

*hunter communications law group*

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September 15, 1997

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

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SEP 15 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Comments submitted by  
the Telecommunications Resellers Association  
CC Docket No. 94-129

Dear Mr. Caton:

Pursuant to Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration, CC Docket No. 94-129, FCC 97-248, released July 15, 1997, transmitted herewith, on behalf of the Telecommunications Resellers Association ("TRA"), is a diskette containing TRA's Comments submitted today in the above referenced matter. Also enclosed are an original and eleven copies of TRA's Comments.

If you should have any questions concerning this matter, please do not hesitate to contact me at (202)293-2590.

Respectfully submitted,

*Catherine M. Hanman*

Catherine M. Hanman

Enclosure

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

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**In The Matter of** )

**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** )

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CC Docket No. 94-129

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**COMMENTS OF**  
**THE TELECOMMUNICATIONS RESELLERS ASSOCIATION**

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**TELECOMMUNICATIONS**  
**RESELLERS ASSOCIATION**

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September 15, 1997

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## **SUMMARY**

The Telecommunications Resellers Association ("TRA"), a national trade association representing more than 500 entities engaged in, or providing products and services in support of, telecommunications resale hereby recommends that the Commission be guided by the following principles in implementing Section 258 of the Communications Act:

- Consumers' telecommunications service providers should not be changed without their knowing consent. Verification procedures should be designed to facilitate informed judgments by consumers.
- Safeguards against unauthorized carrier changes should be applied to all of a consumer's telecommunications service providers, including the consumer's local exchange carrier, and in a 2-PIC or multi-PIC environment, all of the consumer's long distance service providers.
- Carrier changes resulting from miscommunications or mistakes should be differentiated from intentional slamming. Consumers should be made whole in either circumstance, but penalties should be imposed for fraudulent, as opposed to inadvertent, carrier changes.
- The incremental effectiveness of additional safeguards against slamming should be weighed against any resultant competitive impacts and administrative/cost burdens. A regulation which provides little if any additional protection generally will come at too high a cost.
- Consumers and competitors who have been victimized by slamming should be made whole, but not enriched. Slamming remedies should not relieve consumers of their obligation to pay for the telecommunications services they receive; neither should they provide an additional source of profits for carriers.
- Changes impacting a consumer's relationships with its telecommunications carrier should be administered to the maximum possible extent by independent third parties. Incumbent LECs, as competing providers of local exchange and toll services are not well-suited to make independent judgments regarding carrier changes.
- Safeguards against slamming should not provide opportunities for other types of fraudulent behavior.

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

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**In The Matter of** )

**Implementation of the Subscriber Carrier  
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Long Distance Carriers** )

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**CC Docket No. 94-129**

**COMMENTS OF  
THE TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, hereby submits its comments in response to the *Further Notice of Proposed Rulemaking*, FCC 97-248, released July 15, 1997, in the above-captioned docket ("*Notice*"). In the *Notice*, the Commission proposes certain modifications to Part 64, Subpart K, of its Rules in order to implement Section 258 of the Communications Act of 1934 ("Communications Act"),<sup>1</sup> as amended by Section 101 of the Telecommunications Act of 1996 ("Telecommunications Act").<sup>2</sup> Section 258 declares unlawful any change in a consumer's designated local exchange carrier ("LEC") or interexchange carrier ("IXC")

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<sup>1</sup> 47 U.S.C. § 258.

<sup>2</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996)

undertaken in violation of “verification procedures” prescribed by the Commission and renders any carrier acting in violation of these verification procedures liable to the properly authorized carrier for the full amount of charges collected following the unauthorized change. Codified in Part 64, Subpart K, of the Commission’s Rules are the current regulations governing changes in a consumer’s primary interexchange carrier (“PIC”), including verification procedures which must be followed in effecting such a change.<sup>3</sup>

As it consistently has in this docket in years past, TRA wholeheartedly supports the Commission’s ongoing efforts to ensure that consumers are not switched from one carrier to another without their knowing consent; “slamming,” in TRA’s view, cannot, and should not, be tolerated. TRA thus has supported, and continues to support, the adoption of such safeguards as are reasonably necessary to protect against unauthorized changes in consumers’ telecommunications service providers. TRA, however, also continues to urge the Commission to carefully craft and narrowly tailor such safeguards so as to not inadvertently dampen competition or impose unnecessary administrative and cost burdens on smaller competitors. The consuming public has derived, and continues to derive, great benefit from the availability of alternative sources of telecommunications services, many of which are provided by small to mid-sized carriers. Those benefits should not be lost to excessive regulatory restraints which will enure to the benefit of large, entrenched providers.

