permit easy programming in the way speed or automatic dialers currently available at very moderate prices operate. Such a device would obviate the need for replacing or modifying any telephone within a home or office to prevent minors from dialing

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14/ See 47 C.F.R. Part 68. Our program requires, as a requisite for issuance of a registration number, submission of technical support data showing compliance with our technical standards. Once registered, a device may be connected directly to the telephone network by a subscriber, without harm to the network, telephone company employees, or third parties. Devices typically registered include telephones, answering machines, private branch exchanges (PBXs), key systems, and automatic and memory dialers. For a chronicle of the implementing orders, see Memorandum Opinion and Order (Fourth Report) in Docket Nos. 19528, 20774 and 21182, 70 F.C.C.2d 1800 (1979). See also First Report and Order in CC Docket No. 81-216, 49 Fed. Reg. 21,719 (1984) (inside wiring rules); Second Report and Order in CC Docket No. 81-216, FCC 84-522 (released November 26, 1984) (rules for registering digital equipment). With regard to the regulatory environment, we note a recent order by the Commission that facilitates implementation of the blocking device approach to preventing access by minors to dial-a-porn services. In the First Report and Order in CC Docket No. 81-216, the Commission adopted a universally applicable definition of the demarcation point between the telephone network and subscribers' premises, and rules were promulgated to permit suscribers to install their own new simple inside wiring. (The rules became effective in August 1984.) Thus, in conjunction with state tariffs that generally permit subscribers to arrange for the installation of a jack at the junction between existing inside wiring and the network, there are no regulatory restrictions against installing a single blocking device within a subscriber's premises that functions on all telephones within that premises. System wiring, i.e., premises wiring involving more than one or two pairs of cables and generally associated with PBXs and key systems, similarly may be installed by the premises owner. See Fourth Report in Docket Nos. 19528, 20774 and 21182.

dial-a-porn numbers; and the "lock" would serve as a practical means of discouraging children from tampering with the programming. 15/

16. A version of this device could be adapted for use within telephone company-provided coin telephones, as an alternative to central office screening, though telephone companies might be burdened with retrofitting coin telephones readily accessible to minors, if not all coin telephones. Instrument-implemented coin telephones, on the other hand, which are currently registrable under Part 68, could be required to contain this capability, either at the federal level through a Part 68 rule amendment or by state action coincident with policies set forth in Coin Telephone Registration, 49 Fed. Reg. 27,763 (July 6, 1984). 16/ The problem underlying application of this kind of approach to public telephones is that the calling party cannot be conveniently identified for screening purposes; and total 976 exchange blocking would seem untenable because many adult callers could not freely access their desired numbers. One solution to this problem might be to require calling party identification or code transmission, as discussed in more detail at paras. 19 et seq. herein. Comments are sought generally with regard to implementing a scheme that prevents minors from accessing dial-a-porn services from public telephones without unreasonably restricting access by adults or restricts public access to non-obscene or indecent dial-it services from such telephones.

17. In any case, we believe the option of relying upon a blocking device at the subscriber's premises, strictly under the control of the telephone service subscriber (or the telephone company in the case of central office implemented coin telephones), remains a practical option by which we may accomplish the mandate of Congress. We therefore ask that interested parties offer their views on this generic option, with particular attention to

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15/ One risk of this approach is that a clever youngster could "unplug" the blocking device and install instead a regular telephone, thereby bypassing the blocking function. One answer to this might be to mount the telephone jacks of the blocking device internally so that the locking cover prevents access to the means of network interconnection.

16/ Generally, instrument-implemented coin telephones registered under Part 68 may be connected to the network with the same preemptive right as any other registered telephone. See 47 C.F.R. Part 68. The Commission deferred to the states and local regulatory authorities, however, the matter of resale of local exchange or intrastate service through such coin telephones. It also allowed states to require special features such as free "911" access, etc., on registered coin telephones installed within their borders. See also petition for declaratory ruling by Universal Payphone Corp. regarding state practices in response to the Commission's coin telephone decision, Public Notice No. 1166, December 4, 1984.

estimated costs, and analysis regarding who should bear the financial responsibility for providing the blocking device(s). We ask that telephone companies providing dial-it services supply with their comments information concerning what percentage of (and how many) dial-a-porn calls are made from pay telephones and whether implementing this kind of blocking approach without application to coin telephones generally is a reasonable possibility. We further ask for suggestions as to how the general public could be apprised of numbers that it might choose to block. Interested parties should also provide appropriate recommended revisions to Part 68.

