

FEB 8 1995

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

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

MCI REPLY COMMENTS

MCI Telecommunications Corporation (MCI) hereby provides its reply comments in response to the Commission's Notice of Proposed Rule Making, FCC 94-292, CC Docket No. 94-129, adopted and released November 10, 1994 (Notice). Therein, the Commission is proposing to adopt new rules addressing the form, content and use of "Letters of Agency" (LOAs) with a view toward protecting consumers from interexchange carrier marketing practices perceived to be confusing or potentially misleading.¹

Background and Introduction

Because MCI believes that "full disclosure" regarding its offerings serves the interests of consumers and carriers, it fully supports the Commission's objective of requiring clear and understandable LOAs, a position reflected in its initial comments. MCI indicated that it would support a requirement that print font be of a reasonable, prescribed size and that foreign-language solicitations be accompanied by foreign-language LOAs. MCI also indicated that it supports rules that would prohibit the use of "negative option LOAs," LOAs that also serve as contest

¹ Notice at 1. The Commission's proposed rules are set forth in Appendix A of the Notice.

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entry forms, and LOAs in the form of an endorsement of checks or other negotiable instruments.

However, as demonstrated by MCI and a number of other parties,² the Commission's proposals go far beyond what is needed to eliminate LOA problems. MCI thus opposes a rule that would prohibit the use of LOAs in combination with "inducements" and, further, would require that LOAs be a "separate document."³ Such a rule, if adopted as written, would lead to greater consumer confusion and would unduly restrict the legitimate marketing activities. This would be particularly disadvantageous since the interexchange marketplace continues to be dominated by a single carrier. It thus is important that competitors be given substantial flexibility in marketing their services.

A PIC-Change Document, Taken as a Whole, Should Reasonably Inform the Consumer of a Change in Service

It is apparent that the Commission's greatest concern

² See the comments of AT&T Corp. (AT&T) at 12, 15; Frontier Communications International (Frontier) at 1; L.D. Services, Inc. (L.D. Services) at 4; Telecommunications Resellers Association (TRA) at 12; Home Owners Long Distance, Inc. (Home Owners) at 4-6; ACC Corporation (ACC) at 2, 5; Hi-Rim Communications, Inc. (Hi-Rim) at 5; One Call Communications (One Call) at 6; Communications Telesystems International (CTI) at 7; MIDCOM Communications, Inc. (MIDCOM) at 8; America's Carriers Telecommunications Association (ACTA) at 1; Operator Services Company (OSC) at 4-5; Touch 1 Communications, Inc. (Touch 1) at 6; Telecommunications Company of the Americas (TCA) at 1.

³ While not part of the formally proposed rules, the Notice seems to suggest that the Commission is considering prohibiting LOAs and advertising material from being mailed to consumers in a single envelope. See Notice at 2, 8. MCI opposes any such proposal. Such a rule could significantly increase the cost of providing product information to consumers and would likely lead to more, not less confusion.

involves the use of documents which omit information explaining in a reasonable fashion that their execution will result in PIC changes. The Notice describes the problem of LOAs "disguised" as contest entry forms,⁴ and it describes the use of "a form document that does not clearly advise consumers that they are authorizing a change in their PIC."⁵ However, the Notice does not indicate that the Commission is opposed, in principle, to use of inducements with LOA forms. The Notice also does not indicate that the Commission believes LOAs must be separate documents in order to eliminate consumer confusion. It appears that the "inducements" and "separate document" rules are being proposed to establish a clear line between LOA text and promotional materials, thereby eliminating LOAs "embedded" in a backdrop of text unrelated to change of service.

To achieve the desired result, MCI believes it unnecessary for the Commission to adopt rules requiring that LOAs be separate documents, or prohibiting their use in combination with inducements, or prescribing precise LOA language. Rather, the goal can be accomplished merely by requiring that documents containing LOA text and other materials reasonably inform consumers that LOA execution will result in a PIC change. Consumers could not reasonably be deceived or confused by such an approach which is reflected in the following:

When a document contains a Letter of Agency in combination

⁴ Notice at 5.

⁵ Id.

with other information including, but not limited to, inducements to subscribers to purchase service, the document, taken as a whole, must reasonably inform the consumer that, by executing the Letter of Agency, a consumer is authorizing a change in his or her Primary Interexchange Carrier.

If the above approach were to be adopted, it would be unnecessary for the Commission to adopt specific rules governing LOA content.

MCI submits, as do a number of others, that the Commission should use its enforcement powers against those who engage in deceptive practices,⁶ imposing sanctions when necessary to serve as a punitive measure against wrongdoers and to remind others of its authority and disposition toward taking effective action.⁷ Thus, an approach which requires PIC-change documents to reasonably inform consumers of the consequences of their execution, coupled with enforcement action, when needed, would accomplish the Commission's purpose and, at the same time, not constrain legitimate marketing practices.

The Proposed Rules Raise Important Constitutional Issues

MCI also believes that the Commission should abandon its "inducements" and "separate document" proposals because they likely would not pass Constitutional muster. MCI believes that the rules, as proposed, would not satisfy the legal standards that regulation of Commercial Free Speech directly advance a substantial government interest in a manner that forms a

⁶ See, e.g., AT&T at 7; Sprint at 7; Frontier at 4.

