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 THE AMERICA'S CARRIERS TELECOMMUNICATIONS ASSOCIATION

Prepared by:

Charles H. Helein, Esq.
Julia A. Waysdorf, Esq.
HELEIN & WAYSDORF, P.C.
1850 M Street, N.W.
Suite 550
Washington, D.C. 20036
Telephone: (202) 466-0700
Facsimile: (202) 466-0717

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SUMMARY

This proceeding proposes rules to govern the language and content of Letters of Agency ("LOAs"). America's Carriers Telecommunications Association ("ACTA"), a trade association that represents the interests of communications resale carriers, strongly supports the goals of the FCC in this proceeding -- to protect consumers from misleading marketing materials and ensure that customers are aware that a switch in long distance carriers is being made when an LOA is executed. In fact, ACTA believes that such goals are critical to the growth and success of the resale industry. However, it also is critical that the FCC, in seeking to further those goals, not take action that unnecessarily prevents smaller interexchange carriers from effectively marketing long distance services to their target markets -- small business and residential end users.

It is for this reason that ACTA objects to the FCC's proposal to separate promotional offers from the LOA document. Promotions are a useful marketing tool that are favored by both large and small carriers. However, it is the smaller carriers that will be most impacted by the required separation, for such carriers do not have available to them the alternatives of massive advertising campaigns on radio and nationwide television.

But more importantly, such separation simply is not required to meet the goals of this proceeding. Alternatives are available that will equally protect consumers but at the same time reduce dramatically the adverse impact on small interexchange carriers. As

detailed in ACTA's comments, instead of adopting a rule that requires the separation of promotional offers, more emphasis should be placed on the language and type-face of the LOA itself. If the LOA document is clearly entitled a "Long Distance Service Application" (or a similar title), and if that title, as well as pertinent information on the long distance service and the interexchange carrier, is prominently displayed in bold typeface, consumers will be clearly informed that a switch of long distance service will occur if the LOA is executed. And if consumers are clearly informed in this manner, whether or not the LOA also contains a promotional offer simply will not matter. Consumers will neither be deceived, misled, or confused by a document that is so titled and structured; at the same time, consumers also will receive the benefit of legitimate promotional offers.

ACTA also proposes rules concerning local exchange carrier PIC change procedures and preemption of inconsistent state regulations. The rules proposed by ACTA will fully protect consumers but still allow smaller IXCs to effectively market and provide their services in a clear and explicit manner.

The FCC must be careful to ensure that any action taken herein promotes and strengthens the competitive long distance industry. Just a few days ago the FCC reiterated the important role that resale carriers play in that industry. The FCC must continue to recognize those needs and craft its regulations so as to meet the needs of both consumers and the carriers that serve them.

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COMMENTS OF THE AMERICA'S CARRIERS TELECOMMUNICATIONS ASSOCIATION

The America's Carriers Telecommunications Association (hereafter "ACTA"), by its attorney, hereby submits its comments in response to the FCC's Notice of Proposed Rulemaking, FCC 94-292 (hereafter "Notice"), in the above-captioned docket.

I. Introduction and Background

ACTA is a trade association established in 1985 to represent the interests of independently owned and operated communications carriers providing small business and residential users with switched based and switchless resale long distance communications service. ACTA's approximately 100 carrier members are supported by associate members of switch manufacturers, underlying facilities-based carriers, consultants and others interested in the expansion and growth of resold communications services and the competitive provision of communications services by independent small business companies dedicated to the service of small businesses, institutions and individuals comprising the small user community. ACTA member companies thus provide small business and residential consumers with viable, efficient, and cost-effective alternatives

to the services provided by the "Big-Three" long distance companies.

ACTA commends the efforts of the Commission to explore ways in which carrier marketing practices can be improved so as to minimize customer confusion and unauthorized switching of customers' long distance service providers. Such efforts are in fact critical to the continued success of the resale industry.

