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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Proposed tariff filings by SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY clarifying when a nonpublished number can be disclosed and introducing Caller ID to TouchStar Service,	DOCKET NO.891194-TI DATE FILED: October 26, 1990

BRIEF OF ATTORNEY GENERAL, STATEWIDE PROSECUTOR, AND FLORIDA DEPARTMENT OF LAW ENFORCEMENT

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TABLE OF CONTENTS

PRELIMINARY STATEMENT

Pursuant to notice, this cause was heard on November 28 and 29, 1990, on the issues presented in the Commission's Prehearing Order dated November 21, 1990. The position of the Attorney General, Statewide Prosecutor, and Florida Department of Law Enforcement (FDLE) on each of these issues is presented herein. References to the hearing transcript shall be by use of the symbol "T" followed by the appropriate page number in parenthesis. References to exhibits shall be designated "Ex. _____."

INTRODUCTION

The Caller ID service proposed by Southern Bell in its tariff has the potential for multiple productive uses. Unfortunately, it also has a number of significant legal and policy problems which mandate that implementation of the system as currently proposed be precluded.

First among these drawbacks is the fact that Caller ID without the availability of universal, per-call blocking, would violate Florida's wiretap law, Chapter 934, Florida Statutes. Under both the Florida and Federal statutory definitions, Caller ID is a "trap and trace" device. Use of such a device is illegal in Florida without the consent of both parties to the call.

From a public policy standpoint, Caller ID is a significant intrusion into the privacy of the calling party. The actions of this Commission probably do not arise to the "state action" necessary to trigger a constitutional analysis. Nevertheless, it cannot be denied that the display of the calling party's number constitutes a sharing of information the customer has grown accustomed to viewing as private. This is particularly so in the context of unlisted or nonpublished numbers, for which the customer pays an additional fee to ensure greater privacy.

Another disadvantage, and the one with the most potentially dangerous consequences, is the hazard Caller ID poses to law enforcement. The possibility that the display may alert violent

criminals to an undercover investigation simply cannot be permitted. A similar hazard exists with respect to battered spouses, who could be located and victimized by their abusers through use of the Caller ID display.

The solutions Southern Bell has offered for these concerns are inadequate. It is the position of the undersigned that per call and per line blocking at no charge to the calling parties is the only reasonable, logical alternative.

ISSUES

Issue 1: For the purposes of this docket, what is the definition of Caller ID?

> Attorney General, Statewide Prosecutor, and FDLE Position: Caller ID is the display of the calling party's telephone number to the called party prior to the called party answering the telephone. This is how the feature currently offered by Southern Bell is defined, but this docket should consider the planned expansion of the Caller ID displayed information to include additional calling party related information.

Discussion:

The undersigned adopt the position of the Department of General Services, i.e., that Caller ID has two definitions. In the narrow sense, it is the display of the calling party's telephone number to the called party prior to the called party answering the telephone. (T 53, 490, 499, 1044). In the broad sense, it encompasses the passing of a range of information about the calling party through the telephone network. (T 489, 1045). This information can include directory number, calling party name and address, and personal identification codes. (T 490, 1044-45). When a calling party opts to block the forwarding of the outgoing number, under either definition, no information about the calling party should leave the terminating switch. (T 1046, 1075).

Issue 2: Is Caller ID a trap and trace device as described in Chapter 934, Florida Statutes?

> Attorney General, Statewide Prosecutor, and FDLE Position: Caller ID, as proposed by Southern Bell, constitutes a trap and trace device as defined by §934.02(21), Fla.Stat. (1989).

Discussion:

Sec. 934.02(21) Fla.Stat. (1989) defines "trap and trace device" as "a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or a device from which a wire or electronic communication was transmitted." This is also the definition found in the federal, Pennsylvania, and North Carolina statutes. 18 U.S.C. §3127(4); 18 Pa.C.S. s. 5720; N.C.G.S. 15A-260(3) (1988).

Glenn Mayne, division director at the Department of General Services, described the physical process of Caller ID as follows:

> When the calling out-pulse is generated over the line that goes back to the serving wire center, that as it enters that serving wire center that pulse is trapped at that time. It then goes over to a mass storage device of some sort and picks up that particular dialed number, along with the number that it's calling from, and determines the routing. That routing then travels across the network to wherever the calling number has the terminating logic and circuitry in it. And then at that point that number is transmitted to the calling device itself.

(T 1067).

While Nancy Sims, Operations Manager at Southern Bell, made a general denial that Caller ID was a trap and trace device (T 54), she was unable to explain why this was so. (T 205). In fact, the operation of the Caller ID display device which is attached to the call recipient's phone line, often referred to as the CPE, is such that it falls squarely within the Florida and federal definition of a "trap and trace device." This was tacitly admitted by Ms. Sims when she indicated the device "displays the number." (T 205). Indeed, the testimony of GTE representative Larry Radin indicated that Caller ID is a more sophisticated form of trap and trace. (T 466). FDLE witness Ron Tudor confirms that a vast majority of Southern Bell's switches are digital (T 918), and that traditional trap and traces done by reason of a court order "do the same thing" that Caller ID does, in that the digital switch is programmed to look for, and display, an originating caller's phone number. (T 902, 919). Thus, there is no meaningful distinction between the operation of a Southern Bell digital switch under a court-ordered trap and trace and the operation occurring to facilitate Caller ID. Additionally, with Caller ID, the CPE at the call recipient's phone is the method through which the ultimate display of the number occurs. The CPE is, therefore, "a device which captures the incoming electronic or other impulses which identify the originating number...."

A Pennsylvania appellate court has recently found Caller ID to be a trap and trace device within the meaning of this definition. Barasch v. Pennsylvania Public Utilities Commission, 576 A.2d 79 (Pa. Commw. 1990) (Pa. S.Ct. review pending). Similarly, North Carolina's Attorney General has opined that Caller ID constitutes a trap and trace device:

> when the calling party's number is successfully transmitted by Bell's switch to our hypothetical customer's Caller ID display device, there is unquestionably a "trap and trace" as the term is defined by the statutes (G.S. 15A-260-264 and 18 U.S.C. 3121-3127).

Response and Memorandum of Attorney General, In the Matter of Tariff Filing to Establish Rates and Regulations for Caller ID Service Docket No. P-55, Sub. 925 (North Carolina Utilities Comm., filed January 3, 1991).[1]

Because both Pennsylvania and North Carolina's definitions of "trap and trace device" mirror that of Florida, these decisions indicate that Caller ID as proposed by Southern Bell involves the illegal use of a trap and trace device under Florida law, as is discussed in greater detail in Issue 3.

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[1] Kentucky's Attorney General adopted the North Carolina interpretation as part of a brief recently filed in the Kentucky Public Service Commission. Without addressing the wiretap issue, the Kentucky PSC required GTE South to provide free per-call blocking. In the Matter of: The Tariff Filing of GTE South Incorporated to Establish Custom Local Area Signaling Service, Case No. 90-096, (Ky. Public Service Commission, October 8, 1990).

Issue 3: Does Caller ID violate any federal laws or any laws of the state of Florida?

> Attorney General, Statewide Prosecutor, and FDLE Position: Caller ID would violate both Florida and federal law.

Discussion:

> Electronic devices enable law enforcement officials and private citizens to monitor and record private conversations, to monitor movements of persons and objects, and to trace or record telephone calls made to or from a particular telephone. Recognizing the threat to privacy rights that would result from unrestricted use of these devices Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which regulates the electronic and mechanical interception of wire, oral and electronic communications by government officials and private citizens.

Georgetown Law Journal, Vol. 76:521, 526 (1988).