⁷ See Cherry Communications, Inc., 9 FCC Rcd. 2086 (1994).

"reasonable fit" with that interest,⁸ and that it be no more restrictive than necessary to achieve the government's legitimate objective.⁹ It is unlikely that any court applying these standards would find that the proposed regulations are Constitutionally sound because the governmental objective of eliminating confusing or misleading LOAs could be accomplished with less restrictive measures than are being proposed.

Other Matters

MCI opposes the suggestion that telemarketing verification procedures should apply when a change order is made by telephone, irrespective of who initiates a call. The Commission has never applied its telemarketing rules¹⁰ to "800 number" calls initiated

⁸ See Destination Ventures v. FCC, No. 94-35295, 1995 U.S. App. LEXIS 1872, filed February 1, 1995 (9th Cir.). The burden is on the government to demonstrate the reasonable fit. Id. at 4; Edenfield v. Fane, 123 L.Ed. 2d 543, 113 S.Ct. 1792, 1800 (1993).

⁹ This assumes that a court would find the speech which the proposed rules intended to regulate is not inherently misleading. In Central Hudson & Electric Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980), the Supreme Court held that in such a case, the government may regulate commercial speech where (1) the government has asserted a "substantial" government interest, (2) the restriction directly advances a substantial governmental interest, and (3) the regulation is no more restrictive than necessary to achieve the government's objective [emphasis added]. Moreover, the proposed rules do not satisfy the standard that would apply if a court found the speech which the proposed rules intended to regulate is potentially misleading. In Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 110 S.Ct. 2281, 2287 (1990), the court held that in such a case, the regulation of the speech must be "no broader than reasonably necessary to prevent the deception."

¹⁰ See In the Matter of Policies and Rules Concerning Changing Long Distance Carriers, CC Dkt. No. 91-64, Report and Order, 7 FCC Rcd 1038 (1992), recon. denied, 8 FCC Rcd 3215 (1993). 47 C.F.R. Sec. 64.1100 establishes verification procedures applicable to

by consumers, and it should not do so now.¹¹ These rules were designed to protect consumers reached by telemarketers and not those who initiate calls to carriers to acquire service information or to subscribe to the carrier's service. If the telemarketing rules were to be applied to "800 number" calls, it would lead to an absurd result, namely, the subjecting of consumers to clearly unnecessary confirmation procedures.

MCI opposes the suggestion that, when an unauthorized conversion occurs, a consumer should be excused from any obligation to pay charges for the service provided by the carrier to which the consumer was switched.¹² If adopted, such an approach would amount to an unfair penalty against the carrier, especially if responsibility for the conversion rested in others.¹³ Experience has shown that there are a number of reasons why unauthorized conversions occur, other than by interexchange carrier design. Absent clear and convincing evidence that a carrier is willfully engaging in unauthorized

change orders "generated by telemarketing."

¹¹ Others agree. See comments of Touch 1; LDDS Communications, Inc. (LDDS) at 6; AT&T at 22; Lexicom, Inc. (Lexicom) at 4; Sprint Communications Co. (Sprint) at 14; One Call at 12; General Communications, Inc. (General Communications) at 6; MIDCOM at 11; TRA at 13; GTE Service Corporation (GTE) at 2; NYNEX Telephone Companies (NYNEX) at 4.

¹² See comments of Consumer Action at 3; Pacific Bell and Nevada Bell at 2; Southwestern Bell at 6; State of New York Department of Public Service at 5.

¹³ Also, such a rule would send the wrong signal to consumers: It would encourage claims of "unlawful conversion" because the end-result would be the obtainment of free service.

conversions, no punitive measures should be taken.

MCI agrees with the overwhelming consensus that consumers should be made financially "whole" following unauthorized conversions.¹⁴ This means that a consumer should be placed in the same financial position that he or she would have been in, had the unauthorized conversion not taken place. MCI also agrees with the consensus that, after an unauthorized conversion, a consumer should be absolved of liability for payment to a prior carrier of charges for an optional calling plan.¹⁵ MCI opposes the suggestion made by AT&T that only residential subscribers to domestic optional calling plans should be absolved.¹⁶ Since an affected consumer should pay for service rendered by the "new" carrier in such a circumstance, it is unreasonable to also require the consumer to continue to pay the previous carrier for services not actually rendered. This logic applies regardless of the type of services involved, the type of customers involved, or the level of consumer sophistication.

MCI strongly opposes the suggestion that local exchange carriers of LECs be permitted to impose by tariff any charge for

¹⁴ See comments of AT&T at 21; Allnet Communication Services, Inc. (Allnet) at 11; Sprint at 12-13; One Call at 12; MIDCOM at 12; TRA at 14; William Malone at 1; NAAGTS at 9; Joint Comments of Missouri Office of Attorney General, Missouri Public Service Commission, and Missouri Office of the Public Counsel (Missouri) at 5; LDDS at 7; Touch 1 at 7; OSC at 7.

