on whether the proposals discussed below are within our jurisdiction and consistent with Congress' intent embodied in Section 258 of the Act.

141. Where a subscriber has paid charges to the unauthorized carrier, we propose that the authorized carrier collect from the unauthorized carrier double the amount of charges paid by the subscriber during the first 30 days after the unauthorized change.[429] This proposal would enable the authorized carrier to: (1) provide a complete refund or credit to a subscriber for charges paid after being slammed, so that the subscriber would, in effect, be absolved for the first 30 days of slamming charges;[430] and (2) retain an amount equal to the charges incurred by the subscriber after the unauthorized change, in accordance with the specific language of section 258(b). For example, if a subscriber who has been slammed has paid the slamming carrier $30.00 for charges incurred during the first 30 days after an unauthorized change, the slamming carrier must pay the authorized carrier $60.00. The authorized carrier then would give the subscriber a refund or credit of $30.00 and keep $30.00 for itself. If the subscriber has paid the unauthorized carrier for additional charges beyond the first 30 days after the unauthorized change, the authorized carrier would be entitled to collect and keep that amount from the unauthorized carrier.

142. Where the subscriber has not paid charges to the unauthorized carrier, we propose to permit the authorized carrier to collect from the unauthorized carrier the amount that would have been billed to the subscriber during the first 30 days after the unauthorized change. This proposal would enable the subscriber to be absolved of liability for the first 30 days after the unauthorized change, as provided by the rules we adopt in this *Order*, and at the same time provide for the authorized carrier to receive charges equal to the amount for which the subscriber was absolved. For example, if a subscriber who has been slammed would have paid the unauthorized carrier $30.00, but did not pay such charges, the unauthorized carrier must pay the authorized carrier $30.00. Alternatively, we seek comment on whether the authorized carrier's recovery under this proposal should equal the amount that the authorized carrier would have billed the subscriber during that 30-day time period absent the unauthorized change. The authorized carrier would then receive payments to which it would have been entitled if the unauthorized change had not occurred. Under either approach, the slamming carrier would be liable for charges to the authorized carrier regardless of whether the subscriber has paid the unauthorized carrier for such charges. We note that the rules adopted in this *Order* require that any charges imposed by the unauthorized carrier after the 30-day absolution period be paid by the subscriber to the authorized carrier at the

[429] *See* Appendix B, § 64.1100(c). This proposal would not affect the obligation of slamming carriers to remit to authorized carriers billing and collection expenses and carrier change charges. *See* Appendix A, § 64.1170(a)(2), (b).

[430] *See* Appendix B, § 64.1100(d)(1).

authorized carrier's rates.[431]

143. We tentatively conclude that these proposals would appropriately impose additional penalties on slamming carriers. Moreover, by making the unauthorized carrier liable to the authorized carrier for these additional amounts, these proposals would provide further economic disincentive for carriers that engage in slamming and extra incentive for authorized carriers to pursue their claims against unauthorized carriers. The effect of the first proposal, furthermore, would be to absolve all subscribers of liability for charges incurred after being slammed while still giving authorized carriers incentive to pursue their claims against unauthorized carriers. Under the first proposal, even a subscriber who already has paid the unauthorized carrier would receive the benefit of being absolved of liability for slamming charges, thus compensating all consumers for the intrusion and inconvenience of being slammed.

144. We tentatively conclude that the Commission has the authority to permit these additional payments by slamming carriers, based on the language of section 258, which provides that "the remedies provided by this subsection are in addition to any other remedies available by law."[432] The Commission has additional authority under section 201(b) to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the] Act," as well as under section 4(i) to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions."[433] We tentatively conclude that permitting an authorized carrier to collect the above-described amounts from the unauthorized carrier would help to deter slamming by making slamming so unprofitable that carriers will cease practicing it. We seek comment on these tentative conclusions.

B. Resellers and CICs

145. The practice of reselling telecommunications service from facilities-based carriers to non-facilities based (switchless) carriers is a major development that has enabled many carriers to compete effectively in the long distance market. Reselling has given consumers a wider variety of services and carriers, as well as a reduction in the cost of telecommunications service. As competition develops further, however, so does the need to ensure that consumers are receiving accurate and sufficient information about the assortment of telecommunications services and carriers in order to avoid consumer confusion. Confusion over carriers and the services they provide can negate competition because confused consumers cannot make informed choices. Further misunderstandings may arise due to the

[431] *See* Appendix A, § 64.1100(d)(3).

[432] *Id.*

[433] 47 U.S.C. §§ 201(b), 4(i).

use of carrier identification codes (CICs), which are used by LECs to identify different IXCs. Because CICs are issued by the North American Numbering Plan Administrator (NANPA) to facilities-based IXCs only, switchless resellers do not have their own CICs, but rather use the CICs of their underlying facilities-based carriers. The fact that resellers do not have their own CICs results in two slamming-related problems: (1) the "soft slam;" and (2) the misidentification of a reseller as the underlying carrier.

146. As described above, the "soft slam" occurs when a subscriber is changed, without authorization, to a carrier that uses the same CIC as his or her authorized carrier.[434] This can occur when a subscriber is changed from a switchless reseller to the reseller's facilities-based IXC, from the facilities-based IXC to a switchless reseller of that IXC's service, or from a switchless reseller of the facilities-based IXC's service to another switchless reseller of that same IXC's service. In all such cases, the subscriber's CIC remains the same even though the identity of the carrier has changed. As explained earlier, when a subscriber changes from a facilities-based IXC to a reseller of that facilities-based IXC's services, or in any situation in which a subscriber changes to another carrier that has the same CIC as the previous carrier, the execution of the change is performed by the facilities-based IXC, not the LEC.[435] It is the facilities-based carrier that processes the carrier change in its system to enable the reseller to begin billing the subscriber. The LEC does not make any changes in its system because it will continue to send interexchange calls from that subscriber to the same facilities-based carrier, using the same CIC. In fact, the LEC may not even be notified of any changes.

147. The soft slam is therefore particularly problematic because it bypasses the LEC and enables a slamming reseller to bypass a subscriber's preferred carrier freeze protection.[436] Preferred carrier freeze protection, where the LEC will change a subscriber's carrier only after it receives express written or oral consent from that subscriber to lift the freeze, will not be triggered by a soft slam. This is because the LEC is not the executing carrier and may not even be aware of the unauthorized change. Further complications arise because the name of the facilities-based carrier may continue to appear on the subscriber's bill, giving the subscriber no indication that his or her preferred carrier has been changed.[437] If the slamming reseller's retail rates are higher than those of the carrier it replaced, however, the subscriber may become suspicious.

148. Another problem that results from resellers using the same CICs as their

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[434] *See supra* discussion on Limitation on Freeze Mechanisms for Resold Services.

[435] *See supra* discussion on Definition of "Submitting" and "Executing" Carriers.

[436] *See supra* discussion on Limitation of Freeze Mechanism for Resold Services.

[437] *See, e.g.*, NYSDPS Comments at 9; Ameritech Comments at 17.

underlying facilities-based carriers is that of misidentification. For example, although a consumer is subscribed to a switchless reseller, the LEC will identify the subscriber's carrier as the facilities-based carrier because the LEC's records show that the reseller's CIC is the same as that of the facilities-based carrier. Subscribers also may experience difficulty in detecting when an unauthorized change has occurred. When a subscriber of a reseller receives the monthly bill for long distance services, the identity of the carrier on the portion of the subscriber's bill that lists the presubscribed carrier may not be the reseller, but the facilities-based carrier providing the underlying wholesale service. The identity of the reseller may, however, appear on a separate billing page under the reseller's name, or on an aggregator's billing page. Thus, if a reseller switches a subscriber to its network without first obtaining the subscriber's permission, the subscriber may only see the identity of the facilities-based carrier on the monthly telephone bill, and not the identity of the reseller that committed the slamming, unless the subscriber looks for the reseller's identity among the other pages of the telephone bill. Because the facilities-based carrier appears on the bill, subscribers who have been slammed by the unidentified reseller reasonably might assume that the facilities-based carrier is the culprit. Subscribers could then bring slamming complaints against the facilities-based carriers in numerous fora, when the real culprit is the unidentified reseller.

149. We seek comment on the issue of whether switchless resellers should be required to have their own CICs or some other identifier that would distinguish them from the underlying facilities-based carriers and allow the consumer to ensure that slamming has not occurred. We seek comment on three options: 1) require each reseller to obtain a CIC; 2) require the creation for each reseller of a "pseudo-CIC," that is, digits that would be appended to the underlying carrier's own CIC for identification of the reseller; or 3) require underlying facilities-based carriers to modify their systems to prevent unauthorized changes from occurring if a subscriber has a freeze on the account and to allow identification of resellers on the consumer's bill. We also seek comment on other benefits, unrelated to slamming, that may result from adoption of any of these options.

1. Background - Carrier Identification Codes

150. CICs are numeric codes that enable LECs providing interstate interexchange access services to identify the IXC that the originating caller wishes to use to transmit its interstate call.[438] LECs use the CICs to route traffic to the proper IXC and to bill for the interstate access service provided. CICs facilitate competition by enabling callers to use the

[438] Most access providers are ILECs that provide access customers with circuits that interconnect to the ILEC's public switched telephone network. Commission rules require that "interstate access services should be made available on a non-discriminatory basis and, as far as possible, without distinction between end user and IC (interexchange carrier) customers." Petition of First Data Resources, Inc., Regarding the Availability of Feature Group B Access Service to End Users, *Memorandum Opinion and Order,* 1986 WL2911786 (rel. May 28, 1986) at para. 13. Typical access customers include interexchange carriers, wireless carriers, competitive access providers, and large corporate users.

services of telecommunications service providers both by presubscription and by dialing a carrier access code, or CAC, which incorporates that carrier's unique Feature Group D CIC.[439] Originally, CICs were unique three-digit codes (XXX), and CACs were five-digit codes incorporating the CIC (10XXX). Later, when demand forecasts exceeded the number of three-digit CICs, the Commission: (1) implemented CIC conservation measures in 1995 that stopped assigning three-digit CICs and started assigning four-digit CICs in a seven-digit CAC format (101XXXX),[440] and (2) approved a transition period that would allow subscribers to use either the original five-digit CACs required by the three-digit CICs, or the new seven-digit CACs (101XXXX) required by the four-digit CICs.[441] The transition period ended on July 1, 1998, and all subscribers must now use the seven-digit CAC format.[442] After the Commission is satisfied that all of the Nation's carriers have complied with the requirement to end the transition period, we will consider making available for assignment to carriers the remainder of the approximately 10,000 CICs contained in the four-digit CIC format.

151. As noted above, CICs are also used to bill customers for the access and transport services provided by multiple carriers. Most calls between local access and transport areas (interLATA) involve at least two carriers: the LEC and the IXC. The LEC translates the digits dialed by the subscriber, who uses either the presubscribed carrier (1+) or a "dial-around" carrier,[443] using a CAC. The LEC knows which carrier the subscriber chose by either accessing the database to discover the identity of the carrier to which the subscriber is presubscribed, or by translating the CAC dialed by the subscriber. The LEC then routes the call to the IXC chosen by the subscriber. Carriers that share the transport of calls bill each other for the total minutes of use incurred on their respective networks, using CICs to identify the specific carriers that generated the calls. To obtain a CIC, however, NANPA requires

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[439] Feature Group D access, or "equal access," is known in the industry as "One-plus" ("1+") dialing. This type of access allows calls to be routed directly to the caller's carrier of choice. Feature Group D access offers features, including presubscription, not generally available through other forms of access.

[440] *See* Letter from Kathleen M.H. Wallman, Chief, Common Carrier Bureau, Federal Communications Commission to Ron Conners, Director of NANP Administration, dated March 17, 1995.

[441] Administration of the North American Numbering Plan, Carrier Identification Codes (CICs), *Second Report and Order,* CC Docket No. 92-237, 12 FCC Rcd 8024 (1997).

[442] Administration of the North American Numbering Plan, Carrier Identification Codes (CICs), *Order on Reconsideration, Order on Application for Review, and Second Further Notice of Proposed Rulemaking,* CC Docket No. 92-237, 12 FCC Rcd 17876 (1997). We note that 1+ dialing is not affected by transition from the three-digit CIC, five-digit CAC format to the four-digit CIC, seven-digit CAC format.

[443] A consumer "dials around" a presubscribed carrier by dialing an access code prefix (*e.g.*, 10333 or 1-800-877-8000 to reach Sprint, or 1-800-CALL ATT to reach AT&T) in order to reach an IXC to which he or she is not presubscribed.

carriers to first obtain Feature Group D access from the LECs that serve their customer bases.[444] The translation services provided by the LECs are bundled together with the Feature Group D access purchased by the IXC, and are not sold separately.[445] As a result, most CIC holders are facilities-based carriers because, unlike most resellers, they have a switch that needs to be connected with the LEC over a Feature Group D access facility.

152. Switchless resellers make a profit by buying the facilities-based carrier's service at a wholesale rate, and reselling it to subscribers at a retail rate. As noted above, resellers market the telephone services provided by facilities-based carriers, but do not possess their own unique CICs.

2. Jurisdiction

153. We tentatively conclude that Commission regulations requiring resellers to be identified on their subscribers' monthly bills would be consistent with our authority under sections 201(b) and 4(i). The Commission has authority under section 201(b) to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the] Act," as well as under section 4(i) to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions."[446] Moreover, we tentatively conclude that the plain language of section 251(e)(1) gives the Commission authority to promulgate regulations of the type proposed below for changing the North American Numbering Plan (NANP). We also tentatively conclude that the Commission's authority to change the NANP includes changes to such documents as the CIC Assignment Guidelines as might be required by the Commission in this proceeding. We request comments on these tentative conclusions.

