Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

IN THE MATTER OF	)	
PROTECTING CONSUMERS FROM UNAUTHORIZED CARRIER CHANGES AND RELATED UNAUTHORIZED CHARGES	)	CG Docket No. 17-169

COMMENTS OF THE COALITION FOR A COMPETITIVE TELECOMMUNICATIONS MARKET

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TABLE OF CONTENTS

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I. INTRODUCTION AND INTEREST OF COMMENTERS

The Coalition for a Competitive Telecommunications Market ("CCTM") submits the following comments in response to the Federal Communications Commission's ("FCC's," or "Commission's") July 14, 2017 Notice of Proposed Rulemaking regarding unauthorized carrier changes and related unauthorized charges ("NPRM"), published in the above-captioned proceeding. CCTM consists of various small businesses that provide presubscribed 1+ long-distance services (hereinafter "Commenters").[1] Commenters offer consumers a competitive choice for 1+ service, with a focus on residential and small business consumers. Commenters comply with applicable federal and state regulations, including those that require long-distance carriers to obtain written or recorded authorization from each customer to serve as the customer's

[1] CCTM members include: Business Network Long Distance, Communications Network Billing, Inc., Discount Long Distance, LLC, Integrated Services, Inc., LCR Telecommunications, LLC, Legent Comm, LLC d/b/a Long Distance America and Long Distance Services, Long Distance Access, Long Distance Consolidated Billing Co., Multi-line Long Distance, Inc., National Access Long Distance, Nationwide Long Distance Service, Network Service Billing, Inc., Peak Communications, Inc., Twin City Capital, LLC.

presubscribed 1+ carrier, and have obtained all required licenses and authorizations to provide 1+ services. As companies who provide consumers with competitive alternatives for long-distance service, Commenters have a strong interest in the Commission's most recent rulemaking proceeding regarding "slamming" (unauthorized switches of long-distance carriers) and "cramming" (the inclusion of unauthorized charges onto consumers' bills).[2] Commenters roundly condemn both slamming and cramming but also believe that it is important to attack these problems with targeted solutions rather than blunt-force regulations that eliminate not only these unlawful practices but legitimate competition as well, which would be contrary to the overarching goal of the Communications Act of 1934, as amended (the "Act").

II. SUMMARY

Commenters unreservedly support the FCC's goal of eliminating slamming and cramming. Such practices do not constitute legitimate competition and have caused great consumer harm. At the same time, however, third-party resellers continue to promote competition within the telecommunications market and should continue to be allowed to engage in full and fair competition with incumbent LECs for consumers' long-distance business. More importantly, consumers should continue to be able to choose such competitive long-distance alternatives easily and freely, without unreasonable burdens or hurdles placed in their way of implementing carrier switches where such changes are authorized. Thus, while Commenters support the Commission's objective of eradicating slamming and cramming, we believe that many of the Commission's proposals discussed in the NPRM go too far toward suppressing

[2] The CCTM has weighed in numerous times on these issues, including by submitting comments on October 24, 2011, December 5, 2011, June 25, 2012, July 20, 2012, and November 18, 2013 in CG Docket Nos. 11-116, 09-158, and 98-170.

legitimate competition and unduly hampering consumers' ability to select freely among long-distance carriers.

Commenters seek to strike a balance between (1) supporting targeted, lawful means of continuing to combat slamming and cramming and (2) ensuring that competition for long-distance remains robust and that consumers are easily able to implement switches to the long-distance carriers of their choosing. We do not object to codifying a ban on misrepresentation and/or deception, but ask that the Commission also modify its proposed rule to prevent the mere allegation of unsubstantiated misrepresentation from rendering invalid a legitimately obtained, valid authorization. In that regard, Commenters also suggest improvements to the Commission's third-party verification ("TPV") requirements to restore the TPV process to function as intended – as a mechanism to protect consumers while also providing carriers with better certainty and finality in the carrier change transaction. Commenters' suggested improvements would provide consumers with greater protections against slamming, including misrepresentation and deception, while also obviating the need for other proposals that are inefficient, complicated, costly (for consumers, carriers, and regulators), and anticompetitive.

For ease of reference, the comments set forth below are organized by parts corresponding to the Commission's NPRM.

III. COMMENTERS' RESPONSES TO SPECIFIC FCC QUESTIONS

A. NPRM PART III.A: BANNNG MISREPRESENTATION AND UNAUTHORIZED CHARGES (¶¶ 12-13)

Paragraph 12: The Commission seeks comment on its proposal to codify "a new Section 64.1120(a)(1)(i)(A) banning misrepresentations on the sales calls and stating that any misrepresentation or deception would invalidate any subsequent verification of a carrier change,

even where the submitting carrier purports to have evidence of consumer authorization (e.g., a TPV recording)."[3]

Comments to Paragraph 12: Commenters support the FCC's goal of providing greater clarity to carriers regarding applicable requirements under the Act, but the proposed codification of a ban on misrepresentation does not provide the complete clarity that is needed. Commenters condemn the use of misrepresentation and other deceptive sales practices used to instigate unauthorized carrier changes, but the proposed rule change perpetuates uncertainty for legitimate competitive carriers. A long standing issue for competitive 1+ providers has been the lack of certainty in the finality of a carrier change transaction. It is not uncommon for consumer slamming complaints, including complaints containing allegations of misrepresentation, to be filed long after the completion of a seemingly authorized carrier change – in many cases several months later and, in some cases, even years after the fact. While some complaints may be legitimate, there is no mechanism to prevent a consumer from filing falsified complaints or from adding an allegation of misrepresentation to an otherwise unsubstantiated claim. Even if a slamming complaint is completely falsified, the reputational and financial harm to a competitive carrier is significant.[4]

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[3] NPRM ¶ 12.

