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

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

SEP 15 1997

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

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EXECUTIVE SUMMARY

America's Carriers Telecommunication Association ("ACTA") submits comments urging the Commission to improve its regulatory framework governing the switching of telecommunications service providers for the benefit of consumers, carriers and competition alike. ACTA contends that the current and proposed rules are unworkable in that they are vague, ineffective and potentially discriminatory against smaller carriers.

As with the existing rules, the Commission's proposed rules do not adequately define "slamming." Without a clear definition of the offense, neither carriers nor the consuming public will know what it is that is to be avoided or punished. In light of the fact that offending carriers may have to pay large fines, compensate their competitors and go to jail, the Commission has no choice but to define slamming in a clear and unambiguous fashion. For the Commission to leave the definition of slamming in its current amorphous condition would not only undermine competition, consumer protection and the development of a robust telecommunications industry, it would violate fundamental tenets of constitutional law.

Accordingly, ACTA proposes that the Commission adopt a definition of slamming that incorporates the same *mens rea* element relied upon by jurists over the past several centuries of jurisprudence for the resolution of other offenses. In short, ACTA proposes that slamming be an offense that is the result of knowing, wilful or grossly negligent behavior resulting in an unauthorized change in a subscriber's carrier. Similarly, ACTA contends that, as with other offenses, a mere allegation of slamming not be sufficient to satisfy the complainant's burden of proof. Slamming itself is ill-understood by the industry, regulators and consumers, and complaints other than slamming (e.g., charging too much) or even household confusion are all too frequently labeled

"slamming." Without proper homework on the Commission's part, the number of slamming complaints will only rise due to yet more confusion.

Additionally, ACTA vehemently contends that the new anti-slamming regime should be especially vigilant towards incumbent local exchange carriers ("ILECs") because they act as submitting carrier and executing carrier. Treating the behemoth monopolies as equals to the competitive community in this regard would be an unconscionable act by the Commission. At a minimum, ACTA contends that ILECs' PC changes should be subjected to mandatory verification. Also ACTA calls for the creation of a neutral, third-party, nationwide verifier that would have investigative powers and the duty to report suspicious behavior to government agencies.

ACTA also contends that Congress unambiguously intended to pre-empt state laws affecting slamming except for those relating to the enforcement of the Commission's rules. To implement anything other than clearly defined federal rules would be to Balkanize slamming regulation, create consumer confusion and undermine competition.

Furthermore, ACTA maintains that the "welcome package" verification option should be preserved as it has proved itself to be a helpful tool for consumers and carriers alike to confirm accuracy in PC changes. In the FNPRM, the Commission cites no evidence that demonstrates that the welcome package, a NARUC invention, harms consumers. In fact, the welcome package aids ACTA's members and consumers in *preventing* undesired changes and therefore significant legal costs.

ACTA proposes that the Commission adopt rules other than those it has proposed governing in-bound calls. ACTA argues that such calls are inherently different from carrier-initiated marketing calls to consumers and should be treated differently. Accordingly, ACTA proposes that the

Commission construct a three-ringed consumer protection system that focuses on the marketing materials that solicit consumer initiated calls. An educated consumer taking the initiative to call a carrier needs less protection than an uneducated consumer caught off-guard by a telemarketer.

Also, ACTA urges the Commission to create precise standards regarding PC-Freeze solicitations and give legitimacy to Reverse PIC Changes. Furthermore, ACTA strongly argues for the Commission to reject any proposal that calls for slammed consumers to be absolved of all liability for unpaid charges, or worse, giving them cash compensation. Such a rule would only encourage fraud and kill off competition. Similarly, ACTA just as strongly argues against resellers being held liable for switching underlying carriers without notifying their end users. Such a rule would only confuse consumers and benefit larger carriers wishing to capitalize on that confusion.

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IN RESPONSE TO
FURTHER NOTICE OF PROPOSED RULE MAKING AND
MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

America's Carriers Telecommunication Association ("ACTA"), by its attorneys, submits its initial comments in response to the 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 regulatory compliance, but also in regard to their trade reputation and their ability to compete against the incumbent large carriers.

