

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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)

Docket No. 94-129

COMMENTS OF THE
AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION ("ACTA")
IN RESPONSE TO
FURTHER NOTICE OF PROPOSED RULE MAKING AND
MEMORANDUM OPINION AND ORDER ON RECONSIDERATION
REGARDING THE COMMISSION'S
INITIAL REGULATORY FLEXIBILITY ANALYSIS

America's Carriers Telecommunication Association ("ACTA"), by its attorneys, submits its initial comments in response to the Commission's Initial Regulatory Flexibility Analysis contained in its Further Notice of Proposed Rule Making ("FNPRM") released in this Docket on July 15, 1997.

I. INTRODUCTION

1. ACTA is a non-profit trade association of over 200 members, the majority of which qualify as small business entities. ACTA's members provide telecommunications services to the public, the vast majority of whom, like the ACTA members themselves, are small end users, both residential and business. The rules which come out of the FNPRM will have a direct and palpable effect on ACTA members, not only on their costs of marketing, operations, and

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regulatory compliance, but also in regard to their trade reputation and their ability to compete against the incumbent large carriers.

II. THE IMPACT OF THE PROPOSED SLAMMING RULES ON SMALL CARRIERS MUST BE CONSIDERED

2. The Commission must include, in its calculus of factors that determine its ruling in this proceeding, what impact its slamming rules will have on small carriers. FNPRM at ¶ 72. If there has been one recent message from Congress to the Commission that has been clear and unequivocal in its statutory direction, it is that the Commission needs to take into account, and protect, the interests of small entities in the telecommunications marketplace.

3. As part of the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), Congress enacted the Small Business Regulatory Enforcement Act of 1996. This Act amended the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 ("RFA"), to require agencies to make preliminary and then final "regulatory flexibility analyses" on whether an agency's rules have a significant economic impact on a substantial amount of small entities which includes, *inter alia*, small businesses. 5 U.S.C. §§ 601-612; Funk, *More Stealth Regulatory Reform*, Administrative & Regulatory Law News 1-2 (Summer 1996).¹ Under the 1996 amendment, agency compliance with the RFA's requirements was made fully subject to judicial review under the Administrative Procedure Act. In addition to remanding the rule to the agency -- a court can also defer enforcement of the rule against small

¹ Under the original version of the RFA, agency determinations and analyses under the Act were exempted from judicial review. As a result of this exemption, both agencies and courts widely ignored the Act. *See, generally, Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985) and its progeny.

entities “unless the court finds that continued enforcement of the rule is in the public interest.” 5 U.S.C. § 611(a)(4)(b); Funk, *More Stealth Regulatory Reform*, Administrative & Regulatory Law News 1-2 (Summer 1996).

4. Of particular importance is that the Commission is required to perform an initial regulatory flexibility analysis (“IRFA”) in a notice of proposed rulemaking. 5 U.S.C. § 603. The IRFA is required to contain “a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant impact of the proposed rule on small entities.” 5 U.S.C. § 603(c). In ostensible compliance with these duties, the Commission devotes *two* paragraphs to possible alternatives. FNPRM at ¶ 89. Nothing said in these two paragraphs, however, addresses the impact of the vague and standardless environment surrounding enforcement of the anti-slamming campaign on small carriers.

5. The only purported action the Commission took to minimize the impact on small carriers is the requirement of private settlement negotiations regarding the transfer of charges arising due to Section 258 liability. The Commission suggests that private negotiations will “lessen the economic impact of a dispute on small entities.” FNPRM at ¶ 89. This approach emphasizes form over substance. It fails to address the more basic problem created by imposing liability on carriers that do not wilfully slam. The issue of private negotiations for a small carrier confronted with typical scatter gun accusations is largely an academic exercise. Liability is already imposed first by the cost of defending against the erroneous accusations and then having to accept as a lesser evil a negotiated settlement favoring the complainant and/or a competitor. These adverse consequences result therefore regardless of the nature of the

proceeding. The only question is how much the ordeal will cost the small carrier.