18. A regulation relying on subscriber initiative and expense to provide blocking devices in effect would alleviate the dial-a-porn message provider from having to perform any act to prevent minors from accessing his or her service. The Court itself noted:

> Yet we do not see why the financial burden could not be placed on dial-it services. For example, an alternative regulation might provide a defense to dial-it services that provide screening devices to telephone customers who request the installation of such devices.

Court Decision at n. 16. We seek comment as to whether a regulation of this nature should be adopted (as the least restrictive means of achieving the intent of Congress in adopting Section 223(b)), whether such a regulation should provide that blocking devices ought to be made available by the dial-a-porn service provider at no expense to the calling party, and whether telephone companies should be required to notify subscribers that blocking devices are available.

19. Access and identification codes. This approach essentially limits access to dial-a-porn services by requiring each caller to provide an access number for identification to an operator or computer before receiving the message. 17/ Based on the record before it, the Commission found that requiring operator intervention for every prerecorded message would be economically impracticable in view of the vast number of simultaneous calls, and that an automatic access code system "would place substantial economic and administrative burdens on recorded service providers." Report and Order, 49 Fed. Reg. at 25,000. The Commission therefore rejected this regulatory approach.

17/ The court did not find fault with the Commission's conclusion that requiring payment by credit card before transmission of live dial-a-porn messages was a proper means of restricting access to minors under Section 223(b). The rationale is that minors are generally not issued and do not have access to credit cards. See para. 3, supra. Our discussion here focuses on situations where there is no such inherent age screening. See Report and Order, 49 Fed. Reg. at 24,998-25,000 (para. 17); id. at 25,000 (paras. 25-29).

20. In its opinion, the court stated that it found "no great administrative difficulty" in requiring each person who desires access to dial-a-porn services to fill out some type of application which would be sent to the message service provider who then would have to rely on some system of age verification. Court Decision at 123. The court added that age verification might not be necessary because an access code mailed to a minor child would likely be intercepted by the parents. 18/ The court further stated that it was not determining the constitutional impact of this scheme on adults who do not have access or identification codes but who wish to partronize dial-a-porn services. It observed that the Commission rejected the financial risk argument when it embraced the time-channeling approach, discussed briefly below, but did not accept the same financial jeopardy argument with regard to an automated access code scheme. In short, the court concluded that "[t]he Commission did not make the crucial determination about which scheme would be less restrictive of freedom of expression." Court Decision at 123. In this regard, we believe that an automated coding scheme not discussed earlier in this proceeding might offer an alternative and therefore warrants public comment.

21. That approach, incorporating a method of encryption technology known as scrambling, basically consists of mixing the content of a signal before transmission and reconstituting it on receipt. As applied to limiting access to dial-a-porn services by minors, a master scrambler would be installed at the output of the dial-a-porn provider's recorders and descramblers would be located at each subscriber's premises. Only those whose scramblers contained the "correct" code could receive the dial-a-porn messages. The actual scrambling could be achieved in a variety of ways. For example, the dial-a-porn audio would be disassembled under an algorithm into frequency bands, reassembled in an artificial and seemingly unintelligible fashion for transmission to subscribers, and descrambled, i.e., reassembled, at the subscriber's location to restore the "intelligence". The descrambler located at the subscriber's premises could consist of a self-contained, prewired box plugged into the telephone line much like the blocking device discussed earlier herein, or could be acoustically coupled. To prevent the spread of purloined or pirated descrambling devices, it might be possible to include a removable circuit board feature and periodically change the scrambling algorithm or code (and the circuit board) in a way analogous to changing the combination of a lock. This scheme would also permit other dial-it service providers to offer similar subscription services; they would only need to provide their unique circuit cards. The scheme requires no action by the common carrier.