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<sup>3</sup> 47 C.F.R. § 64.1100, *et. seq.*

## I.

### **Introduction**

A national trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are or will soon be offering local exchange telecommunications services.

While the telecommunications resale industry is a maturing market segment comprised of an eclectic mix of established, publicly-traded corporations, emerging, high growth companies and newly created enterprises, the "rank and file" of TRA's resale carrier members continues to be made up of small to mid-sized carriers. Market credibility is critical to small resale carriers competing against large, well-established facilities-based providers. TRA and its resale carrier members are well aware that ethical business practices are essential to maintenance of credibility both with end user customers and network service suppliers, and hence are central to the long-term success of resale providers in the competitive telecommunications marketplace. Moreover, given that their customer bases are substantially smaller than those of their far larger

facilities-based competitors, the adverse impact of losing subscribers to slamming is far more damaging to resale carriers than it is for facilities-based providers.<sup>4</sup>

For these reasons, TRA adopted at its inception, and continues to enforce, a strict "Code of Ethics" which requires honest, fair and ethical dealings by its members with both consumers and other carriers. Thus, in order to join TRA, carriers must pledge to:

recognize and uphold their obligation to their subscriber, vendors and the general public to provide quality services at reasonable rates, under stated terms and conditions, to conduct business ethically and with integrity and to place customer satisfaction foremost in their endeavors.

And of critical importance here, TRA members must commit not to *"submit orders for provisioning without customer authorization or participate in 'slamming' activities."*

TRA members must also agree to uphold, and, accordingly, empower the TRA Board of Directors to act upon and enforce, among others, the following standards:<sup>5</sup>

- Members' advertising and promotional materials will accurately, honestly and clearly represent their company products and services as actually provided;

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<sup>4</sup> Far too often, "slamming" is portrayed as an activity unique to the small carrier community. To the contrary, the large IXC's and LEC's, with a relatively few notable exceptions, are the subject of the largest number of slamming complaints. Thus, in 1995, included among the ten carriers for which the Commission received the greatest number of slamming complaints were AT&T Corporation ("AT&T") -- 2,316, MCI Telecommunications Corp. ("MCI") -- 1,706, the NYNEX Telephone Companies ("NYNEX") -- 1,864, Pacific Telesis Group ("PacTel") -- 1,426, Southwestern Bell Telephone Company ("Southwestern Bell") -- 1,062, GTE Corporation ("GTE") -- 1,034, and the Bell Atlantic Telephone Companies ("Bell Atlantic") -- 762. *Common Carrier Scorecard*, Enforcement and Industry Analysis Divisions, Common Carrier Bureau, Federal Communications Commission (Fall, 1996). Indeed, the overwhelming majority of TRA's resale carrier members are not listed among those providers for which the Commission received at least 20 complaints in calendar year 1995.

<sup>5</sup> Although these matters are, and must remain, confidential, TRA's Board of Directors has taken action against members that have been the subject of regulatory sanctions for engaging in slamming.

- Members will make available, upon request, accurate and clearly understandable rates, terms and conditions to the public;
- Members will respond to subscriber service inquiries and complaints expeditiously and honestly, and will work in good faith to resolve subscriber concerns to the subscriber's satisfaction.
- Members will accept responsibility for representations made on behalf of their company by employees or agents; and
- Members will fulfill their regulatory obligations and cooperate fully with regulatory agencies.

TRA also is cognizant, however, that given the limited name recognition, size and resources of small to mid-sized resale carriers, its members generally operate at a severe competitive disadvantage. Limits imposed on competitive opportunities and stratagems favor entrenched providers, insulating their customer bases from competitive intrusion. Likewise, excessive regulatory requirements have their most significant negative impact on small carriers that are least able to absorb the associated cost and administrative burdens.

