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

In the Matter of )  
Policies and Rules Concerning )  
Unauthorized Changes of Consumers' )  
Long Distance Carriers )

CC Docket No. 94-129

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REPLY COMMENTS OF ACC CORPORATION

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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## SUMMARY

The commenters in this proceeding generally agree that the Commission's rules governing the change of primary interexchange carriers ("PICs") should require that carriers communicate clearly with consumers. In its initial comments, ACC Corp. ("ACC") expressed its support for the Commission's efforts to assure that customers are not misled, but suggested that the Commission should revise the proposed PIC change rules because they discourage not only deceptive conduct but also legitimate and reasonable marketing practices. Many other parties concurred with ACC's position that the proposed rules are overly restrictive and will unnecessarily impede competition by inhibiting innovative and informative marketing practices.

Consistent with the comments of a number of other parties, ACC believes that the Commission should adopt a more carefully tailored approach so that its rules target only instances of specific customer harm without inhibiting the marketing flexibility of interexchange carriers ("IXC"). In particular, ACC agrees with a number of commenters who support the adoption of Sections 64.1150 (d) and (e) because such rules encourage clarity without unduly restricting legitimate IXC marketing practices.

ACC also agrees with Sprint that consumers should be responsible for the reasonable charges due to a carrier even if the consumer believes a PIC change to be unauthorized. Since the customer receives the benefit of the service provided, ACC agrees with the Commission's suggestion that a carrier who has made an unauthorized PIC change be responsible for reimbursing a consumer for any amounts that the consumer would have paid "but for" the unauthorized change. ACC believes that reimbursing customers for the difference between the actual rates paid and the rates they should have been paying will make

a consumer "whole" without providing an incentive for consumers to manipulate the system to obtain telephone service without payment.

ACC also joins a number of parties in urging the Commission to clarify that it will preempt any inconsistent state PIC change rules in order to create a uniform nationwide standard for Letters of Agency. Specifically, ACC believes that preemption: (1) will assure that there is no confusion about what requirements apply; and (2) will prevent carriers from being subject to a potentially inconsistent patchwork of regulations that would cause administrative burdens for carriers and increase consumer prices.

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Unauthorized Changes of Consumers' )  
Long Distance Carriers )

**REPLY COMMENTS OF ACC CORPORATION**

ACC Corporation ("ACC"), by its undersigned counsel, hereby submits its reply to the initial comments filed in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking in the above-captioned docket.

**INTRODUCTION**

The commenting parties generally agree that the Commission's rules governing the change of primary interexchange carriers ("PICs") should require that carriers communicate clearly with consumers. However, the parties differ significantly in their recommendations for accomplishing this goal.

In its initial comments, ACC expressed its support for the Commission's efforts to assure that customers are not misled, but suggested that the Commission should revise the proposed PIC change rules because they discourage not only deceptive conduct but also legitimate and reasonable marketing practices. Many other parties including, *inter alia*, AT&T Corp. ("AT&T"), MCI Telecommunications Corporation ("MCI"), Sprint Communications Company ("Sprint"), MIDCOM Communications, Inc. ("MIDCOM"), Telecommunications Reseller Association ("TRA"), Operator Service Company ("OSC"), America's Carriers Telecommunications Association ("ACTA"), Touch 1, Inc. and Touch 1

Communications, Inc. (collectively "Touch 1"), and One Call Communications, Inc. ("One Call") concurred with ACC's position that the proposed rules are overly restrictive and will unnecessarily impede competition by inhibiting innovative and informative marketing practices.

Consistent with the comments of a number of other parties, ACC believes that the Commission should adopt a more carefully tailored approach so that its rules target only instances of specific customer harm without inhibiting marketing flexibility and discouraging competitive marketing efforts. Specifically, ACC agrees with a number of commenters who support the adoption of Sections 64.1150 (d) and (e) because such rules encourage clarity without unduly restricting legitimate interexchange carrier ("IXC") marketing practices. Further, ACC believes that those parties correctly assert that the rules in Sections 64.1150 (e) and (d) are sufficient to protect consumers from unauthorized carrier switches.

In addition, ACC agrees with Sprint that consumers should be responsible for the reasonable charges due to a carrier even if the consumer believes a PIC change to be unauthorized. Since the customer receives the benefit of the service provided, ACC agrees with the Commission's suggestion<sup>1/</sup> that a carrier who has made an unauthorized PIC change be responsible for reimbursing a consumer for any amounts that the consumer would have paid "but for" the unauthorized change. The customer should not be permitted to obtain free service by continually changing carriers. ACC believes that reimbursing customers for the difference between the actual rates paid and the rates they should have been paying will make a consumer "whole" without providing an incentive for consumers to manipulate the system

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<sup>1/</sup> Notice of Proposed Rulemaking ("NPRM") at ¶ 17.

to obtain telephone service without payment. Such results could increase rates for customers who do not attempt to exploit the system by avoiding legitimate charges.