[4] More often than not, when faced with such a complaint (regardless of the validity of the claims), competitive carriers take the high road—the general practice is to refund all charges incurred by the consumer even if the complaint, if also filed with the FCC or a state PUC, does not ultimately result in the finding of a "slam." If the complaint results in the finding of slam, then even larger reimbursements are called for by applicable regulations and industry practices. In any case, a falsified slamming complaint results in the potential loss of months' or, in the extreme, years' worth of legitimately incurred charges for long-distance services that have been used by the consumer. The loss to the competitive carrier is also magnified by costs already expended for underlying carrier services, commissions paid to telemarketers, fees incurred for third-party verification services, and billing and other administrative expenses.

The only protection competitive carriers typically have against unsubstantiated slamming complaints, including potentially falsified claims of misrepresentation, is the consumer's authorization for the carrier change in the form of a recorded TPV.[5] Indeed, the Commission believed the TPV requirements would, in part, help to "increase the ability of carriers to refute false allegations of slamming, thereby providing carriers with greater certainty in the finality of transactions."[6] In practice, however, that has not been the case due, in part, to the inconsistent and, at times, purpose-driven interpretation and punitive application of the TPV requirements in slamming complaint and enforcement cases.[7] That and the unbalanced burden of proof applied to carriers defending against slamming complaints – which can be filed completely unsubstantiated, while recorded TPV authorizations can be disregarded on technicalities or repudiated by the consumer on a whim years later – has rendered the TPV process devoid of any certainty or finality.

The Commission's proposed rule, which would apparently invalidate a consumer's legitimately given carrier change authorization based on merely an allegation of misrepresentation, exacerbates the uncertainty. This would effectively render the carrier change

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[5] In addition to the standard content required by the FCC's rules, competitive carriers generally augment their TPVs to provide additional disclosures and obtain additional confirmations to address common allegations of misrepresentation. For example, it is common for TPV scripts to include an additional disclosure that the telemarketing call received by the consumer was from the submitting carrier that is not affiliated with the consumer's current long-distance provider or local exchange carrier.

[6] *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Fourth Report and Order, 23 FCC Rcd 493, 501, ¶ 4 (2008) ("*Fourth Report and Order*").

[7] *See, e.g., Preferred Long Distance, Inc.*, Forfeiture Order, 30 FCC Rcd 13711, Dissenting Statement of Commissioner O'Rielly (2015) (highlighting that the Commission sought to impose the forfeiture despite the penalized company's apparent adherence to applicable TPV requirements).

authorization process (whether conducted via TPV or written letter of authorization) meaningless, and all carriers would be continuously forced to shoulder the difficult burden of maintaining and producing evidence to prove a negative – *i.e.*, that misrepresentation or deception did not occur, no matter how far-fetched, time-barred, or unsubstantiated the claim. In this regard, while Commenters unequivocally condemn misrepresentation, we do not support the proposed rule, as written, unless the Commission also creates mechanisms that would better address falsified, unsubstantiated, or untimely complaints. For example, the Commission could require complainants to certify claims under penalty of perjury, bar unsubstantiated claims of misrepresentation or deception submitted too long after-the-fact (*e.g.*, six months after the carrier change), or provide clearer mechanisms for carriers to refute such allegations through a more robust TPV authorization process. Of these suggestions, Commenters favor the latter suggestion and believe that strengthening the TPV requirements is the most targeted, efficient, and commonsense approach to combat slamming and misrepresentation. It also would restore the TPV process to function as intended – as a mechanism to protect consumers while also providing carriers with better certainty and finality in the carrier change transaction. Accordingly, in addition to improvements to the TPV process that we describe in further detail below,[8] Commenters propose to replace the second sentence in the proposed rule Section 64.1120(a)(1)(i)(A) with the following:[9]

> Absent evidence to the contrary, a subscriber's authorization is presumed valid if the subscriber has specifically confirmed that misrepresentation and/or deception did not occur on the sales call.

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8 *See infra* Comments to Paragraphs 34-35.

9 Currently, the second sentence reads as follows: "Authorization is not valid if there is any misrepresentation and/or deception when making the sales call."

