> The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area. It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to preempt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.
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> 486 U.S. at 64, 108 S.Ct. at 1642 (internal citations, quotations and citations omitted). The Supreme Court has cautioned that, in analyzing the preemptive effect of an agency regulation, "a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' " for " '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'" *Id.* (*quoting de la Cuesta*, 458 U.S. at 154, 102 S.Ct. at 3023). Rather, courts should inquire whether the agency intended to preempt state law, and, if so, whether the agency possessed the power to do so. *de la Cuesta*, 458 U.S. at 154, 102 S.Ct. at 3023; *see also City of New York*, 486 U.S. at 64, 108 S.Ct. at 1642.

Time Warner Cable v. Doyle, 66 F. 3d 867, 875-876 (7th Cir. 1994).

38. These general principles may be profitably applied to preemption of the verification/anti-slamming rules governing PC changes. To begin with, Congress intended there to be uniform, national rules on PC change verification is crystal clear from the language of Section 258(a), which states:

> No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone <u>exchange service</u> or telephone <u>toll service</u> except in accordance with such verification procedures <u>as the Commission shall prescribe</u>. Nothing in this section shall preclude any State commission from <u>enforcing</u> such procedures with respect to intrastate services." (Emphasis added.)

It is clear from the language of the statute that Congress intended there to be a single set of rules for verifying changes in service provider for both local exchange service and toll service; that these rules were to be promulgated by the FCC; and that States were free to enforce the Commission's rules as they applied to intrastate service.[15]

39. ACTA submits that it is most significant that Congress specified that States were permitted to "enforce" such procedures, that is, to enforce those adopted by the Commission. Had Congress intended to say "enact or enforce," it knows how to do that, as it did with regard to cable television services, saying "[n]othing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title." (Emphasis added.) 47 U.S.C. § 552(d)(1).

40. Compelling reasons exist as to why the Commission should expressly preempt state rules on PC change verification procedures. Most importantly, Congress has clearly expressed its intent that there be one national standard. From the standpoint of burdens on interstate commerce, to have anything other than one national standard will significantly increase marketing and regulatory compliance costs, a cost which will have to be passed on to customers in some form, thus raising their rates. The worst-case scenario is to have one set of verification rules promulgated by

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[15] ACTA is aware of one case, *Castellanos v. U.S. Long Distance Corp.*, 928 F. Supp. 753 (N.D. Ill. 1996) in which the issue arose in the context of whether or not the case should be remanded to the state court. The issue of whether 47 U.S.C. § 258 evidenced the intent of Congress to preempt the field was considered. The court held that Congress had not intended to preempt. *Castellanos* at 756. The case is not good precedent however. The court did not address and therefore did not interpret the key phrase "nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate service." (Emphasis added.) Nor did the court attempt to explain why Congress would specifically state (immediately after directing the Commission to prescribe verification procedures) that States were not precluded from "enforcing such [Commission] procedures" if Congress meant to allow the states to "enact their own procedures." Additionally, the *Castellanos* opinion was issued June 17, 1996, after the enactment of section 258 but obviously before the Commission had a chance to prescribe procedures in accordance therewith.

the FCC, plus fifty-one sets of state rules, all of which are subject to continual amendment and administrative and judicial interpretation,[16] with which to deal in trying to acquire customers. This has and will continue to create monumental confusion among domestic carriers and their employees. All the more will be the confusion caused to new foreign carrier entrants to whom the United States has pledged to open its markets, come January 1, 1998, under the World Trade Organization agreement. Multiple sets of rules create confusion; confusion spawns litigation; litigation drains resources (of all parties); and resultant costs and delays distort competition. Fifty-one sets of rules will not provide greater protection to consumers than one set of carefully-considered rules.

41. Nearly all, if not all, interexchange carriers market their international, interstate, and intrastate interexchange services together. It is likely that within the very near future, as interexchange carriers enter the local exchange markets, and local exchange carriers enter the interexchange market, and foreign competitors enter our domestic market, local service, intrastate interexchange service, interstate interexchange service, and international service (along with cellular services, paging, PCS, and Internet access) will all be marketed together. There should be one set of marketing/slamming rules for all.