Obviously, a balance must be struck between on the one hand, safeguarding consumers against unauthorized changes in their designated telecommunications providers and on the other hand, promoting and maintaining competitive dynamism in the telecommunications industry. As noted above, slamming cannot, and should not, be tolerated. All safeguards reasonably necessary to protect against unauthorized changes in consumers telecommunications service providers should not only be adopted, but strictly enforced. Competitive dynamism, however, should not be sacrificed to well-intentioned, but misguided, safeguards which produce little incremental benefits or, worse yet, engender new problems.

TRA submits that in adopting safeguards against unauthorized carrier changes, the Commission should, as it has in the past, carefully weigh not only the effectiveness of those

safeguards, but their adverse impact on competition and in particular, on small competitors. As the Commission succinctly noted in adopting its original verification procedures:

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 . . . [verification procedures should] facilitate the IXCs' marketing efforts while maintaining the protection embodied in the requirement for LOAs.<sup>6</sup>

Consistent with these views, TRA urges the Commission to factor into its regulatory calculus the following principles, balancing each against the others:

- Consumers' telecommunications service providers should not be changed without their knowing consent. Verification procedures should be designed to facilitate informed judgments by consumers.
- Safeguards against unauthorized carrier changes should be applied to all of a consumer's telecommunications service providers, including the consumer's local exchange carrier, and in a 2-PIC or multi-PIC environment, all of the consumer's long distance service providers.
- Carrier changes resulting from miscommunications or mistakes should be differentiated from intentional slamming. Consumers should be made whole in either circumstance, but penalties should be imposed for fraudulent, as opposed to inadvertent, carrier changes.
- The incremental effectiveness of additional safeguards against slamming should be weighed against any resultant competitive impacts and administrative/cost burdens. A regulation which provides little if any additional protection generally will come at too high a cost.
- Consumers and competitors who have been victimized by slamming should be made whole, but not enriched. Slamming remedies should not relieve consumers of their obligation to pay for the telecommunications services they receive; neither should they provide an additional source of profits for carriers.
- Changes impacting a consumer's relationships with its telecommunications carrier should be administered to the maximum possible extent by independent third parties.

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<sup>6</sup> Policies and Rules Concerning Changing Long Distance Carriers, 7 FCC Rcd.1038, ¶¶ 42, 48 (1992), *recon. denied*, 8 FCC Rcd 3215 (1993).

Incumbent LECs, as competing providers of local exchange and toll services are not well-suited to make independent judgments regarding carrier changes.

- Safeguards against slamming should not provide opportunities for other types of fraudulent behavior.

With these principles in mind, TRA offers the following comments on the issues raised and proposals made in the *Notice*.

## II.

### Argument

#### A. TRA Generally Supports the Modifications Proposed by the Commission to the Existing Verification Rules

##### 1. Existing Verification Rules Should be Extended to Apply to All Telecommunications Carriers

TRA supports the *Notice's* proposal to expand application of the verification rules to apply to all carriers and to all telecommunications markets, specifically including the nascent competitive local telecommunications market. The evolving nature of the Commission's verification rules underscores the Commission's commitment to a continuing adaptation of those rules in order to address ongoing changes in the telecommunications marketplace which may provide additional opportunities for unscrupulous carriers to engage in deceptive or misleading practices designed to deprive consumers of competitive choices. The Telecommunications Act has made possible an entirely new arena for competitive service alternatives, specifically encouraging such offerings in the local telecommunications market. And as those new competitive opportunities expand, so will the opportunity and the incentive for carriers to engage in unauthorized carrier changes in the local

services market. The Commission's verification rules must likewise be expanded to meet this growing concern.

As the Commission is aware, telecommunications carriers are making available to consumers innovative service offerings encompassing various combinations of interexchange, international and local exchange/exchange access services, frequently supplementing those service options with wireless, enhanced and internet services as well. The ability to obtain such customized service offerings will benefit consumers and advance the public interest. At the same time, however, the ability to offer such bundled service offerings increases an unscrupulous carrier's opportunities to engage in slamming. A carrier which is subject to the Commission's verification rules with respect to the provision of interexchange services should not be allowed free reign to engage on the local level in the precise practices which the Commission and the telecommunications industry as a whole condemn as directly contrary to the best interest of the consuming public. Application of the Commission's verification rules to carriers active in the local market is thus necessary in order to protect consumers from the "deceptive and misleading marketing practices"<sup>7</sup> which have led to the development and enforcement of the Commission's verification rules in the interexchange services market.