3. Option 1: Require Resellers to Obtain Individual CICs

154. As noted above, the NANPA currently requires resellers to first obtain Feature Group D access from a LEC before it will assign the reseller a CIC. If resellers were to obtain CICs without Feature Group D access, resellers would not need their own physical access to the public switched telephone network because that would be provided to them by facilities-based carriers. Instead, resellers would need "translation" access, or the ability of the LECs to route subscriber calls to the resellers even though the facilities used to route those calls were provided to the reseller by the facilities-based carrier. Under the auspices of the North American Numbering Council (NANC), the CIC Ad Hoc Working Group recommended

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[444] Carrier Identification Code (CIC) Assignment Guidelines 4, INC 95-0127-006, Industry Numbering Committee (November, 1997).

[445] *See, e.g.,* The Bell Atlantic Telephone Companies, Tariff FCC No. 1 (June 30, 1998) and Bell South Telecommunications, Inc., Tariff FCC No. 1 (May 27, 1998).

[446] 47 U.S.C. §§ 201(b), 4(i).

to the NANC that the current Feature Group D access requirement be dropped:

> [a]ssignment of [Feature Group D] CICs without the need for the purchase of [Feature Group D] trunk (i.e., "translations access") could help alleviate some difficulties associated with resale. Specifically, translations access will facilitate the assignment of CICs to resellers, and thereby allow easier identification of these type service providers, enhancing the ability to resolve conflicts, including disputes which involve slamming.[447]

155. As our first option, we seek comment on requiring each reseller to obtain an individual CIC and on any changes to the NANP that would be required to make such a requirement effective. First, we request comment on whether we should make the purchase of translations access by resellers mandatory in order to deter slamming. We note that if each reseller had a unique CIC, the preferred carrier freeze mechanism would be effective against soft slamming because every interexchange carrier change would involve a CIC change, and therefore trigger LEC preferred carrier freeze protection. We also ask commenting parties to address how effective this option would be in allowing consumers and carriers to detect slamming. Further, we seek comment on whether this option has advantages because it does not require facilities-based carriers to modify their existing billing and collection systems and will not cause a CIC shortage now that the Commission has ended the transition period to four-digit CICs. We request comment on the CIC Ad Hoc Working Group's recommendation to allow resellers to purchase translations access instead of Feature Group D trunk access. We note that section 251(e)(2) of the 1934 Act states: "[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[448]

156. We request further comment on this option's impact on the "competitively neutral" requirements of section 251(e)(2), in lieu of the fact that translations access is currently bundled together with Feature Group D trunk access. Specifically, should resellers pay the full Feature Group D trunk access rates for translations access in order to "level the playing field" with facilities-based carriers? How long of a transition period should we require? Should resellers be required to adhere to the same CIC Assignment Guidelines as facilities-based carriers? What will be the effect on CIC conservation if the Commission requires all resellers to obtain CICs? Commenting parties are encouraged to include empirical information with their comments.

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[447] Report and Recommendation of the CIC Ad Hoc Working Group to the North American Numbering Council (NANC) Regarding the use and Assignment of Carrier Identification Codes (CICs), February 18, 1996 at 7.

[448] 47 U.S.C. § 251(e)(2).

4. Option 2: Require the Use of "Pseudo-CICs" for Resellers

157. The term "pseudo-CIC" refers to the creation of a coded suffix that follows a facilities-based carrier's CIC.[449] A facilities-based CIC would assign a three or four-digit suffix code to each reseller of the facilities-based carrier that could be used to identify a particular reseller on a consumer's bill. For example, the NANPA assigned AT&T the four-digit CIC 0288. Under the pseudo-CIC system, resellers of AT&T's services would be assigned suffixes to 0288 beginning with 0001, assuming the pseudo-CICs are four digits. Thus, reseller "A" would be assigned the pseudo-CIC "0288-0001."

158. We seek comment on use of the pseudo-CIC to prevent switchless resellers from circumventing a subscriber's preferred carrier freeze protection through soft slams. As with Option 1, if each reseller had a unique CIC, the preferred carrier freeze mechanism would be more effective against slamming perpetrated by resellers because every interexchange carrier change would involve a CIC change, and therefore trigger any LEC-provided preferred carrier freeze protection mechanisms. We also request comment on the viability of the pseudo-CIC option as a method to identify particular resellers of a facilities-based carrier's services so that consumers can detect slamming if it occurs.

159. We request comment on recovering the cost of implementing the pseudo-CIC option, which would be borne primarily by ILECs and other carriers or entities that provide billing and collection services to resellers. We request further comment on the need to standardize pseudo-CIC assignments, particularly in cases where a reseller resells services from multiple facilities-based carriers. Should a single pseudo-CIC suffix be used by all facilities-based carriers to identify the same reseller, so that the 0001 suffix applies to reseller "A" regardless of the facilities-based carrier's CIC? Should the NANPA be required to administrate pseudo-CICs, to ensure uniformity? Finally, we request comment on the impact of pseudo-CIC implementation on section 251(e)(2)'s requirement for competitive neutrality, when determining the cost of its administration.

5. Option 3: Require Facilities-Based Carriers to Modify Their Systems

160. Facilities-based carriers maintain the network systems which enable them to execute carrier changes when a subscriber changes to a carrier whose CIC is the same as the previous carrier. They also maintain records of telephone service sales generated by each reseller, in order to bill resellers for the services consumed by the resellers' subscribers, or to pass that information to the entity providing the resellers with billing and collection services. We seek comment on imposing additional duties on facilities-based carriers to utilize their systems to help prevent soft slams and to help subscribers identify resellers on their bills.

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[449] *See* Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, *Notice of Proposed Rulemaking*, 9 FCC Rcd 6885 (1994), BellSouth's Reply Comments at 2-4.

161. We seek comment on requiring a facilities-based carrier to modify its system to enable it to execute preferred carrier freeze protection only for subscribers who are presubscribed to the services of either the facilities-based carrier or one of its switchless resellers. We propose that LECs be required to provide to each facilities-based IXC certain freeze information about subscribers of the facilities-based carrier or subscribers of any of the facilities-based carriers' resellers. This communication would contain information about which of those subscribers have preferred carrier freeze protection on their accounts, as well as information about which subscribers have lifted their freezes. Each facilities-based carrier then would have the information necessary to enable it to reject carrier change orders, in soft slam situations, for those subscribers who have preferred carrier freeze protection. The LEC would continue to be responsible for accepting subscriber requests for preferred carrier freeze protection, for maintaining such freeze protection for the subscriber against all other unauthorized changes, and for lifting freezes upon receiving notification from subscribers. We seek comment on this proposal. We also seek comment on how frequently the facilities-based IXC would need to receive information from the LEC in order to prevent soft slams, as well as undue delays in legitimate carrier changes. We seek comment on the burden this proposal would impose on both facilities-based IXCs and LECs.

162. We also seek comment on whether facilities-based carriers should be required to modify their billing records to allow identification of resellers on the consumer's bill, whether such bill is issued from the reseller, the LEC, or a billing agent. We also seek comment on whether, if the subscriber's carrier has been changed but the CIC remains the same, such subscriber's bill should include information on how to contact the underlying facilities-based carrier if the subscriber believes that an unauthorized change has occurred. This would enable the subscriber to contact the facilities-based IXC, rather than the LEC. In this particular situation, the LEC has no ability to properly identify the carrier, nor any ability to change the subscriber back to the properly authorized carrier, because the subscriber's CIC has not changed. Only the facilities-based IXC has the ability to perform these functions. We seek comment on whether facilities-based carriers possess the information needed to distinguish resellers of their services on subscribers' monthly telephone bills. We ask for comment on the cost and effort associated with placing on consumers' bills information based on the reseller usage information already maintained by facilities-based carriers. Specifically, how expensive and difficult would it be for facilities-based carriers to modify their existing billing records to provide the means to identify on the subscribers' monthly bills the specific resellers responsible for the service? Finally, we request comment on the impact of this proposed option on section 251(e)(2)'s requirement for competitive neutrality, when determining the cost of its administration.

163. We also seek comment on any other proposals that would help to distinguish the identities of resellers from their facilities-based carriers, both for purposes of identification on subscriber bills and to prevent soft slams. We seek comment on additional CIC proposals, as well as on methods that would not involve CICs, if such proposals would attain both goals of properly identifying resellers and preventing switchless resellers from slamming

subscribers.

6. Other Potential Benefits

164. We also seek comment on other benefits unrelated to slamming remedies that may result from the adoption of any of these options. For example, we ask commenters to describe how the enhanced identification of resellers may allow more efficient billing or routing of calls. In addition, we seek comment on whether such identification would promote competition by giving greater emphasis to the identity of resellers that provide service.

C. Independent Third Party Verification

165. As noted previously, the Commission has seen many instances of abuse concerning our existing requirements for independent third party verification. We clarify above, for example, that the verifier must be truly independent of both the carrier and any telemarketing agent, that the third party verifier must not be compensated in a manner that creates incentives to engage in deceptive verification practices, and most importantly, that the third party verification must clearly and conspicuously confirm the previously obtained authorization. Several parties, however, have requested further guidance regarding independent third party verification.[450] Based on the number and breadth of comments we received asking for clarification of the independent third party verification option, we tentatively conclude that we should revise our rules for independent third party verification.

166. NAAG suggests in its comments that independent third party verification should be separated completely from the sales transaction, so that a carrier would not be permitted to conduct a three-way call to connect the subscriber to the third party verifier.[451] NAAG argues that a verification call initiated by the carrier is not truly independent because the subscriber would remain under the influence of the carrier's telemarketer during the verification.[452] We note, however, that using a three-way call is often the most efficient means by which to accomplish third party verification.[453] We seek comment on whether, if a telemarketing carrier is present during the third party verification, such verification can be considered "independent."

167. We seek comment on the use of automated third party verification systems, as opposed to "live" operator verifiers. Although different automated third party verification

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[450] *See, e.g.*, NAAG Comments at 17; Quick Response Comments at 2.

[451] NAAG Comments at 17.

[452] *Id.*

[453] *See also, e.g.*, ACTA Reply Comments at 29; MCI Reply Comments at 4, n.5.

systems operate in various ways, such systems generally work as follows: after obtaining a carrier change request from a subscriber through telemarketing, the telemarketing carrier sets up a three-way call between the subscriber, the carrier, and the automated verification recording system. The recording system then plays recorded questions and records the subscriber's answers to those questions. Presumably the system would record both the questions asked by the system and the answers given by the subscriber. With some systems, the telemarketing carrier remains on the call during the verification, while in other systems the telemarketing carrier may hang up on the call after connecting the subscriber to the third party verifier. We seek comment on whether automated third party verification systems as described above would comply with our rules concerning independent third party verification, as well as with the intent behind our rules to produce evidence independent of the telemarketing carrier that a subscriber wishes to change his or her carrier. We also note that one commenter, VoiceLog, offers an additional system called a "live-scripted" version.[454] In this "live-scripted" version, after the telemarketing carrier's representative sets up the three-way call between the subscriber, the carrier's representative, and the automated recording system, the system begins recording, at which point the carrier's representative asks scripted questions to confirm the necessary information about the subscriber's account and that the subscriber wishes to change his or her carrier.[455] We seek comment on whether such a "live-scripted" automated verification system would be at odds with our rules because it permits the carrier itself, who is not an independent party located in a separate physical location, to solicit the subscriber's confirmation. We also seek comment on the advantages and disadvantages of using automated third party verification and live operator third party verification. We note that some commenters argue that automated third party verification is more economical to use than live verifiers, and that automated systems provide recordings that, by recording the subscriber's tone of voice, may also indicate the subscriber's state of mind.[456] Other commenters maintain that live verifiers are more effective than automated verifiers because a live operator can answer questions asked by the subscriber, whereas an automated system may only be able to record "yes" or "no" answers.[457] We seek comment on these viewpoints and on any other advantages, disadvantages, or alternatives to using automated third party verification systems.

168. We seek comment on the content of the third party verification itself. For example, should the independent third party verifier be required or permitted to provide certain information in addition to confirming a subscriber's carrier change request? NAAG proposes that the Commission should define the format and content of the third party

[454] VoiceLog Comments at 3.

[455] *Id.*

[456] *See, e.g.*, TPV Services Reply Comments at 7; VoiceLog Comments at 5.

[457] *See* Quick Response Comments at 4-6.

verification.[458] Quick Response states that its verifiers have carrier-provided information sheets with which to answer subscribers' questions during the verification process.[459] We also seek comment on whether independent third party verifiers should be permitted to dispense information on preferred carrier freeze procedures. Several commenters argue that requiring a third party verifier to provide additional information is unnecessary, time-consuming, and would put the third party verifier in the role of telemarketing for the carrier.[460] We seek comment on any benefits that might be gained from permitting or requiring third party verifiers to provide additional information. We also seek comment on whether such a requirement would compromise the independent nature of the verification, or on whether such a requirement is necessary. Finally, we seek comment on any other proposals that would improve the quality of the third party verification.