6. Ironically, Section 257 of the Telecommunications Act requires the Commission to identify and eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.” 47 U.S.C. § 257(a). In carrying out this mandate, the Commission must “promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity.” 47 U.S.C. § 257(b).

7. The Commission in its Report, *In The Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, FCC 97-164, GN Docket No. 96-113 (May 8, 1997) (“Report”), recognizes that market entry barriers can also include “obstacles that small telecommunications businesses face in providing service or expanding within the telecommunications industry” Report, ¶ 13. Market entry barriers are conceptualized as those impediments that “significantly distort the operation of the market and harm consumer welfare.” Report, ¶ 16.

8. The Commission seems to have been convinced that small telecommunications companies in particular are the “villains” of the slamming issue. It has unfortunately decided to act on this grossly unfair assumption as if it were fact, and in a startlingly prejudicial manner for a major government agency.² It has publicly announced, in a publication paid for by taxpayer

² See, *Common Carrier Scorecard*, Federal Communications Commission, (Fall 1996) at p. 11.

dollars, festooned with dramatic graphic illustrations, disseminated world-wide over the Internet, and provided ostensibly for the protection of consumers,³ that "[t]he [slamming] complaint patterns suggest that smaller companies may be using sales and marketing practices that raise consumer concerns about slamming." *Common Carrier Scorecard*, at p. 11. It goes on further to promote AT&T, MCI, and Sprint, to the detriment of the smaller carriers attempting to provide competition, saying that "the major companies such as AT&T, MCI and Sprint have relatively low complaint ratios." *Id.* at 11. In other words, there is nothing wrong with the marketing practices of large carriers, whom consumers should trust. Yet, in apparent disregard for fundamental obligations to maintain governmental neutrality, the FCC devises its ratios by comparing "the number of slamming complaints served divided by total communications-related revenue"! *Id.* at 11. The FCC therefore deliberately gamed its own system to favor large, more politically potent carriers. Application of a more common-sense approach such as comparing the number of slamming complaints served to the number of marketing calls made, or to the number of customers switched has been ignored, or worse, never considered to begin with.

9. Comparing complaints of slamming, a marketing abuse, to telecommunications-related revenue is absolutely shameful. This may be easier to visualize by stepping back and looking at a hypothetical for say, Germany. If, for example, Deutsche Telekom, which has been a total monopoly until now, were to earn 20 billion marks per year in telecommunications-related

³ The second sentence of the publication reads "[c]onsumers can use this information to make informed decisions about which company and service they want to use." *Common Carrier Scorecard* at 1.

revenue⁴, and began making 1,000,000 marketing calls per year to attempt to "win back" the customers it begins losing to new entrants, even if every single call it made resulted in a slamming complaint, the ratio of complaints per million marks of revenue would be one in 2000 (1,000,000: 20,000,000,000). Continuing the example, if a new entrant in the German market, with few customers and little revenue as of yet, say 1,000,000 marks per year, makes 5,000,000 marketing calls per year, and gets 500 slamming complaints (which equals one complaint per 10,000 marketing calls made), its ratio of complaints to million marks of revenue would be 500:1,000,000, or 1 in 2000 also. But according to FCC mathematics, the company which generated a consumer complaint each and every time it made a marketing call had marketing practices no worse than a company who generated a marketing complaint only one time for every 10,000 calls made. It is shocking that the FCC would resort to such ridiculous and deliberately prejudicial tactics.⁵

10. The FCC's statistical aberrations are not the only problem for small carriers in this arena. ACTA is concerned about the phenomena of incumbent carriers which supply access services or underlying transport services to smaller carriers to unilaterally place the responsibility for slamming complaints at the doorstep of their small carrier "customers." These "supplying

⁴ It is understood that it is closer to 67 billion Deutsche marks annually, but this is a hypothetical number.