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 is codified at 18 U.S.C. §§2510-2520. As noted by the United States Supreme Court in Gelbard v. United States, 408 U.S. 41, 48 (1972), the overriding concern of the Congress when it passed Title III was to protect privacy rights. See also, Berger v. New York, 388 U.S. 41 (1967), and S. Rep. No. 1097, 90th Cong., Second Session 66, reprinted in 1968 U.S. Code Congress and Administration News 2112, 2153 (discussing constitutional standards established in Berger and legislative history of Title III).

In 1986, the Congress revisited the area of electronic surveillance when it passed Public Law 99-508, "Electronic Communications Privacy Act of 1986", to monitor the use of pen registers and trap and trace devices. 18 U.S.C. §§3121-3127. Specifically, 18 U.S.C. §3121 provides:

> **General prohibition on pen register and trap and trace device use; exception**
>
> (a) **In general.**-Except as provided in this section, no person shall install or use a pen register or a trap and trace device without first obtaining a court order under section 3213 of this title or under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §1801 et. seq.).
>
> (b) **Exception.**-The prohibition of subsection (a) does not apply with respect to the use of a pen register or a trap and trace device by a provider of electronic or wire communication service-
>
> > (1) relating to the operation, maintenance, and testing of a wire or electronic communication service or to the protection of the rights or property of such provider, or to the protection of users of that service *from* abuse of service or unlawful use of service; or
> >
> > (2) to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from fraudulent, unlawful or abusive use of service; or (3) where the consent of the user of that service has been obtained.
>
> (c) **Penalty.**-Whoever knowingly violates subsection (a) shall be fined under this

title or imprisoned not more than one year, or both.

In section 3127, the Congress defined the terms "wire communication", "electronic communication", and "electronic communication service" as meaning the same as those terms under 18 U.S.C. §2510. Section 3127 also defines the term "trap and trace device" as "a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted."

The Congressional intent is explained in 1986 United States Code Congress and Administrative News, page 3600, as follows:

> Subsection (a) of the proposed section 3121 of title 18 contains a general prohibition against the installation or use of a pen register or trap and trace device without a court order. Such a court order may be obtained under section 3123 of title 18 or under the Foreign Intelligence Surveillance Act (FISA).
>
> Proposed subsection 3121(b) contains exceptions to subsection (a)'s general prohibition against the use of pen registers and trap and trace devices. Providers of electronic or wire communication services may use pen registers or trap and trace devices if one of three conditions are met. The provider may use a pen register or trap and trace device (1) if it relates to the operation, maintenance, and testing of a wire or electronic communication service, or to the protection of the rights or property of such provider, or to the protection of users of that service from abuse or unlawful use of the service; (2) to record the fact that a wire or electronic communication was

> initiated or completed in order to protect the provider, another provider furnishing service toward completion, or a user of that service from fraudulent, unlawful or abusive use of service; or (3) where the consent of the user has been obtained.
>
> Proposed subsection 3121(c) imposes a penalty for knowing violation of subsection (a). The penalty is a fine under this title, imprisonment for up to 1 year, or both. (Emphasis added).

Clearly Congress intended to insure privacy to all users of electronic communication equipment except in very narrow circumstances.

In 1968, the Florida Legislature also revisited the area of electronic communication and abolished section 822.10, Fla. Stat., which prohibited the tapping of any telephone or telegraph lines. The next year the Florida Legislature created Chapter 934, Fla. Stat., the Security of Communications Law, which closely followed the federal Title III Act outlined above. In 1988, the Legislature created section 934.31, Fla. Stat.,[2] which provides as follows:

> 934.31 General prohibition on pen register and trap and trace device use; exception.--
>
> (1) Except as provided in this section, no person may install or use a pen register or a trap and trace device without first obtaining a court order under ss. 934.33.

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[2] See Laws of Florida, Chapter 88-184.

(2) The prohibition of subsection (1) does not apply with respect to the use of a pen register or a trap and trace device by a provider of electronic or wire communication service:

(a) Which relates to the operation, maintenance, and testing of a wire or electronic communication service or to the protection of the rights or property of the provider or to the protection of users of that service from abuse of service or unlawful use of service;

(b) To record the fact that a wire or electronic communication was initiated or completed in order to protect the provider thereof, another provider furnishing service toward completion of the wire communication, or a user of the service, from fraudulent, unlawful, or abusive use of service; or

(c) Where the consent of the user of the service has been obtained.

(3) Whoever knowingly violates subsection (1) is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The Legislature also amended section 934.02, Fla. Stat., to include within that definition section "electronic communications" which were defined as "any transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or other photo-optical system that effects intrastate, interstate, or foreign commerce" (providing certain exceptions exist). Furthermore, the

Legislature defined "trap and trace device" as "a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted." Clearly, the Florida Statute is nearly identical to the federal law.

A court order is required to install a trap and trace device. The only exceptions set forth in the statute are for "a provider of electronic or wire communications service" (i.e., the phone company) to install such a device under one of three circumstances for its own use:

> 1. To assist in operation, maintenance, and testing of their equipment,
>
> 2. To record the fact that an electronic communication was initiated or completed in order to protect the provider, or other phone company, from fraudulent, unlawful, or abusive use of its service, or
>
> 3. Where the consent of the user of the service has been obtained.

Congressional intent is to protect electronic and other communications from interception. Any exception should be specifically stated within the body of the legislation and not justified through implication. The general rule for interpreting a statute is to give it a meaning based on the plain language unless that meaning would lead to an absurd result. Section 18 U.S.C. §3121(b) indicates that a telephone provider would be exempt from the prohibition against the use of trap and trace

devices if it initiated the device for its own use. As noted by the North Carolina Attorney General, the Congressional Record, March 22, 1990, at E-785 n. 7, indicates that Congressional intent was to limit this exception to telecommunication providers. Telecommunication users, such as Caller ID purchasers, remain under the general statutory prohibitions.

In creating 18 U.S.C. §3121 Congress relied upon a United States Senate report which shed further light on this point:

> The tremendous advances in telecommunications and computer technology have carried with them comparable technological advances and surveillance devices and techniques. Electronic hardware making it possible for over-zealous law enforcement agencies, industrial spies and private parties to intercept the personal or proprietary communication of others are readily available in the American market today.

See, 1986 United States Congress and Administrative News at 358.

Implicit in this language is a determination that Caller ID purchasers are exactly the type of private party which the Congress sought to bar from active interception of electronic communications initiated by other private citizens.

Based upon the foregoing, it is clear that the Caller ID service proposed by Southern Bell Telephone and Telegraph Company would run afoul of Sec. 934.31, Fla. Stat., which prohibits the use of trap and trace devices by private citizens in Florida.

Section 934.31 provides that anyone found guilty of violating this section would be guilty of a misdemeanor. This view of Florida Statutes is consistent with reported Congressional intent and is the view accepted by at least one appellate court in Pennsylvania, the Attorneys General of North Carolina and Kentucky, and the Kentucky Public Service Commission.[3] Absent legislative action in Florida addressing this issue, state law makes the current proposed use of Caller ID unlawful.

Even if it is determined that Caller ID does not entail illegal use of a trap and trace device, the utilization of the CPE display box entails the interception of an electronic communication as defined under sec. 934.02(12).

That the digital display of a phone number is an electronic communication is demonstrated by its nature as "signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part..." by the phone system. Section 934.02(12) Fla.Stat. (1989).