TRA further agrees with the *Notice's* assessment that verification procedures should not be applied to the "executing" carrier. Section 258 does not mandate verification of carrier changes by the executing carrier, requiring as it does only that carrier changes be undertaken in conformance with Commission-prescribed procedures. As the *Notice* points out, dual verification "could have the effect of doubling the transaction costs associated with a subscriber's selection of

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<sup>7</sup> Further Notice of Proposed Rulemaking, FCC 97-248 at ¶ 11.

a primary carrier.”<sup>8</sup> More consequentially, mandatory, or for that matter, permissive, verification of carrier changes by executing carriers is fraught with the potential for abuse. The carrier that will most frequently be responsible for executing carrier changes will be the incumbent LEC. In many instances, the executed carrier change will result in the loss of a local exchange customer by the incumbent LEC; in other instances, an executed carrier change may represent a lost business opportunity for the incumbent LEC in the interexchange market. In both circumstances, the incumbent LEC will have strong motivation to hinder or altogether prevent the carrier change by exploiting its position as the executing carrier. Elsewhere in these Comments, TRA will recommend that this inherent conflict of interest be addressed by substituting an independent third party for the incumbent LEC as the entity responsible for executing carrier changes. If the Commission does not opt for such an approach, it certainly should not provide the incumbent LEC with a ready vehicle for engaging in strategic manipulation of the carrier change process by requiring it to verify all such changes; indeed, the Commission should affirmatively prohibit incumbent LECs and other executing carriers from contacting consumers for whom requests for carrier changes have been submitted. The *Notice* identifies one means by which an incumbent LEC could abuse its role as executing carrier to protect its customer base from competitive erosion;<sup>9</sup> myriad other, highly creative, approaches no doubt would be developed if the incumbent LECs are permitted to serve as executing carriers, or worse yet, are provided officially-sanctioned access to consumers seeking a carrier change in order to “verify” the consumer’s choice.

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<sup>8</sup> Id. at ¶ 14.

<sup>9</sup> Id. at ¶ 15.

**2. Verification Rules Should Apply to Inbound Consumer Inquiries, as Well as Outbound Telemarketing Calls**

TRA further agrees with the Commission that the need to safeguard consumers from unauthorized carrier changes outweighs the burdens to carriers associated with verifying carrier changes resulting from consumer-initiated, inbound calls. Through various petitions for reconsideration, the Commission has heard arguments that consumers who choose to contact a carrier have already determined to effect a carrier change and therefore do not require the full panoply of protections provided by the verification rules. The Commission, however, has correctly identified significant risks associated with carving out an exception to its consumer protection principles based upon the slim distinction of whether the consumer or the carrier initiates the call. Namely, an inbound call may be placed by a consumer for a variety of purposes, only one of which may be the initiation of a carrier change. The consumer, who may be calling merely to obtain information, might be subjected to a "hard-sell" telemarketing sales pitch which absent the protections afforded by the verification rules could result in an unintended and unwanted carrier change. Likewise, as the *Notice* points out, consumers could be enticed to call a carrier by advertisements touting contests or sweepstakes, with no prior intention of requesting a carrier change.<sup>10</sup>

Principles of competitive neutrality certainly argue for like treatment of outbound and inbound marketing contacts. Large carriers with the financial resources to mount large media campaigns or to engage in massive direct mailing efforts are the primary recipients of inbound marketing calls. Accordingly, exempting inbound marketing calls from verification requirements

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<sup>10</sup> Id.

imposed on outbound telemarketing provides large carriers with a regulatory advantage over their smaller rivals. Given that no commenter has shown that verifying carrier changes resulting from consumer-initiated inbound calls would be more costly or burdensome than the verification requirements currently imposed on carriers engaged in outbound telemarketing efforts, this regulatory quirk translates into a substantial cost advantage.