⁵ The FCC also notes that "[t]he average [total] complaint ratio for telecommunications companies other than local telephone companies was less than 0.25 complaints per million dollars of revenue. The average complaint ratio for local telephone companies was even lower -- only 0.10 complaints per million dollars of revenue." *Common Carrier Scorecard* at p. 17. It cannot be surprising that the segment of the industry that is still a virtual monopoly and thus has high telecommunications-related revenues while being immune from the single largest source of competitive complaints -- slamming -- has a lower complaint ratio.

carriers” are have an incentive to pass off all slamming complaints received as the unquestioned fault of the carriers to which they supply access or transport services.

11. For example, GTE recently announced that it will charge its IXC customers for which it bills, for “excessive complaints” GTE receives.⁶ On July 17, 1997, Pacific Bell filed tariff provisions in which it assumes total discretion to determine the validity of the LOAs submitted to it by “third party” carriers and to assess charges and seek indemnification when it determines that the third party carrier has failed to meet Pacific Bell’s untariffed and totally arbitrary standards.⁷

12. ACTA has also learned that a large underlying carrier will file comments in this proceeding which will blame its resale carriers for the slamming complaints filed against it. Perhaps the master of all “buck-passers,” however, is AT&T who has gone so far as to file a formal complaint alleging an aggregator of its 800 service engaged in slamming based on complaints which resulted from AT&T’s own deliberate conduct.⁸ ACTA submits that the Commission must be fully cognizant of how the presently over-emotionally charged atmosphere surrounding claims of “slamming” can easily be distorted into an anti-competitive weapon to discipline smaller competitors. The Commission must be alert to and devise clear rules

⁶ DNSI Telecom Newsletter, Sept. 11, 1997, p.1.

⁷ Pacific Bell Transmittal No. 1928, Tariff F.C.C. No. 128, issued July 17, 1997, effective August 1, 1997. By providing itself with complete discretion to determine the validity of a third party carrier’s LOAs, Pacific Bell’s tariff violates Sections 201, 202 and 203, as well as the Commission’s rules outlawing vague tariffs. ACTA believes that other LECs, particularly the RBOCs, have filed similar tariff provisions.

⁸ See, *AT&T Corp. v. Winback & Conserve Program, Inc.*, FCC File No. E-97-02.

protecting against allowing competitor-suppliers to abuse the often perilous relationship created by such an unique, but unavoidable situation.

13. ACTA is not attempting to dissuade the Commission and its state counterparts from believing that there are too many slamming complaints. ACTA recognizes that the costs and the burden on the limited resources of the Commission and the states in processing these complaints are enormous, regardless of the validity or invalidity of the complaints received. ACTA agrees that something must be done to improve the situation. It does not believe, however, that there is only one path to take, and will not support one which makes a scapegoat out of the industry, particularly the smaller members thereof, for the sake of garnering favorable media attention and enhanced public relations.

14. Because the vast majority of carriers that will be impacted by the Commission's actions will be small businesses, the Commission must be solicitous of its Regulatory Flexibility Act responsibilities and attempt to fashion a scheme that is not unduly and/or unequally burdensome on small carriers. In this latter regard, the Commission must revise its internal attitudes toward small carriers and cease its unfounded and gratuitous criticism of smaller carriers over slamming.

III. FCC ACTIONS WILL DIRECTLY AFFECT SMALL CARRIERS

15. ACTA's substantive comments addressing the issues raised in this proceeding contain facts and arguments applicable to the Commission's obligations to conduct its Initial Regulatory Flexibility Act (IRFA) analysis. Those comments are therefore incorporated by reference in full in these comments submitted in direct response to the Commission's IRFA notice.

16. Summarizing the points made in its substantive comments, ACTA submits that the actions taken in this proceeding will have a serious and direct impact on each of the 260 resale carriers the Commission's notice identified. ACTA further submits that each of these 260 carriers qualify as small businesses and hence deserve the protection Congress intended when it enacted the amendments to the Regulatory Flexibility Act as part of the Contract with America.