In the initial comments, a number of parties, including ACC, indicated that the Commission should clarify that it will preempt any inconsistent state PIC change rules in order to create a uniform nationwide standard for Letters of Agency ("LOAs"). In this reply, ACC underscores its belief that preemption: (1) will assure that there is no confusion about what requirements apply; and (2) will prevent carriers from being subject to a potentially inconsistent patchwork of regulations that would cause administrative burdens for carriers and increase consumer prices.

**I. PIC CHANGE RULES SHOULD FACILITATE CLARITY AND ENCOURAGE LONG DISTANCE COMPETITION**

**A. The Proposed Rules Must Strike a Proper Balance Between Consumer Protection and IXC Marketing Flexibility**

**1. IXCs Must be Accorded Sufficient Flexibility to Promote Competition**

ACC agrees with MCI that "[i]t is critically important that the Commission recognize that the interexchange marketplace, while becoming more competitive than it has been at any time in the past, still is dominated by a single carrier, AT&T . . . , which possesses more than a 60-percent market share of the interexchange long distance market."<sup>2/</sup> Further, TRA and Touch 1 correctly state that in an industry in which one carrier holds a 60 percent

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<sup>2/</sup> MCI Comments at 4. ACC notes that AT&T recently announced record earnings in 1994. AT&T announced 27% earnings growth in 1994 with a net income of \$4.71 billion. AT&T stated that its network telecommunications unit saw its best quarter on record and "stemmed the tide of long distance market share erosion" by adding one million new residential customers during the year. *AT&T Posts Record Earnings Increase*, Communications Daily, Jan. 25, 1995, at 3.

market share and three carriers control more than 85 percent of the market, any limitations on marketing should be carefully scrutinized because of the inordinate impact on small to mid-sized carriers which occupy the remaining 10 to 15 percent of the market. TRA Comments at 12; Touch 1 Comments at 7. Therefore, ACC believes that the Commission must accord substantial marketing flexibility to those carriers that seek to compete with the large, established providers who possess substantial market share. Further, ACC submits that under the existing market conditions, the imposition of undue restrictions on legitimate and reasonable marketing practices will be detrimental to competition, and will, ultimately, harm consumers.<sup>3/</sup>

ACC also believes that the Commission should take heed of the concerns of a number of commenters that a proper balance must be established in this rulemaking between protecting consumers from unauthorized PIC changes and the need to preserve IXC marketing flexibility. *See, e.g.*, ACTA Comments at 6; Competitive Telecommunications Association ("CompTel") Comments at 1-2; TRA Comments at 4; Touch 1 Comments at 4. The Commission should be attentive to CompTel's warning that "[t]he Commission should be careful to preserve . . . legitimate form[s] of competition while correcting the relatively limited abuses of some participants." CompTel Comments at 2. Otherwise, the vibrant

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<sup>3/</sup> Indeed, the Commission has sought to facilitate the marketing efforts of IXCs in prior PIC change proceedings. *See Policies and Rules Concerning Changing Long Distance Carriers*, 7 FCC Rcd. 1038 (1992), *recon. denied*, 8 FCC Rcd. 3215 (1993) (Commission stated that "[in] considering the advisability of imposing requirements on carriers of all sizes, we seek to benefit consumers without unreasonably burdening competition in the interexchange market."); *Illinois Citizens Utility Board Petition for Rulemaking, Memorandum Opinion and Order*, 2 FCC Rcd 1726 (Com.Car.Bur. 1987) (The Commission stated that its intent was to "clearly facilitate the IXCs' marketing efforts while maintaining the protection embodied in the letter of agency requirement.").

competition that currently exists will be negatively impacted to the detriment of all consumers.

ACC agrees with commenters who question whether the extent of unauthorized PIC disputes justifies the proposed level of regulation. Indeed, Lexicom, Inc. ("Lexicom") and One Call accurately point out that the 2,500 complaints received by the Commission with respect to PIC order changes does not reflect a widespread problem. They correctly observe that assuming a conservative estimate of one million PIC change orders were executed for fiscal year 1994, 2,500 complaints amounts to a mere 0.25% of the total PIC changes for 1994. Lexicom Comments at 2; One Call Comments at 2.