D. Carrier Changes Using the Internet

169. Many carriers have begun to utilize the Internet as a marketing tool to gain new subscribers. Consumers may log onto a carrier's website and file forms electronically to switch to that carrier's telecommunications service. We recognize that using the Internet is a quick and efficient method of signing up new subscribers and should be made widely available. Such availability, however, should be accompanied by measures to ensure that consumers are provided the same safeguards to prevent slamming as we have mandated for other forms of solicitation. It is the very ease with which a subscriber may change carriers using the Internet that also makes the Internet fertile ground for slamming. For example, we can envision scenarios in which a consumer who is "surfing" the Internet inadvertently signs up for a switch in long distance service, or is misled into signing up for a contest that actually results in a switch of telecommunications provider.

170. As stated in this *Order*, all carrier changes must be confirmed in accordance with one of the three verification methods in our rules: written LOA, electronic authorization, or independent third party verification.[461] It appears, however, that carriers have widely differing interpretations of the applicability of the Commission's verification rules to Internet carrier changes. For example, some carriers' websites state that the subscriber's carrier change request will be verified separately after the consumer sends, by electronic submission, the carrier change request. Other carriers' websites indicate that verification will occur only if the subscriber lives in certain specified states. Some carriers' websites do not offer electronic submission of any forms, stating that they cannot change any subscriber's service without that

[458] NAAG Comments at 17.

[459] Quick Response Comments at 5.

[460] *See, e.g.*, ACTA Reply Comments at 28; TPV Reply Comments at 6.

[461] *See* Appendix A, § 64.1150.

subscriber's signed written agreement. These websites offer the subscriber the choice of downloading a paper form or receiving the paper form in the mail, stating that the carrier will only change the subscriber's service after the subscriber submits a signed paper form.

171. We seek comment on whether a carrier change submitted over the Internet could be considered a valid LOA under our verification rules. When carriers obtain written LOAs from subscribers, such LOAs serve as both authorization to change a subscriber's carrier and verification of that subscriber's decision to change carriers. We seek comment on the extent to which current carrier change requests submitted over the Internet contain all the required elements of a valid LOA in accordance with our rules. We have particular concerns about how an Internet sign-up system satisfies the signature requirement, which is one of the most important identification requirements of the written LOA.[462] The electronic forms that we have seen generally contain a section called the "electronic signature" that serves as a substitute for the consumer's written signature. Some electronic signatures consist of the consumer typing his or her name into the box. Other electronic signatures consist of the consumer submitting the form electronically to the carrier. We tentatively conclude that electronic signatures used in Internet submissions of carrier changes would not comply with the signature requirement for LOAs. We believe that the electronic signature fails to identify the "signer" as the actual individual whose name has been "signed" to the Internet form. We also believe that the electronic signature fails to identify the "signer" as an individual who is actually authorized to make telecommunications decisions. For example, there appear to be few safeguards to prevent someone from simply typing another person's name into the field for the electronic signature. There would be no telltale variations in handwriting to distinguish one electronic signature from another. We seek comment on these tentative conclusions, and seek comment generally on how carriers are dealing with the above-identified problems or how our rules should be modified to account for these differences.

172. We also seek comment on what additional information would provide sufficient consumer protection from an unscrupulous carrier. For example, some carriers will accept carrier changes using the Internet if subscribers submit their credit card numbers for billing purposes. We seek comment on whether obtaining a subscriber's credit card number would provide sufficient proof that a subscriber authorized a carrier change and that the submitting person is actually the subscriber. We seek comment on the extent to which a subscriber would be protected by the consumer protection aspects that accompany the use of credit cards. We also seek comment on whether carrier changes submitted over the Internet should require a subscriber to include certain personal information, such as social security number or mother's maiden name, to ensure that only the subscriber may change his or her own carrier. We seek comment on whether requiring the submission of these types of information would be sufficient to prevent slamming using the Internet, without jeopardizing the subscriber's privacy and other interests.

[462] *See, e.g.*, 47 C.F.R. § 64.1150(b) (requiring that an LOA be signed and dated by the subscriber).

173. To the extent that a carrier change using the Internet is *not* a valid LOA, then at a minimum, a carrier using such a method of solicitation must verify in accordance with our rules. That is, the carrier must either obtain a valid written LOA, or confirm the sale with electronic authorization or independent third party verification. We seek comment on whether additional methods of verification might be particularly appropriate for use by carriers who solicit subscribers over the Internet.

174. We also have general concerns about the content of the solicitation using the Internet. For example, some IXC webpages state that in changing to that IXC's long distance service, the consumer also agrees to change to the IXC's intraLATA toll service where applicable. These carriers do not give consumers the option of choosing only interLATA service by that carrier, but instead require the consumer to accept both interLATA and intraLATA toll service from that IXC. We tentatively conclude that such statements would be in violation of our rule that requires LOAs to contain separate statements regarding choices of interLATA and intraLATA toll service.[463] We seek comment on this tentative conclusion and on any other problems that may result from carrier use of the Internet to change subscribers' carriers.

175. Finally, we seek comment on other uses of the Internet in the carrier change context. For example, we seek comment on the extent to which subscribers may use the Internet to request or lift preferred carrier freezes. We have the same general above-mentioned concerns about whether this method would identify the submitting party as the actual subscriber whose service would be affected by the imposition or lifting of the preferred carrier freeze. We also seek comment on the verification procedures that should apply. Should subscribers requesting preferred carrier freezes over the Internet verify their requests in the same manner as requests given directly by telephone to a LEC? We state above that LECs should, at a minimum, provide subscribers with the option to lift freezes using either a written LOA or a three-way call, but that they may offer additional options. Could LECs provide a simple and secure method for subscribers to impose and lift their freezes using the Internet? We seek comment on any other uses of the Internet that would promote efficiency and convenience for both carriers and consumers in changing telecommunications carriers and other related activities.

E. Definition of "Subscriber"

176. Section 258 of the Act and our implementing rules require that the carrier obtain authorization from a subscriber before making a switch. Neither the Act nor our rules define the term "subscriber" for this purpose. We seek comment on how a subscriber should be defined, in light of our goals of consumer protection and promotion of competition. SBC suggests that the term "subscriber" should include "any person, firm, partnership, corporation,

[463] *See* 47 C.F.R. § 64.1150(e)(4).

or lawful entity that is authorized to order telecommunications services supplied by a telecommunications services provider," so that carriers could obtain authorization from whomever at the business or residence is authorized to make the purchasing decision.[464] In the *1995 Report and Order*, we determined that the only individual qualified to authorize a change in carrier selection is the "telephone line subscriber," although we did not specifically define the term.[465] We believe that allowing the named party on the bill to designate additional persons in the household to make telecommunications decisions could promote competition because carriers would be able to solicit more than one person in a household. We also believe that consumers would find such an arrangement convenient because it would allow more than one person to make telecommunications decisions, while still giving the named party control over which members of the household may make changes to telecommunications service. A spouse named on the bill could therefore designate the other spouse as being authorized to make decisions regarding telecommunications service, although their minor children would not be authorized to make such decisions.

177. On the other hand, we are concerned that adoption of such a proposal could lead to an increase in slamming. It is unclear, for example, how a marketing carrier would know if the person who has authorized a carrier change is in fact authorized to order telecommunications services. We are concerned that a slamming carrier could simply submit changes requested by unauthorized persons and claim that it thought that those persons were authorized. If the definition of a subscriber is limited to the party named on the bill, however, a carrier would know conclusively that it may only submit changes authorized by persons named on the bill. Furthermore, such a proposal presumably would require executing carriers to not only maintain lists of persons other than the named party who are authorized to make telecommunications decisions, but also to check each carrier change request against these lists to determine if the person who authorized the carrier change is also authorized to make decisions. We believe that this could be an unreasonable burden on the executing carrier.

178. We also seek comment on the current practices of carriers with regard to which members of a household are permitted to make changes to telecommunications service. Carriers who submit proposals should include an explanation of how their present systems operate and the advantages and disadvantages of their proposals, as opposed to their current procedures. We seek comment on this and other proposals to define the term "subscriber" in order to maximize consumer protection, provide consumer convenience, and promote competition in telecommunications services.

F. Submission of Reports by Carriers

[464] SBC Comments at 6.

[465] *See 1995 Report and Order*, 10 FCC Rcd at 9564, n.16.

179. We seek comment on whether we should require each carrier to submit to the Commission a report on the number of complaints of unauthorized changes in telecommunications providers that are submitted to the carrier by its subscribers.[466] This concept is based on a provision in the Senate's anti-slamming bill.[467] We believe that a reporting requirement could serve to alert the Commission as soon as possible about carriers that practice slamming. Because most subscribers initially complain about slamming to their local exchange or long distance carriers, the Commission may not learn of a carrier's slamming practices until a subscriber has been unable to resolve the matter and then files a consumer complaint with the Commission. Early warning about slamming carriers will enable the Commission to take investigative action, where warranted, to stop slamming as soon as possible. We seek comment on the potential benefits of this reporting requirement and on whether such benefits outweigh the burdens on carriers. If the Commission were to adopt a reporting requirement, we seek comment on the frequency of filing such a report.

G. Registration Requirement

180. We seek comment on whether the Commission should impose a registration requirement on carriers who wish to provide interstate telecommunications service. Such a registration requirement could help to prevent entry into the telecommunications marketplace by entities that are either unqualified or that have the intent to commit fraud.[468] We propose that any telecommunications carrier that provides or seeks to provide interstate telecommunications service should register with the Commission.[469] We seek comment on the information that the registration should contain. We propose that the registration should contain, at a minimum, the carrier's business name(s); the names and addresses of all officers and principals; verification that such officers and principals have no prior history of committing fraud; and verification of the financial viability of the carrier. To the extent that the Commission already possesses some of this information, we seek comment on whether the Commission should consolidate the collection of the above-described information with other

[466] *See* Appendix B, § 64.1100(f).

[467] *See* S. 1618, 105th Cong., 2nd Sess. (1998).

[468] For example, we have experienced difficulty in tracking down certain switchless resellers. Because they resell the service of facilities-based carriers and do not require large amounts of capital, switchless resellers are extremely portable businesses. This portability enables unscrupulous entities to enter a market as resellers to commit fraud and disappear at the first sign of trouble, only to reappear in another state under a different business name. In conducting our investigations of slamming carriers, we often encounter this exact problem when attempting to serve process on entities that have deserted their business address locations.

[469] *See* Appendix B, § 64.1195.

existing collection mechanisms, in order to lessen the burden on carriers.[470] We do not wish to impose any unnecessary barriers on entities seeking to enter the telecommunications market, but we believe that requiring carriers to register with the Commission will prevent entities with a history of fraud from offering telecommunications services. It also will provide the Commission with accurate information as to the identity of all entities that are providing telecommunications services, as well as provide a means of tracking and contacting these entities.[471] We tentatively propose that this registration requirement apply not just to new entrants but to all entities that offer telecommunications services. We also seek comment on the Commission's jurisdiction to require carriers to file a registration in order to provide interstate telecommunications service.

181. We tentatively conclude that the Commission should revoke or suspend, after appropriate notice and opportunity to respond, the operating authority of those carriers that fail to file a registration or that provide false or misleading information in their registration. Many states have authority to revoke carriers' operating licenses with regard to the provision of intrastate services. These states' revocation powers are limited to prohibiting carriers from operating within one state, which permits unscrupulous carriers to move to a different state to offer service. The revocation power proposed herein would enable the Commission to prevent an unscrupulous interstate interexchange carrier from operating nationwide. We seek comment on whether such penalty is appropriate in these situations, as well as in situations where the Commission finds that the provision of telecommunications service by a particular carrier would be contrary to the public interest.

182. We also tentatively conclude that a carrier has an affirmative duty to ascertain

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[470] For example, section 1.47(h) of the Commission's rules requires common carriers to designate an agent in the District of Columbia for service of process. 47 C.F.R. § 1.47(h). Among other things, this designation includes the carrier's name, business address and telephone number. *Id.* Also, the Commission receives certain carrier information that is compiled from worksheets carriers use to calculate their contributions to fund interstate telecommunications relay service (TRS), federal universal service support mechanisms, the cost recovery mechanism for the North American Numbering Plan administration, and the cost recovery mechanism for the shared costs of long-term local number portability. The Commission has issued a Notice of Proposed Rulemaking proposing to simplify the Commission's filing requirements for these purposes. *1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 98-233, CC Docket 98-171 (rel. Sept. 25, 1998).

[471] This proposal would help to address slamming concerns raised by the General Accounting Office (GAO) in its Report on Telephone Slamming and Its Harmful Effects. General Accounting Office, Telecommunications, Telephone Slamming and Its Harmful Effects (1998) (GAO Report). In this report, the GAO stated that the Commission did not have any practice in place to "help ensure that applicants who become long-distance providers, or other common carriers, have satisfactory records of integrity and business ethics." GAO Report at 5.

whether another carrier has filed a registration with the Commission prior to offering service to that carrier. For example, we believe that a facilities-based carrier should verify that a switchless reseller has registered with the Commission before agreeing to sell service to that entity. This would further check the ability of unscrupulous carriers to enter the marketplace. If we were to adopt this requirement, we would certainly facilitate the ability of a carrier to check the registration status of another carrier.[472] We seek comment on what penalty the Commission should impose on carriers that fail to determine the registration status of other carriers before providing them with service. We believe that the penalty should not be as severe as the penalty to be imposed on carriers that fail to file valid registrations. We tentatively conclude that these penalties will protect consumers by ensuring that unqualified and unscrupulous carriers do not profit from the provision of telecommunications services. We seek comment on whether the consumer benefits of these proposals would outweigh the burden on carriers of filing registrations. We seek comment on these proposals and on other proposals that would prevent carriers that have a history of fraud or are otherwise unqualified from providing telecommunications services.