TRA thus supports extension of the verification rules to carrier changes generated through consumer-initiated inbound calls. Such an approach is consistent with TRA's view that regulatory requirements that will more effectively guard against slamming are justified even though they may produce additional administrative and cost burdens for carriers.

**3. The "Welcome Package" Verification Option Continues to be Useful for Smaller Carriers and Should be Retained**

The Commission has tentatively concluded that the "welcome package" verification option is no longer sufficiently useful to warrant its continued availability to carriers. TRA disagrees. Pursuant to the "welcome package" verification option, specifically prescribed information concerning a carrier change is sent to a consumer who has telephonically authorized a carrier change. This verification option also provides the consumer with an opportunity to reconsider the authorized carrier change for up to two weeks thereafter. While this verification option is not as widely utilized as other verification alternatives primarily because of the 14-day "waiting period," the "welcome package" remains a very cost effective means of verifying telemarketed carrier changes, particularly for smaller carriers. The "welcome package" option, for example, is significantly less expensive to use than the more common third party verification.

As the Commission has recognized, certain commenters persist in attempts to analogize the "welcome package" verification method to the "negative LOA" which the Commission has clearly prohibited (a decision which TRA has wholeheartedly supported). Such analogies are inappropriate. The essential anticompetitive danger associated with a "negative LOA" is that the consumer is placed in the untenable position of having to affirmatively act in order to avoid consequences which have been neither sought out nor agreed to. A "welcome package", on the other hand, is utilized only after a consumer has freely exercised his or her ability to designate a preferred carrier. Further, the "welcome package" provides the consumer a full 14 days to consider the implications of that decision. Indeed, by virtue of this extended window during which even an authorized carrier change may be canceled, the "welcome package" may represent the verification option which most fully protects the consumer.

**B. Consumers and Competitors Who have been Victimized by Slamming Should be Made Whole, but Not Enriched**

In implementing the liability provisions of Section 258, TRA urges the Commission to be guided by the thematic principles seemingly relied upon by Congress in fashioning these provisions. In considering the competing equities of the parties necessarily (and for the most part unwillingly) involved in a slamming incident, Congress has appropriately identified as its primary objective the goal that consumers should not be penalized in any way for having been slammed. At the same time, however, the very language of Section 258, which speaks in terms of "charges collected",<sup>11</sup> indicates that Congress did not intend to afford consumers a windfall in the form of absolution from charges for telecommunications services which they have actually utilized. To this

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<sup>11</sup> 47 U.S.C. § 258(b).

end, Congress identified the rights of the authorized carrier as likewise deserving of protection and, to the extent it is possible to protect these rights while simultaneously safeguarding consumers from economic harm, has provided through Section 258 a mechanism pursuant to which authorized carriers may also be made whole. The final principle embodied in Section 258 is Congress' clear commitment that the culpable carrier should derive no economic benefit whatsoever from its fraudulent conduct.

The precepts contained in Section 258, however, are not limited to the above. Seeking a means to curb the growing opportunities for carriers to engage in intentional acts to mislead or defraud consumers, Congress established a penalty structure which links the intentional, and therefore particularly damaging, nature of unauthorized carrier changes to the economic penalties imposed by Section 258(b). TRA agrees that the penalties imposed for engaging in such deleterious practices should indeed correspond to the willful nature of the conduct. Because no deterrent effect could flow from the imposition of harsh penalties to carriers which diligently comply with the Commission's verification rules, however, TRA submits that the full impact of Section 258's economic sanctions should be reserved only for those situations indicating clear disregard for the verification rules and the rights of consumers. In those instances in which a carrier has followed the Commission's verification procedures, but an unauthorized carrier change nonetheless occurs as a result of a miscommunication or inadvertent error, requiring the erring carrier to forego all compensation for services provided to the consumer is neither warranted nor sound public policy. Even in situations in which unauthorized carrier changes have resulted from miscommunication or mistake, TRA believes that a carrier which has not complied with the Commission's verification rules should be subject to the full measure of Section 258's penalty structure.