Paragraph 13: The Commission seeks comment on its "propos[al] to codify in a new Section 64.2401(g) the existing prohibition against cramming."[10]

Comments to Paragraph 13: Commenters do not object to codifying the rules against cramming but would be opposed to the enforcement of such rules in a way that imposes double liability in slamming cases. Legitimate competitive carriers do not submit a carrier change if they do not believe they have the proper authorization to do so. As the Commission is well aware from its past enforcement actions, however, the finding that a slam has occurred is often predicated on technicalities – inconsistent and arbitrary out-of-context interpretations of wording or phrases used in a TPV script – rather than a lack of a recorded carrier change authorization altogether. To penalize carriers for cramming in these cases, in addition to slamming, for providing and billing for services they believed to have been authorized would be unjust. As with the proposed codification of a ban on misrepresentation, Commenters also believe that carriers should be provided a mechanism, such as the adequate disclosure of applicable charges during the TPV process, to refute presumptively certain cramming allegations.

B. NPRM PART III.B: PIC FREEZES AND THIRD PARTY BILLING (¶¶ 14-21)

1. NPRM Part III.B.1: Preferred Carrier Freezes by Default (¶¶ 14-16)

Paragraph 14: The Commission seeks comment on whether it should require carriers to "freeze" consumers' wireline providers by default and affirmatively require consumers to opt out from such freezing in order to change their providers.[11] It also seeks comment on having these

10 NPRM ¶ 13.

11 *Id.* ¶ 14.

default freezes occur for the entire bundle of telecommunications services that a consumer uses rather than on a service-by-service basis.[12]

Comments to Paragraph 14. Commenters strongly oppose any such default freezing of consumers' interexchange carriers – whether bundled or not – because it would harm marketplace competition by deterring consumers from comparing competitive options among carriers and limiting their ability to change to the carrier of their choice. Rather, such default freezing would allow the executing carrier, typically the Local Exchange Carrier ("LEC"), to enjoy the automatic monopoly status of being consumers' default option for long-distance service and would make it harder for consumers to alter that option in favor of a preferable competitive alternative. Such freezing is anti-competitive on its face and would place most of Commenters' businesses in jeopardy by harming the ability to compete fairly in the marketplace.

Bundling and freezing consumers' various telecommunications services as a monolithic unit would only compound this anticompetitive problem. Commenters believe that customers typically do not make affirmative decisions to bundle local and long-distance services based on complete information but due to a lack of exposure to competitive providers. While bundled services may seem attractive, in many instances, they may also require the consumer to buy something they do not need. (One need only look to the cable television industry or to how Verizon markets and prices Internet, phone, and television service for proof of this phenomenon.) Commenters believe that small business customers in particular would prefer to pay only for the services they will actually use, not something they do not need or want. Bundling and freezing all telecommunications services together would make it even more

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12 *Id.*

cumbersome for consumers to select the best provider for each specific telecommunications service that they use.

Paragraph 15: The Commission seeks comment on how a default freeze rule should be implemented, including on how broadly it should apply and on "whether carriers should be able to charge for freezes."[13]

Comments to Paragraph 15: As outlined in comments to NPRM Paragraph 14, Commenters believe that any such default freezing is anticompetitive and strongly oppose it. To the extent that the Commission implements it under any circumstances, freezes should occur only (1) at the specific request of a customer (*i.e.*, the freezes should operate under an opt-in, rather than opt-out, regime) and (2) with respect to customers who had previously been slammed. Moreover, to the extent that a freeze is implemented at a customer's request, carriers should be allowed to charge the customer the reasonable cost of implementing that freeze so that the customer may be able to weigh the cost of the freeze against its perceived benefit and make an informed decision whether to request a freeze. Under no circumstances should customers who have already chosen, and are using, particular long-distance carriers have their prior choices questioned or revoked without their permission.

Paragraph 16: The Commission seeks comment on "the costs and benefits of a default freeze."[14]

Comments to Paragraph 16: As outlined in the comments to NPRM Paragraph 14, Commenters strongly oppose any default freeze and believe that the costs far outweigh any perceived marginal benefit in preventing slamming. The Commission's discussion in Paragraph

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13 *Id.* ¶ 15.

14 *Id.* ¶ 16.

16 narrowly focuses only on the monetary costs for carriers to implement a default freeze. Nowhere in that paragraph, however, does the Commission acknowledge the very real harm to competition as a very significant cost caused by imposing a default freeze, which, as described previously, would be anti-competitive and would give LECs a near monopoly on long-distance usage by their customers. In addition, no matter how simple or inexpensive the Commission may think the imposition of a default freeze would be, most consumers, given human behavior, will simply end up under the default rule by taking no action, which would provide a huge unfair competitive advantage to the LECs that also provide long-distance service.

Similarly, the Commission attempts to measure perceived "savings" from not having to restore service for customers who have been slammed, but any such perceived savings must be counterbalanced by the costs experienced by customers who wish to change their long-distance carriers but find it more difficult and cumbersome to do so as a result of the default freeze. There is no reason to believe that these such "savings" would outweigh the accompanying costs, even putting aside the market harm described above.