H. Third Party Administrator for Preferred Carrier Changes and Preferred Carrier Freezes

183. We seek further comment on the implementation by the industry of a comprehensive system in which an independent third party would administer carrier changes, verification, and preferred carrier freezes, as well as the dispute resolution functions mentioned above.[473] In the *Further Notice and Order* the Commission sought comment on the use of an independent third party to execute carrier changes neutrally in order to reduce carrier change disputes that might arise if ILECs continue to execute changes.[474] Many commenters responded in support of an independent third party administrator for carrier changes and even verification because such a party would have incentive to administer carrier changes in a neutral and accurate manner.[475] Although we agree that many of the commenters' contentions have merit, we conclude that the record before us is not fully

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[472] For example, the Commission could publish a list, to be updated frequently, of carriers that have filed registrations.

[473] *See supra* discussion on Third Party Administrator for Dispute Resolution.

[474] *Further Notice and Order*, 12 FCC Rcd at 10644. Some carriers are concerned that as the competitive marketplace changes, LECs may have a conflict of interest between their role as LEC and their role as an affiliate of an interexchange competitor. *See, e.g.*, Letter from Bruce K. Cox, AT&T, to John Muleta, Federal Communications Commission (Sept. 27, 1996). AT&T suggests that "to avoid the inherent conflict of interest between competing carriers, serious consideration should be given to establishing procedures under which neutral third parties administer PIC protection." *Id.*

[475] *See, e.g.*, CompTel Comments at 7; CWI Comments at 4; IXC Long Distance Reply Comments at 3; LCI Comments at 4; MCI Comments at 25; Sprint Comments at 19.

developed to support the creation of a new and independent agent to handle execution functions at this time.[476] Therefore we seek further comment on the development and implementation of a third party administrator for these functions. We note that any industry-supported neutral party must administer carrier change functions in accordance with the Commission's rules and seek comment on how to ensure that the industry's implementation of such a neutral third party for these functions would be consistent with the Commission's rules, policies, and practices.

184. An independent third party with broader responsibilities, such as administration of carrier changes, verification, and preferred carrier freezes, may be useful in addressing concerns raised by the commenters about potential anticompetitive practices in this area. Although we have concluded that the ability of the LECs to act anticompetitively while executing carrier changes is limited,[477] we find that the concept of an independent third party for administration of carrier changes and preferred carrier freezes is potentially viable. Most of the commenters who support such a system, however, are not specific about how such a system might work, nor do they offer concrete proposals for funding such an administrative scheme.[478] These comments fail to provide sufficient detail about the actual implementation and funding for a third party administrator system necessary for the Commission to mandate at this time. Furthermore, the commenters were unable to come to a consensus as to the actual duties of the independent third party administrator. Several carriers state that the third party administrator would need electronic interconnections with every carrier to be able to receive and process carrier changes and preferred carrier freezes.[479] On the other hand, TRA suggests that the third party administrator should only monitor compliance and document execution of carrier changes and preferred carrier freezes, but that it should not actually execute carrier changes and preferred carrier freezes.[480] We seek comment on concrete suggestions for the implementation of a third party administrator that are workable and cost-effective. Proposals for such third party administration should include specific and detailed information regarding the cost of setting up such a system.

IV. CONCLUSION

185. In this *Order*, we adopt rules to implement Section 258, which prohibits all telecommunications carriers from making changes to subscribers' preferred carrier selections

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[476] *See* WorldCom Comments at 16 (stating that the Commission should establish a separate rulemaking to address the issue of an independent third party administrator).

[477] *See supra* discussion on Concerns with Executing Carriers.

[478] *See, e.g.*, LCI Comments at 4-5; Sprint Comments at 19.

[479] *See, e.g.*, Bell Atlantic Reply Comments at 6; MCI Comments at 16.

[480] TRA Reply Comments at 13.

except in accordance with our verification procedures. We adopt rules to remove the economic incentive to slam by generally absolving consumers of liability for slammed charges for 30 days after an unauthorized change, subject to a 90-day stay of such liability rules. We strengthen our verification rules by eliminating the welcome package as a verification option and by applying our rules to carrier changes resulting from consumer-initiated calls to carriers. We also broaden the application of our verification procedures to all telecommunications carriers, excluding CMRS carriers at this time,[481] in order to prevent slamming in all telecommunications markets, including local exchange, intraLATA, and interLATA services. Finally, we adopt rules to regulate the preferred carrier freeze process to ensure that it will protect consumers from slamming without preventing them from changing carriers when they wish to do so. We conclude that the rules we adopt in this *Order* will both safeguard consumer choice and promote competition in the local exchange, intraLATA, and interLATA telecommunications markets. In the Further Notice of Proposed Rulemaking portion of this *Order*, we seek comment on several proposals to further strengthen our slamming rules, including a proposal to require unauthorized carriers to remit to authorized carriers certain amounts in addition to the amount paid by slammed subscribers, as well as proposals for preventing the confusion and slamming that results from resellers using the same CICs as their facilities-based carriers.

VI. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

186. As required by the Regulatory Flexibility Act (RFA),[482] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Further Notice of Proposed Rule Making and Memorandum Opinion and Order on Reconsideration (*Further Notice and Order*) in Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carrier.[483] The Commission sought written public comment on the proposals in the *Further Notice and Order*, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[484]

1. Need for and Objectives of this *Order* and the Rules Adopted Herein

187. Section 258 of the Act makes it unlawful for any telecommunications carrier

[481] *See supra* discussion on Application of the Verification Rules to All Telecommunications Carriers.

[482] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[483] *Further Notice and Order*, 12 FCC Rcd 10,674 (1997).

[484] *See* 5 U.S.C. § 604.

"to submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe."[485] Accordingly, the Commission adopts in this *Order* rules that: (1) apply the Commission's verification rules to local telecommunications service and to telecommunications carriers that submit carrier changes;[486] (2) eliminate the welcome package as a verification option;[487] (3) apply the Commission's verification rules to sales generated from in-bound telemarketing;[488] (4) require carriers to maintain and preserve verification records for two years;[489] (5) absolve subscribers of liability for slammed charges for a period of time, provided that subscribers do not pay any charges to their unauthorized carriers;[490] (6) require an unauthorized carrier to remit to the authorized carrier an amount equal to all charges that may have been paid by a subscriber from the time the slam occurred, any charge required to return the subscriber to his or her authorized carrier, and expenses of billing and collection;[491] (7) where a subscriber has paid slamming charges to an unauthorized carrier and the authorized carrier has recovered such amount from the unauthorized carrier, require the authorized carrier to provide a refund or credit to a subscriber for any payments made in excess of the authorized carrier's rates;[492] (8) require an authorized carrier to restore premiums to any subscribers who have paid slamming charges to their unauthorized carriers;[493] (9) prescribe procedures for solicitation and implementation of carriers freezes.[494] The Commission stays the effect of the liability rules for 90 days to enable carriers to implement a voluntary dispute resolution mechanism to be administered by an independent third party. The objectives of the rules adopted in this *Order* are to implement the provisions of section 258 and provide further safeguards to protect consumers from unauthorized switching of their telecommunications service providers, as well as to encourage full and fair competition among telecommunications carriers in the marketplace.

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[485] 47 U.S.C. § 258.

[486] *See supra* discussion on Application of the Verification Rules to the Local Market; Application of the Verification Rules to All Telecommunications Carriers.

[487] *See supra* discussion on the Welcome Package.

[488] *See supra* discussion on Application of the Verification Rules to In-Bound Telemarketing.

[489] *See supra* discussion on Other Verification Mechanisms

[490] *See supra* discussion on Liability of Subscribers to Carriers.

[491] *See supra* discussion on Reimbursement Procedures.

[492] *See supra* discussion on Subscriber Refunds or Credits.

[493] *See supra* discussion Restoration of Premiums.

[494] *See supra* discussion on Preferred Carrier Freezes.

2. Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA

188. In the IRFA, the Commission found that the rules it proposed to adopt in this proceeding may have a significant impact on a substantial number of small businesses as defined by 5 U.S.C. § 601(3).[495] Specifically, under the Act and proposed rules, small entities that violate the Commission's carrier change verification rules by slamming subscribers shall be liable to the subscriber's properly authorized carrier for all charges paid by the slammed consumer.[496] Furthermore, the Commission sought comment on whether the welcome package described in section 64.1100(d) should be eliminated, on the costs and benefits associated with in-bound verification procedures, as well as on consumer-to-carrier, carrier-to-carrier, and carrier-to-consumer liability.[497] The IRFA solicited comment on the number of small businesses that would be affected by the proposed regulations and on alternatives to the proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding.[498]

189. America's Carriers Telecommunications Association (ACTA) has submitted comments directly in response to the IRFA.[499] ACTA, which is a non-profit trade association comprised of mostly small business entities,[500] states that the Commission violated the RFA in its IRFA by not addressing sufficiently the "impact of the vague and standardless environment surrounding enforcement of the anti-slamming campaign on small carriers."[501] ACTA asserts that because the proposed rules define slamming to include unintentional acts, small carriers will suffer disproportionately.[502] ACTA states that the only proposal the Commission made to minimize the impact of its proposed rules on small carriers was the proposal to require private settlement negotiations regarding the transfer of charges arising due to section 258 liability.[503] ACTA states that this proposal is inadequate because liability for inadvertent slams should not

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495 *Further Notice and Order*, 12 FCC Rcd at 10,708.

496 *Id.*

497 *Id.* at 10,708-09.

498 *Id.* at 10,715.

499 *See* ACTA Comments Regarding IRFA (ACTA IRFA Comments).

500 ACTA IRFA Comments at 1.

501 *Id.* at 3.

502 *Id.* at 9.

503 *Id.* at 3. We note that this particular proposal will be dealt with in a subsequent order. *See supra* para. 3.

be imposed in the first place.[504] ACTA submits that imposing liability for inadvertent slams will allow dishonest customers to claim falsely that they were slammed in order to avoid payment for legitimate services.[505] Even when a complaint is not prosecuted to a formal decision, ACTA states, handling allegations of slamming are expensive and time-consuming for small carriers.[506] ACTA also claims that the Commission is prejudiced against small carriers[507] and that this attitude is reflected in unbalanced proposals that will allow large carriers and the Commission to subject small carriers to misdirected enforcement efforts and monetary losses and fines, as well as skew competition.[508] ACTA also objects to the following as being harmful to small carriers: (1) elimination of the welcome package because it is an economical verification method for small carriers;[509] (2) imposing the same verification procedures for in-bound and out-bound calls because that would overburden small carriers;[510] (3) non-preemption of state regulation because small carriers would have difficulty in meeting the requirements of different states.[511]

190. We disagree with ACTA's contention that we did not conduct a sufficient IRFA because we ignored the "impact of the vague and standardless" anti-slamming environment created by the inclusion of inadvertent acts as slamming violations. We do not believe that imposing liability for all intentional and unintentional unauthorized changes is vague. In fact, we believe that it is so clear as to eliminate any doubts as to the circumstances that would constitute a slam. The bright-line standard that we adopt in this *Order* should help all carriers, including small carriers, to avoid making unauthorized changes to a subscriber's selection of telecommunications provider. We also disagree with ACTA's contention that defining slamming to include accidental slams would disproportionately affect small carriers. Section 258 prohibits slamming by any telecommunications carrier and does not distinguish between intentional and inadvertent conduct.[512] Regardless of its size, no

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504 *Id.*

505 *Id.* at 9.

506 *Id.*

507 ACTA claims, for example, that the Commission skewed its statistics in the *Common Carrier Scorecard* to make it appear as though the majority of slamming complaints may be due to the marketing practices of smaller companies. *Id.* at 5.

508 *Id.* at 10.

509 ACTA Comments at 24.

510 *Id.* at 26.

511 ACTA IRFA Comments at 9.

512 47 U.S.C. § 258.

carrier has the right to commit unlawful acts. We believe that holding carriers liable for intentional and inadvertent unauthorized changes to subscribers' preferred carriers will reduce the overall incidence of slamming. First, we believe that the rights of the consumer and the authorized carrier to remedies for slamming should not be affected by whether the slam was an intentional or accidental act. Regardless of the intent, or lack thereof, behind the slam, they have suffered injury. Second, we agree with those commenters who assert that imposing liability for all slamming occurrences will make all carriers more vigilant in preventing unauthorized carrier changes, whether such changes are inadvertent or intentional.[513]

191. We disagree with ACTA's allegation that the Commission is biased against small carriers and that this bias is evident in the rules we proposed in the *Further Notice and Order*, such as elimination of the welcome package and application of the verification rules to in-bound calls. The rules we adopt require all carriers, regardless of size, to take precautions to guard against the harm to consumers that is caused by slamming. While the rules we adopt may impose some costs on all carriers, these are necessary costs. We cannot lower the costs for carriers in order to promote competition at the expense of the consumer. A consumer can only take advantage of the benefits of competition if his or her choice of carriers can be guaranteed. Finally, regarding the preemption of state law, we decline to exercise our preemption authority at this time because the commenters have failed to establish a record upon which a specific preemption finding could be made. The record in this proceeding does not contain any analysis of which particular state laws would be inconsistent with our verification rules or would obstruct federal objectives.

3. Description and Estimates of the Number of Small Entities to Which the Rules Adopted in the *Order* in CC Docket No. 94-129 Will Apply

192. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the adopted rules.[514] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[515] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[516] A small business concern is one which: (1) is independently owned and

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[513] *See, e.g.*, BellSouth Reply Comments at 3.

[514] 5 U.S.C. § 603(b)(3).