It is further demonstrated by reviewing what was specifically deleted from the definition of "electronic communication." Significantly, at sec. 934.02(12)(c),

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[3] Maryland's Attorney General opined that no state law violation would occur there because that state's law requires the consent of only one of the parties to the conversation. In the Matter of the Provision of Caller Identification Service by the Chesapeake & Potomac Telephone Company of Maryland, Case No. 8283, (November 20, 1990). Accord, Southern Bell v. Hamm, Case No. 90-CP-40-2686 (Court of Common Pleas, South Carolina November 20, 1990).

communications made through a tone-only paging device were excluded. Communications made through digital display paging devices are not mentioned in the exclusions. They must, therefore, be "electronic communications" and are highly protected under federal and Florida law. A common communication made on a digital paging device is the display of a phone number. This is little different from the display one would find on a Caller ID display box. Consequently, under sec. 934.03(1), Fla.Stat., the interception of the electronic communication (i.e. the display of the phone number) is prohibited.

An exception to this prohibition appears at sec. 934.03(2)(d):

> (d) It is lawful under ss. 934.03-934.09 for a person to intercept a wire, oral, or electronic communication when all of the parties to the communication have given prior consent to such interception. (Emphasis supplied.)

Other exceptions for intercepting electronic communications are provided in sec. 934.03 (such as by reason of a court order or when done as part of a criminal investigation under limited circumstances), but they do not apply to the Caller ID issue. In the context of Caller ID, under sec. 934.03, the only way the electronic communication can be legally intercepted by the general use of the Caller ID display unit is with consent of "all parties to the communication."

The Caller ID technology automatically generates the display of the originating number between the first and second ring at the recipient's phone. (T 53, 817). A caller does nothing to generate this display. Thus consent of the caller for the interception of the electronic communication must be demonstrated either by express action or his choice not to take a particular action. It is submitted that only if per call or per line blocking is made available to every calling party in Florida at no charge, will the predicates for establishing "consent" of the calling party be established.

If a calling party does not "consent" to the interception of the electronic communication, she can engage the per call block prior in conjunction with dialing a call, or demonstrate a blanket refusal to consent by engaging per line blocking. By dialing calls without engaging blocking, consent to the interception of the electronic communication will be tacitly demonstrated. Indeed, blocking appears to be essential to a determination that operation of Caller ID in Florida is not in violation of Chapter 934.

Issue 4: Does Caller ID violate Florida's Constitution?

Attorney General, Statewide Prosecutor, and FDLE Position: It does not appear that Caller ID would violate Florida's Constitution, as the act of the Commission would not constitute the "state action" required to find a constitutional claim.

Discussion:

It is well settled that private action no matter how discriminatory or wrongful, is immune from the restrictions of the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1, (1948). Private action is similarly immune from the restrictions of Art. I, Sec. 23 of the State Constitution, as the section speaks specifically to freedom from "governmental intrusion". Protection from private activity was specifically considered and rejected by the Ethics, Privacy and Elections Committee of the 1977 Constitution Revision Commission. Dore, Of Rights Lost and Gained 6 FSU L.Rev. 610, 650-651 (1978). Therefore, the state action analysis for federal constitutional rights and the state right to privacy should be the same. It is true that Shaktman v. State, 553 So.2d 148 (Fla. 1989) suggests that under the Florida Constitution some privacy interest against governmental intrusion exists in out-dialed numbers. Case law from the United States Supreme Court and the federal Eleventh Circuit Court of Appeals indicates, however, that the degree of government participation involved in a PSC tariff review would not amount to "state action" required to find a constitutional violation.

The case of Carlin Communication, Inc. v. Southern Bell Telephone and Telegraph Co., 802 F.2d 1352 (11th Cir. 1986) speaks directly to this issue. Carlin involved Southern Bell's "Dial-It" service. With "Dial-It," a subscriber would provide a prerecorded message to Southern Bell, and telephone customers could, for a specified charge, dial a certain number and hear the message. Carlin's messages were sexually suggestive. When the company filed its tariff for "Dial-It" it initially restricted only illegal messages. But at the beginning of the public hearing on the matter, the company's representative read a proposed amendment which would also exclude "any message that 'implicitly or explicitly invites, describes, simulates, excites, arouses or otherwise refers to sexual conduct, or which contains sexual innuendo which arouses or attempts to arouse sexual desire." Id. at 1355. The tariff, with the amendment, was approved. When two of Carlin's proposed messages were rejected by Southern Bell, Carlin sued, alleging violations of the First and Fourteenth Amendments. The district court granted summary judgment for Southern Bell and the Eleventh Circuit affirmed.

Given this procedural posture, the Court scrutinized the record to determine whether there could be a genuine issue of material fact as to the question of state action. Carlin's first argument was that the Public Service Commission, by conducting a study and public hearing and in issuing an order strongly approving the tariff language "placed the 'imprimatur' of the

state upon that language." Id. at 1358. The Court noted that the study of the dial-it proposal was standard procedure for tariff approval rather than an independent initiative, as demonstrated by "uncontroverted evidence" in the record as to the Commission's routine procedure.

Carlin also claimed that comments made by one Commissioner expressing concern over the possibility of selling "pornographic phone calls" and calling, over advice of Commission counsel, for public hearings, constituted coercion of Southern Bell by the Commission. However, the Court found that the record viewed as a whole did not support such a reading. It also found that neither the language of the order, strongly favorable to the amendment, nor the favorable comments of various Commissioners, after the amendment was proposed, evidenced coercion. Apart from the fact that the remarks were made after the amendment had already been proposed, there was clear and uncontroverted evidence in the record that Southern Bell was motivated solely by a desire to protect its corporate image.

In the Caller ID context, the South Carolina Court of Common Pleas, using the foregoing analysis, concluded that no state action was present in that state's Public Service Commission tariff approval process. Southern Bell v. Hamm, Case No. 90-CP-40-2686 (Court of Common Pleas, November 20, 1990), slip op. at 13.

While the majority of cases suggest that a public service commission's efforts concerning the approval of a filed tariff do not constitute "state action" of a constitutional level, the Barasch court reached a different conclusion. It distinguished the role assumed by the Pennsylvania Public Utility Commission in considering Bell of Pennsylvania's request to implement Caller ID from that normally taken by regulatory commissions. In the Barasch court's opinion, the Commission moved from mere regulation of private enterprise and became involved in "state action" by reason of the extent and nature of its activities. Obviously, such a determination would have to be made on a case-by-case basis, after a review of the role taken by a particular regulatory commission in a matter before it.

It must be noted that the Florida Public Service Commission's involvement in the pending matter has been extensive. The fact that parties who normally do not appear before the Florida PSC have intervened in this Commission's consideration of Southern Bell's Caller ID tariff has produced extraordinary response and effort by this Commission. It could be argued that this Commission's efforts in the pending matter constitute "state action" rather than mere regulation.

However, the United States Supreme Court precedent and most other cases demonstrate that showing state action for purposes of proving deprivation of a constitutional right is an extremely difficult task. Given this precedent, it is the position of the

parties joined herein that this Commission's role normally would not constitute "state action." However, since the process engaged in by this Commission in considering Southern Bell's Caller ID tariff already suggests an out of the ordinary response to the phone company tariff, a factual basis for finding "state action" may be found to exist. Accordingly, upon the conclusion of this matter the Commission's efforts will be subject to intense scrutiny and review by the parties joined herein to determine if they have exceeded mere regulation and have, in fact, become "state action."

Issue 5: What are the benefits and detriments to Florida's consumers of Caller ID services?

> Attorney General, Statewide Prosecutor, and FDLE Position: Caller ID affords few benefits unavailable from other sources, and carries the potential for extreme detriment to law enforcement officers, potential victims of crime, and existing telephone customers.