2. The Commission points out that the FNPRM has been instituted to implement Section 258 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (hereinafter the “Act”). FNPRM at ¶ 1. In order of importance, the FNPRM cites the provisions of Section 258 of the Act making it unlawful for a telecommunications carrier (hereinafter “carrier”) to submit or execute a change in a subscriber’s selection of telephone exchange or telephone toll service except in accordance with verification procedures adopted by the FCC. FNPRM at ¶ 3.

3. Later, it is pointed out that while “[s]ection 258 reflects Congressional recognition that unauthorized changes in subscriber’s carrier selections . . . is a significant consumer problem . . .” (FNPRM at ¶ 4), it also cites the fact that the 1996 amendments to the Act failed to define “slamming,” or put another way, failed to define when a change in a subscriber’s selection of a carrier should be determined not to have been made in accordance with FCC verification procedures. FNPRM at ¶ 4, n.14. Definitions of slamming are nevertheless cited in the FNPRM as “illegal changes in subscriber selections” and that used by the Commission prior to the 1996 revisions to the Act: “the unauthorized conversion of a consumer’s interexchange carrier (IXC) by another IXC, an interexchange resale carrier, or subcontractor telemarketer.” FNPRM at ¶ 4.

4. The Commission then sets forth factors which it believes have made slamming “prevalent,” fixing on developments in technology and telecommunications economics and on its belief that “[c]arriers have an economic incentive to slam,” and that “carriers may provide service to slammed consumers for a considerable time before [they] become aware of the unauthorized PIC change.” *Id.* The Commission concludes that “slamming distorts telecommunications markets by enabling companies engaged in misleading practices to increase their customer bases, revenues and profitability through illegal means.” *Id.*

5. ACTA agrees that “slamming” is a vexatious, costly, and burdensome problem for the industry, particularly the 700¹ or so “no-name” carriers that compete with the handful of carriers that control over 85% of the total interexchange market.² To address the problem effectively, it will be important to collect all the facts on the record and to attempt to fashion new rules and policies based on those facts, eschewing facile assumptions and unverified anecdote.

6. An example of the latter concern may be found in the Commission’s citation that it has “received 11,278 slamming complaints in 1995, a six-fold increase over the number of such complaints received in 1993. Further, the FCC complains that the number of slamming complaints received in 1996 is over 16,000.” FNPRM at ¶ 6. These statistics unquestionably show a rise in complaints received which the Commission and other government instrumentalities, such as the state attorneys general, classify as “slamming.” *See* FNPRM at ¶ 6, n.25. But ACTA believes that if proper, fair rules and policies which are not unduly burdensome and prejudicial are to be adopted, they must be considered in the light of the actual underlying facts on which most complaints filed as “slamming complaints” are being made. In addition, the numerical total of complaints received should not be viewed in isolation of all surrounding and relevant circumstances.

¹ Estimates vary as to the total number of IXCs, but with ACTA’s estimates along with other associations’ being between 500 and 700, clearly the Commission’s count of 260 resale carriers is far too low. *See, In the Matter of Defining Primary Lines, Notice of Proposed Rulemaking*, CC Docket 97-181, Released September 4, 1997, at ¶ 30.

² Use of the epithet “no-name” carriers is to highlight the fact that ACTA members are not household words to the general public because they haven’t the funds to underwrite national advertising campaigns. The non-billion dollar players must rely on the more difficult and time-consuming practices of building their customer bases through dedicated services, consumer-friendly operations and bone-scraping competitive prices. To their customers, competitive carriers have a name, and for the most part, it is synonymous with service, reliability, and quality.

7. In the first place, many “slamming” complainants have not actually been “slammed” at all. Rather than a carrier having deliberately or negligently transferred a subscriber against his/her wishes or knowledge, the reality is often nothing of the sort. Rather, a complaining subscriber has forgotten about giving authorization; has had someone else in his/her family or business place the order without telling the complaining subscriber (or sharing the subscription premium with the complaining subscriber, whether that was a check or a pint of ice cream); has not actually had their service switched after a sales call was made, but just became angry, for example, at the receipt of a welcome package to confirm the order placed; or has experienced “buyer remorse” for some inexplicable reason and to save personal embarrassment claims to have been slammed. Often in such cases, such claims are made because the subscriber has been subjected to immediate remarketing by his or her former carrier and made to feel "stupid" or "misled" by having been persuaded to switch (a favorite remarketing technique of some of the larger incumbent carriers). There are also numerous cases in which a claim is made simply to attempt to avoid paying lawful charges.