The years since divestiture have witnessed enormous growth in the resale segment of the interexchange services market -- a growth which has played a central role in the shape of the competitive interexchange market. However, regulatory bodies have been slow to recognize the true importance of this growth and its critical part in ensuring a continuation of effective competition. For example, the FCC frequently points to statistics concerning the "over 500" long distance companies operating in the United States (most of which are resale carriers and many of which are ACTA members) as proof that federal policies are successfully promoting a truly competitive marketplace. As a practical matter, little attention has been paid to the conditions affecting the resale segment of that marketplace. A continually vexing problem faced by the resale industry is that its ability to compete more effectively is hampered not only by the continually shifting regulatory system, but also by the inflexible and, at times, hostile practices by some of the local exchange and other established direct sale retail facilities-based carriers which adversely affect the manner in

which resale carriers are forced to compete and market their services.

Therefore, ACTA welcomes carefully crafted regulations that will promote greater customer understanding of carrier marketing practices so long as the regulations evenly address all such practices and avoid the perception of "small carrier bashing" which is too often the result, intended or not, of "consumer protection" efforts.

Therefore, in promulgating any regulations, it is critical that the Commission recognize that troublesome marketing techniques are not, in any way, limited to smaller carriers in the industry. Ironically, although it was a dispute over marketing tactics between MCI and AT&T that led to the Commission's adoption of rules in 1992 concerning telemarketing of long distance services, (Notice, ¶ 4-5),[1] the public and regulators seem unaware or unconcerned about the extent to which these large carriers use disinformation to gain unfair competitive advantage against small carriers. It is therefore no great surprise, unfortunately, that once again, it is the smaller carriers in the industry that will bear more of the impact of the rules now being proposed.

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[1]Surely the Commission is aware that certain of the practices cited in the Notice -- most notably the mailing of checks to consumers which, when endorsed and cashed, switch the customer's long distance service -- frequently are used by AT&T and the larger carriers. These carriers also run promotional offerings involving free goods and services for switching to the carrier, including, but not limited to, providing the customer with points/credits for participation in an airlines' frequent flyer programs. Many of these programs involve perforated LOA and promotional materials on the same document.

For example, because such companies do not have huge advertising budgets like larger carriers, Letters of Agency ("LOAs") that reach the customer through mailings or display tables or boxes, in conjunction with promotional inducements, often are the most, and in many cases, the only, cost-effective method of reaching potential customers -- particularly residential subscribers. It is critical, therefore, that the Commission, in its zeal to correct a perceived consumer problem, not lose sight of the needs of smaller carriers to efficiently and economically market their services.

It also is critical that there is an adequate understanding of the scope and nature of the problems confronting consumers. The Commission must move deliberately to create a record which properly documents the promotional inducements which are truly causing problems before any final action is taken. For example, the Notice states, in the opening paragraph, that the FCC received over 1700 "slamming" complaints in Fiscal Year 1993, and over 2500 such complaints in 1994, but then goes on to state that "many" of the complaints involve telemarketing calls. ACTA submits it would not be proper to fashion rules directed to the use of LOAs based on complaints caused by telemarketing sales, without also establishing a nexus between the telemarketing and related customer LOA. Moreover, the number of LOAs being complained of that actually contained promotional inducements also must be determined. Additionally, it is important to consider the number of complaints in proper perspective -- i.e., the millions of customers who signed

up for long distance service during that same time period and did not file complaints with the FCC; the number of complaints in which clear and accurate LOAs or sales presentations were used but the customer either changed its mind, forgot that he or she authorized a switch in carriers, experienced "buyer remorse", were "re-marketed" by the incumbent carrier, were led to believe the new carrier was inferior by the incumbent carrier; or simply wanted an excuse to avoid paying for the charges incurred. Also, the Commission must examine how many complaints involve errors by the local exchange carrier implementing the PIC change and how many involve inadvertent "human error" such as the transposing of a telephone number by a data processing operator.