E. Viability of the "Welcome Package" Verification Option.

42. In the FNPRM, ¶ 18, the Commission seeks comment on a matter on which it again telegraphs an apparent existing antipathy. Without a factual premise presented, the Commission announces its "tentative conclusion" that the "welcome package" verification option should be

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[16] It is jurisdictionally important to recognize that almost without exception, competing carriers exclusively market interstate services. When a customer is switched to a new carrier then, the fundamental underpinning for doing so is based on interstate service selection. Intrastate services are simply not part of the "buy decision."

eliminated. The Commission thus seems to be expressing its agreement with the NAAG view that the welcome package operates like a negative-option LOA.

43. The proposed elimination of the "welcome package" option is a perfect example of a near vendetta attitude that is being followed in this area. Some history may help here. The welcome package option is the product of the suggestion made by none other than the National Association of Regulatory Utility Commissioners (NARUC). In short, when the Commission first considered adopting verification procedures, it was not any carrier interest which suggested this means of protecting consumers, but the expert state bodies through their national trade association. If this procedure had so much merit then, what, it may logically be asked, has occurred at this time to require an 180 degree turn today?

44. Unfortunately, the answer is first, nothing has occurred that demonstrates that this procedure has resulted in any cognizable harm to consumers. However, the powerful NAAG is dead set against negative option marketing, and apparently the Commission believes this may be enough to eliminate this option. Such an approach does not constitute reasoned decision making. Not only is there no factual basis for this proposal, other than the distaste of the NAAG, but on the contrary, there are facts that demonstrate that there are indeed benefits to both consumers and to competition, especially competition generated by smaller carriers who rely on this procedure.

45. The reality is that ACTA members have used this procedure and that consumers have responded by returning a notice that they changed their mind after a telemarketing sale was concluded and canceled their order. Such notices have been effective therefore in curtailing any changes in service, despite the initial authorization to do so.

46. The issue of welcome packages reveals a problem that is endemic to the current regulatory approach to slamming. All too often "pro-consumer" policies are instituted without any consideration as to whether the policy is effective or is actually "pro-consumer." As many parties have already stated, this situation is not akin to that of a negative option LOA because the consumers have already orally agreed to the service during the telemarketing call.

47. Moreover, the fact that a consumer will have to return a postcard if he/she changes his/her mind, simply provides more protection than what consumers normally get in transactions involving other products. The vast majority of products and services that a consumer purchases do not have such an after-the-fact right to as easily effect a change of mind. Almost all consumer "cooling off" laws provide only a three-day period within which to exercise their "buyer's remorse." With the Commission's rule, as designed by NARUC, they have a full two weeks, ***14*** days. During that period, the welcome package allows consumers to obtain additional and confirming information in writing about the new carrier, further ensuring that their choice is a well-educated and considered one. The inescapably correct conclusion is, therefore, completely at odds with the Commission's tentative conclusion. The correct conclusion based on actual industry experience is that the welcome package procedure effectively protects consumer interests.

48. The welcome package is vital to carriers as well, particularly smaller carriers. It provides an additional means by which to ensure compliance with the PC change rules, thereby avoiding regulatory and associated legal costs and problems. It avoids the costs of opening an account which is not likely to stay with the carrier for a significant period of time thereby actually raising the cost of sale and account maintenance for such short-lived customers to uneconomic levels. Removing this procedure for no other reason than that NAAG objects to an unrelated

marketing tactic of negative options ignores reality and is not a basis for eliminating a procedure that has mutual benefits for consumer and carrier and which exists because it was recommended by the expert state bodies with primary jurisdiction over intrastate communications. The Commission should leave the procedure intact. However, if the Commission determines that change must be made, then rather than removing this pro-competitive procedure, the Commission should consider modifying it. Possible modifications might include requiring that the mailing be made by an independent third party; that the return cards be addressed to an independent third party; that the carrier be required to maintain evidence of mailing manifests; or that certified mail be used.