8. An ironic twist in the present environment is that the oft-voiced official concern over the extent of the slamming problem has been played up by the media far in excess of more serious problems afflicting this country. With the added publicity, it is nearly certain that more complaints are encouraged and made. Human nature being what it is, it is certain that anyone with a real or imagined “beef” in regard to any aspect of his/her service, on seeing some carrier written about or cited for having allegedly been engaged in slamming, is likely to assume that his/her own service has been slammed or to see it as an opportunity to exact revenge against a carrier that has not responded to a complaint or demand as desired.

9. One ACTA member, a small carrier, has quickly grown in size in a short time by being astute enough to find yet another untapped market niche ignored by larger competitors. To reach its targeted market, massive telemarketing efforts are required. This one carrier makes approximately 20 million marketing calls per month: that is 240 million calls per year. When one carrier out of 500 carriers makes that many calls, it is hardly fanciful to conclude that hundreds of millions of calls by all competing carriers are made each year. Out of these hundreds of millions of calls, there were 16,000 complaints that the Commission "lists" as slamming in 1996. The percentage of complaints versus the number of sales attempts is therefore infinitesimal. Placed in still another perspective, AT&T estimates that, on average, 90 million end users switch service every year. But 16,000 complaints, many of which are not true slamming complaints, represent only .018% (.00017777), or eighteen one-thousandths of one percent of all those end users who switched carriers.

10. 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.³ It has publicly announced, in a publication paid for by taxpayer dollars, festooned with dramatic graphic illustrations, disseminated world-wide over the Internet, and provided ostensibly for the protection of consumers,⁴ that "[t]he [slamming] complaint patterns

³ See, *Common Carrier Scorecard*, Federal Communications Commission, (Fall 1996) at p. 11.

⁴ 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.

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.

11. 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 revenue⁵, 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

⁵ It is understood that it is closer to 67 billion Deutsche marks annually, but this is a hypothetical number.

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.⁶

12. 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 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.

13. For example, GTE recently announced that it will charge its IXC customers for which it bills, for "excessive complaints" GTE receives.⁷ On July 17, 1997, Pacific Bell filed tariff provisions in which it assumes total discretion to determine the validity of the LOAs submitted to

⁶ 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.

⁷ DNSI Telecom Newsletter, Sept. 11, 1997, p.1.

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.⁸

14. 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.⁹ 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 protecting against allowing competitor-suppliers to abuse the often perilous relationship created by such an unique, but unavoidable situation.

15. 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

⁸ 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.

⁹ *See, AT&T Corp. v. Winback & Conserve Program, Inc.*, FCC File No. E-97-02.

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.

16. Not only must the Commission's approach be balanced, it must recognize that it faces new issues with which it must deal in fashioning a revised regulatory scheme. Because there are penal attributes involved (forfeitures, fines and even criminal charges possible, plus payments to rival carriers), the Commission must clearly define the offense of slamming. Further, there must be explicit delineation of the proof required to sustain a claim based on well-defined constituent elements of the offense. Because there are important property and competitive rights of carriers involved, for both those accused of or victimized by slamming claims, there are important constitutional issues to be considered, such as equal protection and "takings" issues. Because Congress has been explicit in its direction to the Commission in Section 258, the Commission must preempt state anti-slamming regulations. 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. Additionally, because there is a burden on all concerned arising from slamming complaints, the Commission should consider establishing a public education program and an industry advisory committee to assist in improving the situation. These and other issues raised by FNPRM will be addressed in the sections which follow.