From the perspective of the "slammed" consumer, the above-described principles ensure full compensation, but do not provide for undue enrichment. As an initial matter, TRA submits that it is a given that a consumer should never be required to pay more for telecommunications services provided by an unauthorized carrier than it would have paid to its authorized carrier for the same services. Further, a consumer whose telecommunications service provider has been changed without his or her consent, whether intentionally or through inadvertence, should be switched back to the authorized carrier at no charge. In keeping with Congress' determination that the consumer should be "made whole", however, the consumer should not be relieved from liability for telecommunications services, capped at the level of charges which would have been owed the authorized carrier for similar services.

As the Commission has recognized, two distinct and weighty considerations militate against absolving consumers of all charges following an unauthorized carrier change. First, such an approach would deprive the authorized carrier of foregone revenue in contravention of the provisions of Section 258.<sup>12</sup> More importantly, however, the Commission has acknowledged that "by establishing a rule that absolves slammed subscribers of liability for charges assessed by an unauthorized carrier, we may create an incentive for subscribers to delay reporting that they have been slammed. . . [and to] fraudulently claim that they have been slammed to avoid payment for telecommunications service that they may both have requested and received."<sup>13</sup>

TRA has previously joined the many commenters which have urged the Commission to refrain from providing the unscrupulous with an incentive to claim wrongful conversion in order

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<sup>12</sup> Further Notice of Proposed Rulemaking, FCC 97-248 at ¶ 27.

<sup>13</sup> Id.

to avoid payment of legitimate long distance charges. With the advent of competitive local telecommunications alternatives, it is all the more imperative that the Commission refuse to open such a "Pandora's box". The repercussions of providing consumers with an open invitation to evade responsibility for validly requested, and provided, telecommunications services would now extend far beyond the interexchange services market. The irony of creating the possibility of widespread fraud by consumers within the context of a proceeding specifically designed to protect consumers from the inappropriate activities of unscrupulous carriers should be manifest to even those commenters who, out of an abundance of concern for the consumer, continue to press for a total absolution from all charges.

As noted above, in the case of patently fraudulent or intentional slamming activity, or even an inadvertent carrier change where compliance with the Commission's verification rules cannot be readily demonstrated, the unauthorized carrier should be obligated to remit all monies collected from the consumer to the authorized carrier and also to pay any resultant carrier change charge associated with returning the consumer to the authorized carrier. Additionally, in cases where the unauthorized carrier has collected from the consumer charges for telephone exchange or toll service which exceed the charges which the consumer would have owed the authorized carrier absent the switch, the authorized carrier should be required to refund to the consumer any excess amount. This result would be consistent with the intent of Congress that among the various parties, the interests of the consumer should be paramount. Indeed, allowing the authorized carrier to retain "excess" charges would fail to satisfy Congress' directive that the consumer should be "made whole" because the authorized carrier would receive a windfall at the direct expense of the consumer.

Since the authorized carrier will receive from the unauthorized carrier the charges paid by the consumer, the authorized carrier will attain the full benefit of its bargain with the consumer. Thus, no justification exists for the authorized carrier to withhold from the consumer any premiums which would have accrued as a result of service usage absent the unauthorized switch. Likewise, no rationale supports liability on the part of the unauthorized carrier for such premiums. As a result of remitting collected charges to the authorized carrier, the unauthorized carrier will have already been deprived of all economic benefit which might otherwise have flowed from the unauthorized switch; any additional payment to the authorized carrier would result in a windfall to the authorized carrier. Finally, such an approach would give rise to a host of valuation disputes between carriers the resolution of which, in TRA's opinion, would impose undue administrative burdens upon the Commission disproportionate to the amounts involved.

For purposes of the above analysis, TRA submits that a LEC which fails to process a carrier change within a reasonable period of time, where that change would result in a consumer's switch from the LEC or an affiliate of the LEC, should be treated as an intentional slam and penalties imposed accordingly. The penalty to be imposed upon a LEC which merely executes a carrier change inaccurately as a result of inadvertence, however, should correspond to the treatment of carriers which submit appropriately verified carrier changes but which, as a result of consumer miscommunication or other unintentional action such as typographical error, nevertheless effect an inaccurate or an unintended carrier change.