F. Application of the Verification Rules to In-Bound Calls.

49. In the FNPRM at ¶ 19, the Commission tentatively concluded that verification of in-bound calls (calls placed to the carrier by the consumer) is necessary to deter slamming, and sought further comment on the volume of in-bound calls received by carriers, and the per-consumer costs for verification using the Commission's requirements versus alternative verification techniques.

50. ACTA agrees with the Commission's goal of protecting consumers who, on their own volition, call carriers to switch their PIC. *See* FNPRM at ¶¶ 19-20. ACTA places in-bound calls from potential subscribers in a fundamentally different category from cases where a carrier takes the initiative to contact the consumer. Accordingly, different rules should apply. Nonetheless, these rules should carry out the public policy goals of Section 258 without adding overbearing costs on scrupulous small carriers. Therefore, ACTA suggests that the Commission adopt rules that do not include the same verification procedures as proposed but, instead, achieve the same goals in the following, more cost-effective manner.

51. As a first line of protection for the consumer, all marketing materials should clearly indicate that calling the advertised number may result in a change of the subscriber's long distance (or local) carrier in the same manner that LOAs and inducement checks are required to bear currently. Similarly, such disclosure language must be separate and apart from any inducements, keeping in line with today's rules. At this point, a fully-informed consumer is aware of the potential consequences of making the call to the carrier and his/her conscious initiative to place the call acts as a strong second line of protection. That is, the consumer is now empowered to protect him/herself. As a third line of protection, the in-bound telemarketing representative should be required to verbally confirm the fact that the customer is embarking on a transaction that will result in a PC change much in the same manner as a consumer would be informed if he/she took the initiative to call a mail-order catalogue number to order clothes. In fact, ACTA's suggested safeguards provides the telecommunications consumer responding to an advertisement far more protection than the mail order consumer. Nonetheless, ACTA submits that a prudent carrier should *voluntarily* employ one of the verification procedures proposed to defend itself against PC disputes that may result from household confusion or other circumstances which are not slamming. Should a carrier violate these rules and be unable to offer proof of a consensual PC change, it should be subject to the same enforcement procedures as outlined elsewhere in these comments.

52. This triad of consumer protection should achieve the same goals Congress intended when it enacted Section 258 while eliminating the cost of needlessly redundant verification procedures that would disproportionately burden smaller carriers struggling to play by the rules and meet the demands of onerous regulations.

G. Extending PIC-Change Verification Procedures to PC-Freeze Solicitations.

53. The Commission, in ¶ 21 of its FNPRM, seeks comment on whether it should extend PIC-Change Verification Procedures to PC-Freeze Solicitations. As with many of the procedures the Commission is evaluating, there are many advantages to such procedures, but there also is a great potential for abuse. For instance, PC-Freezes reduce opportunities for slamming and, thus, offer protection to consumers. There is the danger, however, that customers can be easily induced into PC-Freezes through above-board and not so above-board appeals of carriers. This is a particular danger with larger carriers who can offer many inducements to elicit the coveted PC-Freeze. This will certainly inhibit competition and act to the detriment of smaller carriers.

54. ACTA emphasizes the need for the Commission to take a balanced approach to procedures such as PC-Freezes which have both good and bad elements. The Commission needs to allow for such procedures, but be vigilant for the possibility of abuse of such procedures. Thus, Commission efforts in this area should be tailored to developing regulations that minimize the opportunity for abuse of such procedures.

55. ACTA urges that the Commission come up with precise standards in regard to PC-Freeze solicitations. The problems in the area of slamming enforcement, elucidated earlier in these Comments, show the danger of vague and overbroad standards. Moreover, the Commission should concentrate on penalizing only those carriers whose conduct is culpable, i.e. those who knowingly and wilfully abuse the PC-Freeze procedures. This is the best way to balance the good and the bad aspects of PC-Freeze changes.

56. ACTA also urges the Commission to give legitimacy to other less intrusive procedures that serve the same purposes as the PC-Freeze. For instance, the Reverse PC Change whereby the incumbent carrier can "switch back" a customer that it discovers has left its network, and then notify the customer of the "switch back." The customer is then given the opportunity to determine if it wants to stay with the incumbent carrier or go with the new carrier.