II. ACTA'S PROPOSALS

A. ACTA's Proposed Definition of Slamming.

17. Given the onerous penalties that have been assessed and which are intended to be imposed and expanded, it is incumbent on the Commission to define with particularity the elements of the offense. Slamming might more accurately be defined as follows:

Knowingly and wilfully (a) submitting oral, written or electronic instructions to change a subscriber's provider of telecommunications service or services; (b) effecting a change in a subscriber's provider of telecommunications service or services; or (c) assisting in submitting oral, written or electronic instructions to change or assisting in effecting a change in a subscriber's provider of telecommunications service or services, without such person's verifiable authorization to submit such instructions, effect such a change; or assist in regard to either; or acting with gross disregard of the requirement not to engage in the conduct proscribed by the foregoing resulting in an unauthorized change in a subscriber's provider of telecommunications service or services.

18. Utilization of one of the verification procedures specified in 47 C.F.R. § 64.1100 will create a rebuttable presumption that a change in primary interexchange carrier was authorized by the customer. If the customer chooses to challenge the verification, the customer will bear the burden of proof as to showing that the verification was invalid. The Commission shall determine, given the circumstances of the change as alleged, whether a reasonable person would believe that the customer desired a change in carrier. A carrier will not be subject to liability under Section 258 for an unauthorized change in any of the following situations:

- 1) Where consent to a change in PC was provided by any member of a household, business, institution or other entity and the soliciting carrier or its agents reasonably relied on consistent practices used to determine a person's authority to act, such as, without limitation, a signature, taped confirmation, direct mail confirmations (whether or not containing "welcome package" materials), or payment of three (3) standard invoices for services rendered (covering at least the 90 day period following authorization to change the soliciting carrier).

- 2) Where no change to the soliciting carrier is effected.
 - 3) Where a change is effected due to inadvertence (*i.e.*, not the result of a willful or grossly negligent) of the soliciting carrier or its agents, but the end user is promptly provided with full restitution of any costs, expenses or lost benefits due to the inadvertent change of PC; provided that, the soliciting carrier may credit against such restitution any dollar for dollar benefit derived by the temporary change in service.
 - 4) Where a change is effected due to the negligence of a third party other than the soliciting carrier.
- B. The Current Concept of Slamming Is Vague and Creates Numerous Constitutional Concerns.

19. Official overreaction to an admittedly frustrating problem is most prone to abuse when the cause of the problem remains ill-defined, and hence, ill-understood. The history of jurisprudence is regrettably replete with instances of reliance on standardless or vague laws which when applied, result in the punishment of the innocent as well as the guilty, or serve to cloak in an aura of public interest the ability to pursue individual agendas based on preconceived prejudices.

20. The danger in today's increasingly overcharged atmosphere surrounding slamming is to exalt the political capital involved in seeming to protect the consumer with little or no regard for the rights of carriers, particularly small ones, and the adverse ripple effect on the rights of the vast majority of their customers. The Commission, therefore, first needs to determine the actual nature of the problem and then to carefully and, in a balanced manner, tailor a remedy to cure the problem that actually exists. As ACTA has argued, the place to begin is with a useful definition of slamming itself.

21. Prior to the passage of the 1996 Act, the Commission defined slamming as “the unauthorized conversion of a consumer’s interexchange carrier (IXC) by another IXC, an interexchange resale carrier, or a subcontractor telemarketer.” FNPRM at ¶4, n.14, *quoting, Cherry Communications, Inc.*, Consent Decree, 9 FCC Rcd 2086, 2087 (1994). The 1996 Act does not define slamming, but in the FNPRM, the Commission notes that the Joint Explanatory Statement of the Act refers to slamming as “unauthorized changes in subscriber selections.” FNPRM at ¶ 4. What must be made clear is what constitutes an “unauthorized conversion,” an “illegal change.”

22. The importance of focusing on the definition of slamming arises from the fact that a carrier found to be guilty of slamming faces an array of penalties ranging from civil forfeiture to possible imprisonment. 47 U.S.C. §§ 258, 501. Yet, by the Commission’s own admission, a proper definition of slamming is nary to be found. Given the increasingly severe attitudes being adopted and the equally severe penalties being brought to bear on alleged offenders, it has become constitutionally imperative for the Commission to establish a precise definition of the offense of slamming.