2. NPRM Part III.B.2: Blocking Certain Third Party Charges by Default (¶¶ 17-21)

Paragraphs 17-19: The Commission seeks comment on whether to "require[e] wireline carriers to block third-party charges for local and long-distance service … by default, and only bill such charges if a consumer opts in."[15]

Comments to Paragraphs 17-19: As Commenters stated in the comments to NPRM Paragraph 13, we do not condone cramming. We oppose, however, a ban on including third-party long distance charges on LECs' bills unless a consumer specifically opts in to the inclusion

15 *Id.* ¶ 18.

of these charges, as such a ban would render more cumbersome consumers' ability to choose alternative carriers. The proposal also would be anti-competitive, unfairly would favor incumbent LECs because they would not be subject to the same restriction regarding long-distance service billing, and potentially would hurt hundreds of small businesses across the country by making it more burdensome for them to receive unified billing for local and long-distance service where they have chosen different carriers to provide such services.

In addition, such a restriction seriously risks running afoul of the First Amendment. As the Supreme Court has held, "the creation and dissemination of information are speech within the meaning of the First Amendment";[16] the billing information that the Commission proposes to suppress easily falls within the scope of this statement. In an analogous context, the Supreme Court found that third-party communications included with a utility company's consumer billing statements are constitutionally protected speech.[17] Similarly, a federal district court found that when telecommunications service providers "convey certain information by placing a line item on their customers' bills," they "engage in 'speech.'"[18] The Commission itself similarly has acknowledged that information included on consumer bills constitutes speech protected by the First Amendment.[19] Therefore, so long as the billing information at issue concerns lawful

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16 *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *see also Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1207 (E.D. Cal. 2015) ("speech that conveys price information" "is protected by the First Amendment").

17 *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986); *see also Consolidated Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 535 (1980) (finding that state agency's ban on bill inserts is an unconstitutional "limitation upon speech").

18 *AT&T Corp. v. Rudolph*, No. 06-16, 2007 WL 647564, at *11 (E.D. Ky. Feb. 27, 2007); *see also id.* ("A Line Item Charge is 'Speech.'"); *Bloom v. O'Brien*, 841 F. Supp. 277, 280-81 (D. Minn. 1993) (treating line item charges on medical patient bills as protected speech).

19 The FCC has previously recognized that, with respect to regulating the content of consumer billing statements, "the First Amendment is implicated." *See Cramming FNPRM*, 27 FCC Rcd. at 4482 ¶ 128.

activity and is not misleading, it is protected commercial speech and can only be restricted if the Commission's regulations satisfy the test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[20] Specifically, any such restrictions are constitutionally impermissible unless they: (1) purport to protect a substantial governmental interest; (2) "directly advance[] the governmental interest asserted"; and (3) are not "more extensive than is necessary to serve that interest."[21] "Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment."[22]

Here, the billing information that the Commission proposes to restrict indisputably concerns lawfully offered third-party long-distance services. Therefore, any regulations that the Commission proposes to issue must comport with the stringent requirements of the *Central Hudson* test to avoid being stricken as unconstitutional.

Paragraph 20: The Commission seeks comment on various ways to mitigate the effect of a default opt-in requirement on third-party billing, including whether to subject carriers that offer only local service to this requirement, whether to grandfather consumers that "currently subscribe to a third-party local or long-distance service," and how to minimize the impact of such a requirement.[23]

Comments to Paragraph 20: Again, Commenters strongly oppose a blanket opt-in requirement for third-party billing.[24] To the extent that the Commission nonetheless decides to attempt to impose such a requirement notwithstanding the serious First Amendment and other

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20 447 U.S. 557, 561, 566 (1980).

21 *Id.*

22 *Sorrell*, 564 U.S. at 571-72.

23 NPRM ¶ 20.

24 *See supra* Comments to Paragraphs 17-19.

impediments in doing so, consumers who already have third-party long-distance providers should not have to opt in to continue to enjoy third-party billing. Moreover, it would be cost prohibitive for small competitive carriers to implement this proposal retroactively and may not be 100% effective (due to lack of swift consumer response, etc.), thereby giving the default LEC a sizeable and unfair competitive advantage.

Paragraph 21: The Commission seeks comments "on the costs and benefits of an opt-in process for third-party local and long-distance charges."[25]

Comments to Paragraph 21: Again, Commenters strongly oppose a blanket opt-in requirement on third-party billing and believe that the costs far outweigh any perceived marginal benefit in preventing cramming.[26] As was true regarding the FCC's discussion in Paragraph 16 of the purported costs and benefits of a default carrier freeze rule, the Commission's discussion in Paragraph 21 regarding the costs and benefits of an opt-in requirement narrowly focuses only on the monetary costs for carriers to implement such a ban. The Commission also needs to acknowledge the very real harm to competition as a significant cost caused by imposing a default opt-in requirement, which, as described previously, would be anti-competitive and would give LECs unfair market leverage to serve as the long-distance carriers of their customers. Given natural human behavior and the forces of inertia, a blanket opt-in requirement would result in large numbers of consumers either (a) defaulting to the LEC as their long-distance carrier in order to receive a unified bill for local and long-distance service or (b) receiving separate bills for local and long-distance service, which is a significantly less desirable market alternative that would place third-party long-distance carriers at a significant and unfair competitive

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25 NPRM ¶ 21.

26 *See supra* Comments to Paragraphs 17-19.

disadvantage vis-à-vis LECs. Such a regime would unfairly thwart consumer choice and result in a marketplace that resembles the monopolistic environment of the past.