57. The Reverse PC Change procedure, with clear and conspicuous affirmative disclosure to all customers, best secures the customer's choice of a telecommunications carrier. In the vast majority of cases a customer's existing carrier is their carrier of choice at the given moment. When that customer is switched by the local exchange carrier to a new carrier there is no immediate way to verify the validity of the switch. The only parties possessing full information as to the validity of the switch, *i.e.*, whether it was properly verified, is the carrier requesting the change and the consumer together. Without the Reverse PC Change procedure, the change will be executed by the local exchange carrier, and the customer will be on the new carrier's network. The incumbent carrier is left wondering about the validity of the change and, in some cases, whether there has been a contractual breach by the consumer.

58. Clearly if the customer desired the change there is no problem with the above scenario. In the event of an unauthorized change, however, a situation which the Commission notes is quite prevalent in the present market, the situation is quite problematic.[17] It will only be

[17] *See* FNPRM at ¶ 4 (Congress has recognized that slamming is "a significant consumer problem."); *see also* "True Dimensions of Slamming Unknown, Subcommittee Is Told," *Telecommunications Reports*, August 18, 1997 ("Commissioner Susan Ness said last week during a Senate subcommittee field hearing, 'Because most slammed consumers grin and bear it, we don't know how many of the 50 million carrier selection changes each year result from slamming. If just 1% were slamming changes -- a very conservative estimate -- that would total over 500,000

after the customer receives their first bill that they will realize that they have been "slammed." At that point, the customer will either decide to go through the arduous procedure of attempting to get "switched back" to their old carrier or they will do nothing. Given the inertia of most consumer choices, i.e. the "grin and bear it" approach, the most likely scenario is that the customer will remain with the new carrier, even though it is not their carrier of choice, merely to avoid the hassle of returning to their old carrier.

59. The above scenario paints a picture of a market where consumer choice is not adequately protected. There will be customers who will be on carriers not of their choosing for at least a month, if not longer. The Reverse PC Change procedure protects against this distortion of consumer choice. The procedure allows the status quo to be maintained as to the consumer's choice of carrier until the consumer itself can verify the choice of carrier. The incumbent carrier, once learning of a change of carrier, switches back the customer to its network and then informs the customer of its action. The customer then is given the opportunity to make a better informed affirmative choice of carrier. It can either remain with the incumbent carrier or go to the new carrier. In either situation, the consumer is the one making the choice, and the choice is clearly verifiable.

60. Granted there is some inconvenience to the customer who wanted to switch in the first place and is now sent back to the original carrier because the customer forgot to notify its existing carrier of termination of service. This consumer's choice of a new carrier will be carried to fruition albeit only after the consumer has verified its choice of a new carrier. This

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slamming incidents each year.'")

inconvenience is marginal in comparison to the protection of customer choice offered by Reverse PC Change procedure. The Commission might even consider issuing rules requiring the consumer to notify the former carrier before removal of the reverse PIC, and make the new carrier responsible for any LEC switching charges incurred due to the consumer's failure to give proper notice of the change to the former carrier in order to release the reverse PIC's hold on the consumer's BTN.[18]

61. Clearly the ideal situation in terms of ensuring that change in a subscriber's service is authorized is to provide for an opportunity to verify the consumer's choice. This is why the written letter of authorization is the Commission's preferred choice of the four options of verification. The verification procedures instituted by the Commission seek to provide a way to elicit what the consumer's choice was. The Reverse PC Change procedure is a mere expansion of this theme. It requires a clear articulation of consumer choice prior to the removal of a customer from a carrier's network. In this way, the Reverse PC Change procedure is consistent with and complements the Commission's verification procedures. The Commission should consider such an alternative approach, which is based upon standard "termination of service" contract provisions. Under such provisions, typically, until an existing service provider who provides service on a routine basis is told to terminate service, one is contractually required to pay that existing service provider until proper notice of termination is provided, even if another service provider has been hired.

[18] While this may, at first, seem too involved, the Commission should consider that the chances for an increase in complaints may accelerate as the country moves to the 2-PIC structure. Without a system of checks and balances, in which consumers are given some responsibility to make an informed decision and act accordingly, the opportunity to improve slamming controls will be lost.