23. It is a fundamental principle of statutory construction that a statute must be definite to be valid. A statute will violate the due process clause of the U.S. Constitution where its language does not convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices -- i.e., where its language is such that men of common intelligence must necessarily guess at its meaning. *See Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); 16A Am. Jur. 2d *Constitutional Law* § 818 (1979).

24. The due process requirement of definiteness is especially important when application of penal statutes are or may be involved. The legislature, in the exercise of its power to declare what shall constitute a punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that the person may have a certain understandable rule of conduct, and know what acts it is his duty to avoid. *See Colautti v. Franklin*, 99 S. Ct. 675 (1979); *Musser v. Utah*, 333 U.S. 95 (1948); *U.S. v. Brewer*, 139 U.S. 278 (1891); 16A Am. Jur. 2d *Constitutional Law* § 818 (1979).

25. The constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense the nature of which no fair warning was given. *See American Communications Assoc. v. Douds*, 339 U.S. 382 (1950); 16A Am. Jur. 2d *Constitutional Law* § 818 (1979). The uncertainty in the application of a statute which constitutes the denial of due process is not the difficulty of ascertaining whether close cases fall within or without the prohibition of the statute. Rather, it is whether the standard established by the statute is so uncertain that it cannot be determined with reasonable definiteness which particular act or acts are outlawed. *Mixon v. State*, 178 S.E.2d 189 (Ga. 1970); *State v. Lanesboro Product & Hatchery Co.*, 21 N.W.2d 792 (Minn. 1946); 16A Am. Jur. 2d *Constitutional Law* § 818 (1979).

26. The only indication in the Telecommunications Act of 1996 as to what constitutes a violation of Section 258 is that the penalties are imposed if the carrier violates the Commission's verification procedures found in 47 C.F.R. § 64.1100. But Section 64.1100 contains no definitions of what constitutes a violation. Rather, it sets forth alternative procedures by which a carrier is authorized to submit PC changes for processing. The central problem is that there is no *mens rea* standard attached to the concept of a violation having occurred. Hence, there is no

delineation between inadvertent or accidental acts and those committed with a “guilty mind.” The carrier is exposed to a standard more onerous than that of strict liability. A mere allegation can be accepted as proof, the entire benefit of “belief” being unfairly bestowed on the complainant, even in instances in which the complainant may be a competitor.

27. Treating slamming as an offense in which culpability is irrelevant, unreasonably exposes carriers to punitive measures regardless of any actual misfeasance or any intent to engage in such conduct. Carriers are therefore exposed to liability not for proven cause, but because guilt is automatically assumed once a complaint is made and irrespective of exculpatory circumstances such as consumer fault, negligence or contributory actions such as miscommunication within the customer’s family.

28. The chilling effect of the current befuddlement over what constitutes slamming is very detrimental to carriers and their customers, as well as to competition in the telecommunications market in general. The PIC change cannot be viewed as a discrete event. It is part of an extended process of the soliciting, provisioning and ultimately serving and billing the customer. Exposing a carrier to fines, with the threat of potential criminal sanctions, for mere allegations of wrongly effecting a subscription change unjustly skews the competitive environment, gives aid and succor to larger more entrenched competitors with the advertising and remarketing budget to make the most of such an unbalanced approach to solving the problem and forces carriers, particularly small carriers, to overcompensate in their efforts to avoid the mere threat of being accused.

29. The Commission itself has recognized that there is a constitutional dimension to a carrier’s marketing activities. Report and Order, *In The Matter of Policies and Rules Concerning*

Unauthorized Changes of Consumers' Long Distance Carriers, FCC 95-225, CC Docket No. 94-129 (June 14, 1995), ¶¶ 14, 15-18. The Commission has rightly recognized that advertising and marketing efforts of a carrier constitute commercial speech. The problematic situation created by the lack of a slamming definition which incorporates *mens rea* is that marketing practices that are not misleading or confusing will be adversely impacted. It is feared that regulators are consciously stretching the definition of slamming to encompass those customers who switch carriers based on allegedly misleading marketing materials. The amorphous nature of what today is accepted as the slamming definition allows the "wrong" to be stretched to such extremes. The lack of a knowing and wilful requirement in the definition means that innocent carriers have and will fall within the scope of expanding enforcement efforts. Such a situation clearly inhibits the commercial speech of carriers and chills their constitutional rights of speech.