C. NPRM PART III.C: DOUBLE CHECKING A SWITCH WITH THE CONSUMER (¶¶ 22-29)

Paragraphs 22-23: The Commission seeks comment on whether – in lieu of a default opt-in requirement for third-party billing – it should "require the executing carrier to confirm or 'double-check' whether the consumer wants to switch providers before making the change" and, if so, how best to implement it.[27]

Comments to Paragraphs 22-23: Commenters oppose in the strongest possible terms placing the responsibility of verifying a long-distance service switch in the hands of their largest and well-funded competitors. Such a process would create an insurmountable conflict of interest on the executing carrier's part between its obligation to comply with FCC regulations and its commercial objective of retaining its customers. No matter how stringent the regulations, executing carriers simply cannot be relied upon to refrain from engaging in customer retention efforts during such a verification process, including by delaying the verification process itself.

The potential for mischief is particularly troubling with respect to a requirement that such verifications be conducted during live telephone calls, where choice of wording, tone, emphasis, and other sales pressure tactics could be employed by the executing carrier's representatives as part of their customer retention efforts. This mischief cannot be cured by prescribing a specific script for executing carriers to follow, as those carriers could still use non-verbal tactics to dissuade consumers from switching carriers such as vocal tone, emphasis, pauses, and the like, and there would be no practicable means of enforcing strict adherence to such scripts. Equally

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[27] NPRM ¶¶ 22-23.

troublingly, compelled speech, like prohibited speech, is constitutionally problematic under the First Amendment.[28]

Such verification calls also would interfere with customers' freedom to switch their long-distance service to another carrier. In Commenters' experience, consumers demand and expect that a switch to another service will be accomplished easily and efficiently. Delays could occur if the executing carrier is unable to contact the customer and, if contact efforts remained unsuccessful, customers could be forced to remain with a long-distance carrier he or she has chosen to replace or even stranded without service. Customers are then also likely to contact the submitting carrier with such potential issues, and already limited resources would need to be reallocated to interface with LECs for a resolution. In short, this proposal is highly anti-competitive and would not facilitate the simple movement of customers between carriers of their choice, as was intended by the Act.

Paragraph 24: The Commission seeks comment on the extent to which market trends impact the need for the Commission's proposed slamming rules, how to "avoid unintended negative consequences" of the Commission's proposals, and whether the proposals would "effectively 'lock' consumers into bundles of services that may not meet their" needs.[29]

Comments to Paragraph 24: While Commenters acknowledge that there is a wider variety of communications technologies available today, the market for traditional wireline services is significantly less competitive than in the recent past. Indeed, the availability of competition in the traditional stand-alone long-distance space is trending in the opposite

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[28] *See, e.g., Agency for Int'l Dev't v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) ("It is …a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'").

[29] NPRM ¶ 24.

direction, especially due to the mega mergers of a few telecommunications giants that control the vast majority of traditional communications networks in this country. These large carriers have become increasingly aggressive about marketing bundled service, including bundles involving newer and other technologies, to consumers, but that does not mean that such bundles are the best options or should be the only options for consumers. Commenters do not believe that customers should be "locked" into any one service or bundle and not have the freedom to move to other carriers or be so restricted in their ability to use traditional services, including third-party long-distance, as to be forced to transition to products that some consumers may not want. Commenters believe that this is precisely the effect that adoption of certain of the Commission's proposals – such as a default carrier freeze, bundling the carrier freeze for all carrier services, and erecting additional barriers before allowing a customer to change long-distance carriers – would have.

Paragraph 25: The Commission "seek[s] comment on whether the Commission's previous concerns about delays and anti-competitive practices that could arise from a double-check requirement are still valid" and, if so, whether they are "outweighed by other factors, such as ensuring that consumers are not victimized by the new forms of slamming."[30] The Commission also "seek[s] comment on whether and how the changed circumstances since 1998 have reduced the danger of anti-competitive behavior, as well as how to structure a double-check mechanism to avoid or limit any competitive harms."[31] The Commission also acknowledged its prior "concern that requiring verification by the executing carrier could be a de facto preferred

30 NPRM ¶ 25.

31 *Id.*

carrier freeze without the consumer's consent that would take control away from consumers."[32] Despite the Commission's concern about restricting consumer choice, it nonetheless also "seek[s] comment on whether [it] should adopt both a verification by the executing carrier and the default carrier freeze" it has proposed, whether these measures are duplicative, and the costs associated with these measures.[33]

Comments to Paragraph 25: Commenters appreciate the Commission's recognition that there are significant anti-competitive concerns associated with its contemplated verification requirement of carrier switches and strongly believe that those concerns, as well as the Commission's concerns about delays in implementing such switches, remain well-founded, as explained earlier in comments to NPRM Paragraphs 22-23. Not only would a secondary verification requirement greatly increase the risk that LECs would engage in anticompetitive conduct in attempting to dissuade their customers from switching carriers, but it would significantly curtail consumers' freedom to choose their preferred carrier to provide long-distance service. In Commenters' experience, customers want and expect to be able to change services when they want to without having to jump through complicated hoops to do so.