[515] *Id.* at § 601(6).

[516] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[517]

193. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS).[518] According to data in the most recent report, there are 3,459 interstate carriers.[519] These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers.

194. The SBA has defined establishments engaged in providing "Radiotelephone Communications" and "Telephone Communications, Except Radiotelephone" to be small businesses when they have no more than 1,500 employees.[520] Below, we discuss the total estimated number of telephone companies falling within the two categories and the number of small businesses in each, and we then attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

195. Although some affected incumbent local exchange carriers (ILECs) may have 1,500 or fewer employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they are either dominant in their field of operations or are not independently owned and operated, and therefore by definition not "small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small ILECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small ILECs within this analysis and use the term "small ILECs" to refer to any

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[517] Small Business Act, 15 U.S.C. § 632 (1996).

[518] FCC, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997) (*Telecommunications Industry Revenue*). We believe that the TRS Fund Worksheet Data is the most reliable source of information for our purposes because carriers file the TRS worksheets yearly and are instructed to select the single category of type of service provision that best describes them. Other sources of carrier data, such as the tariffs on file with the Common Carrier Bureau, may not reflect the same figures as the TRS Fund Worksheet Data, because such sources are not updated annually.

[519] *Id.*

[520] 13 CFR § 121.201, Standard Industrial Classification (SIC) codes 4812 and 4813. *See also* Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual* (1987).

ILECs that arguably might be defined by the SBA as "small business concerns."[521]

196. **Total Number of Telephone Companies Affected.** The U.S. Bureau of the Census ("Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[522] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, personal communications services providers, covered specialized mobile radio providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small ILECs because they are not "independently owned and operated."[523] For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It is reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small ILECs that may be affected by the proposed rules, if adopted.

197. **Wireline Carriers and Service Providers.** The SBA has developed a definition of small entities for telephone communications companies except radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[524] According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.[525] All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small ILECs. We do not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 2,295 small telephone

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[521] *See* 13 CFR § 121.201, SIC code 4813. Since the time of the Commission's 1996 decision, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996), 61 FR 45476 (August 29, 1996), the Commission has consistently addressed in its regulatory flexibility analyses the impact of its rules on such ILECs.

[522] U.S. Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

[523] *See generally* 15 U.S.C. § 632(a)(1).

[524] *1992 Census, supra*, at Firm Size 1-123.

[525] 13 CFR § 121.201, SIC code 4813.

communications companies other than radiotelephone companies are small entities or small ILECs that may be affected by the proposed rules, if adopted.

198. **Local Exchange Carriers.** Neither the Commission nor the SBA has developed a definition for small providers of local exchange services (LECs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[526] According to the most recent *Telecommunications Industry Revenue* data, 1,371 carriers reported that they were engaged in the provision of local exchange services.[527] We do not have data specifying the number of these carriers that are either dominant in their field of operations, are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,371 providers of local exchange service are small entities or small ILECs that may be affected by the proposed rules, if adopted.

199. **Interexchange Carriers.** Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[528] According to the most recent *Telecommunications Industry Revenue* data, 143 carriers reported that they were engaged in the provision of interexchange services.[529] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that may be affected by the proposed rules, if adopted..

200. **Competitive Access Providers.** Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services providers (CAPs). The closest applicable definition under the SBA rules is for telephone communications companies other than except radiotelephone (wireless) companies.[530] According to the most recent *Telecommunications Industry Revenue* data, 109 carriers

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[526] *Id.*

[527] *Telecommunications Industry Revenue*, Figure 2.

[528] 13 CFR § 121.201, SIC code 4813.

[529] *Telecommunications Industry Revenue*, Figure 2.

[530] 13 CFR § 121.201, SIC code 4813.

reported that they were engaged in the provision of competitive access services.[531] We do not have data specifying the number of these carriers that are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 109 small entity CAPs that may be affected by the proposed rules, if adopted.

201. **Resellers (including debit card providers).** Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company other than radiotelephone (wireless) companies.[532] According to the most recent *Telecommunications Industry Revenue* data, 339 reported that they were engaged in the resale of telephone service.[533] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by the proposed rules, if adopted.

202. **Cellular Licensees**. Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[534] According to the Bureau of the Census, only twelve radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.[535] Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, we note that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. In addition, according to the most recent *Telecommunications Industry Revenue* data, 804 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Service (PCS) services, which are placed together in the data.[536] We do not have data specifying the number of these carriers that are not independently owned

[531] *Telecommunications Industry Revenue*, Figure 2.

[532] 13 CFR § 121.201, SIC code 4813.

[533] *Telecommunications Industry Revenue*, Figure 2.

[534] 13 C.F.R. § 121.201, SIC code 4812.

[535] *1992 Census, Series UC92-S-1*, at Table 5, SIC code 4812.

[536] *Telecommunications Industry Revenue*, Figure 2.

and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 804 small cellular service carriers that may be affected by the proposed rules, if adopted.

4. Summary of Projected Reporting, Recordkeeping and other Compliance Requirements

203. Below, we analyze the projected reporting, recordkeeping, and other compliance requirements that may affect small entities and small incumbent LECs.

204. *Verification rules.* The Commission's verification rules shall apply to all carriers, excluding for the present time CMRS carriers, that submit or execute carrier changes on behalf of a subscriber. This rule implements the mandate of section 258 that the Commission's verification rules apply to all carriers who submit or execute changes in a subscriber's selection of a provider of telephone service.[537] We believe that application of the verification rules to all carriers is the best way to prevent slamming from occurring in the first instance.

205. *Elimination of the welcome package.* Carriers may not use the welcome package as a verification method. Although smaller carriers may have utilized the welcome package as an economical way to verify telemarketing sales,[538] we conclude that the welcome package has been a significant source of slamming. We conclude that unscrupulous carriers could use the welcome package as a negative-option LOA if carriers send it to consumers from whom they have not obtained consent, or if the oral consent obtained was based on false or misleading telemarketing efforts. Because of our responsibility to safeguard consumer choices, we cannot continue to allow carriers to use this method of verification.

206. *Verification of in-bound telemarketing sales.* Carriers must comply with our verification rules for all calls that result in carrier changes that are submitted on behalf of subscribers, whether those calls are consumer-initiated or carrier-initiated. Consumers who call carriers are vulnerable to being slammed and deserve the same level of protection as consumers who receive calls from carriers. Excluding in-bound calls from our verification requirements would open a loophole for slammers. Through this loophole, unscrupulous carriers could slam not only consumers who call in for reasons other than to change carriers, but also consumers who do not call in at all. Consumers slammed in this way would have difficulty proving that they had never called in because there would be no record of any alleged transaction. We note, furthermore, that TRA states that the verification rules should apply to in-bound calls in order to balance the verification burden between small and large

[537] *See* 47 U.S.C. § 258.

[538] *See, e.g.*, ACTA Comments at 25; TRA Comments at 11.

carriers.[539] TRA explains that because the large carriers can launch massive campaigns to encourage customers to call, exempting them from verification would give large carriers an advantage over small carriers, who generally must initiate calls to consumers and then verify any sales made through such calls.[540]

207. *Independent Third Party Verification.* The Commission adopts criteria to determine the independent status of a third party verifier. This will provide carriers and independent third party verification companies with guidelines for determining independence.

208. *Verification Records.* Carriers must maintain and preserve verification records for a period of two years. Any person desiring to file a complaint with the Commission alleging a violation of the Act must do so within two years of the alleged violation.[541] A two-year retention period will enable carriers to produce documentation to support their claims regarding an alleged unauthorized change.

209. *Liability rules.* The Commission's rules permit a slammed subscriber to be absolved of liability for slamming charges for 30 days after the unauthorized change. Charges from a slammed carrier on any subsequent bills shall be paid to the authorized carrier at the authorized carrier's rates. If a subscriber pays the unauthorized carrier, however, the unauthorized carrier shall remit an amount equal to all charges paid by the subscriber from the time the slam occurred, any charge required to return the subscriber to his or her authorized carrier, and billing and collection expenses. Upon receipt of such amount, the authorized carrier shall provide a refund or credit to the subscriber for any amounts the subscriber paid in excess of the authorized carrier's rates. The authorized carrier shall keep the remaining amount. The authorized carrier must also restore premiums to any subscribers that have paid slamming charges to their unauthorized carriers. Such rules are necessary to eliminate the economic incentive to slam and to compensate consumers for the fraud that has been perpetrated upon them. The effect of these liability rules is stayed for 90 days, however, to enable carriers to implement an carrier-supported independent dispute resolution mechanism.

210. *Third Party Administrator for Dispute Resolution.* The effective date of the Commission's liability rules is delayed until 90 days after publication in the *Federal Register* to enable carriers to develop and implement an alternative carrier dispute resolution mechanism involving an independent administrator. If carriers successfully implement such a plan, the Commission will entertain carriers' requests for waiver of the administrative requirements of our liability rules where such carriers voluntarily agree to use the independent

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[539] TRA Comments at 10-11.

[540] *Id.*

[541] *See* 47 U.S.C. § 415.

administrator. An independent administrator could enable consumers to resolve a slamming incident by dealing with one entity, while carriers would benefit from having a neutral party execute the procedural requirements of the liability rules.

211. *Preferred Carrier Freeze Procedures.* The Commission's rules require carriers who offer preferred carrier freeze protection to follow certain procedures. Preferred carrier freeze solicitations must make clear the different services that may be frozen and ensure the subscriber understands how to lift a freeze. Carriers must verify subscriber requests for preferred carrier freezes. Subscribers must be able to lift their freezes using, at a minimum, three-way calling and written authorization. These requirements are necessary to provide consumers with protection against slamming and to prevent anticompetitive conduct.

5. Steps Taken to Minimize the Significant Economic Impact of This *Order* on Small Entities and Small Incumbent LECs, Including the Significant Alternatives Considered

212. *Verification rules.* Some carriers state that the Commission's rules should not burden the entire industry but rather target the unscrupulous carriers, so as to avoid imposing unnecessary costs on smaller competitors.[542] Ameritech, SBC, and U S WEST propose systems that would impose fines or more stringent verification requirements on carriers with a history of slamming, as determined by the LEC or otherwise.[543] We decline to adopt such proposals because they would impose more stringent verification requirements on carriers only after such carriers have slammed significant numbers of consumers. Application of our rules will help to prevent carriers from slamming consumers in the first place. Furthermore, we find such proposals to be problematic because they could permit LECs to target certain carriers for "punishment." Considering the fact that LECs will no longer be neutral parties in the carrier change process, we conclude that it would not be prudent to provide LECs with incentive to act anti-competitively. We note that Ameritech did state that punishment could be imposed using a more neutral source of numbers of carrier change disputes, such as the Common Carrier Scorecard, which shows the number of disputed carrier changes for carriers.[544] We share TRA's concern, however, about imposing disparate treatment before a

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[542] *See, e.g.*, TRA Comments at 2; U S WEST Reply Comments at 5.

[543] *See* Ameritech Comments at 12; SBC Comments at 4-5; U S WEST Comments at 20. For example, under SBC's "3 strikes and you're out" approach, Strike 1 would occur if a carrier's disputed change orders exceeded 2% of its service orders in one month. The carrier would be placed on probation. Strike 2 would occur if the dispute level continued to exceed 2% of its service orders in one month at the end of the probation period. That carrier would then be subjected to a fine of at least $5,000 per slamming occurrence. Strike 3 would occur if the dispute level continued to exceed 2% of its service orders in one month. The carrier would then be subject to $10,000 fines, as well as possible suspension of carrier-change privileges. SBC Comments at 5.

[544] *See* Ameritech Comments at 12.

carrier has the opportunity to prove that it did not slam a consumer.[545]

213. *Elimination of the welcome package.* Several commenters propose modifications to the welcome package, rather than elimination of it entirely, because the welcome package is an inexpensive verification option that is suitable for use by smaller carriers. For example, the Oklahoma Commission and WorldCom suggest that the welcome package contain a positive-option postcard, so that a carrier change would not be considered verified until the customer signed and returned the postcard.[546] AT&T, however, opposes the concept of a positive-option postcard because it argues that it would transform the welcome package into a signed LOA requirement, which is difficult to obtain from consumers.[547] We decline to adopt this proposal because such modification would not increase the utility of the welcome package for carriers. Although we feel that requiring a positive-option postcard requirement would minimize one of the fraudulent aspects of the welcome package, we agree with AT&T that such a requirement merely transforms the welcome package into a written LOA requirement, which is already a verification option under our rules.[548] ACTA states that carriers could prove that consumers received a welcome package by using certified mail, or by maintaining mailing manifests.[549] We decline to adopt these proposals. Although they may help to prove that a customer received a welcome package, they will not prevent carriers from sending welcome packages to consumers with whom they have never spoken or from whom they have not obtained consent. We conclude that it is better to eliminate the welcome package entirely, rather than attempt to "fix" it with modifications that fail to provide adequate protection against fraud or curtail its usefulness.

214. *Verification of in-bound telemarketing.* Several commenters propose that less burdensome verification procedures apply to in-bound telemarketing. ACTA and RCN, for example, suggest that the telemarketer be permitted to confirm the order verbally, just as a mail order telemarketer would.[550] BellSouth, GTE, IXC Long Distance, and TOPC propose to allow carriers to make inexpensive audio recordings of inbound calls.[551] We decline to adopt these proposals because we feel that they offer little protection to a consumer against an

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[545] *See* TRA Reply Comments at 9-11.

[546] *See, e.g.*, Oklahoma Commission Reply Comments at 4; WorldCom Comments at 7.