Discussion:

The principal concern in any consideration of Caller ID as proposed by Southern Bell and supported by GTE is the jeopardy to the safety of law enforcement personnel, operatives, and even their family members caused by Caller ID's shift of the balance of control toward the criminal element (T 821); and the jeopardy to the safety of countless abused spouses and others in similar situations Caller ID produces. (T 949). Any consideration of the benefits of Caller ID must keep this significant detriment in mind. No amount of benefit should outweigh the risk of jeopardy to personal safety manifested by any Caller ID system offered without universal blocking.

Even if personal safety is not jeopardized in a particular investigation, Caller ID as proposed by Southern Bell and supported by GTE carries with it significant detriments. It tends to identify law enforcement investigations by attempting to shift law enforcement to unusual or unique alternatives to per call or per line Caller ID blocking (T 833); costs to public law

enforcement agencies will be increased (T 834), although it is recognized that Southern Bell has at least indicated a willingness to work to reduce costs of its alternatives to law enforcement interests; Caller ID as proposed by Southern Bell and the numerous alternatives to blocking make investigative activity more complex (T 834), ignoring the fast-moving and ever-changing nature of drug trafficking and other investigations (T 834); and many alternatives suggested are "short term solutions" since developing technology will soon allow cellular phones and calling card originating numbers to be displayed via Caller ID (T 835). The combined effect of these detriments is that Caller ID as proposed by Southern Bell and supported by GTE carries with it the real potential for revealing the existence of an investigation. (T 836). Such a revelation, even if it does not threaten the safety of operatives, will "tip" a subject that he is being investigated, and will subvert the criminal justice system's attempts to detect and prosecute criminal behavior, resulting in fruitless efforts by law enforcement.

Caller ID as proposed by Southern Bell and supported by GTE has significant detrimental effects on the now-developing 800 megahertz statewide law enforcement radio communication system for Florida. This system is being developed with great sensitivity to protecting the communications that will be carried over it. (T 915). Part of the capability being developed is the ability to allow a law enforcement officer to make phone calls

from his vehicle or by using his hand held police radio. (T 914). Making such calls will necessitate connection with a land-based "trunk" phone. (T 1055-1056). Since Caller ID will display the phone number of whatever trunk phone is utilized, law enforcement calls placed over the 800 MHz system will fall under the same security concerns and considerations regarding all law enforcement investigative calls discussed hereafter. Additionally, since the 800 MHz system is a statewide system, involving at least five state law enforcement agencies (T 1054), the additional concern of coordinating the system through what might become a patchwork of various Caller ID systems throughout Florida is significant. (T 1053, 1054). The detriments of Caller ID to a very large consumer of phone services in Florida - state government - are significant.

Southern Bell, GTE and other phone companies provided similar descriptions of benefits of Caller ID service. These benefits typically were identified as: ability to "screen" received calls (T 55); reduction of obscene/annoying/ harassing phone calls (T 55-56, 438), ability to store "missed" calls for review at a later time (T 57), and improved delivery of services by businesses. (T 57-58). Additional benefits identified included an assertion that Caller ID will reduce false fire alarms and bomb threats (T 58, 438), will reduce prank calls to law enforcement or other public agencies (T 58, 438), and will assist emergency services. (T 59, 438).

While some of the identified benefits may be obtained, most are illusory. Hardly any of the identified benefits are such that they are exclusively obtained through Caller ID.

Despite the phone companies' continued assertion to the contrary (e.g. T 55), Caller ID does not identify a caller. The called party's response to the information displayed on a Caller ID display box may, or may not, be identification of the calling party. All Caller ID can do is display a phone number. The call recipient may not recognize the number. (T 273, 275). If, for whatever reason, the recipient fails to identify the number, the call recipient has no way of distinguishing whether a call is being received from a stranded spouse (T 273) or other person. The likelihood of identifying a caller using Caller ID is analogous to one's reaction when receiving a digital pager readout of a number to call. Frequently the number displayed is not one immediately known to the person being asked to make a return call. The reaction to seeing a number similarly displayed on one's Caller ID display unit should be no different. Southern Bell's witness, Nancy Sims, admitted that frequently information displayed on one's Caller ID display box would have "absolutely no relevance" to identifying the person who is placing the call. (T 275). Even if the number is recognized, there is no guarantee that the caller is identified since many people may have access to the same phone. (T 274).

The benefit of receiving phone number displays is diluted by the realization that even if per call or per line blocking is unavailable there are presently several ways in which the display may be effectively blocked. Calls from cellular phones, (T 274), operator assisted calls, (T 65, 99), calls from other areas (e.g. a long distance call), (T 100), calling card calls, (T 99), and calls made from an area in which the display of an originating number can be blocked (such as a Centel or United call) will not display the originating number. (T 306-307). At best, Caller ID as proposed by Southern Bell and supported by GTE provides the Caller ID user with an additional piece of information (sometimes) in the form of a displayed phone number. The true value of that information is doubtful.

The reduction in annoying phone calls that has been asserted to be a result of Caller ID is similarly illusory. First, Caller ID offers no assurance against the first receipt of an annoying call. The first time the call is received the number will be an unknown number, and, unless the recipient chooses to answer only "known" calls, the call recipient will be subjected to the abuse when answering this "first" call. (T 326). Even Bell's witness, Nancy Sims, admits that most people will be inclined to answer calls from unrecognized phone numbers. (T 105). Calls made from pay phones will display that phone's number, yet communicate nothing about the harassing caller's intent in placing the call. (T 627). An abusive caller intent on circumventing Caller ID

could do so by moving from one pay phone to another or by utilizing any of the various methods of calling which do not produce Caller ID displays as noted above. (T 624). Any direct cause-effect assertion regarding Caller ID's ability to reduce annoying calls must make the assumption that an annoying caller will not utilize any of these presently available means of avoiding the display of his originating phone number. (T 624). Since many truly abusive calls will be placed by one who is intent on completing a call (T 826), such an assumption is not warranted.

Further, contrary to traditional phone company policy regarding how to handle abusive calls ("Hang up") (T 284, 627, 828), Caller ID promotes self-help intervention in dealing with the receipt of an abusive call. (T 283, 819). Such vigilante activity carries with it the real potential of encouraging violent confrontations. (T 819). Interestingly, revealing an abusive caller's number and the implied invitation to make contact with that caller such disclosure provides is inconsistent with Southern Bell's policy regarding Call Trace. Southern Bell will not reveal a caller's number in Call Trace situations because the matter is more appropriate for phone company or law enforcement intervention. (T 226, 247). Certainly this detrimental effect of potentially violent self-help responses outweighs any benefit that might be obtained through such use of Caller ID to obtain displays of annoying callers' numbers.

Phone company statistics appear to indicate that the number of reports of annoying calls received by the phone companies drop when Caller ID is implemented. It should first be noted that a drop in reports of annoying calls does not equate with a drop in the number of annoying calls being received by consumers. A drop in reports of annoying calls is a predictable result when Caller ID by its very nature promotes self-help intervention. There is no need to contact the phone company when one plans to take matters into his own hands. Even so, the statistics offered by phone company representatives fail to identify Caller ID as being the sole reason for purported drops in abusive calling activity. (T 628). Call Trace may explain a significant portion of any drop in abusive call reports. (T 620). Better prosecution by reason of more extensive use of Call Trace over the old Annoyance Bureau/Trap and Trace methods may also explain such drops. (T 774). Regarding the alleged reduction of annoying calls attributed to Caller ID, it has been suggested that allowing universal per call or per line blocking of Caller ID displays will eliminate or greatly limit any reduction of such calls. This effect has not been documented. (T 628). In fact, receipt of a blocked call may be beneficial in handling annoying callers since it puts the recipient on notice that he or she may be receiving a call of questionable nature. (T 630).