Over 500 long distance companies (most of which are resale carriers) operate in the United States and the Commission frequently cites to this statistic as proof that federal policies are successfully promoting a truly competitive marketplace. ACTA Comments at 2. However, as discussed above, three carriers control over 85 percent of the market. The remaining IXCs, especially the resellers, face intense competition and operate with extremely thin profit margins. Unfortunately, ACTA observed that "[a]s a practical matter, little attention has been paid to the conditions affecting the resale segment of the marketplace." *Id.* Furthermore, as ACTA aptly observes, a continuous problem faced by the resale industry is that its ability to effectively compete is hampered by the continually shifting regulatory system as well as the practices of certain carriers.<sup>4/</sup> Therefore, the Commissioner should

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<sup>4/</sup> *Id.* For example, the NYNEX Telephone Companies ("NYNEX") suggests in this proceeding that the Commission should adopt, in addition to the Commission's proposed rules, NYNEX's proposal that LOAs be standardized through a Commission prescribed text. See NYNEX Comments at 3. As discussed in further detail below, such a rigid rule would be detrimental to competition and costly to consumers.

carefully craft balanced PIC-change rules that do not restrict legitimate, innovative marketing practices.

## **2. Proposed Rules Regarding General Form and Content of LOAs Achieve Appropriate Balance**

As a number of commenters have pointed out, the Commission's general intent of requiring carriers to provide clear information to customers is a commendable goal that deserves the support of the interexchange industry. *See, e.g.*, ACTA Comments at 7; AT&T Comments at 9; CompTel Comments at 2; OSC Comments at 2; Touch 1 Comments at 4. Accordingly, ACTA, Touch 1 and TRA, *inter alia*, prudently support rules such as Section 64.1150(d)<sup>5/</sup> and (e)<sup>6/</sup> because they encourage clear and easily understood rules that do not mislead consumers. *See, e.g.*, ACTA Comments at 7; Touch 1 Comments at 4; TRA Comments at 7.

Consistent with the suggestions of Touch 1 and TRA, the Commission should adopt these two sections because they are sufficient to allow informed consumer action without imposing unnecessary costs and administrative burdens. *Id.* ACC believes, however, that any greater degree of specificity is unnecessary. Specifically, ACC agrees with a number of parties that Commission prescribed joint size, text, or title of LOAs are unnecessary in light of the underlying requirements of content, clarity, and legibility. *See* AT&T Comments at 10; CompTel Comments at 7; Touch 1 Comments at 4; TRA Comments at 7. While ACC supports enforcement action against carriers who engage in deceptive practice, ACC

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<sup>5/</sup> 64.1150(d) states the general rule that LOAs must be "clear and unambiguous" and that certain information must be included in LOAs.

<sup>6/</sup> 64.1150(e) prohibits negative option LOAs.

disagrees with NYNEX and Southwestern Bell Telephone ("SWBT) who argue that Commission rules should prescribe the specific form and content for LOAs. NYNEX Comments at 3; SWBT Comments at 2. Such a requirement would generate needless carrier expenses, would unnecessarily intrude upon flexibility in IXC business operations, and ultimately would increase costs to consumers. ACC therefore urges the Commission to reject rules prescribing form or content of the LOA format.

### **3. Treatment of Residential and Business Customers**

ACC agrees with the views of a number of commenters that the Commission should not disrupt the proper balance between consumer protection and IXC flexibility by treating business and residential customers differently. *See* One Call Comments at 11; OSP Comments at 5; Sprint Comments at 9-10; General Communications, Inc. (GCI") Comments at 5. As these parties aptly state, additional rules distinguishing business and residential LOAs are unnecessary and may cause confusion. *Id.* Further, Sprint correctly points out that the problem of LOAs being executed by persons without authority to do so is a problem that applies equally to residential and business customers. Sprint Comments at 10. ACC agrees with Sprint and One Call that such authorization problems are internal to the customer, and should not be addressed by imposing additional regulations on IXCs.

ACC supports OSC's recommendation that the customer authorization issue be addressed by requiring local exchange carriers ("LECs") to provide billing account name/authorized individuals to IXCs. OSC Comments at 6. ACC agrees with OSC that unwanted PIC changes could be greatly reduced if such information were made available to IXCs at a reasonable price.