18/ Cf. Report and Order, 49 Fed. Reg. at 25,000, n. 43.

22. Interested parties are invited to comment on the feasibility of access and identification code approaches, who should bear the costs incurred by such approaches, and the degree to which freedom of expression would be restricted by each of the access and identification code approaches discussed in this proceeding. Commenters should also include detailed analysis of the likely impact of each approach on the viability of the message service provider, and the impact of each approach on the telephone company and telephone subscribers generally.

23. Limiting operational hours. We concluded in our Report and Order at 25,001-02 that limiting operational hours of dial-a-porn services to between the hours of 9:00 p.m. and 8:00 a.m. Eastern Time would present a "most effective method of limiting the availability of recorded 'dial-a-porn' services to minors , . . ." As noted above, however, the court requires that limiting access to dial-a-porn services by time-channeling restrictions carries with it the necessity for careful evaluation against all reasonable alternatives.

24. In view of the court's decision, we ask that interested parties consider alternative means of implementing a time-channel approach to achieve the intent of Congress in adopting Section 223(b)(2). For example, the court observed that

> . . . the record before us offers little that demonstrates why a prohibition on dial-it services is needed during daytime school hours when children are for the greater part of the year likely to be in class under adult supervision, while the prohibition is not needed after 9:00 p.m. Eastern Time (6:00 p.m. on the West Coast), when a young person needs to be unsupervised for only about ninety seconds in order to dial the number and hear the message.

Court Decision at 121. It may be appropriate to consider alternative hours of prohibition, or structure a regulation founded on time-channel restrictions but which is coupled with an access limitation or code scheme. Interested parties are invited to comment on these time-channel approach alternatives. We also solicit views on the relative merits of time-channel proposals against other methods already in the record and against those new approaches and schemes set forth in this Second Notice.

Conclusion

25. By this Second Notice of Proposed Rulemaking we seek to cure what the court found to be infirmities in the record supporting the regulation we issued pursuant to the mandate of Section 223(b). More specifically, we ask parties to supplement the record on the feasibility, the costs and who would bear them, the benefits, and the efficacy of various means of satisfying Congress' objective in amending Section 223 -- to achieve the compelling public interest of limiting the access of children to obscene or indecent material transmitted by telephone. Our primary purpose is to address the concerns raised by the court. We particularly call upon those who may wish to avail themselves of the defense the Commission's regulation will provide, and upon the telephone companies who may be affected by techniques prescribed to limit the access of children to salacious material (and who draw revenue from the services under scrutiny), to respond to the concerns raised by the court and to propose techniques that would be "more effective in limiting the dial-it audience to those over the age of eighteen and less restrictive of adults' freedom to hear what they want when they want to hear it." Court Decision at 122.

26. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared another 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 Second 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 Second 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, 5 U.S.C. § 601 et seq. (1980)).

27. Members of the public are advised that ex parte contacts are permitted from the time the Commission adopts the Second 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, § 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231.

28. This Second Notice of Proposed Rulemaking is issued pursuant to authority contained in Sections 4(i) and 223(b)(2) of the Communications Act of 1934, as amended. Interested parties may file comments on or before May 14, 1985 and reply comments on or before June 11, 1985. All relevant and timely comments filed in response to this Second Notice will be considered by the Commission. In accordance with the provision of § 1.419 of the Commission's 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 that follows.

29. 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.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Appendix A - Initial Regulatory Flexibility Analysis

1. Reason for Action: Section 223(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 223(b)(2), requires the Commission to adopt rules and regulations limiting access to obscene or indecent telephone message services by persons 18 years of age or older. Further, the United States Court of Appeals for the Second Circuit set aside the initial regulation adopted by the Commission as insufficiently justified under constitutional standards. This action is in response to that finding.

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 approaches but requires public comment in addition to those submitted earlier in the proceeding before deciding whether to adopt them.

3. Legal basis: Action proposed herein is taken pusuant to Sections 223(b)(2) and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i) and 223(b)(2).