Caller ID does provide a new means of capturing "missed calls," but this limited benefit certainly cannot outweigh Caller

ID's numerous detriments and can be easily duplicated to a great extent by the use of a simple phone answering machine. (T 647).

Regarding the alleged benefit to emergency services, it must first be noted that implementation of Caller ID with universally available blocking would have little adverse impact on this area since one seeking emergency assistance would not be inclined to block his number. (T 596).

Regarding the alleged benefit to schools and other entities of receiving a display of threatening caller's phone numbers, it must first be realized that the number may not be readily identified to a person or location and some sort of cross referencing may become necessary. (T 627). It should also be noted that no testimony as to this asserted benefit was introduced at the formal hearing. Close analysis of this purported benefit suggests that having Caller ID will not affect the school or other entity's response to the threat. Does the display of the originating number of a telephoned bomb threat make that threat any more or less dangerous than a threat received from a caller whose number is not displayed? Certainly not. It is predictable that a school or other entity's response to a threatening call will be the same regardless of whether the originating number is displayed or not. Increased focus upon quick utilization of Call Trace may in fact be preferred to Caller ID in this regard. (T 626).

Any true benefit that may be experienced would be in identifying the threatening caller's location and identity. In this regard, Call Trace and the phone company business records generated thereby will provide better evidence for prosecution of the threatening party. (T 627, 827). Even then, the caller has at his disposition the numerous methods of avoiding Caller ID display of his number as have been discussed earlier. He could also utilize a pay phone to produce a Caller ID display of limited use.

Caller ID with universal blocking is not necessarily incompatible with the benefit alleged by Southern Bell and GTE in this regard. A call can be traced with Call Trace even if blocking were attempted. (T 121, 122). It is known that 911 systems will display an originating number regardless of whether blocking is initiated or not. (T 1041). This being the case, it is obvious that the technology exists to program certain recipients' numbers to receive displays of numbers regardless of whether they are blocked by the caller or not. The proposal made by FDLE witness Ron Tudor that schools, hospitals, suicide hotlines, etc. be placed in a "cannot be blocked" category would provide the benefit identified by Southern Bell and GTE (i.e. display numbers of threatening callers or those needing intervention) while still allowing universally available blocking as a means of addressing the significant safety concerns of law enforcement and domestic violence witnesses.

Issue 6: Are there any existing CLASS services (e.g., Call Trace, Call Return, Call Block, etc.) that have similar functions and/or benefits as Caller ID; if so, what are their detriments? Is their rate structure appropriate?

> Attorney General, Statewide Prosecutor, and FDLE Position: We join the postion of the Public Counsel that call trace at a reasonable price will allow the public to achieve the essential benefits of Caller ID without the major cost or impact of Caller ID.

Discussion:

Call Trace, as proposed by the Office of Public Counsel would provide significant benefits, many of which would duplicate the benefits alleged to be derived from Caller ID. Since Call Trace does not display a caller's phone number, the significant concerns regarding personal safety of law enforcement personnel and domestic violence victims is not a factor. Call Trace should not be a service that must be presubscribed (as currently offered by Southern Bell, T 220) since no one can know ahead of time that he or she will receive an annoying call that should be traced. (T 237). The approach to Call Trace offered by Centel (available generally, with a charge assessed for each successful trace, T 535) more closely approaches what should be available to phone users statewide, although the Office of Public Counsel advocates a lower per-trace charge, and that position has been adopted by the undersigned.

Call Trace in any form duplicates many of the purported advantages of Caller ID. It provides a means of addressing the receipt of an annoying call in that a Call Annoyance Bureau can be notified that a Call Trace was initiated and an appropriate response can be taken. (T 627). If an annoying call is life threatening, Call Trace can be engaged and phone security can contact law enforcement quickly. (T 626). Thus the alleged benefits of Caller ID to schools and other entities that might receive threatening calls are just as available with Call Trace.

If Call Trace is made generally available, with no need to presubscribe, any phone customer could utilize Call Trace as a response as needed. Such general availability would stand in sharp contrast to the predicted utilization of Caller ID. Bell's representative Ms. Sims testified that the expected "penetration" of Caller ID for the next five years is only 5 to 7% of the residential market. (T 271). Currently, in areas where Caller ID has been introduced the penetration is in the range of 1.2% in Tennessee (T 195, 271) and 2% in New Jersey. (T 271). Clearly Caller ID will not attain the degree of residential market penetration to make it a viable weapon in responding to annoyance calls. Call Trace, on the other hand, is presently more generally available since some companies such as Centel offer it without a need for subscription (T 535) and it is a less expensive Southern Bell CLASS option than Caller ID, with a monthly cost of $4 as opposed to the proposed monthly cost of

$7.50, plus cost of a CPE display. (T 252). If the Public Counsel's alternative Call Trace proposal were adopted, the availability of Call Trace as a viable option will be assured throughout the state. If there is any discouragement of annoying callers by the realization that the phone from which they are calling may be identified, Call Trace would provide greater discouragement than Caller ID because it is more generally available.

Significantly, Call Trace provides business records evidence and corroboration of annoying calls that is necessary for a successful prosecution. (T 627, 827, 1021). Use of Caller ID provides no such corroboration and invites courtroom challenges to the accuracy of an alleged number identification based on possibilities such as misidentification or misperception of the numbers displayed on the call recipient's Caller ID display device. Call Trace avoids the "swearing match" between a caller and call recipient that presently prevents prosecution in some situations. (T 1021).

Unlike Caller ID, Call Trace does not provide the recipient with the caller's phone number, so potentially dangerous self-help vigilante encounters would be impossible.

Call Block provides a benefit of cutting off the possibility or receiving a second call from an annoying caller. Up to six numbers can be blocked. (T 67). Again, since no caller number is

displayed or otherwise identified, the personal safety concerns raised by law enforcement and others regarding Caller ID are not a factor. If Call Trace were made generally available throughout the state, Call Block and Call Trace, utilized together would provide a formidable weapon against annoying callers.

Call Return raises similar concerns about safety as Caller ID since the recipient of a call can effect a "call back" and the potential for accidental or inadvertent compromise of an investigation or location of a battered spouse can occur. Because of this, Call Return is considered of little benefit. The only benefit would be that since no number is displayed, the potential for a face-to-face confrontation between an annoying caller and the call recipient is reduced. (T 647).

The existence of several CLASS options does not alleviate our primary concern of protecting personal safety of law enforcement operatives and others from the jeopardy that Caller ID without universally available per call and per line blocking presents. Even if Call Trace is made available throughout the state as proposed by the Office of Public Counsel, our objections to Caller ID as proposed by Southern Bell and supported by GTE continue.

Issue 7: What effect will Caller ID have on nonpublished and unlisted subscribers?

> Attorney General, Statewide Prosecutor, and FDLE Position: We adopt the position advanced by the Public Counsel on behalf of the Citizens of Florida that the more than 1 million Southern Bell customers with either nonpublished or unlisted telephone numbers have a legitimate expectation that their numbers will remain private and that continued privacy should not be conditioned upon their payment of an additional fee for blocking service.

