

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

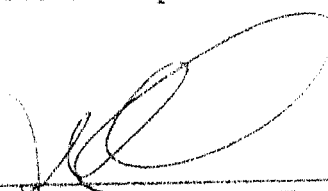
In re: Proposed tariff filing by  
SOUTHERN BELL TELEPHONE AND TELEGRAPH  
COMPANY clarifying when a non-published  
number can be disclosed and introducing  
Caller ID to TouchStar Service

DOCKET NO. 89-1192-FL

ORIGINAL COPY

NOTICE OF FILING POST-HEARING LEGAL MEMORANDUM  
OF FLORIDA MEDICAL ASSOCIATION, INC.

COMES NOW, Florida Medical Association, Inc. (FMA), by its undersigned counsel and files the attached post-hearing legal memorandum in the above-styled cause.

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the POST HEARING MEMORANDUM OF

ACK  FLORIDA MEDICAL ASSOCIATION, INC., have been furnished to the following  
AFA \_\_\_\_\_  
APP \_\_\_\_\_ parties by U.S. Mail this 27th day of December, 1990:  
CAF \_\_\_\_\_

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CTR \_\_\_\_\_ Telegraph Company  
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WAS \_\_\_\_\_  
OTH \_\_\_\_\_

DOCUMENT NUMBER-DATE  
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PSC-RECORDS/REPORTING

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LEGAL MEMORANDUM OF FLORIDA MEDICAL ASSOCIATION, INC.

I. Caller ID violates Chapter 934, Florida Statutes (1989)      The Florida Legislature has carefully delineated the circumstances and conditions under which interception of wire and oral communications may be authorized. Specifically listed as one of its concerns was the effective protection of the privacy of such communications. Section 934.01(2), Fla. Stat. (1989). The Legislature also listed as a specific objective the safeguard of personal privacy. Section 934.01(4), Fla. Stat. (1989). Moreover, the Florida Supreme Court has interpreted the legislative intent behind Chapter 934 as affording even broader protection to privacy than the Federal Act. State v. Tsavaris, 394 So.2d 418 (Fla. 1981).

Chapter 934, Fla. Stat. (1989), Florida's Wiretap Act, was enacted with a great concern for protection of one's privacy interests. It specifically prohibits the use of a "trap and trace device" without first obtaining a court order unless the device's use falls under three specific exceptions.

Such a device is defined by the Act 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." Section 934.02(21), Fla. Stat. (1989). The Caller ID device translates an incoming electronic signal into the calling party's number and displays the number on the screen. As such, the device fits squarely within Florida's definition of a trap and trace device. Pennsylvania, for example, has a nearly

identical provision, and that state's Attorney General has conceded that Caller ID is a trap and trap device. Barasch v. Pennsylvania Public Utility Commission No. 2270 C.D., Commonwealth Court of Pennsylvania, 1989. Therefore, a court order is required, or the device must fit within one of the statutory exceptions before it may be used.

A court order is required for the installation or use of a trap and trace device unless:

(1) the trap and trace device is used by a provider of electronic or wire communication service relative 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 lawful use of service"; or

(2) when the trap and trace device is used by a provider of electronic or wire communication service "[t]o 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 the completion of the wire communication, or user of the service, from fraudulent, unlawful, or abusive use of service."

The only other exception to the requirement for a court order applies where the user of the services has given consent. Sections

934.31(2)(a),(b),(c), Fla. Stat. (1989).

The pertinent exceptions listed above clearly apply only when a provider of electronic or wire communication service uses a trap and trace device for three specific purposes. Even if Southern Bell were to justify the device on the basis that it protects users of the service from abuse, unlawful use, or fraudulent or abusive use, the exceptions do not apply unless the trap and trace device is used by the provider, that is, Southern Bell. Caller ID impermissibly places the device into the hands of the general public, unlike, for example, Call Tracing, over which Southern Bell retains control and which information is appropriately communicated to law enforcement authorities. Under the present statutory scheme, the installation or use of Caller ID would first require a court order under Section 934.33, Fla. Stat. (1989).

Chapter 934 also addresses the use of "Pen Register" devices, and restricts the use of such a device without a court order in precisely the same manner as trap and trace devices. No court has yet decided how the Florida Constitution relates to trap and trace devices, but the Florida Supreme Court's recent treatment of the issue with regard to pen registers is applicable here.

## II. Caller ID violates the Constitution of the State of Florida

In 1989, the Florida Supreme Court determined that individuals have a constitutional right of privacy regarding their telephone numbers. Shaktman v. State 553 So.2d 148 (Fla. 1989). Though the device implicated in that case was a pen register, the principles

clearly apply in this matter.