H. Liability of Subscribers to Carriers.

62. When a subscriber pays charges assessed by an unauthorized carrier, Section 258(b) provides that the unauthorized carrier is not entitled to keep the revenue gained through slamming. The Act does not, however, address whether subscribers must pay any unpaid charges assessed by an unauthorized carrier to the properly authorized carrier, or whether charges collected from the unauthorized carrier should be returned to the subscriber who has been slammed. FNPRM at ¶ 25.

63. Under the statute, the liability between properly authorized and unauthorized carriers exists only to the extent that the unauthorized carrier actually collects charges from a slammed subscriber. The Commission seeks comment on whether slammed consumers should have the option of refusing to pay charges assessed by an unauthorized carrier. FNPRM at ¶ 27. The Commission recognized that if subscribers were absolved of all liability for charges assessed after being slammed, the properly authorized carrier would be deprived of revenue. The Commission also recognized that if it were to establish a rule that absolved slammed subscribers of liability for charges assessed by an unauthorized carrier, it might create an incentive for subscribers to delay reporting that they have been slammed. The Commission also recognized the potential for subscribers to fraudulently claim that they have been slammed to avoid payment for telecommunications service that they may both have requested and received.

64. ACTA urges the Commission to reject any proposal to absolve slammed consumers of liability for unpaid charges. ACTA cannot state too strongly its conviction that customers should not receive free telephone services, even those customers who are actually slammed. Such action is not necessary to deter carrier misconduct, as Section 258 has already mandated that a slamming carrier pay over all revenues collected to the carrier previously selected; would aggravate consumer

fraud, a large problem which is getting bigger and impacts most heavily on the smaller carriers who can ill afford the loss; and, would needlessly complicate the "premium" issue.

65. The August, 1997 issue of *PHONE* + Magazine included a Special Report on telephone fraud, which stated:

> Phone fraud has been termed 'our fourth largest carrier.' Estimates vary by nearly an order of magnitude. Vendors' estimates are consistently higher; carriers' lower.
>
> . . . there are valid reasons the lower estimates may be too soft: Until phone fraud is thoroughly detected, its magnitude is unknown. Good fraud detection systems find more fraud than was suspected. Publicizing one's company as a fraud victim declares oneself a "soft target" that attracts phreaks (those who use technology to obtain free phone time). Financial and "image" considerations lead some carriers to soft-pedal fraud losses. Per Gary Kim's October 1996 *PHONE+* article, local exchange carriers (LECs) gain long distance revenue from fraudulent traffic, so they may not accurately gauge its depth. Not every entity chooses to report. True losses may well lie at the higher end of the band.
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> The FCC's May 1997 Monitoring Report to Congress (CC docket 80-286) reports 158,672,217 pre-subscribed lines in the United States. Alan Feldman, the FCC's deputy chief of the Industry Analysis Division augments that by approximately 4 million "no-picks" (people who have not subscribed to a long distance carrier) plus another 4 million toll-restricted lines.
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> If domestic phone fraud is reckoned at just $10 billion annually, thieves could be said to add $60 annually to every phone bill in the nation and cost us some $320 per second. And cost estimates normally only track direct expenses. Soft costs are not included.
>
> . . .
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> Perhaps the oldest and crudest of all forms of toll fraud is known as "subscription fraud." The criminal simply signs up for telephone service, runs up an enormous bill in the first month or two, then skips town. In another variation, a cardholder whose long distance bill had shot up dramatically one month indignantly refused to pay--until an investigator discovered the man's new business had indeed made the calls.
>
> . . .
>
> . . . cellular fraud grows alarmingly. Fraudsters have reverted to subscription fraud schemes so successful they guarantee 45-days of air time before the bogus cell

> phone usage is shut off. Phony business are set up, often with fake credit references and parent companies. Or the true name of a person or business is used to get a bogus account.
>
> . . .
>
> One repercussion of effective fraud systems is that criminal desert "hard targets" and swarm to "soft targets." When AT&T tightened security and instituted automatic number identification (ANI) tracing, Baby Bells suffered. Baby Bells came down hard on hackers and drove them to small long distance providers.