As previously explained in comments to NPRM Paragraph 14 and NPRM Paragraphs 22-23, Commenters strongly oppose any requirement that an executing carrier verify a carrier switch as well as any default carrier freeze based on anticompetitive, First Amendment, and other grounds. Imposing <u>both</u> such proposals would compound the problems associated with restricting consumers' choice of carriers. Commenters do not condone slamming or cramming, yet imposing further wide-reaching prophylactic measures would not necessarily deter those

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32 *Id.*

33 *Id.*

seeking to engage in illegal activities but, on the other hand, would inhibit legitimate competitive activities. Commenters strongly urge the Commission to refrain from adopting vastly over inclusive additional measures that would harm legitimate competition among carriers.

Paragraph 26: The Commission "seek[s] comment on the costs and benefits of requiring some form of secondary verification by the executing carrier before switching a consumer's long-distance provider."[34]

Comments to Paragraph 26: Commenters previously have described the significant costs and marginal, if any, benefits, of the Commission's proposed additional verification requirement in comments to NPRM Paragraphs 22-25. Commenters are small long-distance carriers and reiterate our strong disagreement that the LECs – our largest and well-funded competitors – should be required to verify customer orders for Commenters' services before the customer can be switched to Commenters' services. The LECs will have a strong incentive to attempt to retain those customers and no incentive to make the switching process quick or easy. Rather than creating and administering secondary verification requirements, Commenters believe that the better, more efficient, and targeted solution would be to improve the existing verification process. Suh a solution would create a more robust, affirmative obligation at the outset, rather than creating another layer of cumbersome "secondary" regulation that would add unnecessary costs for consumers, carriers, and the regulators tasked with enforcing the rules.

Paragraphs 27-29: The Commission seeks comment on its changed interpretation of section 222(b) of the Act, which bars carriers from using proprietary information received from another carrier for marketing efforts.[35] The Commission previously believed that verifications of

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34 *Id.* ¶ 26.

35 *Id.* ¶¶ 27-28.

carrier changes by executing carriers would violate this section.[36] Now, however, it tentatively concludes that such verifications fall under the exception in this provision that "allow[s] the carrier to use the customer information 'to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to such services'" so long as any implementing rules "bar the executing carrier from using the confirmation process for marketing or anticompetitive purposes."[37]

Comments to Paragraphs 27-29: Commenters strongly believe that the Commission's longstanding prior interpretation of this section is correct and strongly agree with the current implementing rules as written. Placing one well-funded competitor carrier in the position of purportedly acting "to protect users of [telecommunications] services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to such services" would stretch this exception beyond its purpose, result in the exception swallowing the rule, and lead to potential abuses of the exception as the executing carrier acts in its own competitive self-interest. For example, while purporting to verify a switch request, an executing carrier, by voice tone, innuendo, or wording, could imply that the switch request was fraudulent or inappropriate, which may improperly cause customers who knowingly authorized the switch to change their minds and stay with the executing carrier's service. The Commission's new interpretation also would award a huge unfair competitive advantage to executing carriers at the expense of competing carriers, thereby severely harming market competition and restricting consumer choice.

While the rules state that the executing carrier may not use this information to either retain or sell to a third party's customer, there is no process in place (other than the honor

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36 *Id.* ¶ 28.

37 *Id.*

system) to ensure that does not happen. Moreover, the Commission's proposal essentially would allow executing carriers to presume that every carrier change transaction is fraudulent, abusive, or unlawful even absent any evidence to the contrary. If the Commission decides to move forward with this proposal, then, at a bare minimum, executing carriers should be subject to the same requirements as submitting carriers to use a neutral third-party for verification purposes, to have such verifications recorded and audited, and to be subject to penalties and reimbursement procedures if those recorded verifications do not comply with adopted standards or if verifications are not performed promptly after a switch request. Nevertheless, Commenters do not believe that such safeguards would remedy the mischief and competitive harm that would result from a secondary verification requirement and exceptions that swallow the rule.

D. NPRM PART III.D: OTHER MEASURES (¶¶ 30-35)

1. NPRM Part III.D.1: Recording Sales Calls (¶¶ 30-32)

Paragraphs 30-32: The Commission seeks comment on whether submitting carriers should be required to record all sales calls and whether its rules should forbid sales representatives from "making any false or misleading statements to the consumer regarding the third-party verifier or the role of the verifier."[38] It further seeks comment on "whether submitting carriers that rely on TPVs should be required to record the entire sales call that precedes a switch," whether the Commission should dictate that particular content be included in such calls, the First Amendment implications of compelling such speech, and the costs and benefits of such requirements.[39] It also seeks comment on whether, in the alternative, recordings

38 NPRM ¶¶ 30-31.

39 *Id.* ¶¶ 31-32.

of sales calls should be voluntary and whether such recordings should provide an affirmative defense to allegations of slamming.[40]

Comments to Paragraphs 30-32: Commenters do not object to the inclusion of a provision making the recording of sales calls voluntary and providing that such recordings may serve as an additional affirmative defense to allegations of misrepresentations. Commenters believe, however, that the more efficient and effective approach would be to recognize the TPV process for what it was intended to be – a presumptive method for competitive carriers to refute slamming and misrepresentation complaints and to obtain certainty in the finality of a carrier change transaction. An improved TPV process (as Commenters propose below) would better alleviate concerns regarding the sales process, while voluntary recording of sales calls, where feasible, would only be necessary to refute any substantiated evidence that misrepresentation and/or deception actually occurred.