[547] AT&T Reply Comments at 4.

[548] *See* 47 C.F.R. § 64.1150.

[549] ACTA Comments at 26.

[550] *Id.* at 27; RCN Comments at 5.

[551] *See, e.g.*, BellSouth Comments at 11; GTE Comments at 10-11; IXC Long Distance Comments at 3; TOPC Reply Comments at 4.

unscrupulous carrier. In previous orders, we have rejected in-house verification procedures as providing carriers with too much incentive and opportunity to commit fraud.[552] Because we conclude that consumers deserve the same protection from in-bound call slamming as they do from out-bound call slamming, we cannot permit carriers to use less secure procedures to verify sales generated from in-bound calls. Furthermore, our rules provide a carrier with sufficient flexibility to choose a verification method that is appropriate for that carrier. Finally, as noted above, TRA believes that exempting in-bound calls from verification favors large carriers over small carriers because it is the large carriers that are able to launch massive campaigns to encourage customers to call and avoid verification costs.[553]

215. *Independent Third Party Verification.* Several commenters submitted proposals for determining the independence of a third party verifier.[554] These commenters support the criteria that the Commission has adopted in this *Order*. We find that the adoption of these criteria will benefit all carriers, including small carriers, because it provides certainty and guidance in choosing an appropriate independent third party verifier. The rules also provide guidance for small entities that are independent third party verifiers.

216. *Verification Records.* Several commenters, including NAAG and NYSDPS, support a requirement that carriers retain verification records for a certain period of time.[555] NAAG suggested that carriers retain records for three years,[556] while NYSDPS suggested a period of nine months.[557] We choose a retention period of two years because any person desiring to file a complaint with the Commission alleging a violation of the Act must do so within two years of the alleged violation.[558] Although this rule may place a burden on smaller carriers to retain their records, they will benefit from this requirement because it will enable them to produce documentation to support their claims regarding an alleged unauthorized change.

217. *Liability rules.* Although some carriers state that liability for slamming should

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[552] *See PIC Verification Order*, 7 FCC Rcd at 1041.

[553] *Id.*

[554] *See, e.g.*, MCI Comments at 21; TPV Services Comments at 7.

[555] *See, e.g.*, NAAG Comments at 8; NYSDPS Comments at 5.

[556] NAAG Comments at 8.

[557] NYSDPS Comments at 5.

[558] *See* 47 U.S.C. § 415.

not be imposed on carriers who inadvertently slam subscribers,[559] we conclude that the rights of the consumer and the authorized carrier to remedies for slamming should not be affected by whether the unauthorized change was an intentional or accidental act. Regardless of the intent, or lack thereof, behind the unauthorized change, they have suffered injury. We also conclude that holding carriers liable for all slamming occurrences will make all carriers more vigilant in preventing unauthorized carrier changes, whether such changes are inadvertent or intentional. To address concerns that smaller carriers may suffer from the imposition of our liability rules, we note that a carrier accused of slamming has the opportunity to provide evidence of verification, in order to prove that it did not slam a subscriber, before having to remit any revenues to an authorized carrier.

218. Additionally, several carriers object to absolving subscribers of liability because they argue that authorized carriers should not be deprived of revenue.[560] Although our rules do absolve subscribers of liability for slammed charges for a limited period of time, if a subscriber does pay the unauthorized carrier, the authorized carrier is entitled to demand, and keep, all charges paid by the subscriber to the unauthorized carrier. While authorized carriers, including smaller carriers, may be deprived of some revenue because many subscribers will not pay for charges incurred after being slammed, all carriers will ultimately receive greater benefits from the overall decrease in slamming that will result from our rules. Any other liability rule would still enable slamming carriers to keep their profits and would not give consumers the same incentive to police their telephone bills carefully and quickly. Furthermore, because the authorized carrier has not incurred any costs for providing service, the authorized carrier would receive a windfall if it were to receive, in every instance, the revenues for charges imposed by an unauthorized carrier. We also note that we are delaying the effective date of these liability rules for 90 days to enable carriers to implement an alternative mechanism to resolve slamming disputes.

219. *Third Party Administrator for Dispute Resolution.* This provision will benefit smaller carriers by providing them with an alternative means of compliance with our liability rules. Carriers are given a choice of complying with our liability rules in whole by administering the requirements themselves, or of complying by using an independent third party to administer the requirements.

220. *Preferred Carrier Freeze Procedures.* Some carriers, including smaller carriers, object to allowing preferred carrier freezes of local exchange and intraLATA services prior to the advent of competition for those services.[561] We agree that preferred carrier freezes have the potential to lock out competition in a monopoly market, but we find that consumers

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[559] ACTA IRFA Comments at 9.

[560] *See, e.g.*, ACTA Comments at 35; TRA Comments at 14.

[561] *See, e.g.*, CompTel Comments at 8; TRS Petition Comments at 2.

should not be deprived of this valuable protection on a nation-wide basis. Accordingly, states are free to impose restrictions on the use of preferred carrier freezes for local exchange and intraLATA toll services if they determine that such steps are necessary in light of the availability of local competition in a particular market. Furthermore, we impose certain requirements that will prevent carriers from using preferred carrier freezes in an anticompetitive manner, such as easy procedures to lift freezes. In this way, the existence of preferred carrier freeze programs will not impede carriers wishing to compete in local services, especially smaller carriers.

221. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[562] In addition, the Commission will send a copy of the *Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[563]

B. Initial Regulatory Flexibility Analysis

222. As required by the Regulatory Flexibility Act (RFA),[564] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Second Report and Order and Further Notice of Proposed Rulemaking (*Order*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Order* provided below in the Comment Filing Procedures section. The Commission will send a copy of the *Order*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[565] In addition, the *Order* and IRFA (or summaries thereof) will be published in the Federal Register.[566]

1. Need for, and Objectives, of Proposed Rules

223. The Commission, in its efforts to protect consumers from unauthorized switching of preferred carriers, and to implement provisions of the Telecommunications Act of 1996 pertaining to illegal changes in subscriber carrier selections, is issuing this *Order*

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[562] *See* 5 U.S.C. § 801(a)(1)(A)

[563] *See* 5 U.S.C. § 604(b).

[564] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[565] *See* 5 U.S.C. § 603(a).

[566] *See id.*

containing a Further Notice of Proposed Rulemaking. The Commission seeks comment on: (1) requiring unauthorized carriers to remit to authorized carriers certain amounts in addition to the amount paid by slammed subscribers; (2) how to modify and clarify the independent third party verification method in the Commission's rules[567] in order to ensure that this verification method will be effective in preventing slamming; (3) proposals for verifying carrier changes made by subscribers using the Internet; (4) how the term "subscriber" should be defined, in order to determine which person or persons should be authorized to make changes in the selection of a carrier; (5) requiring carriers to submit to the Commission reports on the number of slamming complaints received by such carriers, in order to alert the Commission as soon as possible about carriers that practice slamming; (6) imposing a registration requirement to ensure that only qualified entities enter the telecommunications market; and (7) whether resellers should be assigned their own carrier identification codes (CICs) to prevent confusion between resellers and their underlying facilities-based carriers.

224. Under the Act and the proposed rules, a small entity that violates the Commission's carrier change verification rules may be liable to an authorized carrier for double the amount of charges paid to the slamming entity by a slammed subscriber or for the amount for which the slammed subscriber was absolved. Small entities may be affected by the proposals for modifying the independent third party verification process; verifying carrier changes made on the Internet; adopting a definition of "subscriber;" requiring carriers to submit to the Commission a report on the number of slamming complaints received by them; imposing a registration requirement; and modifications of the CIC process.

2. Legal Basis

225. This *Order* containing a Further Notice of Proposed Rulemaking is adopted pursuant to sections 1, 4(i), 4(j), 201-205, 258, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 258, 303(r).

3. Description and Estimates of the Number of Small Entities to Which Rules Will Apply

226. In the associated FRFA, *supra*, we have provided a detailed description of small entities.[568] Those entities include wireline carriers, local exchange carriers, small incumbent local exchange carriers, interexchange carriers, competitive access providers,

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[567] *See* 47 C.F.R. § 64.1100(c).

[568] *See* discussion in Final Regulatory Flexibility Analysis, Description and Estimates of the Number of Small Entities to Which the Rules Adopted in CC Docket No. 94-129 Will Apply.

resellers, and wireless carriers. We hereby incorporate those detailed descriptions by reference.

4. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements

227. *Liability.* The proposed rules would require permit authorized carriers to recover from unauthorized carriers double the amount of charges paid by slammed subscribers, or the amount for which the subscriber was absolved.[569] This would enable authorized carriers to provide a refund or credit to slammed subscribers while keeping the amount they would have received in the absence of an unauthorized change. This could affect small entities that engage in slamming.

228. *Resellers and CICs.* The Commission proposes to require switchless resellers to obtain their own carrier identification codes (CICs), to obtain pseudo-CICs, or to have the facilities-based reseller modify its billing systems. These proposals are intended to address the confusion that occurs because switchless resellers have the same carrier identification code (CIC) as their underlying facilities-based carriers. When a subscriber is slammed, the unauthorized change may not appear on the subscriber's bill if the slamming carrier is a reseller using the CIC of its facilities-based carrier. Furthermore, subscribers who have preferred carrier freeze protection on their accounts may still be slammed because the freeze protection is not triggered when the slamming carrier is a reseller using the CIC of its facilities-based carrier. These proposals would probably impose additional costs on switchless resellers, most of whom are small entities.

229. *Independent Third Party Verification.* Although specific rules are not proposed to modify the independent third party verification process, which could be used by small carriers, the Commission seeks comment on the definition of an independent third party verifier and on the content of the independent third party verification. This was in response to many commenters who indicated a need for further guidance on independent third party verification.

230. *Internet Carrier Changes.* Although specific rules are not proposed, the Commission seeks comment on the extent to which the electronically-submitted Internet form could be considered a valid LOA in accordance with the verification procedures. The Commission also seeks comment on other procedures that might be appropriate to verify Internet carrier changes. This is in response to the need for standards among the widely

[569] *See supra* discussion in Further Notice of Proposed Rulemaking; Double Recovery of Charges Paid by Slammed Subscribers.

varying Internet solicitation and verification practices being utilized by carriers, including small entities.

231. *Definition of "Subscriber."* Although no specific proposals were made, the Commission seeks comment on how the term "subscriber" should be defined, which may affect the marketing practices of small entities. A set definition would prevent carrier changes by persons who are not authorized to change carriers in a household.

232. *Carrier Reports.* The proposed rules would also require each carrier to submit to the Commission a report on the number of slamming complaints that are submitted to that carrier by subscribers. Small carriers would not be exempt from filing this report. This would enable the Commission to learn about slamming entities as quickly as possible.

233. *Registration Requirement.* This rule proposes to require all interstate carriers to register with the Commission. The Commission seeks comment on requiring the registration to contain the carrier's business name(s); the names and addresses of all officers and principals; verification that such officers and principals have no prior history of committing fraud; and verification of the financial viability of the carrier. The Commission also proposes to revoke or suspend the operating authority of any carriers who fail to register or who provide false or misleading information in their registration. This would apply to all carriers, including small entities. The proposals are designed to prevent entry into the telecommunications marketplace by entities that are either unqualified or have the intent to commit fraud.

234. *Third Party Administrator for Preferred Carrier Changes and Preferred Carrier Freezes.* Although specific rules are not proposed, the Commission seeks comment on the implementation of a comprehensive system in which an independent third party would administer carrier changes, preferred carrier freezes, and verification. Several commenters support the use of an independent administrator, but failed to provide sufficient detail on the scope of its functions, how such a system would work, and how it would be funded.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

235. *Liability Proposal.* Given that slamming is becoming an increasingly prevalent practice, we believe that our liability proposal is necessary to discourage carriers from slamming consumers. Permitting authorized carriers to recover the additional amounts proposed will make slamming unprofitable for carriers. If the carrier provides proof that it did not violate the Commission's rules, then it is not required to pay any penalty. All carriers, including small carriers, will benefit by the reduction in slamming that will result

from the implementation of our proposals.

236. *Carrier Reports.* In order to reduce the burden on carriers, we seek comment on requiring the report to be filed only when complaints reach a threshold level, rather than requiring the report to be filed on a regular basis. Filing the report only when complaints reach a threshold level could permit carriers to file a more limited amount of information only when necessary to stop a pattern or practice of slamming. We believe that the resulting investigations into slamming will reduce slamming and be beneficial to all carriers, including those carriers that are small entities.

237. *Registration Requirement.* The registration requirement proposal is not overly burdensome. The registration does not require carriers to obtain difficult information, unless such carriers have previously been involved in fraudulent activities. This requirement should only burden carriers who have a history of fraud, in order to keep them from offering telecommunications services. As such, the proposal is narrowly tailored to impose only minimal burdens on other carriers.

238. *Resellers and CICs.* The Commission offers several options to resolve the problems with identification between switchless resellers and their facilities-based carriers. They range in expense and burden on carriers, so small carriers will have the opportunity to endorse the option that best suits their needs.

239. We invite parties commenting on this regulatory analysis to provide information as to the number of small businesses that would be affected by our proposed regulations and identify alternatives that would reduce the burden on these entities while still ensuring that consumers' telecommunications carrier selections are not changed without their authorization. Furthermore, in the event of a dispute between carriers under our liability provisions, the carriers involved in such disputes must pursue private settlement negotiations prior to filing a formal complaint with the Commission.[570] As we stated in the IRFA of the *Further Notice and Order*, we believe that the adoption of such a dispute mechanism will lessen the economic impact of a dispute on small entities.