"Telephone Fraud. How Big? How Bad? How Unstoppable?" by Jeffrey Hodgson, *PHONE+*, August, 1997 at pp. 46-52.

66. A rule immunizing "slammed" consumers from all phone charges could be too easily abused by the unscrupulous. In our view, such a rule would serve to encourage both outright consumer fraud and its first cousin, negligently-made slamming complaints, which would unjustly penalize both acquiring carriers and their honest customers. Providing a significant financial incentive for claiming to be slammed will not decrease complaints; if anything, it will increase complaints. Allowing unscrupulous consumers to escape all charges for telephone service[19] would result in the honest customers of carriers having to pay more for services in order to make up for the losses carriers suffer as a result of consumer fraud, just as the honest customers of retail merchandise stores pay higher prices to cover the stores' losses from shoplifting. Despite justifiable sympathy with the victims of slamming, any rule aimed at correcting the slamming problem should at the same time not work an injustice to honest customers who are not slammed, nor to the carriers who serve those customers. And if consumers were to get free phone service, will that include collect calls?

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[19] North Carolina has recently proposed to flatly immunize all customers who claim to have been slammed from payment of any charges whatsoever unless the customer's order was verified by written LOA, period.

Third-party billed calls? 900-number calls? Again, these costs are going to wind up being passed on to the honest and responsible customers. Even on those occasions where a consumer is truly intentionally or at least negligently slammed, a balanced rule, wherein the consumer pays for his phone service at either the slamming carrier's rate or the rate of his actual carrier of choice, whichever is lower: (1) does not penalize the consumer; (2) does not enrich the slamming carrier, who has incurred a cost in providing the service, has incurred two PC change charges, and has gotten no revenue in return (having paid all monies collected from the consumer over to the consumer's true carrier); (3) does not penalize the true carrier, who has been paid for service it has not had to provide; (4) and should eliminate the premium issue -- the consumer has paid for service received, the money is in the account of the consumer's true carrier, so the true carrier should provide whatever premium was pledged. The slamming carrier, of course, may still face Commission enforcement action for repeated or egregious conduct.

I. Liability of Carriers to Subscribers.

67. The Commission sought comment on the duties and obligations of both the unauthorized carrier and the properly authorized carrier with regard to making slammed subscribers whole, and on what steps should be taken to "make whole" the subscriber victimized by an unauthorized PC change. FNPRM at ¶ 29. The FCC seeks comment on what types of premiums offered by telecommunications carriers should be restored to slammed subscribers. The FCC proposes that the unauthorized carrier remit to the properly authorized carrier an amount equal to the value of such premiums, as reasonably determined by the properly authorized carrier. Upon receiving the value of such premiums from the unauthorized carrier, the properly authorized carrier

would then have to provide or restore to the subscriber any premiums to which the subscriber would have been entitled if the subscriber had not been slammed.

68. Again, ACTA believes that consumers should pay for telephone service received. If that service has been provided by a slamming carrier, then that the slamming carrier must transfer the payment made for the service to the previously selected carrier and must pay for all PC change charges. The previously selected carrier who has been paid for the services its customer has used (even though it has not had to provide those services) should provide the premium it agreed to provide its customer. Neither the consumer nor its previously selected carrier are in a worse position than if the slamming had not occurred.

J. Clarification of the Circumstances Under Which Resale Carriers Must Notify Their Subscribers of a Change in Their Underlying Network Provider.

69. The Telecommunications Resellers Association ("TRA") requests clarification of the circumstances under which resale carriers must notify their subscribers of a change in their underlying network provider. FNPRM at ¶ 36. TRA seeks to establish a bright line test whereby subscriber notification would be required only if a resale carrier either: (1) identified its underlying network provider to its subscribers and committed to those subscribers in writing that it would not switch networks; or (2) identified its network provider on a bill or other correspondence to its subscribers within six months prior to the change in network provider. FNPRM at ¶ 38.