Discussion:

According to Nancy H. Sims, an Operations Manager for Southern Bell, approximately 834,000 of Southern Bell's subscribers have nonpublished, and about 211,000 have unlisted, telephone numbers. (T 197). As Commissioner Easley pointed out at the hearing "the minute they [the unlisted or nonpublished customer] make a phone call with Caller ID their phone number is now out, it is now published unless they use one of the means that you have enumerated for blocking." (T 202). The means enumerated included use of calling cards (T 203), operated-assisted calling (T 203), and going to another phone (T 202). The Maryland Public Service Commission has recognized "subscribers to unlisted and nonpublished services may experience an erosion in the value of that service if a blocking option is not available to them." In the Matter of the Provision of Caller Identification Service by the Chesapeake and Potomac Telephone Company of Maryland, Case No. 8283, (November 20, 1990).

While Southern Bell suggests that subscribers to unlisted and nonpublished service will benefit from and desire Caller ID, (T 61), survey data discussed by Dr. Mark Cooper, president of Citizen's Research, indicate that those subscribers are extremely concerned about the potential loss of privacy they would experience under Caller ID. (T 606-608, 613). Indeed as Ms. Sims testified, potential erosion in the value of unlisted and nonpublished service was a major factor in Bell South's initial position that blocking should be available to those subscribers. (T 260).

The Attorney General, Statewide Prosecutor and FDLE adopt the position of the Public Counsel as to this issue, but wish to underscore the irony and inherent unfairness of assessing upon the over 1 million Florida consumers served by Southern Bell who utilize nonpublished or unlisted phones (T 197) a fee for such utilization, only to make those numbers public via Caller ID. Unless universally available blocking is offered in order to maintain the privacy of one's unlisted or nonpublished number the customer, who is already paying $1.75 per month for nonpublished service or $.80 per month for unlisted, (T 196) will be required to pay an additional $.75 or $1.00 per call. (T 203).[4] This untoward result would be avoided should free per call and per line blocking be made available. The undersigned also adopt the

[4] Additionally, this change would take place with no prior notice to the nonpublished or unlisted customer. (T 262).

position of the Department of General Services as to the negative effect of Caller ID on nonpublished SUNCOM numbers.

Issue 8: What alternatives to Caller ID blocking are available and do they sufficiently protect customers' anonymity?

> Attorney General, Statewide Prosecutor, and FDLE Position: Caller ID without free per call blocking violates Florida law, as discussed in Issue 3, therefore no alternative to blocking is viable. In addition, the alternatives proposed by Southern Bell and GTE are inadequate to meet law enforcement needs.

Discussion:

The phrase "alternative to Caller ID blocking" is somewhat misleading since Caller ID blocking can be presently secured through several alternatives, as long as one is willing to pay Southern Bell or others for the blocking option. Use of a calling card "blocks" Caller ID displays for a charge of $.75 (T 99); utilizing an operator-assisted call for a charge of $1.00 (T 99) will not generate a Caller ID display. Use of a cellular phone will not generate a Caller ID display. (T 100). Any of these alternatives provide some protection to anonymity, but they do not sufficiently protect undercover law enforcement operatives and people such as domestic abuse victims.

FDLE witness Ron Tudor identified numerous concerns with trying to utilize these various options. Concerns included costs, complexity, and likelihood of accidental compromise. (T 833-36). Spouse abuse centers find such options unacceptable for various reasons including fear for personal safety, fear of

compromise of the location or identity of battered spouses, their families and those supporting them, and distaste for having to certify oneself or another as a "battered spouse." (T 949-51, 980, 1005). Only allowing universally available per call and per line blocking generally throughout the state will begin to alleviate the significant personal safety concerns expressed.

GTE strongly promoted its Protected Number Service (PNS) as a substitute for per call or per line Caller ID blocking. PNS is the functional equivalent to Southern Bell's RingMaster (T 455). This service would allow a second number to be assigned to one's original line, with the second number ringing in with a distinctive ring, allowing it to be distinguished from a call being received on the originally assigned number. (T 440). As such, PNS would allow the newly assigned number to be displayed on a Caller ID unit, with any return call made in reliance upon the displayed number being identified by its distinctive ring. (T 440). PNS would provide an alternative to blocking, but is does not truly address the concerns of law enforcement and domestic violence center representatives.

First among the detriments is that PNS must be a subscribed service, established at a known telephone location. (T 456, 842). Law enforcement operations are such that they change from moment to moment and are not predictable. (T 842). A particular known phone may not always be the phone from which undercover calls must be made. (T 456, 842). This being the case, not

having universally available per call or per line blocking will still frequently produce the safety and security concerns previously expressed, even if a law enforcement agency utilizes the PNS option for some of its phones. Further, multiple investigations may need to utilize the same undercover phones at a police facility. PNS suffers from an inherent limitation in that either the original or the assigned alternative number would be the number displayed to a Caller ID unit. (T 842). The fallacy of utilizing the same number in multiple undercover investigations should be obvious. Next, the same risks and concerns that come with the display of any phone number on a Caller ID unit will surface even if the display is generated by reason of PNS. A number will be displayed. There are the risks of inadvertent compromise of an investigation. (T 293, 457-8, 842). As with any "alternative" that displays a phone number, the risks of compromise are higher than in situations where no number is displayed on the Caller ID unit. (T 458). Even use of a recording indicating "this phone is not being answered" as suggested by GTE witness Larry Radin (T 452) would generate suspicion which could jeopardize an investigation. (T 836). Even if PNS is utilized, law enforcement retains the same need for universal per call or per line blocking as previously identified. At best, PNS should be considered a valuable supplement to per call and per line blocking. (T 461). It is not a panacea. (T 841, 846).

If PNS were made available to domestic violence centers, the same limitations of location, presubscription, opportunity for compromise by reason of accidental or inadvertent disclosure of location when the PNS-generated phone number is called back, etc. would be of concern. PNS is not an effective substitute for per call and per line blocking. (T 844).

Issue 9: Should the Commission allow or require the blocking of Caller ID? If so, to whom and under what circumstance?

> Attorney General, Statewide Prosecutor, and FDLE Position: The Commission should require Southern Bell to provide universal per call and per line blocking at no charge to the calling party.

Discussion:

First, it should be noted that if Caller ID is approved, methods of blocking the display of a Caller's originating number already exist. These have been previously discussed. So to a great extent, as was pointed out by the Public Counsel, methods of blocking a Caller ID number display already exist, but for a fee, presently payable to the phone companies.

Universal per call blocking at no charge has been mandated in Kentucky,[5] South Carolina,[6] Pennsylvania,[7] and Maryland.[8] This Commission should issue the same prerequisite for Caller ID.

Per-call blocking would address the most significant drawback of the system by eliminating any questions as to the

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[5] In the Matter of: The Tariff Filing of GTE South Incorporated to Establish Custom Local Area Signaling Service, Case No. 90-096, October 8, 1990.

[6] Southern Bell v. Hamm, supra.

[7] Barasch, supra.

[8] Matter of the Provision of Caller Identification Services, supra.

system's legality under Florida's wiretap law, since interceptions to which both parties consent are lawful. Sec. 934.03(2)(d) Fla.Stat. (1989).

If it is determined that Caller ID does not violate Florida or federal law, and Caller ID is to be implemented in this state, then blocking of Caller ID should be available on both a per call and per line basis, selected at the option of the calling party, and at no cost to the calling party.

The need for the blocking option has been demonstrated in several circumstances as previously discussed, the most compelling of which are the needs to protect undercover law enforcement investigations from jeopardy caused by the accidental or unintentional display of an originating phone number and the needs to protect victims of domestic violence.

