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William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Comments of Lexicom, Inc. on
Policies and Rules Concerning Unauthorized Changes of
Consumers' Long Distance Carriers, Docket No. 94-129

Dear Mr. Caton:

Enclosed are one original and nine copies of Lexicom, Inc.'s Comments in the above docket proceeding.

Please date stamp and return the enclosed duplicate copy of this letter as acknowledgment of its receipt.

Sincerely,

Randall B. Lowe

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules Concerning	)	CC Docket No. 94-129
Unauthorized Changes of Consumers'	)	
Long Distance Carriers	)	

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Comments of Lexicom, Inc.

Randall B. Lowe
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1200 Nineteenth Street, N.W.
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(202) 861-3900

Dated: January 9, 1995

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Unauthorized Changes of Consumers'	)	
Long Distance Carriers	)	

Comments of Lexicom, Inc.

Lexicom, Inc. ("Lexicom") hereby files these Comments in accordance with the Commission's Notice of Proposed Rule Making ("NPRM") in the above-captioned matter.[1]

On November 10, 1994, the Commission, on its own motion, initiated a rule making proceeding to review its policies and propose rules regarding unauthorized changes of consumers' interexchange carriers ("IXCs"). The Commission seeks comment on proposed rules prescribing the form and content of letters of agency ("LOAs") used to verify primary interexchange carrier ("PIC") orders. In addition, the Commission has sought comment on several other related issues.

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[1] Adopted and released on November 10, 1994.

I. Introduction

Since the Execunet decision by the U.S. Circuit Court of Appeals in 1977, IXCs have been competing for long distance customers.[2] Over the past seventeen years, competition between IXCs for customers has been intense. Today over 440 IXCs compete in quality of services offered, types of services, prices of services, and even compete in inducements offered to entice customers to switch IXCs. However, overzealous telemarketing by some IXCs resulted in the Commission adopting rules and procedures for verification of PIC change orders received through telemarketing techniques.[3] These verification rules and procedures have been in place since 1991 and have kept the number of PIC change complaints to remarkably low levels.

In fiscal year 1994, the Commission received only 2500 complaints with respect to PIC change orders.[4] Yet, on the basis of this insignificant number of complaints, the Commission implies in the NPRM that there is a widespread "PIC change problem" and proposes to revamp the present regulatory scheme with additional rules.

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[2] MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), cert. denied, United States Independent Tel. Assoc. v. MCI Telecommunications Corp., 434 U.S. 1040 (1978). Execunet was a service offered by MCI that enabled any subscriber to dial up MCI's network over the regular loop and bypass AT&T's long distance network. Initially, the Commission found that the Execunet service constituted an unlawful application of the authority for the shared use of private line services. However, on appeal, the U.S. Court of Appeals rejected the Commission's findings and ruled there was nothing in existing regulations to prohibit a specialized common carrier from competing with AT&T Long Lines. This meant that customers could dial up alternate long distance services.

[3] See 47 C.F.R. § 64.1100; In re Policies and Rules Concerning Changing Long Distance Carriers, CC Dkt. No. 91-64, Report and Order, 7 FCC Rcd. 1038, 1046 (1992) ("PIC Verification Order"), recon. denied, 8 FCC Rcd. 3215 (1993) ("PIC Verification Reconsideration Order").

[4] Assuming a conservative estimate of one million PIC change orders executed for fiscal year 1994, 2500 complaints when compared to one million PIC changes is a mere 0.25% of PIC changes for 1994.

The proposed PIC change rules are unnecessary and superfluous. They are not designed to add efficiency to the industry; to the contrary, among other things, they add unnecessary administrative inefficiencies and disproportionately harm the competitive viability of small IXCs. The Commission proposes these new rules under the genre of consumer protection. However, consumers are already protected by a myriad of existing federal and state laws and regulations specifically designed to protect consumers from the types of fraud and deception that the Commission cites in the NPRM. These consumer protections already provide consumers with judicial and administrative forums to adjudicate their complaints. Moreover, the Federal Trade Commission and other state consumer protection agencies were specifically created to prosecute cases of deceptive and fraudulent practices.

More regulations, especially nonessential regulations, distort the efficient allocation of the country's resources and, in the end, are detrimental to consumers in the form of higher prices, reduced services and less competition. In sum, the Commission will best achieve the consumer benefits objectives that underlie the NPRM by leaving the present PIC change rules unaltered.