30. The fact that constitutional rights are implicated by the slamming rules heightens the concern over the vague and standardless definition of slamming. Given the constitutional dimensions involved, stricter standards of statutory exactitude must be applied. *See Colautti, supra; see also Cramp supra; NAACP v. Button*, 371 U.S. 415 (1963); 16A Am. Jur. 2d *Constitutional Law* § 818 (1979).¹⁰

¹⁰ Where free speech rights are involved, a statute must be carefully scrutinized to ensure a First Amendment freedom does not suffer under the guise of regulating conduct that is reachable by the police power. A government can only regulate in this area with narrow specificity because the existence of a penal statute susceptible of sweeping and improper applications leads to a "chilling effect" on these freedoms. *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Gooding v. Wilson*, 405 U.S. 518 (1972); *NAACP v. Button*, 371 U.S. 415 (1963); 16A Am. Jur. 2d *Constitutional Law* § 459 (1979); 73 Am. Jur. 2d *Statutes* § 346 (1974).

31. Courts are particularly concerned about vague statutes that implicate constitutional guarantees. Their concerns center on the lack of clear guidelines to direct those in charge of enforcement of the statute. Such a lack of guidelines places too much discretion in the hands of enforcement officials leading to the evil of selective enforcement.¹¹ Selective enforcement, (evidence of instances of which exists as these comments are being prepared) distorts prosecutorial discretion, permitting personal opinions to judge not conduct alone, but the message the person wishes to convey in his speech or to judge the message based on the individual characteristics of the person (company) behind the message. *See Treatise on Constitutional Law: Substance and Procedure*, 2nd § 20.9.¹²

32. Section 258 (b) of the 1996 Act provides:

(b) LIABILITY FOR CHARGES -- Any telecommunications carrier that violates the verification procedures described in

¹¹ The evidence of the Commission's own pronounced prejudice against small carriers on the issue of slamming creates a palpably far greater sinister likelihood that an actual problem of abusive selective enforcement exists.

¹² As Justice O'Connor has observed:

[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit a "standardless sweep [that] allows policemen, prosecutors and juries to pursue their personal predilections."

Kolender v. Lawson, 461 U.S. 352 (1983), quoting *Smith v. Goguen*, 415 U.S. 566 (1974). A penal statute "susceptible of sweeping and improper application . . . may deter their exercise [First Amendment freedoms] almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415 (1963). The vagueness doctrine requires "legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" *Smith v. Goguen*, 415 U.S. 566 (1974). A statute will be void for vagueness if it is found to be so ambiguous that the enforcement officials were able to determine what actions were punishable on the basis of their personal preferences. *Id.*

subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation, in accordance with such procedures as the Commission may prescribe. The remedies provided by this subsection are in addition to any other remedies available by law.

47 U.S.C. § 258(b). A carrier found guilty of slamming is required to remunerate the carrier previously selected for all charges paid by the subscriber after the violation. This is certainly acceptable in a situation where the violating carrier intentionally slammed the customer. Where, however, the “guilty” carrier was actually innocent, or merely negligent, its legitimately obtained revenue -- i.e. the subscriber’s charges -- is being taken by the Commission and given to a competing carrier. The expropriation of a carrier’s revenue pursuant to a vague and overbroad concept of slamming done in the name of a distorted view of the public good constitutes a taking of the carrier’s property which is prohibited by the Fifth Amendment which also would mandate that the carrier be adequately compensated.¹³ There can be no authority to require a carrier that has done no wrong to compensate another carrier, its competitor. Yet, unless precise standards are put in place, with confidence that they will be meticulously applied, even a “hearing” conducted after receipt of a complaint will be no guarantee of due process when the mere fact that a consumer has complained of slamming constitutes its having carried its burden of proof against the carrier.

¹³ Established principles of statutory construction require the Act to be interpreted to avoid the constitutional question that would arise if Congress had authorized such a taking. *See, e.g., United States v. Security Indus. Bank*, 459 U.S. 70, 78-80 (1982)(narrowing construction of statute applied to avoid taking); *TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812, 815 (8th Cir. 1994)(same).