70. The Commission tentatively concluded that any test established to determine when a resale carrier must disclose to its subscribers a change in the underlying carrier should be based on the subscribers' reliance on statements by the resale carrier that it either (1) would provide service

to its subscribers using a particular underlying carrier, or (2) would not change its underlying carrier (with or without notifying its subscribers). FNPRM at ¶ 39.

71. ACTA urges the Commission to refrain from promulgating any general rule or standard mandating any disclosure of change of underlying carriers by resale carriers. First, this is a proceeding concerning slamming. The danger is that by adding another level of concern in the volatile area of slamming, the Commission is nearly certain to ensure yet further customer confusion and an increase in complaints. From the resale carrier's perspective, such a rule will interfere with their lawful business/management discretion to select the facilities by which it determines to provide service, an inherent right of any carrier and one which has been reserved in virtually every tariff ever filed with both the Commission and state regulatory bodies.[20]

72. Creating an implication that slamming is involved when a carrier changes underlying carriers paints with too broad a regulatory brush. First, it ignores the present legal framework existing between resale carriers and their underlying carriers, which ACTA submits is more than sufficient to deal with the problems of carriers who market based on the name of their underlying carriers. Virtually every contract contains clauses restricting a resale carrier's references for

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[20] The Commission may take official notice of the prevalence of the following language in carriers' tariffs -- "Long Distance Communication Service is furnished by means of the wire, radio, satellite, fiber optics, or any suitable technology or combination of technologies employed by Carrier and/or Carrier's underlying carriers."

The Commission has also held that reasonable and appropriate management and business decisions are well within the business discretion of carriers. *See, generally,* Second Report and Order and Further Notice of Proposed Rulemaking, *In The Matter of Toll Free Service Access Codes*, FCC 97-123, CC Docket No. 95-155, 1997 WL 177338; *In re Contel of Indiana, Inc.*, DA 88-1031, File No. W-P-C-6064, 3 FCC Rcd. 4298 (1988).

marketing or other purposes to its underlying carrier. Moreover, commercial prudence would dictate in most cases, that a resale carrier that has accepted the mantel of carrier status does not wish to tout its underlying carrier as opposed to its own identity in dealing with existing or potential customers. And finally, the trademark laws prevent any untoward passing off, that is, prevent retail carriers from winning or attempting to win customers by passing themselves off as their underlying (wholesale) carrier. Indeed, AT&T has been vigorous in its resort to these laws to prevent such conduct. Hence, there is simply no need to bring such an issue under the slamming framework.

73. On the other hand there is a real certainty that the Commission could unwittingly create damage if it creates another rule in this area. From the subscriber's perspective, the reseller is and should be the only long distance provider involved. The relationship between the reseller and its underlying carrier is of no moment and should remain seamless. Rendering resellers liable for switching their underlying carriers in the exercise of their prudent business judgment will only open up a whole new vista of potential, needless consumer confusion and false slamming claims. Resellers are a significant component of the interexchange market, and resellers will become a significant component of the local service market once interconnection and local competition becomes a reality.[21] Resale carriers' management discretion to determine which underlying carrier they utilize, their inherent right to use any facility to complete a customer's call as long as the call gets completed must be preserved. Exposing a resale carrier to slamming liability based on a change of underlying carriers where the standards are bound to be vague and amorphous is a definite

[21] Actually resale will be a major component in making local competition a reality.

intrusion on the resale carrier's autonomy, and would suggest yet a further instance of the bias against resale and small carriers alluded to earlier.

74. The alleged problems raised in the FNPRM are the result of misfocusing on marketplace structure. If indeed there are instances in which an entity markets in the name of, or overtly using references to a facilities-based carrier, that entity is operating essentially as the agent of the carrier and not as an autonomous resale carrier.[22] In fact, when disputes arise between carriers and agents over which entity controls the customer, those disputes center on what representations have been made by the agents to end users, not those made by the resale carrier once the end user is added to the network of that resale carrier. Clearly agents should be required to disclose proper identifying information about the carrier they represent. And, it would be logical that agents would have to give notice if a change was being made in the identity of the carrier providing service. But the problem is that an agent has no authority to act in regard to changes in carriers. An agent doing so, would in nearly all cases be acting in violation of its contractual obligations to the carrier for which it markets (as well as under common law principles of governing the agent/principal relationship) if it attempted to change the carrier of the end user it has marketed to as that carrier's agent. Resale carriers should be spared the needless exposure to slamming complaints adoption of a rule in this area would produce. It is not that the tests posited by the Commission or the one posited by TRA are not logical, it is that they do not apply to real world marketing relationships. They also add unnecessary complexity to an already difficult area of regulation and can in the best interests of all concerned, the regulators and the regulated companies be left to be handled by the