Commenters oppose any provision that mandates the recording of such calls or that prescribes specified text for such calls. Commenters' companies are small businesses with limited resources. Requiring all sales calls to be recorded would be cost prohibitive for Commenters, and also would not be feasible – due to cost and administrative concerns – for the small third-party marketing companies that Commenters are able to use.[41] A requirement that companies create, catalogue, and retain recordings of sales calls would impose an enormous financial and administrative burden on carriers and, for many smaller companies, including

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40 *Id.* ¶ 31.

41 In Commenters' experience, small telemarketing companies do not have the resources to use systems capable of recording all sales calls, and most refuse to do so due to additional operational risks and compliance costs associated with the varying state consent requirements for call recording.

Commenters and their third-party sales representatives, would require that additional technological functions be developed or outsourced.[42]

Finally, any requirements mandating the inclusion of specific content in such sales calls constitutes compelled speech subject to the First Amendment and would need to comply with the test articulated in *Central Hudson* to be permissible.[43]

2. NPRM Part III.D.2: Third-Party Verifications ("TPVs") (¶¶ 33-35)

Paragraph 33: The Commission seeks comment on whether it should eliminate TPVs, the costs and benefits of such elimination, and potential alternatives to such TPVs.[44]

Comments to Paragraph 33: Commenters believe that TPVs are an effective means of providing evidence of a consumer's wish to switch carriers – and even more so with the improvements that Commenters suggest below. Decades of resources have been invested in developing and implementing the TPV process, and eliminating it would be, in Commenters' view, a costly endeavor without any corresponding benefits. While Commenters do not oppose offering alternative authorization mechanisms, the Commission should not mandate any particular method, require adoption or implementation of a particular technology involving significant cost investments,[45] or completely reinvent the wheel.

Paragraphs 34-35: The Commission seeks comment on whether to augment its current TPV requirements to make it more difficult to falsify such TPVs, including by requiring

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42 Commenters estimate the average cost of such implementation efforts to exceed $20,000, not to mention ongoing costs related to maintenance, storage, and archival of recorded data, which could increase annual operating expenses by more than $80,000. For small businesses like Commenters, these costs could represent as much as 10% to 30% of annual gross revenue.

43 *See supra* Comments to Paragraphs 17-18, 22-23.

44 NPRM ¶ 33.

45 For example, online sales portals are, for Commenters, typically cost prohibitive.

consumers to recite the numbers that they would like to have switched to another carrier.[46] The Commission also seeks comment on whether there are "other ways to ensure the validity of" TPVs, such as "requir[ing] certification of third-party verifiers by either carriers or the Commission," and whether it has "authority to require such certification," or whether there are updates that could "make rules clearer and easier to follow."[47] Finally, the Commission asks for feedback on ways to "further mitigate the costs by, for example, extending implementation deadlines and considering additional specific relief for smaller carriers."[48]

Comments to Paragraphs 34-35: Commenters welcome the adoption of targeted, effective, and common sense regulations aimed at enhancing the reliability of TPVs. We believe that a more robust TPV process should alleviate most, if not all, of the concerns regarding slamming and misrepresentation. Not only would a more robust TPV process better protect consumers, it would also: provide greater certainty and finality in the carrier change transaction; avoid the costs, confusion, and efforts that would be needed to implement more complicated proposals (*e.g.*, opt-in, secondary verification, default freezes); ensure that competition is not unduly and unfairly hindered by processes that place even greater restrictions on the ability for consumers to easily and freely change carriers; and avoid the potential for anticompetitive conduct that could occur from allowing LECs and other executing carriers to second-guess a consumer's validly given authorization.

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46 NPRM ¶ 34.

47 *Id.* ¶ 35. While Commenters are not opposed to such a requirement, we do not believe that certification of third party verifiers is necessary. Companies using third party verifiers are ultimately held responsible for any failures in the verification process. Accordingly, it is in a carrier's best interest to carefully vet and only to use legitimate verification companies.

48 *Id.*

In addition to the improvements Commenters propose below,[49] we also offer suggestions on clarifying changes to make the rules easier to follow and comments on implementation deadlines and additional relief for smaller carriers. For ease of reference, our proposed changes track the current, relevant language of Section 64.1120, with additions underlined and deletions stricken through.

In our experience, consumers typically do not understand or recognize the distinction between intraLATA and interLATA toll service. We suggest updating the "separate authorization" requirement to reflect more commonly understood terminology: local toll and long distance. We also suggest other clarifying additions to Section 64.1120(b) as follows:

> (b) Where a telecommunications carrier is selling more than one type of telecommunications service (e.g., local exchange, ~~intraLATA~~ local toll, and long distance ~~interLATA toll~~), that carrier must obtain separate authorization from the subscriber for each service sold, although the authorizations may be obtained within the same method of verification ~~solicitation~~. Each authorization must be ~~verified~~ provided or confirmed separately from any other authorizations obtained in the same verification ~~solicitation~~. Each authorization must be verified in accordance with the verification procedures prescribed in this part, although a separate verification of all other information required to be elicited under the applicable procedure is not required for each service authorized.