It is incumbent on the Commission to reveal the nature of the complaints, to the extent known, in order for meaningful regulations to be fashioned. Reliance on the volume of complaints alone will not produce a reasoned or justified regulatory response. For example, the remedies now proposed in the Notice involve changes to the LOA to require contests and other promotions to be completely separate from the LOA, as well as to require the LOA to contain (or not contain) certain language and type face. Some of the proposed changes can be supported. For others, better alternatives to those proposed can be fashioned which not only will protect legitimate consumer interests, but also avoid regulatory intrusion into legitimate management discretion on how to devise effective marketing efforts.

II. The Language, Typeface and Structure of the LOA Is More Important Than the Separation of Promotional Inducements

ACTA supports reasonable guidelines for the acquisition, submission, and processing of primary interexchange carrier ("PIC") change requests. Clear and reasonable guidelines are viewed as having direct benefit for the resale industry by promoting more competitive resale and greater interexchange competition. However, focusing on promotional inducements that accompany certain LOAs is not viewed as desirable or necessary, and neither is requiring that such offers be kept completely separate from the LOA itself. A balanced approach appears to ACTA to be contained in the language of the Notice itself. The Notice describes what is considered to be an "apparently deceptive marketing practice", which is the use of a "form document that does not clearly advise the consumers that they are authorizing a change in their PIC." Notice at p. 5 (emphasis added). The underscored language is precisely the point-- if the form document does in fact clearly advise the consumer that a change in carrier is being authorized, then it is immaterial that the document also contains a promotion, or offers a prize, participation in a drawing, etc.[2]

The Notice also addresses LOAs that are "disguised" as contest entry forms or solicitations for charitable contributions. Id. A

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[2]The Notice appears to be concluding, without any documented support, that all LOAs that are combined with promotional inducements do not clearly advise the consumer that a change in carrier also is being authorized, and that therefore all such LOAs seem to be assumed as deceptive. This is not the case on an industry-wide basis today. And, if the Commission adopts rules concerning the language and type-face of LOAs, it could not be the case in the future.

fortiori, if the LOA is clearly labeled as a long distance service application in prominent letters that "jump out" at the consumer, clearly it is not being "disguised" as anything, and it therefore will not confuse or mislead the consumer if the LOA also happens to contain language concerning a prize drawing or charitable contributions that are being made by the long distance carrier.[3]

The Commission's proposal on page 8 of the Notice that the text of the LOA be "clear and unambiguous" and that it be printed in "type that is sufficiently large and of such a style to be clearly legible" is viewed as far more important to educate consumers than whether the promotional language is on a separate piece of paper. In this regard, ACTA supports an FCC effort to designate specific language to appear on LOAs that is standard, straightforward, and unambiguous. For example, LOAs could be clearly entitled a "Long Distance Service Application" or similar title. The title would be prominently displayed. The title could be required to use larger type face and bolder print than language concerning a promotional message. Importantly, these types of changes could be implemented by carriers within the context of their present marketing programs. In short, by allowing language on promotions in the same document as the LOA, the carrier's

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[3]The Notice appears to assume that every prize offering or reference to a charitable contribution that is contained in an LOA is not a proper or lawful offering. No support is given for that assumption. The Commission should be aware that the vast majority of the promotional and charitable offerings being administered by long distance carriers are legitimate and not only generate increased usage for the carrier, but also add to the effectiveness of the competition for customers.

discretion on how best to market its services is left intact and saved from government encroachment.[4]

III. Rules Should be Adopted to Protect All Interexchange Carriers, Including Resale Carriers

The time has finally arrived that the Commission has recognized the growth and importance of the resale sector of the interexchange industry.[5] The Commission should build on this and seek to promulgate rules that acknowledge such recognition. Resale carriers are common carriers, no more and no less than facilities-based carriers. Resale carriers have all the obligations and responsibilities that accompany such common carrier status, and it is only proper that the FCC definitively recognize their status as