[22] TRA's position is more designed to protect those carriers acting as agents than it is with true resale carriers.

application of the common law of contracts, agency, trademarks and unfair competition. The Commission should find it unnecessary for it to enter into what is certain to become another regulatory quagmire adding to its resource shortages and to the cost of regulation for all.

K. The Negative Effect of the Slamming Rules on Small Carriers.

75. 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.

76. 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).[23] 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

[23] 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.

agency -- a court can also defer enforcement of the rule against small 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).

77. 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.

78. 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.

79. 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).

80. 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.

81. To the extent the Commission's proposed slamming enforcement framework perpetuates the vague conceptualization of slamming it will continue to distort the operation of the marketplace. The Commission must not remain blind to the reality of the interexchange market. The resources and name recognition of the larger carriers allow them to individually contact customers won by fair competition and then often to disparage the smaller carriers. Denigration of

small carriers also occurs through television and print advertisement as well, which as mentioned earlier, provides the seeds for illegitimate slamming complaints. Continuing the approach to slamming that lacks substantive standards has and will continue to fail to avoid unnecessary and unjust impact on small carriers arising from false, or mistaken, charges of slamming. These carriers are much more vulnerable to the penalties imposed due to purported slamming violations. The Commission is under an obligation not only to protect the viability of small carriers, but also to ensure that the Commission regulations do not unnecessarily imperil them. The Commission under its Regulatory Flexibility Act and Section 257 obligations is required to address the lack of specificity in its attempts to regulate the problem of slamming. The Commission has failed to consider the impact of its approach to slamming upon small businesses.

82. The statutory scheme surrounding the regulation of communications carriers has always represented "a careful accommodation of the various interests involved" - the interests of both carriers and those who use their services. *See American Telephone and Telegraph Company v. Federal Communications Commission*, 487 F.2d 865, 873 (D.C. Cir. 1973), *citing United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). In *SCRAP*, the Supreme Court, discussing a provision in the Interstate Commerce Act which has corresponding provisions in the Communications Act (*American Telephone and Telegraph Company v. Federal Communications Commission,* 487 F.2d 865 at 873 n.15), said:

> [W]e stressed in Arrow that § 15(7) represents a careful accommodation of the various interests involved. The suspension period was limited as to time to prevent excessive harm to the carriers, for the revenues lost during that period could not be recouped from the shippers. On the other hand, Congress was aware that if the Commission did not act within the suspension period, then the new rates would automatically go into effect and the shippers would have to pay increased rates that might eventually be found unlawful. To mitigate this loss, Congress authorized the

> Commission to require the carriers to keep detailed accounts and eventually to repay the increased rates if found unlawful. To allow judicial suspension for noncompliance with NEPA, would disturb this careful balance of interests. A railroad may depend for its very financial life on an increased rate, and the rate may be perfectly just and reasonable. Granting an injunction against that rate based on the Commission's alleged noncompliance with NEPA, although the Commission had determined not to suspend the rate, would deprive the railroad of vitally needed revenues and result in an unjustified windfall to shippers.

SCRAP at 697. The Commission must in this proceeding exercise a thoughtful, careful balancing of interests. It must not overreach in protecting the interests of complaining consumers and large/incumbent carriers, but also protect the small carriers and the "silent majority" of consumers who should not have to pay for, in the form of higher rates resulting from higher carrier costs, excessive, layered regulation, confusion, and increased consumer fraud.

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III. CONCLUSION

83. For the foregoing reasons, ACTA respectfully requests that the Commission adopt rules as proposed by ACTA.

Respectfully submitted,

AMERICA'S CARRIERS
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