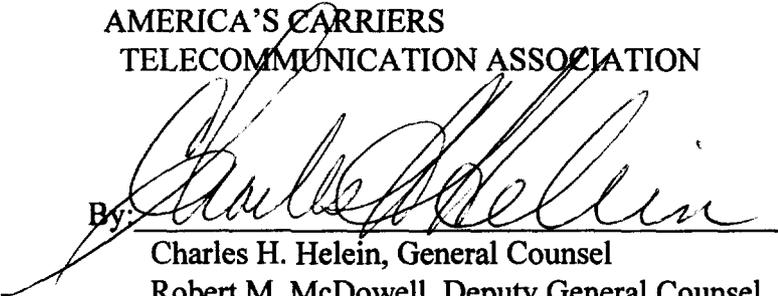
17. Small carriers are especially burdened by the Commission's current anti-slamming rules and policies. The lack of a clear definition of slamming and the consequent state and federal regulatory proceedings costs small carriers an inordinate amount of expense and lost revenues. Small carriers serve smaller customers. This means that often, recovery of charges is foregone because the cost of collection efforts is prohibitive. The confusion created by the lack of a carefully defined rule on slamming adds greatly to this problem. It permits disgruntled or dishonest consumers to wave the slamming accusation in order to avoid payment for legitimate services. Even when a complaint is not prosecuted to formal decision, allegations of slamming require the expenditure for legal/regulatory costs and take executive time, often well in excess of the amount of the charges outstanding. The result is that the small carrier, wrongly accused of slamming, loses not only the monies due for services rendered, but also, must bear additional costs of defense as well.

18. The small carrier suffers from additional exposure to multiple unjust burdens created by present rules and policies which are detailed in ACTA's substantive comments. Unless the FCC preempts all or major portions of slamming enforcement, small carriers face the potential of answering to no less than a potential 102 state jurisdictions - 51 public service commissions and 51 state attorney general or district attorney offices. Unless the Commission

adopts a balanced approach, tried and true marketing and verification techniques, such as reliance on “welcome packages” will be arbitrarily eliminated as alternatives means to conduct business; protection of customer selection of their PC will be arbitrarily narrowed; large carriers will be able to use their greater name recognition, immensely larger advertising budgets and the FCC’s own arbitrary denigration of small carriers as a whole to unduly burden small carriers, subject them to increased misdirected enforcement efforts and possible monetary losses and fines; and skew their competitive standing by aiding and abetting their larger rivals, not only unwittingly, but, as shocking as it may sound, deliberately. ACTA requests that the Commission refuse to turn its back on small carriers and to address the need for revised slamming rules and policies on a balanced and unprejudiced basis. Anything less will violate the RFA, as well as the duties under the Act and the rights of equal protection and due process guaranteed by the Constitution.

Respectfully submitted,

AMERICA’S CARRIERS
TELECOMMUNICATION ASSOCIATION

By: 

Charles H. Helein, General Counsel
Robert M. McDowell, Deputy General Counsel

Of Counsel:

Rogena Harris
Harisha Bastiampillai
HELEIN & ASSOCIATES, P.C.
8180 Greensboro Drive
Suite 700
McLean, Virginia 22102
Telephone: (703) 714-1300
Dated: September 15, 1997

CERTIFICATE OF SERVICE

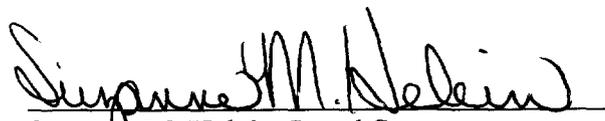
I, Suzanne M. Helein, a secretary in the law offices of Helein & Associates, P.C., do hereby state and affirm that I have caused copies of the foregoing "Comments of the America's Carriers Telecommunication Association ("ACTA") In Response to Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration Regarding the Commission's Initial Regulatory Flexibility Analysis," in Docket No. 94-129, to be served, via hand-delivery, upon the following:

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