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[4]The Notice recognizes that inducements "may be proper and effective marketing devices for attracting customers to an IXC's service." Notice, p. 8. Nevertheless, the FCC has indicated it would consider comments on prohibiting inducements altogether, or to require they be mailed in a separate envelope from the LOA. Because some form of promotional inducements are used by all carriers, including the "Big-Three," clearly it would be the smaller carriers that would be most hurt by such a prohibition. Smaller carriers do not have the resources for massive advertising campaigns. Moreover, the Commission is exposing itself to a constitutional embroglio over commercial speech, for it is all too possible that the FCC would have to specifically delineate, based on a complete record, the precise types of "inducements" that would be prohibited. For example, contest entries might be prohibited, but not offers of free or waived installation charges and/or monthly fixed or usage fees. Offers of frequent flyer mileage, or offers of free goods and services, which are common marketing tools of AT&T, MCI and Sprint should become suspect. If inducements are to be prohibited from being included in the same mailing as the LOA, by that same reasoning, AT&T, MCI and Sprint must be prohibited from advertising reduced long distance charges, frequent flyer miles, or other free services for a promotional period in the same TV spot in which they are asking customers to sign up for their service.

[5]See Notice of Apparent Liability for Forfeiture and Order to Show Cause, In re AT&T Communications, FCC 94-359 (rel. Jan. 4, 1995).

such. In the context of this rulemaking, such recognition requires rules concerning the language of the LOA itself, as well as the manner in which PIC changes to resale carriers are handled by the local exchange carriers ("LECs").

First, customer confusion will be greatly alleviated, and resale carriers will be protected, by FCC rules that mandate that the only IXC name to appear on the LOA is the IXC that actually bills the end user, and that that name be prominently displayed on the LOA itself. As the LOA constitutes a contractual arrangement between the billing IXC and the end user, and the billing IXC is responsible for all marketing practices, billing, customer service and other responsibilities related to providing the end user with telecommunications service, no other carrier name is necessary to be listed. And if no other carrier is designated on the LOA document, and if the name of the billing IXC is conspicuously noted on the LOA, customer uncertainty as to the service that is being ordered will be considerably minimized.

Additionally, the FCC needs to officially recognize that resale carriers must be accorded equal carrier status with all other carriers. For example, LECs must be required to assign resale carriers their own CIC codes, with appropriate translations as necessary to allow resellers to select their underlying long-distance facility provider.[6] Assigning separate CIC codes

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[6]ACTA suggests the Commission could assist on more rapidly integrating the status of resale carriers into the fabric of competitive telecommunications by routinely referring to them in a shorthand manner as "RIXCs," i.e., resale interexchange carriers.

facilitates direct identification of the resale carrier for the purpose of answering end user inquiries, confirming PIC changes, and resolving PIC disputes and complaints. Customer confusion concerning PIC changes would be reduced and the RIXC, assigned its own CIC code, can market its service in a manner that is virtually identical to its facilities-based competitors. At the present time, however, a customer that has questions about its long distance carrier status, must call a LEC customer service operator or a 700 number to inquire about such status. These customers are then misinformed that they are a customer of the "underlying facilities provider" and not the RIXC. Such customer confusion and misinformation produce not only unnecessary complaints to both this Commission and the carriers, but further unbalances the already unlevel competitive playing field.

Moreover, RIXC CIC codes will also aid the Commission, other regulatory agencies, and the LECs in the resolution of customer complaints. Problems and complaints can be traced to the IXC which has contracted with the end user, rather than having to work through the underlying facility provider in order to investigate and resolve the service problem.

Finally, LECs also should be required to provide RIXCs, at a reasonable cost, with verification of the customer name and address information associated with a billing telephone number. Many LOAs are completed by customers by hand-written entries that are not completely legible. Additionally, the customer completing the form may simply transpose certain numbers when writing down the

telephone number, or LOAs may be completed fraudulently by writing in telephone numbers that are not those of the consumer. RIXCs have no way of verifying that the information provided on the LOA is accurate. As a result, inaccurate (but completely inadvertent) switches may be made. The means are well within the capabilities of the LECs to correct this problem and eliminate another source of "slamming" complaints. It merely requires the LECs to treat RIXCs as full-fledged interexchange carriers (which they are).