¹⁵ See comments of AT&T (in part supporting); Hertz Technologies, Inc. at 4; NAAGTS at 10; New York Department of Public Service at 5; Missouri at 5; Touch 1 at 10.

¹⁶ AT&T at 8.

unauthorized PIC changes.¹⁷ This proposal incorrectly assumes LEC impartiality in resolving unauthorized conversion disputes and, further, that a LEC could not be responsible for errors resulting in unauthorized conversions.¹⁸ Under the circumstances, such a "policing" policy should not be performed by LECs or any other non-governmental entity.

MCI is in agreement with most parties that the language used for LOAs for business customers should be no more restrictive than that used for residential consumers.¹⁹ There is no record information to support a determination that the unauthorized conversion of business customers is a greater problem. And, of course, the issue of who has appropriate authorization to change a PIC is not merely a business issue, but a residential issue as well.

MCI opposes the suggestion that an interexchange carrier should bear the burden of ascertaining whether a person has actual authorization to request a PIC change.²⁰ A carrier should be able to rely upon the authority of those whom they reasonably believe to be authorized to act. In this respect, carriers

¹⁷ See comments of Frontier at 3.

¹⁸ Some unauthorized conversions are caused when a LEC installs service and, in error, notifies an interexchange carrier that the consumer had requested the interexchange carrier's service.

¹⁹ See comments of Sprint at 10; One Call at 11; L.D. Services at 5; NAAGTS at 8; ACC at 6; CTI at 11; HI-RIM at 7; Consumer Action at 3; General Communications at 5; NYNEX at 4; OSC at 5.

²⁰ See comments of State of New York Department of Public Service (New York) at 4.

should not be required to meet a standard any more stringent than the law of agency requires. If the Commission were to seek to vary the conventional rules of agency, the result could be to provide a basis for the dishonest to claim that the person who requested a PIC change was "without actual authority."

Finally, MCI agrees with others who call for the preemption of inconsistent state requirements.²¹ MCI is concerned about the potential conflict between federal and state requirements based on the recent rush of state proposals seeking to address and provide for carrier selection procedures.²² Consumers should not be subject to the possibility of multiple service authorization procedures, and carriers should not be forced to incur higher costs to develop marketing strategies on a state-by-state basis. In contrast to differing state policies, a single set of nationwide requirements would send a coherent message to both carriers and consumers and would hasten public understanding of consumer rights and responsibilities.

As set forth by the Supreme Court in Louisiana Public Service Commission v. FCC and developed in subsequent case law, the Commission may preempt state regulation when it would thwart or impede the exercise of lawful federal authority over

²¹ See comments of ACC at 2; L.D. Services at 2; CTI at 2; ACTA at 11; Hi-Rim at 5; LDDS at 2; Competitive Telecommunications Association (CompTel) at 11.

²² Florida and South Carolina are currently considering new LOA requirements. See Re: Proposed Revision to Rule 25-4.118, F.A.C., Interexchange Carrier Selection, Dkt. 941190-TI. See also In re: Proceeding to Review Marketing Telecommunications Companies Operating within the State of South Carolina, Dkt. 94-559-C.

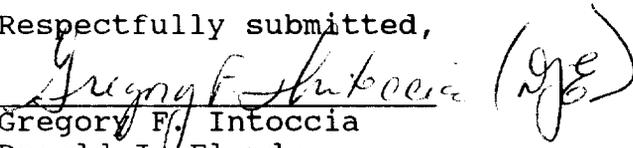
interstate communications, such as when it is not possible to separate interstate and intrastate portions of asserted federal regulations.²³ State requirements for carrier selection that are inconsistent with Commission standards would frustrate the Congressional mandate to adopt policies that provide for the furnishing of efficient communications services at reasonable prices.²⁴

Conclusion

MCI requests that the above comments and those contained in its initial comments be considered by the Commission in fashioning any new rules and in otherwise addressing the issues in its Notice.

Respectfully submitted,

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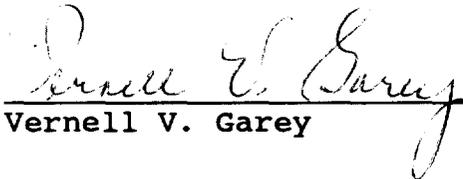
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²³ Louisiana Public Service Comm'n v. FCC 476 U.S. 355, 375 n.4 (1986). See also Maryland Public Service Comm'n v. FCC, 909 F.2d 1510 (D.C. Cir. 1990); California v. FCC, 905 F.2d 1217 (9th Cir. 1217); Texas Public Utility Comm'n v. FCC, 886 F.2d 1325, 1331 (D.C. Cir 1989); National Association of Regulatory Commissioners v. FCC, 880 F.2d 422, 429 (D.C. Cir 1989).

²⁴ See 47 U.S.C. Sec. 151.

CERTIFICATE OF SERVICE

I, Vernell V. Garey, hereby certify that the foregoing "MCI REPLY COMMENTS" was served this 8th day of February, 1995 by mailing copies thereof, postage prepaid, to the following persons at the addresses listed below:


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