II. Discussion

A. "Encouraging" consumers to switch IXCs through an 800 number

The Commission seeks comment on several proposed PIC change rules and IXC marketing practices. A particular concern of the Commission is the marketing practice of IXCs whereby consumer-initiated callers to an IXC are being "'encourag[ed]'" to switch IXCs. This "'encourage[ment]'" is especially troublesome to the Commission when the caller to an IXC's 800 number is "'encourag[ed]'" to switch IXCs even though the caller did not initially call the 800 number with the intent to switch IXCs. The Commission seeks comment whether an 800 number should be used by IXCs to receive consumer-initiated PIC changes and if so, whether the telemarketing verification protections should apply.

1. Consumer-initiated PIC change orders do not raise the same concerns as PIC changes generated by telemarketing techniques

The offering of an 800 number by an IXC is an explicit part of an IXC's overall marketing strategy to attract new customers. Clearly, a caller to an IXC's 800 number seeking information has at least some active interest in the services of the IXC and is probably "shopping around" for an IXC that best suits the caller's long distance calling patterns and financial ability. If during the course of the consumer's ensuing conversation the consumer chooses to make a PIC change, this is a consumer-initiated PIC change, not a telemarketing stimulated event, and therefore, the telemarketing safeguards designed to curb overly aggressive telemarketing tactics are inapplicable in design and practicality.[5] To require a consumer who has made a consumer-initiated PIC change to confirm his or her decision is redundant, wasteful and will discourage consumers from making PIC changes.

From the perspective of the consumer, even if the consumer was not predisposed to switch IXCs at the time the consumer-initiated the telephone call, there is a clear and obvious difference between a PIC change generated by telemarketer soliciting a consumer and a consumer-initiated PIC change. First, most consumers regard telemarketing calls as intrusive, irritating and coercive. They are considered an uninvited intrusion upon a consumer's privacy. However, a consumer that places a telephone call to an IXC's 800 number does so at his or her own volition and leisure, presumably, with the forethought that the 800 number is a part of a

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[5] In its PIC Verification Order, the Commission required IXCs to institute one of four confirmation procedures before submitting PIC change orders generated by telemarketing techniques to the local exchange carriers ("LECs"): (i) obtain the consumer's written authorization; (ii) obtain the consumer's electronic authorization by use of an 800 number; (ii) have the consumer's oral authorization verified by an independent third party; or (iv) send an information package, including a prepaid, returnable postcard, within three days of the consumer's request for a PIC change, and wait 14 days before submitting the consumer's order to the LEC, so that the consumer has sufficient time to return the postcard denying, canceling, or confirming the change order.

marketing strategy to eventually attract the consumer as a customer of the IXC. By virtue of making the telephone call, the consumer assumes active control of the situation rather than being a passive listener to a soliciting telemarketer.

Moreover, from the perspective of the Commission, there is also a clear and obvious difference between a PIC change generated by a telemarketer soliciting a consumer and a consumer-initiated PIC change. The Commission has explicitly stated that "a customer has the option of independently contacting the IXC to make arrangements for long distance service."[6] The term "customer-initiated PIC change" as defined by the Commission[7] is "an order to change a customer's PIC that is generated as a result of a communication to an IC or LEC originated by a customer." The definition does not require that the consumer call the IXC predisposed with the intent to change his or her PIC, merely that the consumer had to initiate a call that resulted in a PIC change. In addition, IXCs must still obtain LOAs for all PIC changes, including consumer-initiated PIC changes, for use in resolving disputes regarding PIC changes. If the IXC does not obtain a LOA, then the IXC is responsible for charges associated with a disputed PIC change.[8]

If the Commission is convinced that telemarketing safeguards should apply to consumer-initiated PIC changes received over an IXC's 800 number, the Commission should limit the application of such safeguards only to PIC changes received over telephone lines that are not dedicated to receiving consumer-initiated PIC changes. In other words, if a consumer calls a telephone number advertised and dedicated to consumer-initiated PIC changes and authorizes a

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6 In re Investigation of Access and Divestiture Related Tariffs, CC Dkt. No. 83-1145, Phase I, 101 FCC 2d 911, 929 (1985) ("Allocation Order"), recon. denied, 102 FCC 2d 503 ("Reconsideration Order").

7 In re American Telephone and Telegraph, Petition for Rule Making, Notice of Proposed Rule Making, 6 FCC Rcd. 1689 (March 14, 1991).

8 See, PIC Verification Reconsideration Order.

PIC change, neither the consumer nor the IXC should be burdened with the additional administrative costs and inconvenience of verifying the consumer-initiated PIC change. Nevertheless, if a consumer initiates a PIC change over a non-dedicated telephone line, arguably, the telemarketing safeguards have some applicability because the consumer does not have the same degree of intent to switch IXCs that is manifested by the consumer who calls a telephone number that is dedicated to PIC changes.