As TRA has noted, slamming allegations occasionally arise despite a carrier's full compliance with the Commission's verification rules. Frequently such allegations follow one spouse's valid authorization of a carrier change without communicating that change to the other

spouse. Misunderstandings also result when a validly authorized carrier (frequently a resale carrier) does not possess a distinct Carrier Identification Code ("CIC"), resulting in consumers being inaccurately identified as customers of the underlying facilities-based carrier, to the consternation and confusion of the inquiring consumer. The Commission has clearly stated that "Section 258 applies only if a carrier violates our verification procedures."<sup>14</sup> Situations as those described do not indicate a violation of the verification rules and thus do not implicate application of Section 258.<sup>15</sup> And the unintentional nature of a carrier change submission bearing a typographical error is without question beyond the intended scope of Section 258. A carrier, having obtained and verified a valid carrier change, will hardly invite liability or, more consequential to the carrier's business objectives, risk customer dissatisfaction, by delaying the implementation of a customer's desired carrier change in order to slam a customer with which it has no relationship.

That having been said, TRA does believe that carriers owe certain obligations to consumers even in situations which do not rise to the level of intentional slamming but which nevertheless result in carrier changes which do not accurately reflect consumer wishes. The erring carrier should be required to pay any carrier change charges necessary to immediately switch the consumer back to its authorized carrier. The erring carrier should also be required to refund to the customer any overages in charges paid as compared to the amount which would have been charged

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<sup>14</sup> Id. at ¶ 20.

<sup>15</sup> With respect to inter-household miscommunications, TRA submits that a carrier which has made reasonable inquiries as to the spouse's legitimate ability to effectuate a carrier change -- *i.e.*, that the individual authorizing the change is indeed responsible for charges billed to the telephone number -- should be entitled to rely upon the consumer's assertion of authority to make the carrier change. Indeed, without access to the consumer's CPNI, the carrier would have no other means of verifying the consumer's authority and would be almost continuously at risk of slamming accusations.

by the authorized carrier absent the service change. Finally, the authorized carrier should be required to credit the consumer with such usage as reflected on the bills of the unauthorized carrier for purposes of determining any premiums earned by the consumer.

Finally, TRA does not disagree with the Commission's tentative conclusion that to the extent there are disputes among carriers attempts should be made to resolve those disputes before seeking formal Commission intervention. TRA urges the Commission, however, to be cognizant of the significant costs to carriers, particularly smaller carriers, which unavoidably flow from delay in dispute resolution. Thus, when dispute resolution attempts are unsuccessful, the Commission should make expedited resolution of formal disputes a high priority.

**C. An Independent Administrator Should be Appointed to Implement Carrier Changes and PC-Freezes**

TRA strongly supports "the use of an independent third party to execute PC-changes neutrally"<sup>16</sup> and urges the Commission to extend to this independent administrator the authority to oversee the implementation of PC-freezes as well. As demonstrated below, changes to the competitive landscape warrant the immediate removal from incumbent LECs of the ability to effectuate -- or intentionally delay effectuating -- carrier changes. As a result of the procompetitive initiatives of the Telecommunications Act, incumbent LECs are now poised to become the direct competitors of carriers which must depend upon the incumbent LECs for timely and accurate implementation of carrier changes. If consumers are to benefit from the competitive opportunities which the Telecommunications Act seeks to promote, the Commission must (i) recognize the ability (and the incentive) of incumbent LECs to engage in anticompetitive behavior against their local

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<sup>16</sup> Id. at ¶ 35.

exchange and interexchange competitors, including intentional abuse of the carrier change procedure, and (ii) act to prevent such abuse. The appointment of an independent carrier change administrator will significantly limit the ability of incumbent LECs to exploit their presently unique position as executing carriers to inappropriately disadvantage potential competitors.

The necessity of removing from incumbent LECs the unfettered ability to disadvantage competing carriers is every bit as compelling when a PC-freeze, rather than a carrier change is involved. The Commission has been presented with ample evidence of anticompetitive abuses occurring in connection with the solicitation and implementation of PC-freezes. Accordingly, TRA asks the Commission to designate an independent entity, unaffiliated with any incumbent LEC, to administer not only the timely effectuation of carrier changes, but also the timely effectuation (and removal, upon consumer notification) of PC-freezes.