6. Federal Rules that May Overlap, Duplicate, or Conflict with the Proposed Rules

240. None.

C. Initial Paperwork Reduction Act of 1995 Analysis

[570] *See* 47 C.F.R. § 1.721(a)(8).

241. The Further Notice of Proposed Rulemaking portion of this *Order* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in the Further Notice of Proposed Rulemaking portion of this *Order,* as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on the Further Notice of Proposed Rulemaking; OMB comments are due 60 days from date of publication of this *Order* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Final Paperwork Reduction Act of 1995 Analysis

242. The decision herein has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. 104-13, and the Office of Management and Budget (OMB) has approved some of its requirements in OMB No. 3060-0787. Some of the proposals have been modified or added, however, and therefore some of the information collection requirements in this item are contingent upon approval by the OMB.

E. Ex Parte Presentations

243. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[571] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[572]

F. Petitions for Reconsideration

244. Parties must file any petitions for reconsideration of this *Order* within thirty days from publication in the Federal Register. Parties may file oppositions to the petitions for

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[571] *See Amendment of 47 C.F.R. 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, Report and Order, 12 FCC Rcd 7348, 7356-57, 27 (citing 47 C.F.R. 1.1204(b)(1)) (1997).

[572] *See* 47 C.F.R. 1.1206(b)(2), as revised.

reconsideration pursuant to section 1.429(f) of the rules.[573]

245. To file a petition for reconsideration in this proceeding, parties must file an original and ten copies of all petitions and oppositions. Petitions and oppositions should be sent to the Office of the Secretary, Federal Communications Commission, 445 12th St., S.W., TWA-204, Washington, D.C. 20554. If parties want each Commissioner to have a personal copy of their documents, an original plus fourteen copies must be filed. In addition, participants should submit two additional copies directly to the Common Carrier Bureau, Enforcement Division, Room 6008, 2025 M Street, N.W., Washington, D.C. 20554. The petitions and oppositions will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Copies of the petition and any subsequently filed documents in this matter may be obtained from International Transcription Services, 1231 20th Street N.W., Washington D.C. 20036, (202) 857-3800.

246. Petitions for reconsideration must comply with section 1.429 and all other applicable sections of the Commission's rules.[574] Petitions also must clearly identify the specific portion of this *Order* for which relief is sought. If a portion of a party's arguments does not fall under a particular topic listed in the outline of this *Order*, such arguments should be included in a clearly labelled section at the beginning or end of the filing.

G. Comment Filing Procedures

247. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before 30 days from publication in the Federal Register, and reply comments on or before 45 days from publication in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[575]

248. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to

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[573] *See* 47 C.F.R. § 1.429(f).

[574] *See* 47 C.F.R. § 1.429. We require, however, that a summary be included with all comments, although a summary that does not exceed three pages will not count toward the page limits. The summary may be paginated separately from the rest of the pleading (*e.g.*, as "i, ii"). *id.*

[575] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address." A sample form and directions will be sent in reply.

249. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th St., S.W., TWA-325, Washington, D.C. 20554.

250. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Kimberly Parker, Federal Communications Commission, Common Carrier Bureau, 2025 M Street, N.W., Sixth Floor, Washington, DC 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, proceeding (including the lead docket number in this case, CC Docket No. 94-129); type of pleading (comment or reply comment); date of submission; and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20037.

251. Written comments by the public on the proposed and/or modified information collections are due 30 days after publication of this Notice in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, 445 12th St., S.W., Room A1836, Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

VI. ORDERING CLAUSES

252. Accordingly, IT IS ORDERED that pursuant to sections 1, 4, 201-205, and 258, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, and 258, the policies, rules, and requirements set forth herein ARE ADOPTED.

253. IT IS FURTHER ORDERED that 47 C.F.R. Part 64 IS AMENDED as set forth in Appendix A, effective 70 days after publication of the text thereof in the Federal Register, except that the following rules set forth in Appendix A will not become effective until 90 days after publication of the text in the Federal Register: sections 64.1100(c), 64.1100(d), 64.1170, and 64.1180.

254. IT IS FURTHER ORDERED that the stay of the application of the Commission's verification rules to in-bound calls imposed in *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Order, 11 FCC Rcd 856 (1995) is lifted.

255. IT IS FURTHER ORDERED that pursuant to section 1.429(d) of the Commission's rules, 47 C.F.R. § 1.429(d), U S WEST's Petition for Reconsideration is dismissed as being untimely filed.

256. IT IS FURTHER ORDERED that a FURTHER NOTICE OF PROPOSED RULEMAKING IS ISSUED.

257. IT IS FURTHER ORDERED that the Chief of the Common Carrier Bureau is delegated authority to require the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding.

258. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Order*, including the Final Regulatory Flexibility Analysis and the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

259. The *Order* IS ADOPTED, and the requirements contained herein will become effective 70 days after publication of a summary in the Federal Register, except that the following rules in Appendix A will become effective 90 days after publication of the summary in the Federal Register: sections 64.1100(c), 64.1100(d), 64.1170, and 64.1180. The collections of information contained within is contingent upon approval by OMB.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

RULES AMENDED

Part 64 of the Commission's Rules and Regulations, Chapter 1 of Title 47 of the Code of Federal Regulations, is amended as follows:

1. The title of Part 64, Subpart K, is amended to read as follows:

Subpart K - Changes in Preferred Telecommunications Service Providers

2. Part 64, Subpart K, is further amended by redesignating section 64.1100 as section 64.1150, and modifying new section 64.1150 to read as follows:

§64.1150 Verification of Orders for Telecommunications Service

No telecommunications carrier shall submit a preferred carrier change order unless and until the order has first been confirmed in accordance with one of the following procedures:

(a) The telecommunications carrier has obtained the subscriber's written authorization in a form that meets the requirements of section 64.1160; or

(b) The telecommunications carrier has obtained the subscriber's electronic authorization to submit the preferred carrier change order. Such authorization must be placed from the telephone number(s) on which the preferred carrier is to be changed and must confirm the information required in paragraph (a) of this section. Telecommunications carriers electing to confirm sales electronically shall establish one or more toll-free telephone numbers exclusively for that purpose. Calls to the number(s) will connect a subscriber to a voice response unit, or similar mechanism that records the required information regarding the preferred carrier change, including automatically recording the originating automatic numbering identification; or

(c) An appropriately qualified independent third party has obtained the subscriber's oral authorization to submit the preferred carrier change order that confirms and includes appropriate verification data (e.g., the subscriber's date of birth or social security number). The independent third party must (1) not be owned, managed, controlled, or directed by the carrier or the carrier's marketing agent; (2) must not have any financial incentive to confirm preferred carrier change orders for the carrier or the carrier's marketing agent; and (3) must operate in a location physically separate

from the carrier or the carrier's marketing agent. The content of the verification must include clear and conspicuous confirmation that the subscriber has authorized a preferred carrier change; or

(d) Any State-enacted verification procedures applicable to intrastate preferred carrier change orders only.

3. Part 64, Subpart K, is further amended by redesignating section 64.1150 as section 64.1160, and modifying new section 64.1160 to read as follows:

§64.1160 Letter of Agency Form and Content

(a) A telecommunications carrier may use a letter of agency to obtain written authorization and/or verification of a subscriber's request to change his or her preferred carrier selection. A letter of agency that does not conform with this section is invalid for purposes of this subpart.

(b) The letter of agency shall be a separate document (or an easily separable document) containing only the authorizing language described in paragraph (e) of this section having the sole purpose of authorizing a telecommunications carrier to initiate a preferred carrier change. The letter of agency must be signed and dated by the subscriber to the telephone line(s) requesting the preferred carrier change.

(c) The letter of agency shall not be combined on the same document with inducements of any kind.

(d) Notwithstanding paragraphs (b) and (c) of this section, the letter of agency may be combined with checks that contain only the required letter of agency language as prescribed in paragraph (e) of this section and the necessary information to make the check a negotiable instrument. The letter of agency check shall not contain any promotional language or material. The letter of agency check shall contain in easily readable, bold-face type on the front of the check, a notice that the subscriber is authorizing a preferred carrier change by signing the check. The letter of agency language shall be placed near the signature line on the back of the check.

(e) At a minimum, the letter of agency must be printed with a type of sufficient size and readable type to be clearly legible and must contain clear and unambiguous language that confirms:

(1) The subscriber's billing name and address and each telephone number to be

covered by the preferred carrier change order;

(2) The decision to change the preferred carrier from the current telecommunications carrier to the soliciting telecommunications carrier;

(3) That the subscriber designates [name of submitting carrier] to act as the subscriber's agent for the preferred carrier change;

(4) That the subscriber understands that only one telecommunications carrier may be designated as the subscriber's interstate or interLATA preferred interexchange carrier for any one telephone number. To the extent that a jurisdiction allows the selection of additional preferred carriers (*e.g.*, local exchange, intraLATA/intrastate toll, interLATA/interstate toll, or international interexchange) the letter of agency must contain separate statements regarding those choices, although a separate letter of agency for each choice is not necessary; and

(5) That the subscriber understands that any preferred carrier selection the subscriber chooses may involve a charge to the subscriber for changing the subscriber's preferred carrier.

(f) Any carrier designated in a letter of agency as a preferred carrier must be the carrier directly setting the rates for the subscriber.

(g) Letters of agency shall not suggest or require that a subscriber take some action in order to retain the subscriber's current telecommunications carrier.

(h) If any portion of a letter of agency is translated into another language then all portions of the letter of agency must be translated into that language. Every letter of agency must be translated into the same language as any promotional materials, oral descriptions or instructions provided with the letter of agency.

4. Part 64, Subpart K, is further amended by adding new sections 64.1100, 64.1170, 64.1180, and 64.1190 to read as follows:

§ 64.1100 Changes in Subscriber Carrier Selections

(a) No telecommunications carrier shall submit or execute a change on the behalf of a subscriber in the subscriber's selection of a provider of telecommunications service except in accordance with the procedures prescribed in this Subpart. Nothing in this section shall preclude any State commission from enforcing these procedures with

respect to intrastate services.

(1) No submitting carrier shall submit a change on the behalf of a subscriber in the subscriber's selection of a provider of telecommunications service prior to obtaining: (A) authorization from the subscriber, and (B) verification of that authorization in accordance with the procedures prescribed in section 64.1150. For a submitting carrier, compliance with the verification procedures prescribed in this Subpart shall be defined as compliance with subsections (a) and (b) of this section, as well with section 64.1150. The submitting carrier shall maintain and preserve records of verification of subscriber authorization for a minimum period of two years after obtaining such verification.

(2) An executing carrier shall not verify the submission of a change in a subscriber's selection of a provider of telecommunications service received from a submitting carrier. For an executing carrier, compliance with the procedures prescribed in this Subpart shall be defined as prompt execution, without any unreasonable delay, of changes that have been verified by a submitting carrier.

(3) Commercial mobile radio services (CMRS) providers shall be excluded from the verification requirements of this Subpart as long as they are not required to provide equal access to common carriers for the provision of telephone toll services, in accordance with 47 U.S.C. § 332(c)(8).

(b) Where a telecommunications carrier is selling more than one type of telecommunications service *(e.g.*, local exchange, intraLATA/intrastate toll, interLATA/interstate toll, and international toll) that carrier must obtain separate authorization from the subscriber for each service sold, although the authorizations may be made within the same solicitation. Each authorization must be verified separately from any other authorizations obtained in the same solicitation. Each authorization must be verified in accordance with the verification procedures prescribed in this Subpart.

(c) Carrier Liability for Charges. Any submitting telecommunications carrier that fails to comply with the procedures prescribed in this Subpart shall be liable to the subscriber's properly authorized carrier in an amount equal to all charges paid to the submitting telecommunications carrier by such subscriber after such violation, as well as for additional amounts as prescribed in section 64.1170 of this Subpart. The remedies provided in this Subpart are in addition to any other remedies available by law.

(d) Subscriber Liability for Charges. Any subscriber whose selection of telecommunications service provider is changed without authorization verified in accordance with the procedures set forth in this Subpart is absolved of liability for charges imposed by the unauthorized carrier for service provided during the first 30 days after the unauthorized change. Upon being informed by a subscriber that an unauthorized change has occurred, the authorized carrier, the unauthorized carrier, or the executing carrier shall inform the subscriber of this 30-day absolution period. The subscriber shall be absolved of liability for this 30-day period only if the subscriber has not already paid charges to the unauthorized carrier.

(1) Any charges imposed by the unauthorized carrier on the subscriber after this 30-day period shall be paid by the subscriber to the authorized carrier at the rates the subscriber was paying to the authorized carrier at the time of the unauthorized change. Upon the subscriber's return to the authorized carrier, the subscriber shall forward to the authorized carrier a copy of any bill that contains charges imposed by the unauthorized carrier after the 30-day period of absolution. After the authorized carrier has re-rated the charges to reflect its own rates, the subscriber shall be liable for paying such re-rated charges to the authorized carrier.

(2) If the subscriber has already paid charges to the unauthorized carrier, and the authorized carrier recovers such charges as provided in paragraph (c), the authorized carrier shall refund or credit to the subscriber any charges recovered from the unauthorized carrier in excess of what the subscriber would have paid for the same service had the unauthorized change not occurred, in accordance with the procedures set forth in section 64.1170 of this Subpart.

(3) If the subscriber has been absolved of liability as prescribed by this subsection, the unauthorized carrier shall also be liable to the subscriber for any charge required to return the subscriber to his or her properly authorized carrier, if applicable.