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 involved. We believe our proposals are the least burdensome available to these operators. (Telephone companies are not considered small businesses for purposes of this analysis. See Market Structure (Phase I), 93 F.C.C. 2d 241, 338 (1983).) We therefore ask small entities to comment on the impact they foresee arising out of adoption of any of the rules we or others are proposing.

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.

(Env.)

AVH-198D (Rev.)
RE: Pornography and Mention of Senator Helms' S.2769 on Cable-Porn

THE WHITE HOUSE
WASHINGTON

November 8, 1984 (XXX198D)

Dear Mr. Ortega:

Thank you for your message to President Reagan regarding legislation proposed in the Congress to address the problem of pornography in the cable television industry, as well as so-called "Dial-A-Porn" operations. I can assure you that the President shares your concern about these issues. He has spoken out forcefully against the degrading of human dignity by obscene materials distributed in our country, and he will continue to do so.

The 98th Congress adjourned without completing consideration of the legislation you described, and therefore it did not come to the President for his signature. With regard to pornography in the cable television industry, the interpretation of the Federal Communications Commission and the Department of Justice is that the existing Federal law against obscene and indecent broadcasting applies only to broadcasting over the airwaves, not to cable transmissions. Federal regulation of cable television would require new action by the Congress. But there's no question that local and State authorities already have the power to regulate indecent materials that have an impact on their communities, and the efforts of citizens like you and groups organized against pornography are vital if this power is to be exercised to stop pornography.

Let me share with you some of the progress President Reagan has made in addressing the overall pornography problem at the national level. Although the enforcement of the Federal laws against obscenity had declined to very low levels by the beginning of the 1980s, we have begun on the path back to a sound enforcement policy.

Last December the President personally addressed the United States Attorneys at their annual conference in Washington, D.C. He told them that pornography degrades human dignity for women, children, and men alike. He urged them, as the frontline enforcers of Federal criminal laws, to step up their enforcement of the Federal anti-obscenity statutes.

The Justice Department, in May of this year, held the first-ever training seminar for Federal prosecutors and investigators on how to pursue anti-obscenity cases. This is a necessary first step in improving enforcement of the laws. At the same time, the United States Customs Service has increased -- by over 200 percent -- its seizures of obscene materials illegally coming into the country. By the use of "controlled deliveries" to the addressees of child pornography, in cooperation with the Postal Service, Customs has seized materials leading to arrests and indictments of persons who had been engaged in producing child pornography and molesting children.

(11/6/84)

To further tighten the Federal laws against child pornography, the Administration supported and the President recently signed the Child Protection Act of 1984. This legislation closes any and all loopholes that might have been open to child pornographers in the past, and dramatically increases the criminal penalties.

Finally, the Attorney General is in the process of setting up a new national commission to study the effects of pornography on American society and what can be done about it. In sum, the Administration is making real headway and we are determined to do even more to defeat pornography and its assault on basic values in our society. We certainly appreciate your support. Thank you for your concern.

With best wishes from the President,

Sincerely,

Anne Higgins

Anne Higgins
Special Assistant to the President
and Director of Correspondence

(11/6/84)

Mr. Michael Ortega
Evening Supervisor
Correspondence Analysis Section
Room 60
Old Executive Office Building
Washington, DC 20500

AVH/CAD/OPD-Galebach/RDC/AVH

AVH/CAD/RDC/

THE WHITE HOUSE
WASHINGTON

November 6, 1984

AVH198D (Rev.)

Thank you for your message to President Reagan regarding legislation proposed in the Congress to address the problem of pornography in the cable television industry, as well as so-called "Dial-A-Porn" operations. I can assure you that the President shares your concern about these issues. He has spoken out forcefully against the degrading of human dignity by obscene materials distributed in our country, and he will continue to do so.

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With best wishes from the President,

AVH-198D (Env.)
RE: Pornography and Mention of Senator Helms' S.2769 on Cable-Porn

THE WHITE HOUSE
WASHINGTON

October 24, 1984 (XXX198D)

Dear Mr. Ortega:

Thank you for your message to President Reagan regarding legislation proposed in the Congress to address the problem of pornography in the cable television industry, as well as so-called "Dial-A-Porn" operations. I can assure you that the President shares your concern about these issues. He has spoken out forcefully against the degrading of human dignity by obscene materials distributed in our country, and he will continue to do so.