**B. PIC Change Rules Must Be Narrowly Tailored So That Competition Is Not Inhibited**

**1. Blank Prohibitions on Combining Inducements and LOAs and Separation of LOAs Unnecessarily Hinders IXC Flexibility**

As ACC stated in its initial comments, the Commission must adopt rules that allow IXCs sufficient flexibility in choosing among legitimate marketing practices. ACC Comments at 2-3. TRA and Touch 1 correctly suggested that Commission action must be narrowly tailored to address the problem of unauthorized PIC changes so that interexchange competition is not adversely affected. TRA Comments at 9; Touch 1 Comments at 6. As a number of commenters have noted, however, several of the Commission's proposed rules unduly restrict competition by prohibiting a wide variety of legitimate and fair marketing IXC practices.

In particular, the requirement that an LOA be a separate document<sup>7/</sup> and the requirement that an LOA not be combined with an inducement of any kind<sup>8/</sup> are unnecessary to prevent customer confusion and would impose hardships on both consumers and IXCs. AT&T correctly notes that Section 64.115(d) already requires that LOAs be clearly and unambiguously set forth in legible typeface. AT&T Comments at 13. ACC believes that the enforcement of Section 64.115(d) is sufficient to prevent customer confusion.

ACC agrees with a number of parties that the Commission's requirements in Section 64.115(d) and (e) will be detrimental to competition and will unduly burden smaller

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<sup>7/</sup> 64.1150(b).

<sup>8/</sup> 64.1150(c).

carriers. *See, e.g.*, ACTA Comments at 2; One Call Comment at 3; TRA Comments at 12. For instance, the Telecommunications Company of America, Inc. ("TELCAM") states that the requirement that an LOA be a separate document would require TELCAM to increase customer rates by approximately 4% (which would jeopardize its ability to remain in business) in order to maintain its slim profit margin. TELCAM Comments at 2. Similarly, One Call accurately states that the proposed rules unduly burden smaller carriers "by disproportionately raising their administrative costs and unreasonably restricting their ability to use marketing inducements to attract customers from larger and more dominant IXC's." One Call Comments at 3. Consumers will be the most adversely affected by such changes because the increased costs for printing and distributing revised marketing materials (as well as costs for ordering service) need to, ultimately, be passed on to the consumer.

ACC also concurs with AT&T, MCI and Touch 1 that the proposed rules are overbroad and interfere with legitimate marketing efforts to the detriment of both long distance competition and informed consumer choice. AT&T Comments at 12; MCI Comments at 5; Touch 1 Comments at 6. As MCI points out, inducements are an integral part of the interexchange business and "actually serve to assist customers in making important choices by coupling necessary information with legitimate incentives." MCI Comments at 5. ACC also agrees with MCI's assertion that if promotional materials or advertisements are prohibited in connection with LOAs, the Commission's long standing policy of encouraging expanded consumer choice would be contravened. *Id.* at 6. As MCI observes, adoption of the proposals would actually increase customer confusion because consumers would be restricted from easy access to the necessary product information. *Id.*

Consistent with the recommendations of ACC, TRA and Touch 1, the Commission should narrowly tailor its rules so that only "deceptive or misleading" inducements are prohibited from being placed on the same page as LOAs. ACC Comments at 5; TRA Comments at 11; Touch 1 Comments at 6-7. This clarification would prohibit activities that deceive or mislead consumer without eliminating legitimate promotional efforts that allow carriers to lower costs and permit consumers to make informed choices.

## **2. Customer-initiated PIC Changes Involving "800" Calls**

ACC agrees with a number of commenting parties that the Commission should not apply its telemarketing rules to customer-initiated PIC changes involving "800" calls. AT&T Comments at 22-23; Lexicom Comments at 4; LDDS Communications, Inc. ("LDDS") Comments at 6; Sprint Comments at 14. As AT&T points out, such calls are initiated by the consumer who is in full control of the situation. AT&T Comments at 22. Indeed, LDDS aptly observes that consumers initiating "800" PIC-change calls tend to be aware of the impact such a change may have on their service. LDDS Comments at 6.

As Sprint points out, there is no evidence to support claims that any significant number of consumers have been "slammed" after a customer initiated call to an IXC's "800" number. Sprint at 15. ACC also agrees with Sprint that applying telemarketing rules to such customer initiated calls would merely add to the costs of long distance prices for customers. Therefore, ACC submits that the Commission should refrain from applying these rules because they increase costs and hinder competition.

## **II. CUSTOMERS SHOULD BE RESPONSIBLE FOR REASONABLE CHARGES DUE IN THE EVENT OF DISPUTED PIC CHANGES**

ACC disagrees with SWBT's suggestion that consumers should not be liable for any charges rendered by an unauthorized IXC in order to stop unauthorized PIC changes. SWBT Comments at 7. ACC believes that the Commission's goal in this arena should be focused on making consumers "whole," rather than unduly punitive economic penalties. IXCs incur significant costs already due to unauthorized PIC changes which may occur as a result of LEC error or internal customer confusion. As MCI correctly recognizes, the Commission should employ its considerable enforcement powers in targeted enforcement actions to combat deceptive PIC marketing practices. MCI Comments at 4.