Ron Tudor, testifying on behalf of a task force representing a variety of law enforcement entities stated:

> If the blocking option is available to the public at large, then a criminal who receives a blocked telephone call would not become overly suspicious. This is in sharp contrast to what Southern Bell proposes. Under Southern Bell's proposal, which would allow blocking for only a limited portion of the telephone using public, the very fact that blocking has occurred will serve to suggest to the criminal that a law enforcement officer or one acting on behalf of law enforcement may be the person making the call.

(T 819-820).

In a similar vein, Cheryl Ray Phoenix, of the Florida Coalition Against Domestic Violence, questioned the viability of the selective blocking offered by Southern Bell to battered women.

> The first concern we have is that battered women who are struggling to be financially independent will be unable to afford another monthly phone charge, and how will Southern Bell decide who can obtain it free of charge? Will a victim have to detail all of the threats, physical and sexual abuse which she has experienced, and that of her children? If so, how will Southern Bell be able to adequately handle 60,000 requests from individuals in this state, which is the number of victims who called the domestic violence hotlines statewide last year? Is this a reasonable solution to the problems?

(T 950).

Law enforcement's concerns in this regard are neither specious nor imagined. (T 822, 823). Similarly, the concerns expressed by spouse abuse representatives are nether specious nor imagined. As pointed out, such need will often call for a per line blocking option rather than just per call blocking, since children or others may not be relied upon to enter a blocking code prior to making each phone call. (T 950).

Caller ID blocking on a per call or per line basis ought to be made available to all callers on a free basis statewide. Otherwise, law enforcement concerns regarding safety will become

complicated by the "patchwork quilt" of blocking options that will occur, with safety of an undercover operative depending to a great degree on the geographic location from which the operative's originating call is being made. (T 845). Law enforcement undercover investigators cannot constantly refer to manuals to determine whether a call they are about to place is "Caller ID safe" or not. (T 917). The Florida Department of Law Enforcement has responsibility to train and advise law enforcement officers throughout the State on matters such as the impact of implementation of Caller ID. (T 815, 924-25). A hodgepodge system in Florida in which some phone companies will offer universally available blocking, while others will not will be a trainer's nightmare and carries with it the real risk of jeopardy to law enforcement operatives' safety.

Further, such lack of uniformity will adversely impact the 800 MHz statewide law enforcement radio system presently being developed in that the "call trunking" feature would not be able to offer uniformly throughout the system a predictable blocking option. (T 915).

The fact that some police agencies support Caller ID and have suggested that it be made available with no blocking option reflects a difference in the focus and responsibilities of the agencies, which may produce a failure to perceive the real and present danger unblocked Caller ID calls can have upon undercover investigations. (T 871-73, 922). Expressed desires of certain

law enforcement agencies that they be allowed to utilize Caller ID to assist their general law enforcement function should not be seen as minimizing concerns for law enforcement undercover operatives' safety.

Even if Caller ID were not in violation of Chapter 934, the use of Caller ID by governmental agencies may be challenged by the ACLU or others as being unconstitutional. (T 910-11). As a result of such a challenge, the uses of Caller ID that certain law enforcement agencies have identified may be denied them and other governmental entities operating facilities such as schools and courthouses. Thus one identified benefit to not allowing blocking, the "identification" of bomb threats and similar calls, may never be realized.

Even if general Caller ID use by government agencies is constitutional under Florida law, the "bomb threat" and similar objections to blocking do not withstand close scrutiny. As discussed earlier, these objections seem to assume one making a threat would utilize his personal phone, making investigation and apprehension relatively easy. Yet the various options for "blocking" a call that are presently available such as using a operator-assisted call, using a cellular phone, etc. remain readily available, and would defeat the display of the number. Certainly, the availability of universally available blocking, carrying with it the assurances of protection of safety in the context of undercover investigative operations and in the spouse

abuse area, provides a substantial benefit that outweighs the illusory "advantages" in detecting threatening callers.

Further, the alternative approach to blocking suggested by Ron Tudor that would identify certain facilities to which numbers of calling parties could not be blocked seems to be the preferable way of assuring that blocking is made generally available to those who need it, but denied to those inclined to abuse the blocking option. (T 851-53).

An approach of identifying "subject classes" to whom blocking would be made available is not appropriate. First, such a system would tend to identify those with the blocking option as potentially being associated with law enforcement, thereby jeopardizing the safety of law enforcement operatives. (T 819-820). Second, such a system suffers from an inherent flaw in that it calls upon someone to determine to whom blocking ought to be made available and to whom it will not be made available. It is not appropriate for the phone company to make this determination since the company's decision in this regard will be highly subjective, would be arbitrary, (T 613-614), could be administratively burdensome, attempts to impose decision making responsibilities upon domestic violence support centers that they do not wish to have, and is degrading to victims. (T 960, 962, 963, 980, 990-91, 1000, 1001). The proposal also ignores the real possibility that victims or domestic violence center workers will have to utilize phones other than the one to which "class-

assigned" blocking has been programmed. (T 1005). As suggested by Southern Bell witness Nancy Sims, this Commission could set itself up as being the arbiter of such decisions (T 278, 299), but assuming such responsibility carries with it the same complexity and concerns stated above. To allow certain classes to have access to blocking would not address the concerns of the hundreds and thousands of abused spouses who may not contact a spouse abuse center, yet are at the same degree of risk as their counterparts in the centers. (T 964). To allow certain classes to have access to blocking and to deny others the blocking option appears to be an arbitrary determination that would recognize privacy interests in some, but not all calling parties using phones in Florida.

While it is true that phone tariffs require a calling party to identify himself/herself when asked, as discussed earlier, Caller ID's display of an originating phone number does not provide such identification. Numerous other reasons why receiving the display of a number fails to equate with "identifying the caller" were mentioned in testimony.

Free per call and per line blocking would also avoid the unfairness of requiring telephone customers to pay to maintain their privacy. This is especially so for nonpublished and unlisted subscribers, as discussed earlier.

The Florida Cabinet has adopted the position that free per-call blocking should be available for all state telephones. (T 1031-1032, Ex. 29).

While the area of costs to Florida consumers is an area to be more properly addressed by the Public Counsel, the undersigned submit that the cost of providing the blocking option ought to be borne by those who subscribe to Caller ID. The blocking option should be provided at no charge to those seeking to utilize it. But for the implementation of Caller ID as an option, the need for blocking would not exist. The status quo is such that one need spend no money to avoid display of his or her originating phone number when calling a party. With the implementation of Caller ID, that status quo ought to be maintained, with blocking being made available free of charge.

In summary, per call and per line blocking of Caller ID at no charge to the calling party ought to be made available uniformly throughout the State of Florida. Consideration should be given to whether certain agencies or facilities (e.g. schools) could be identified as a class to which calls would not be blockable. The costs of providing the blocking option should be borne by those using the Caller ID option and by the phone companies offering the option, but not by the callers choosing to block on a per call or per line basis.

Issue 10: What special arrangements, if any, should be made regarding Caller ID for law enforcement personnel?

> Attorney General, Statewide Prosecutor, and FDLE Position: Should it be determined that Caller ID does not violate Florida law, law enforcement should be extended call block capability at no charge.

Discussion:

As has been previously discussed, the first special arrangement is to retain the balance of control in undercover investigations in favor of law enforcement and avoid the significant risk of serious injury or death to law enforcement personnel and operatives that Caller ID as proposed represents. The method of implementing this special arrangement is to make universally available throughout the state of Florida a consistent system of offering per call and per line blocking of the display of originating phone numbers via Caller ID. This blocking should be made available at no cost to blocking parties.