To provide consumers with additional protection from slamming and misrepresentation, we propose that additional disclosures be required during the TPV process. In order to make TPVs more difficult to falsify, Commenters propose to require the elicitation of more robust authorization statements – ones less susceptible to being elicited by yes-or-no questions unrelated to the carrier change process and thereby less likely to be fabricated – from consumers to support the presumptive validity of a TPV. Additionally, we propose modifying the "drop off

[49] These proposals are also in connection with Commenters' suggested change to the Commission's proposed addition of Section 64.1120 (a)(1)(i)(A). *See supra* Comments to Paragraph 12.

requirement" for three-way calls with a "call back" requirement that would better insulate the TPV process from the sales process and would validate further the identity of the subscriber providing the authorization. Commenters' proposed modifications to Section 64.1120(c)(3)(i) – (iii) are as follows:

> (i) *Methods of third party verification.* Automated third party verification systems and three-way conference calls may be used for verification purposes so long as the requirements of paragraphs (c)(3)(ii) through (c)(3)(iv) of this section are satisfied.
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> (ii) *Carrier initiation of third party verification.* A carrier or a carrier's sales representative initiating a three-way conference call or a call through an automated verification system must drop off the call once the three-way connection has been established. For non-automated verification systems, the following additional procedures also apply.
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> (A) During the three-way connection, the sales representative may only provide the verifier with identifying information for the sales representative, the identity of the subscriber (for non-residential subscribers, identity includes the business name and person's title), and the telephone number to be switched. If more than one telephone number is to be switched, only the main billing telephone number where the subscriber can be reached shall be provided.
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> (B) The verifier shall confirm that the subscriber understands that if the subscriber has additional questions for the carrier's sales representative, the three-way connection should be terminated and re-initiated after the subscriber's questions are resolved and that, upon completion of the verification process, the subscriber will have authorized a carrier change.
>
> (C) Upon completion of the exchange of information under (c)(3)(ii)(A) & (B), the verifier shall inform the subscriber that the three-way call will be ended, the sales representative will drop off the call, and the verifier will initiate a call-back to the telephone number provided by the sales representative to complete the verification.
>
> (iii) *Requirements for content and format of third party verification.* Any description of the carrier change transaction by a third party verifier must not be misleading ~~and,~~. The third party verifier must clearly and promptly, at the outset of the verification call-back, disclose the identity of the carrier, whether the carrier is affiliated with the call recipient's local exchange carrier or existing toll service provider, that the purpose of the call is to confirm the call recipient's intent to change preferred carriers for his or her long distance, international, and/or other toll service, and to obtain the call recipient's approval to effectuate such change. Before

proceeding with the rest of the verification, the third party verifier shall obtain confirmation that the person on the call understands the initial disclosures and that the sales representative did not provide any contradictory information (*i.e.*, the sales representative did not engage in misrepresentation or deception). Additionally, all third party verification methods shall elicit, at a minimum: The date of the verification; the identity of the subscriber; confirmation that the person on the call is authorized to make the carrier change; confirmation that the person on the call wants to make the carrier change; confirmation that the person on the call understands that a carrier change, not an upgrade to existing service, bill consolidation, or any other misleading description of the transaction, is being authorized; the names of the carriers affected by the change (not including the name of the displaced carrier); all of the telephone numbers to be switched; and the types of service involved (including a brief description of a service about which the subscriber demonstrates confusion regarding the nature of that service). Absent evidence to the contrary, verifications that contain at least one multi-phrase confirmation statement (*e.g.*, a statement that is more than a simple yes or no, such as, for example, "I confirm that I am authorizing a carrier change to [name of carrier]") from the person on the call regarding the information to be confirmed shall be presumed valid. Except in Hawaii, any description of interLATA or long distance service shall convey that it encompasses both international and state-to-state calls, as well as some intrastate calls where applicable. ~~If the subscriber has additional questions for the carrier's sales representative during the verification, the verifier shall indicate to the subscriber that, upon completion of the verification process, the subscriber will have authorized a carrier change.~~ Third party verifiers may not market the carrier's services by providing additional information, including information regarding preferred carrier freeze procedures.

Commenters believe that these suggested modifications to the TPV rules, or substantially similar modifications, will further the Commission's goal of eliminating slamming and misrepresentation. If the Commission so requests, Commenters are willing to collaborate with the Commission and other industry representatives on additional common sense modifications to improve the TPV process. Finally, to the extent that the Commission's actions are limited to the more targeted approach we suggest here (*i.e.*, strengthening the TPV requirements in lieu of other, more complex proposals), Commenters do not believe that an extended implementation deadline would be necessary. A reasonable implementation time-frame of three to six months after adoption of the rules should be sufficient. If, however, the Commission adopts other

proposals, we would urge extending implementation deadlines, especially for smaller carriers such as Commenters, to at least one to two years.

CONCLUSION

Commenters appreciate the opportunity to be heard on these important issues and respectfully urge the Commission to act in accordance with the comments provided herein.

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