ACC agrees with the concern expressed by a number of commenters that a policy of forgiving all charges related to an unauthorized PIC change would encourage fraud by unscrupulous consumers. *See* LDDS Comments at 7; Sprint Comments at 12; One Call Comments at 12; GCI Comments at 5. ACC endorses Sprint's suggestion that consumers should be liable for the reasonable charges due to a long distance carrier even if the consumer believe that the PIC conversion was unauthorized. Sprint Comments at 12. Accordingly, ACC supports the proposals of a number of commenters that consumers should be liable for the charges billed to them by an unauthorized IXC to the extent of the amount consumers would have paid if their PICs were never changed. One Call Comments at 12; TRA Comments at 14-15; MCI Comments at 15; LDDS Comments at 7. ACC also agrees with LDDS and MCI that carriers who are responsible for improper PIC changes should be liable for all PIC change expenses related to moving the customer back to the original carrier. LDDS Comments at 7; MCI Comments at 15. ACC believes that this fair approach

would make wrongfully-converted customers "whole" without providing an incentive for legitimate customers to manipulate the system to avoid payments for charges incurred for long distance calls.

### **III. THE COMMISSION SHOULD ENSURE THAT THE RULES ARE CONSISTENTLY APPLIED NATIONWIDE**

ACC strongly encourages the Commission to adopt the recommendations of a number of commenters that PIC-change regulations be uniform on a nationwide basis. *See, e.g.,* ACTA Comments at 11-13; CompTel Comments at 10-13; LDDS Comments at 2-3; Sprint Comments at 4. LDDS accurately points out that a failure to establish a consistent nationwide PIC-change policy could result in a patchwork of inconsistent state rules and regulations. LDDS Comments at 3. Such inconsistent regulation would cause customer confusion, and is not in the public interest. Therefore, ACC respectfully submits that the Commission should preempt inconsistent regulations proposed by states to regulate LOAs.<sup>2/</sup>

For example, the Florida Public Service Commission ("FPSC") has proposed rules which are designed to separate LOAs from other promotional or inducement materials. *See* FPSC Comments at 2 of Attachment A. If the Commission decides not to require the separation of LOAs from other promotional or inducement material, and the FPSC adopts its

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<sup>2/</sup> The Commission recently reaffirmed a prior order preempting the 900 "pay-per-call" blocking requirements of the South Carolina Public Service Commission. In its decision, the Commission stated that the South Carolina "pay-per-call" blocking requirements should be preempted because they "are significantly more restrictive than federal rules and would disserve the public interest by hindering rather than promoting the general availability of interstate 900 services." The Commission added that it is under no obligation to defer to more restrictive state regulations regardless of the impact of those regulations on federal policy. *Petition for an Expedited Declaratory Ruling filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc., Memorandum Opinion and Order on Reconsideration.* FCC 94-358 (Released Jan. 24, 1995)

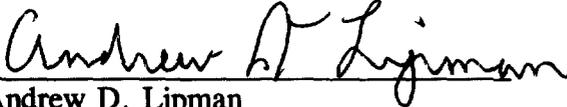
proposal, IXCs could be required to develop separate sign-up procedures for service. Furthermore, as Sprint aptly points out, IXCs could be subjected to fifty different formulations for LOAs. Sprint Comments at 4. Obviously, compliance with varying potentially inconsistent requirements would be expensive and burdensome, especially to smaller interexchange carriers.

ACC therefore concurs with CompTel, Sprint and ACTA that the Commission should issue an order clarifying that any inconsistent state regulation will be preempted. As ACC stated in its initial comments, the Commission has the authority to preempt inconsistent state regulations in this proceeding. Such action would be consistent with applicable law, and in the public interest because customer confusion would be reduced and carriers would not be subjected to unnecessary administrative expenses and burdens.

## CONCLUSION

For the foregoing reasons ACC Corporation respectfully submits that the Commission should revise its proposed rules as described herein. Such action will protect consumers and promote a vibrant and competitive interexchange market.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I, Brenna M. Newman, hereby certify that a copy of the foregoing Reply Comments has been sent by United States First Class Mail, postage prepaid, unless otherwise noted, to all parties listed in the foregoing Reply Comments on this 8th day of February, 1995.

  
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