IV. Federal Preemption of Inconsistent State Regulations On LOA Format Is Required In Order to Promote Stability and Consistency in the Industry

While reasonable, carefully tailored federal regulations concerning the language and format of LOAs will be extremely beneficial to the resale industry as well as to consumers of long distance telephone services, ACTA is concerned that state regulations inconsistent with federal regulations adopted in this proceeding could lead to expensive and difficult compliance problems on the part of the industry, and to further customer confusion. ACTA requests that the Commission, as part of this proceeding, preempt any regulations of individual states that impose conflicting or additional requirements from those adopted herein.

ACTA is aware of at least two state public utility commissions, Florida and South Carolina, that currently have on-going proceedings concerning the rules for consumer selection of interexchange carriers. See Notice of Proposed Rulemaking, Docket No. 941190-TI, Order No. PSC-94-1566-NOR-TI, issued December 15,

1994 by the Florida Public Service Commission. It is reasonable to assume that other states may institute proceedings as well. Each individual state may adopt rules and requirements that differ from one another and that differ from the FCC's rules.

RIXCs market their services on a nationwide basis, and use the same LOAs for interstate and intrastate service in every state. To require a preprinted LOA form to differ with each state and/or depending on whether interstate or intrastate service is being marketed would be a logistical and marketing nightmare that would greatly increase the costs and complexity of marketing.

In contrast, a single, unified set of requirements that are known to both carriers and consumers alike will standardize carrier marketing practices and make all involved in the process aware of their rights and responsibilities. Consumer confidence in the long distance industry will increase, carrier marketing costs will be eased, and carriers that are unable or unwilling to comply with such requirements will be easily recognized and weeded out. The number of consumer complaints no doubt will greatly decrease, and state and federal regulatory and enforcement costs likewise will be reduced as well. Preemption under these circumstances therefore is appropriate. See, e.g., In re Rules and Policies Regarding Call ID, 9 FCC Rcd. 1764, 1775 (1994), citing, City of New York v. FCC, 486 U.S. 57 (1984) and Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); In re Petition for an Expedited Declaratory Ruling Filed by National Association for Information Services, et al., 8

FCC Rcd. 698 (1993), and cases cited in n. 33 therein; In re Operator Services Providers of America, 6 FCC Rcd. 4475 (1991).

V. Conclusion

ACTA stresses the critical importance that this Commission assess the impact on smaller long distance carriers of any final action to be taken in this proceeding. In other contexts, the Commission frequently points to the number of long distance carriers, both large and small, as proof that Commission deregulatory policies designed to foster a competitive marketplace are working as anticipated. Yet any action that threatens to disproportionately impact the "lower end" of the marketplace, not only will harm the competitive state of the marketplace, but also

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the realization of the public benefits the Commission's resale policy fosters.[7]

Respectfully submitted,

AMERICA'S CARRIERS TELECOMMUNICATIONS ASSOCIATION

By: Charles H. Helein
Charles H. Helein
General Counsel

Helein & Waysdorf, P.C.
1850 M Street, N.W.
Washington, D.C. 20036
(202) 466-0700 (Voice)
(202) 466-0717 (Facsimile)

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[7]On January 4, 1995, the Commission released a decision that once again reiterates its belief that "numerous public benefits...flow from unlimited resale and sharing activity...." Notice of Apparent Liability For Forfeiture and Order To Show Cause, In re AT&T Communications, FCC 94-359, at paragraph 12 (released January 4, 1995). This decision also states that "unlimited resale promotes the public interest by creating competitive pressures on carriers to provide service at rates near the cost of service and by stimulating demand for service. Id. at paragraph 2. In that very recent case, enforcement action was initiated against AT&T Communications for apparently violating Section 201(a) of the Communications Act for failing to provide service under its tariff to resale carriers. It would be incongruous to take action in this proceeding, so soon after reaffirming the importance of the resale industry to the competitive marketplace that will adversely impact resellers far more than other segments of the industry.