1. **Appointment of an Independent Administrator to Oversee Carrier Changes and PC-Freezes is Necessary to Ensure Competitive Neutrality**

a. **Implementation of Carrier Changes**

The local exchange is, and will likely remain for the foreseeable future, “one of the last monopoly bottleneck strongholds in telecommunications.”<sup>17</sup> Incumbent LECs are thus in a position to use their “control of bottleneck local facilities to impede free market competition.”<sup>18</sup> Certainly, incumbent LECs have strong incentives to resist competitive entry into the local

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<sup>17</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 4 (1996), *pet. for rev. pending sub nom. Iowa Utilities Board v. FCC*, Case No. 96-3321 (8th Cir. filed September 5, 1996), *recon.* FCC 96-394 (September 27, 1996), *further recon.* FCC 96-476 (December 13, 1996), *further recon.* FCC 97-295 (August 18, 1997), *further recon. pending.*

<sup>18</sup> Id.

exchange/exchange access market;<sup>19</sup> they also have strong incentives to discriminate against their and their long distance affiliates' interexchange carrier rivals.<sup>20</sup>

It follows then that incumbent LECs will have the incentive and the ability to manipulate the carrier change process to secure strategic advantages for themselves and their long distance affiliates and to disadvantage competitors. The experience of TRA's resale carrier members in the interexchange industry suggests that the incumbent LECs will act upon this incentive and advantage. Non-facilities based interexchange resale carriers must rely upon their network service providers to effectuate a customer acquisition. In the late 1980s and early 1990s, most of the customers acquired by resale carriers were AT&T customers and more often than not, the resale carrier was reliant upon AT&T to provide for the carrier change. The term "jamming" was coined to describe the interminable provisioning delays that resulted. And in the interim, the customers seeking to avail themselves of the resale carriers' services were often the subject of repeated "win-back" efforts, which because of the lengthy delays were frequently successful.

The circumstances here are remarkably similar. Competitors, both local exchange and interexchange, must rely upon the incumbent LECs to effect carrier changes which will often involve the loss of customers to the incumbent LECs or their long distance affiliates. TRA submits that the results will likely be similar to those experienced by its resale carrier members in dealing with AT&T unless the incumbent LECs are disintermediated. Certainly, the operational support

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<sup>19</sup> Id. at ¶¶ 10, 55.

<sup>20</sup> Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended (First Report and Order and Further Notice of Proposed Rulemaking), CC Docket No. 96-149, FCC 96-489, ¶ 107 (released December 24, 1996), *pet. for rev. pending sub. nom. Bell Atlantic v. FCC*, Case No. 97-1067 (D.C. Cir. filed Jan. 31, 1997).

service (“OSS”) track record to date of the Bell Operating Companies (“BOCs”) does not suggest otherwise.<sup>21</sup>

The answer seemingly is, as suggested in the *Notice*, to appoint “an independent third party to execute PC changes neutrally.”<sup>22</sup> Such a third party administrator could operate in tandem with the regional number portability administrators, using a comparable database architecture. Cost recovery could mirror the scheme adopted to recover the costs associated with long-term number portability.<sup>23</sup>

**b. Oversight of PC-Freezes**

In response to the MCI Petition for Rulemaking in RM-9085, TRA took the position that PC-freezes should be prohibited altogether. TRA argued for this dramatic action because of the serious competitive threat posed by the ongoing, pervasive manipulation of the PIC-freeze process in which incumbent LECs have been and are engaging. At a minimum, TRA urged the Commission to impose strict restrictions on the marketing, application and removal of PC-freezes.

TRA nonetheless recognizes the benefits to be derived by consumers from the availability of PC-freezes, including the inherent value associated with an enhanced ability by the consumer to more fully participate in efforts to protect against unauthorized carrier changes. For

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<sup>21</sup> Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), CC Docket No. 97-137, FCC 97-298, ¶¶ 128 - 221 (August 19, 1997).

<sup>22</sup> Notice, FCC 97-248 at ¶ 35.

<sup>23</sup> Telephone Number Portability (First Report and Order), 11 FCC Rcd. 8352 (1996), *recon.* CC Docket No. 95-116, FCC 97-94 (released March 11, 1997), *further recon. pending, pet. for rev. pending sub nom. U.S. WEST, Inc. V. FCC*, Case No. 97-9518 (10th Cir. April 24, 1997).