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Last December the President personally encouraged the United States Attorneys, at their annual conference in Washington, to step up their enforcement of the Federal anti-obscenity laws. The Justice Department, in May of this year, held the first-ever training seminar for Federal prosecutors and investigators on how to pursue anti-obscenity cases. This is a necessary first step in improving enforcement of the laws.

At the same time, the United States Customs Service has increased -- by over 200 percent -- its seizures of obscene materials illegally coming into the country. Through the use of "controlled deliveries" to the addressees of child pornography, in cooperation with the Postal Service, Customs has seized materials leading to arrests and indictments of persons who had been engaged in producing child pornography and molesting children.

(10/20/84)

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Finally, the Attorney General is in the process of setting up a new national commission to study the effects of pornography on American society and what can be done about it. In sum, the Administration is making real headway and we are determined to do even more to defeat pornography and its assault on basic values in our society. We certainly appreciate your support. Thank you for your concern.

With best wishes from the President,

Sincerely,

Anne Higgins

Anne Higgins
Special Assistant to the President
and Director of Correspondence

(10/20/84)

Mr. Michael Ortega
Evening Supervisor
Correspondence Analysis Section
Room 60
Old Executive Office Building
Washington, DC 20500

AVH/CAD/OPD-Galebach/RDC/AVH

Steve: Would you please review the
attached and return it to me asap

Judy

THE WHITE HOUSE

WASHINGTON

MEMORANDUM

10-22-84

TO: JUDY JOHNSTON/OPD

FROM: CHUCK DONOVAN CD
Office of Correspondence

The attached draft form reply is submitted for review by the appropriate staff member. This issue is running in current mail and the volume justifies use of a form response. I can be reached at x7610 if any information on the incoming mail regarding this issue is required by your office.

Thank you very much.

Good letter.
AHS

cc: Pending File

AVH/CAD/

AVH/CAD/ROC

Clem E OPD

THE WHITE HOUSE
WASHINGTON

October 20, 1984

AVH198D (Pornography re Mention of Sen. Helms' S. 2769 on Cable-Porn)

Thank you for your message to President Reagan regarding legislation proposed in the Congress to address the problem of pornography in the cable television industry, as well as so-called "Dial-A-Porn" operations. I can assure you that the President shares your concern about these issues. He has spoken out forcefully against the degrading of human dignity by obscene materials distributed in our country, and he will continue to do so.

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Finally, the Attorney General is in the process of setting up a new national commission to study the effects of pornography on American society and what can be done about it. In sum, the Administration is making real headway and we are determined to do even more to defeat pornography and its assault on basic values in our society. We certainly appreciate your support. Thank you for your concern.

With best wishes from the President,

[illegible] and I signed [illegible] last May the [illegible] of 1984. This legislation closes any and all loopholes that might have been open to child pornographers in the past, and dramatically increases the criminal penalties to which they are subject. Finally, Attorney General Smith is in the process of setting up a new national commission to study the effects of pornography on American society and what can be done about it.

I share your concern about pornography in the cable television industry. The interpretation of the Federal Communications Commission and the Justice Department is that the existing Federal statute against obscene and indecent broadcasting applies only to broadcasting over the airwaves, not to cable transmissions. Federal regulation would require new action by the Congress, and we certainly intend to take a look at this. But there's no question that local and State authorities have the power to regulate indecent materials that have an impact on their communities, and the efforts of groups like yours to encourage the exercise of this power are vital to success in the drive against pornography.

In sum, this Administration is making real headway and we are determined to do even more to defeat pornography and its assault on basic values in our society. Your support and concern are certainly appreciated as we work together to reach our goals.

With my best wishes, ~~to you and to the members of your organization.~~

Sincerely,

Mr. Lawrence L. Anderson
President
Committee Concerned For Community Values
803 Hitching Post Road
Vista, California 92083

RR/CAD/RDC/AVH/pt(10PMND)

cc: Stephen Galebach