In sum, the telemarketing safeguards were designed to curb telemarketing abuse. They have been remarkably successful. However, they are inapplicable to consumer-initiated PIC changes that are made over 800 numbers dedicated to PIC changes, but may have limited applicability with respect to consumer-initiated PIC changes that are requested over an IXC's general, non-dedicated telephone lines.

2. The reasonable consumer

The NPRM implies that the American consumer is uninformed and incapable of making a rational decision. Consumers have become much more sophisticated telecommunications users since divestiture. They can and do make informed choices. Even so, more than adequate state and federal consumer protection laws exist to protect consumers. The FTC provides federal protections against "unfair and deceptive acts or practices."[9] All fifty states and the District of Columbia have their own laws based on the FTC's regulations against deceptive and unfair trade practices. These statutes already provide a forum and relief for consumers who file complaints regarding false or deceptive practices.

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[9] The Federal Trade Commission Act ("Act"), 15 U.S.C. §§ 41 et seq. was enacted in 1914. The 1938 Wheeler-Lea Amendments to the Act, 15 U.S.C. §§ 41-58 gives the FTC the authority to prohibit unfair or deceptive trade practices.

"Encouraging" consumers to make purchases or switch brand loyalties is not a novel marketing idea. For example, consumers have continually been enticed into buying magazines by envelopes exclaiming that "you might be a winner" upon entering a sweepstakes to win prizes and money. This method of marketing is perfectly legitimate and understood by consumers. Indeed, Publishers Clearing House was recently vindicated in a challenge to the manner in which it induces consumers, by its sweepstakes, to solicit magazine sales.[10] In that matter, the U.S. District Court for the Eastern District of California maintained that the FTC's standard of the "reasonable consumer," rather than the "unwary consumer" was the correct standard to apply to test a complaint alleging deceptive practices.[11]

In sum, a reasonable consumer knows that when he or she calls an 800 number belonging to an IXC and requests information regarding the IXC's services that there is a substantial likelihood that an representative of the called IXC will "'encourag[e]'" the consumer to switch IXCs. It is naive to assume otherwise.

III. Conclusion

The proportionally small number of PIC change complaints in relation to the total number of PIC changes executed each year indicate that there is no widespread "PIC change problem"

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[10] Haskell v. Time, Inc., 857 F. Supp. 1392 (E.D. Cal. 1994). The Court found that the alleged misrepresentations, including, exaggerations of the recipients chances of winning or implication that he or she has already won, exaggerations of the amount and value of the prizes, use of enticing photographs of the lifestyles available to the winner, and statements allegedly creating a false sense of urgency regarding the time for reply, were not misleading. Even when sweepstakes rules appeared in smaller type than the words used in the advertisement, they were found to not be illegible or misleading. Id. at 1400-1403.

[11] Id. at 1398. The court maintained that this the "reasonable person" standard is the "common standard in the law" and because it is the standard used by the FTC to determine whether a practice is false or misleading pursuant to 15 U.S.C. § 45(a)(1).

that would necessitate the industry-wide PIC change reform as suggested by the Commission. The use of 800 numbers by IXCs to receive consumer-initiated PIC rule changes is a legitimate, unintrusive and innocuous marketing technique which has none of the offensive attributes of telemarketing techniques that resulted in the adoption of the Commission's telemarketing safeguards.

Extending telemarketing safeguards to consumer-initiated PIC changes imposes unnecessary administrative costs on IXCs and unnecessary inconveniences upon consumers which may discourage consumers from making PIC changes. However, the telemarketing safeguards may have limited applicability in situations where consumers initiate calls to an IXC's telephone line that is not dedicated to PIC changes and switch IXCs in response to an on-line solicitation.

In sum, extending the telemarketing safeguards to consumer-initiated PIC changes will provide no or little apparent benefit to consumers and burden IXCs with more administrative costs. The Commission will better serve the interests of consumers by continuing to permit consumers to make self-initiated choices of IXCs without being unnecessarily inconvenienced.

Respectfully submitted,

Lexicom, Inc.

By Randall B. Lowe by Joseph V. Ale

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Dated: January 9, 1995

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments to the Commission's Notice of Proposed Rule Making has been sent by United States first class mail, postage prepaid, or by hand-delivery, this 9th day of January, 1995, to the following:

Formal Complaints Branch
Federal Communications Commission
Enforcement Division
Common Carrier Bureau
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Simin Barbour

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