33. The vice of this scenario extends beyond the potential transgression of constitutional rights. A distorted and confused enforcement policy will effect an alteration of the competitive balance in the marketplace. The “merely accused” carrier will suffer and be unfairly penalized and the former carrier, or another carrier, in either case a competitor of the accused carrier, will unjustly benefit. This scenario is very real given the aggressive techniques of large carriers to recapture lost customers. These carriers frequently telemarket their lost customers to “win” them back. These “winback” contacts often include not only unfair disparagement of the “merely accused” carrier, but active encouragement to convert a change of mind into a complaint of being slammed. Many customers can and will be convinced in such winback remarketing to switch back, and to use the vehicle of a slamming complaint to gain reimbursement. The carrier that regains the customer gets not only a new customer or a winback, but the ability to financially burden its competitors. Thus, the proposed system has built-in incentives for abuse. Without adequate standards of proof and a substantive definition of the elements of slamming, the number of slamming complaints will not abate, unjust redistributions of revenue will result and competition and the public interest will be harmed.

C. Application of the Verification Rules to All Telecommunications Carriers.

34. In the FNPRM, ¶ 11, the Commission seeks comment on whether LECs serving as both submitting carrier and executing carrier for changes in telecommunications service, whether offering interexchange and local exchange service or just local exchange service, have an enhanced ability or incentive to make unauthorized PC changes on their own behalf without detection, and thus should be limited to verification by an independent, third party.

35. ACTA submits that ILECs, being the last monopolies in telecommunications, are in an unique position that requires different verification procedures from those imposed upon the competitive community. Congress recognized the ILECs' unique status when it enacted the Telecommunications Act of 1996, especially Section 271, which restricts the BOCs from entering in-region interLATA long distance until certain rigorous requirements are met. The Commission itself recognizes that the ILECs may be tempted to self-deal when they serve both as submitting carrier and executing carrier. See FNPRM at ¶¶ 11-15. Therefore, ACTA submits that special treatment of ILECs is not only warranted, but vital to the cause of promoting and preserving competition. ACTA proposes the creation of a truly independent nationwide third-party PC verifier that would have investigative powers and the ability to disclose evidence of questionable behavior to the appropriate governmental authorities. Nonetheless, at a minimum, ILECs should be required to employ third-party verification for all changes to their services. Merely treating the ILECs the same as carriers that must compete to survive would clearly violate the letter and intent of Section 258 because of their conflict of interest as both submitting and executing carriers. In short, the Commission had better have especially stringent rules for the fox if he is to guard the henhouse.

D. The Need for FCC Preemption.

36. Also in the FNPRM, ¶ 11, the Commission sought comment on whether its rules could or should be applied to the local market in whole or in part. It is ACTA's position that the Commission's rules may and should be applied to the local market in its entirety. In addition, and most importantly, the Commission should also preempt any state rules on PC change verification procedures.

37. The Commission has the authority to preempt state rules.¹⁴ The Seventh Circuit recently discussed preemption by federal regulation in particular:

Preemption also may occur through the promulgation of federal regulations. *See de la Cuesta*, 458 U.S. at 153, 102 S.Ct. at 3022 ("Federal regulations have no less pre-emptive effect than federal statutes."). As Justice White, writing for the Court in *City of New York v. FCC*, noted, the phrase "Laws of the United States" in the Supremacy Clause "encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." 486 U.S. 57, 63, 108 S.Ct. 1637, 1642, 100 L.Ed.2d 48 (1988); *see also Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 988 F.2d 1480, 1485 (7th Cir.1993) (same). Accordingly, "a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369, 106 S.Ct. at 1898-99. As Justice White explained in *City of New York*:

¹⁴ The Supreme Court has outlined when preemption may occur as follows:

The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L. Ed.2d 604 (1977), when there is outright or actual conflict between federal and state law, e.g., *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L. Ed.2d 180 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L. Ed.2d 248 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L. Ed.2d 490 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L. Ed. 1447 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L. Ed. 581 (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. *Fidelity Federal Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L. Ed.2d 664 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L. Ed.2d 580 (1984).

Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 368, 369 (1986).