The Shaktman petitioners were charged with certain criminal violations relating to illegal gambling. As part of its surveillance activity, the state petitioned the circuit court for a lease line for pen register operation on several telephones within a suspects apartment. Eventually, the petitioners were formally charged. As part of their defense, the petitioners argued that Article I, Section 23 of the Florida Constitution, the Right of Privacy provision, required that evidence obtained through use of the pen register devices was inadmissible. The petitioners were ultimately convicted and the case made its way to the Florida Supreme Court.

Apparently, a pen register is useful for determining what telephone number an individual dials, rather than, in the case of Caller ID, identifying the dialer's telephone number. Nevertheless, both pen registers and trap and trace devices are prohibited in precisely the same way without a court order, and the same three exceptions apply to the use of each device without a court order.

The Shaktman defendants' convictions were ultimately upheld, but only because law enforcement complied with significant procedural requirements relating to the use of pen registers. Caller ID threatens to abolish the clear procedural requisites for the use of trap and trace devices. This, most assuredly, would violate the Constitution of the State of Florida.

The Florida Supreme Court recognized that "the people of Florida unequivocally declared for themselves a strong, clear, free standing,

and express right of privacy as a constitutional fundamental right." Id. at 150. That right, the Court continued, "demands that individuals be free from uninvited observation . . . unless the intrusion is warranted by the necessity of a compelling state interest." Id. The court concluded that Florida's constitutional right of privacy provision is implicated when the government gathers telephone numbers with a pen register.

The telephone numbers an individual dials or otherwise transmits represents personal information which, in most instances, the individual has no intention of communicating to a third party. This personal expectation is not defeated by the fact that the telephone company has that information. Id. at 151.

That the Court intended for each individual to control his or her privacy is solidified by the Court's pronouncement that "the parameters of an individual's privacy can be dictated only by that individual." Id. Caller ID eviscerates callers' constitutional right to privacy by depriving them the control which the Florida Supreme Court requires.

### III. Conclusion

Caller ID clearly violates Chapter 934, Fla. Stat. (1989). It is a trap and trace device to which no statutory exception applies. The greater issue, however, is the constitutional one. Article I, Section 23 of the Florida Constitution states, in pertinent part, "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." This is the crux of the issue



before this Commission. It is an issue which the Florida Supreme Court has addressed extensively. Hence, no other conclusion is reasonable except that Caller ID violates both legislative intent and judicial interpretation. Moreover, the infringement wrought by Caller ID appears to be totally unnecessary in light of Call Trace which Southern Bell itself markets as the solution to harrasing telephone calls. See October 21, 1990 Florida Times Union advertisement attached hereto as Attachment A.

# How one little button can make your life easier.



**TouchStar® services from Southern Bell.** Three remarkable phone services that will give many Jacksonville area customers a new dimension in control, convenience, privacy and security! And they're economical. The initial TouchStar service you order is only \$4.00 a month. Additional services are \$3.00 each. And you don't need special equipment or an installer visit. So don't wait another day! Make your life a touch easier.

**Call On Us:  
780-2133**

## Call Return.

Calls back the number you missed, automatically. Don't you hate it when you rush for the phone and the caller hangs up just as you answer it? With Call Return, you won't have to rush for the phone again. Just press **9000** when you're ready, and your phone dials the number of the last person who called you.

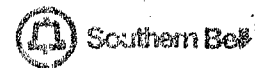
## Repeat Dialing.

Let your phone work, not you. You dial a number and it's busy--time after time. With Repeat Dialing, just press **9000** and go do whatever you like. Your phone automatically checks the busy number every minute for the next half hour. When the line is open, your phone lets you know with a special ring.

## Call Tracing.

Take action against harassing calls. Now you can do something about repeated obscene calls. With Call Tracing, press **9000** the moment you hang up. That sends the number of the person who has just called and the time of the trace to a Southern Bell office. Then call us the next business day with the time/date you used Call Tracing and ask us to take appropriate action. The action we take varies, so ask for details. You will not receive the number being traced. Note: Call Tracing is an alternative to our normal annoyance call service, which is available at no additional charge.

the \$9.00 connection charge if you order now.



Services are available to many Southern Bell Jacksonville area customers. The services work for calls between Southern Bell Jacksonville area customers having TouchStar service capability. For details, see the Southern Bell Jacksonville area TouchStar service brochure. Some calls may incur long distance charges. Business rates are higher. The distinctive ring may not work with some telephone sets. Connection charge savings offer is for a limited time only. © 1990 Southern Bell.

ATTACHMENT A