Second, this Commission should mandate continued assistance by all phone companies with law enforcement to develop and implement alternatives that will minimize the risk to safety and integrity of investigations that Caller ID represents. All of the various proposals made by Southern Bell and GTE as substitutes for Caller ID blocking should be made available to law enforcement. However, these should not be made available as substitutes, but rather as supplements to, universally available

per call and per line Caller ID blocking. To the greatest extent possible, these supplements should be made available to law enforcement at no charge, or minimal charge.

Should blocking be made available only to identified classes, the criteria for making blocking available to law enforcement should be broadly applied in order to maximize the increased safety to law enforcement that blocking will provide.

At least 120 days should be provided prior to the implementation of any Caller ID system to allow the Florida Department of Law Enforcement to adequately notify and train affected law enforcement personnel and agencies.

Adequate protection to the security, integrity and purpose of the statewide 800 MHz radio system must be provided. The only workable method of doing so will be to provide per call and per line blocking capability for the "trunk" lines utilized by the system. The various phone companies should be mandated to assist the Department of General Services, State of Florida in whatever manner necessary to assure the integrity and viability of the system.

Issue 11: What special arrangements, if any, should be made regarding Caller ID for any other group or groups?

> Attorney General, Statewide Prosecutor, and FDLE Position: Free per line and per call blocking should be available.

Discussion:

Special arrangements should be made for groups such as those making up the Florida Coalition Against Domestic Violence (FCADV) (29 battered women's shelters, concerned citizens and other groups working to end domestic violence in Florida). (T 947).

Cheryl Phoenix, Director of FCADV, termed Called ID as proposed by Southern Bell and supported by GTE, "lethal to battered women and their children." (T 949). This concern derives from the real problem of identification of location of battered spouses through the use of Caller ID without a per call or per line blocking option.

By reason of the testimony of Ms. Phoenix and the other domestic violence witnesses, the parties to this brief have modified their position regarding the type of blocking that should be made available. Rather than just per call blocking, both per call and per line blocking should be offered universally with no charge to the blocking party. As pointed out by Ms. Phoenix, a battered woman's children may not remember to dial the "block" code if only per call blocking is available. (T 950).

The potential for inadvertent or accidental compromise of a battered woman's location is too high to justify offering only per call blocking. Battered women should have the choice of either per call or per line blocking as they attempt to better protect themselves from attack or retribution.

The scope of domestic violence should not be underestimated. Approximately 80,000 domestic "hotline" calls were received in Florida in the last fiscal year. (T 964). Ms. Phoenix indicated that it is estimated that only 1/10 of the battered women actually contact a battered women's shelter. Her extrapolation suggests that approximately 800,000 people in Florida would be battered yearly. (T 964).

Phone company suggestions for "limited class" blocking are unrealistic when the numbers of potential seekers of a blocking option by reason of domestic violence are realized. The FCADV shelters are unable to risk the liability for producing a list to Southern Bell of the thousands of domestic violence victims in danger and in need of a blocking option. (T 954). Delays inherent in obtaining requests and processing the requests prior to implementing a blocking option carry with them grave consequences in that the battering spouse goes to great lengths to locate the battered spouse when she leaves him. (T 963). The need for this special class blocking protection will continue indefinitely, meaning the numbers protected will grow continually. (T 966). While Protected Number Service (PNS)

might provide some protection to the shelters and regular employees, Ms. Phoenix indicates those employees and shelter volunteers change frequently, making it difficult, if not impossible for a phone company to keep its PNS service offerings current. (T 960). Company response to these concerns indicate that no specific, considered, plan had been developed to address these concerns.

Cost of securing a blocking option is of crucial importance. Ms. Phoenix indicated that battering occurs in all socioeconomic classes, but that when a woman leaves an abuser she often leaves everything behind. (T 970). The abuser often has control of all the money, so for all practical purposes the battered spouse is indigent. (T 971). To charge for blocking necessary to help protect the spouse from further physical harm is neither compassionate nor justified.

Clearly, universally available per line and per call blocking, with no charge to the blocking party is the only viable option for addressing the concerns of FCADV and similar groups as have been raised by the proposed implementation of Caller ID. As stated by Ms. Phoenix, "We cannot risk additional lives for the profit of the telephone company or to keep the Caller ID system from being devalued." (T 953).

Issue 12: Is Caller ID in the public interest?

Attorney General, Statewide Prosecutor, and FDLE Position: Caller ID, with the caveat of universal blocking at no charge to the calling party, is in the public interest.

Discussion:

In an abstract sense, Caller ID is in the public interest, because it facilitates the sharing of information. Glenn Mayne, Division Director at the Department of General Services testified to the "vast" potential for information retrieval which Caller ID could enable. (T 1037, 1047-48). The framework in which Southern Bell offers the service however, presents drawbacks which outweigh the benefits.

While admitting that "focusing on Caller ID as a service directed at handling annoyance calls disregards the more important reasons for offering this service," (T 87), the company maintains that free per call blocking capability would devalue the service. Yet even Southern Bell's witness admitted this position was based on perceptions, minimal experience, and speculation (T 207, 213) and ignored the impact of new technology, (T 2088). The witness acknowledged that in one trial call block was activated only 143 times out of one million calls. (T 206). As Dr. Cooper noted, the devaluation argument is only true if one accepts the premise that a harassing caller would not use a credit card, pay or cellular phone or operator (all methods

which result in per call blocking) to place his call. (T 624). The benefit/detriment imbalance is made even more clear by Southern Bell's own estimate that ultimate residential market penetration of Caller ID will be only 5-7%. Logic will not support a finding that loss of privacy, erosion of value of unlisted or nonpublished service, possible endangerment of the lives of law enforcement, and risks to abused spouses are outweighed by the benefit of 5-7% of the population knowing the number from which they are being called. The public is simply not being served when the benefits go to so few at a peril to so many. Even Southern Bell initially took a position in favor of broader blocking, but the position was modified by its regional marking council. (T 214, Ex. 4). Such alteration of the company's position raises an inference that the unstated but primary force behind Southern Bell's present position is an economic one.

Clearly, the true potential benefit for Caller ID lies in its use as an information sharing mechanism, rather than a tool to prevent harassing telephone calls. The system has the potential to expand to display a variety of information to the provider of goods or services before the inquiring customer's call is even answered. (T 1073). Per call and per line blocking capability is necessary however, to permit the calling party to be selective in sharing that information. (T 1078).

Issue 13: What further action should be taken of Southern Bell's tariff filing introducing Caller ID (T 89, 507) and changing the conditions under which nonpublished information will be divulged (T 90-1023)? What should be the effective date of such action?

Attorney General, Statewide Prosecutor, and FDLE Position: Southern Bell's tariff filing should be rejected.

Discussion:

The undersigned will defer to suggestions by the Office of the Public Counsel as to the practical steps for taking appropriate action and the effective date of such action, but it is submitted that Southern Bell's tariff filings be rejected. Caller ID should be allowed on a statewide basis in Florida only if universally available per call and per line blocking is offered in conjunction with the Caller ID service. Such blocking should be at no cost or charge to the blocking party since those utilizing Caller ID should pay the costs associated with it.

If possible, a uniform approval and implementation of Caller ID with universal no charge per call and per line blocking statewide should be considered. This will expedite the training program described below and will facilitate the general education of the state's populace to the availability and impact of Caller ID.

Any implementation of Caller ID in the State of Florida should be delayed a minimum of 120 days, to allow the Florida Department of Law Enforcement to adequately train and advise law enforcement personnel of the details of the implementation and the inherent risks to personal safety and investigation integrity Caller ID carries with it.

The mandates for phone company assistance to law enforcement and the Department of General Services should be incorporated in any Commission rulings on tariffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following list of people, this 11th day of January, 1991.

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