(e) Definitions. For the purposes of this Subpart, the following definitions are applicable:

(1) Submitting carrier: a submitting carrier is generally any telecommunications carrier that: (A) requests on the behalf of a subscriber that the subscriber's telecommunications carrier be changed, and (B) seeks to provide retail services to the end user subscriber. A carrier may be treated as a submitting carrier, however, if it is responsible for any unreasonable delays in the submission of carrier change requests or for the submission of unauthorized carrier change requests, including fraudulent authorizations.

(2) Executing carrier: an executing carrier is generally any telecommunications carrier that effects a request that a subscriber's telecommunications carrier be changed. A carrier may be treated as an executing carrier, however, if it is responsible for any unreasonable delays in the execution of carrier changes or for the execution of unauthorized carrier changes, including fraudulent authorizations.

(3) Authorized carrier: an authorized carrier is generally any telecommunications carrier that submits a change, on behalf of a subscriber, in the subscriber's selection of a provider of telecommunications service with the subscriber's authorization verified in accordance with the procedures specified in this Subpart.

(4) Unauthorized carrier: an unauthorized carrier is generally any telecommunications carrier that submits a change, on behalf of a subscriber, in the subscriber's selection of a provider of telecommunications service but fails to obtain the subscriber's authorization verified in accordance with the procedures specified in this Subpart.

(5) Unauthorized change: an unauthorized change is a change in a subscriber's selection of a provider of telecommunications service that was made without authorization verified in accordance with the verification procedures specified in this Subpart.

§ 64.1170 Reimbursement Procedures

(a) The procedures in this section shall apply only after a subscriber has determined that an unauthorized change has occurred, as defined by section 64.1100(e)(5) of this Subpart, and the subscriber has paid charges to an allegedly unauthorized carrier. Upon receiving notification from the subscriber or a carrier that a subscriber has been subjected to an unauthorized change and that the subscriber has paid charges to an allegedly unauthorized carrier, the properly authorized carrier must, within 30 days, request from the allegedly unauthorized carrier proof of verification of the subscriber's authorization to change carriers. Within ten days of receiving such request, the allegedly unauthorized carrier shall forward to the authorized carrier either:

(1) Proof of verification of the subscriber's authorization to change carriers; or

(2) The following:

(A) An amount equal to all charges paid by the subscriber to the unauthorized carrier; and

(B) An amount equal to any charge required to return the subscriber to his or her properly authorized carrier, if applicable;

(C) Copies of any telephone bill(s) issued from the unauthorized carrier to the subscriber.

(b) If an authorized carrier incurs any billing and collection expenses in collecting charges from the unauthorized carrier, the unauthorized carrier shall reimburse the authorized carrier for reasonable expenses.

(c) Where a subscriber notifies the unauthorized carrier, rather than the authorized carrier, of an unauthorized subscriber carrier selection change, the unauthorized carrier must immediately notify the authorized carrier.

(d) Subscriber Refunds or Credits. Upon receipt from the unauthorized carrier of the amount described in paragraph (a)(2)(A), the authorized carrier shall provide a refund or credit to the subscriber of all charges paid in excess of what the authorized carrier would have charged the subscriber absent the unauthorized change. If the authorized carrier has not received from the unauthorized carrier an amount equal to charges paid by the subscriber to the unauthorized carrier, the authorized carrier is not required to provide any refund or credit. The authorized carrier must, within 60 days after it receives notification of the unauthorized change, inform the subscriber if it has failed to collect any charges from the unauthorized carrier and inform the subscriber of his or her right to pursue a claim against the unauthorized carrier for a refund of all charges paid to the unauthorized carrier.

(e) Restoration of Premium Programs. Where possible, the properly authorized carrier must reinstate the subscriber in any premium program in which that subscriber was enrolled prior to the unauthorized change, if that subscriber's participation in the premium program was terminated because of the unauthorized change. If the subscriber has paid charges to the unauthorized carrier, the properly authorized carrier shall also provide or restore to the subscriber any premiums to which the subscriber would have been entitled had the unauthorized change not occurred. The authorized carrier must comply with the requirements of this subsection regardless of whether it is able to recover from the unauthorized carrier any charges that were paid by the subscriber.

§ 64.1180 Investigation Procedures

(a) The procedures in this section shall apply only after a subscriber has determined that an unauthorized change has occurred and such subscriber has not paid for charges imposed by the unauthorized carrier for the first 30 days after the unauthorized change, in accordance with section 64.1100(d) of this Subpart.

(b) The unauthorized carrier shall remove from the subscriber's bill all charges that were incurred for service provided during the first 30 days after the unauthorized change occurred.

(c) The unauthorized carrier may, within 30 days of the subscriber's return to the authorized carrier, submit to the authorized carrier a claim that the subscriber was not subjected to an unauthorized change, along with a request for the amount of charges for which the consumer was credited pursuant to paragraph (b) and proof that the change to the subscriber's selection of telecommunications carrier was made with authorization verified in accordance with the verification procedures specified in this Subpart.

(d) The authorized carrier shall conduct a reasonable and neutral investigation of the claim, including, where appropriate, contacting the subscriber and the carrier making the claim.

(e) Within 60 days after receipt of the claim and the proof of verification, the authorized carrier shall issue a decision on the claim to the subscriber and the carrier making the claim.

(1) If the authorized carrier decides that the subscriber was not subjected to an unauthorized change, the authorized carrier shall place on the subscriber's bill a charge equal to the amount of charges for which the subscriber was previously credited pursuant to paragraph (b). Upon receiving this amount, the authorized carrier shall forward this amount to the carrier making the claim.

(2) If the authorized carrier decides that the subscriber was subjected to an unauthorized change, the subscriber shall not be required to pay the charges for which he or she was previously absolved.

§ 64.1190 Preferred Carrier Freezes

(a) A preferred carrier freeze (or freeze) prevents a change in a subscriber's preferred

carrier selection unless the subscriber gives the carrier from whom the freeze was requested his or her express consent. All local exchange carriers who offer preferred carrier freezes must comply with the provisions of this section.

(b) All local exchange carriers who offer preferred carrier freezes shall offer freezes on a nondiscriminatory basis to all subscribers, regardless of the subscriber's carrier selections.

(c) Preferred carrier freeze procedures, including any solicitation, must clearly distinguish among telecommunications services (*e.g.*, local exchange, intraLATA/intrastate toll, interLATA/interstate toll, and international toll) subject to a preferred carrier freeze. The carrier offering the freeze must obtain separate authorization for each service for which a preferred carrier freeze is requested.

(d) Solicitation and imposition of preferred carrier freezes.

(1) All carrier-provided solicitation and other materials regarding preferred carrier freezes must include:

(A) An explanation, in clear and neutral language, of what a preferred carrier freeze is and what services may be subject to a freeze;

(B) A description of the specific procedures necessary to lift a preferred carrier freeze; an explanation that these steps are in addition to the Commission's verification rules in sections 64.1150 and 64.1160 for changing a subscriber's preferred carrier selections; and an explanation that the subscriber will be unable to make a change in carrier selection unless he or she lifts the freeze; and

(C) An explanation of any charges associated with the preferred carrier freeze.

(2) No local exchange carrier shall implement a preferred carrier freeze unless the subscriber's request to impose a freeze has first been confirmed in accordance with one of the following procedures:

(A) The local exchange carrier has obtained the subscriber's written and signed authorization in a form that meets the requirements of section 64.1190(d)(3); or

(B) The local exchange carrier has obtained the subscriber's electronic authorization, placed from the telephone number(s) on which the preferred

carrier freeze is to be imposed, to impose a preferred carrier freeze. The electronic authorization should confirm appropriate verification data (*e.g.*, the subscriber's date of birth or social security number) and the information required in section 64.1190(d)(3)(B)(i)-(iv). Telecommunications carriers electing to confirm preferred carrier freeze orders electronically shall establish one or more toll-free telephone numbers exclusively for that purpose. Calls to the number(s) will connect a subscriber to a voice response unit, or similar mechanism that records the required information regarding the preferred carrier freeze request, including automatically recording the originating automatic numbering identification; or

(C) An appropriately qualified independent third party has obtained the subscriber's oral authorization to submit the preferred carrier freeze and confirmed the appropriate verification data (*e.g.*, the subscriber's date of birth or social security number) and the information required in section 64.1190(d)(3)(B)(i)-(iv). The independent third party must (1) not be owned, managed, or directly controlled by the carrier or the carrier's marketing agent; (2) must not have any financial incentive to confirm preferred carrier freeze requests for the carrier or the carrier's marketing agent; and (3) must operate in a location physically separate from the carrier or the carrier's marketing agent. The content of the verification must include clear and conspicuous confirmation that the subscriber has authorized a preferred carrier freeze.

(3) Written authorization to impose a preferred carrier freeze. A local exchange carrier may accept a subscriber's written and signed authorization to impose a freeze on his or her preferred carrier selection. Written authorization that does not conform with this section is invalid and may not be used to impose a preferred carrier freeze.

(A) The written authorization shall comply with section 64.1160(b), (c), and (h) of the Commission's rules concerning the form and content for letters of agency.

(B) At a minimum, the written authorization must be printed with a readable type of sufficient size to be clearly legible and must contain clear and unambiguous language that confirms:

(i) The subscriber's billing name and address and the telephone number(s) to be covered by the preferred carrier freeze;

(ii) The decision to place a preferred carrier freeze on the telephone number(s) and particular service(s). To the extent that a jurisdiction allows the imposition of preferred carrier freezes on additional preferred carrier selections (*e.g.*, for local exchange, intraLATA/intrastate toll, interLATA/interstate toll service, and international toll), the authorization must contain separate statements regarding the particular selections to be frozen;

(iii) That the subscriber understands that she or he will be unable to make a change in carrier selection unless she or he lifts the preferred carrier freeze; and

(iv) That the subscriber understands that any preferred carrier freeze may involve a charge to the subscriber.

(e) Procedures for lifting preferred carrier freezes. All local exchange carriers who offer preferred carrier freezes must, at a minimum, offer subscribers the following procedures for lifting a preferred carrier freeze:

(1) A local exchange carrier administering a preferred carrier freeze must accept a subscriber's written and signed authorization stating her or his intent to lift a preferred carrier freeze; and

(2) A local exchange carrier administering a preferred carrier freeze must accept a subscriber's oral authorization stating her or his intent to lift a preferred carrier freeze and must offer a mechanism that allows a submitting carrier to conduct a three-way conference call with the carrier administering the freeze and the subscriber in order to lift a freeze. When engaged in oral authorization to lift a preferred carrier freeze, the carrier administering the freeze shall confirm appropriate verification data (*e.g.*, the subscriber's date of birth or social security number) and the subscriber's intent to lift the particular freeze.

APPENDIX B

PROPOSED RULE CHANGES

Part 64 of the Commission's Rules and Regulations, Chapter 1 of Title 47 of the Code of Federal Regulations, is proposed to be amended as follows:

1. Part 64, Subpart K, is proposed to be amended by modifying section 64.1100(c), (d), and adding subsection (f) to read as follows:

§ 64.1100 Changes in Subscriber Carrier Selections

. . . .

(c) Carrier Liability for Charges. Any submitting telecommunications carrier that fails to comply with the verification procedures prescribed in this Subpart shall be liable to the subscriber's properly authorized carrier for amounts as prescribed in section 64.1170 of this Subpart, as well as for:

(1) If the subscriber has paid charges to the unauthorized carrier, an amount equal to double the charges paid by such subscriber to the submitting carrier for charges incurred during the first 30 days after the unauthorized change, as well as an amount equal to all subsequent charges paid by the subscriber; or

(2) If the subscriber has not paid charges to the unauthorized carrier, an amount equal to what the unauthorized carrier would have charged the subscriber for charges incurred during the first 30 days after the unauthorized change.

The remedies provided in this Subpart are in addition to any other remedies available by law.

. . . .

(d) (2) If the subscriber has already paid charges to the unauthorized carrier, the subscriber shall receive a refund or credit of all charges paid to such carrier, in accordance with the procedures set forth in section 64.1170 of this Subpart. The liability provisions of this subsection shall not apply if the subscriber's authorized carrier does not receive from the unauthorized carrier the amount described in section 64.1170(a)(2)(A) or the amount described in section 64.1170(d)(1)(B).

2. Part 64, Subpart K, is further proposed to be amended by modifying section 64.1170 to

read as follows:

§ 64.1170 Reimbursement Procedures

(a) The procedures in this section shall apply only after a subscriber has determined that an unauthorized change has occurred, as defined by section 64.1100(e)(5) of this Subpart. Upon receiving notification from the subscriber or a carrier that a subscriber has been subjected to an unauthorized change, the properly authorized carrier must, within 30 days, request from the allegedly unauthorized carrier proof of verification of the subscriber's authorization to change carriers. Within ten days of receiving such request, the allegedly unauthorized carrier shall forward to the authorized carrier either:

. . . .

(2) The following:

(A) If the subscriber has paid charges to the unauthorized carrier, an amount equal to double the charges paid by the subscriber to the unauthorized carrier for charges incurred during the first 30 days after the unauthorized change and an amount equal to all subsequent charges paid by the subscriber. If the subscriber has not paid charges to the unauthorized carrier, an amount equal to the charges that the unauthorized carrier billed or would have billed to the subscriber for charges incurred during the first 30 days after the unauthorized change; and

. . . .

(d) Compensation for the Subscriber.

(1) Within ten days of receipt of the amount described in subsection (a)(2)(A) above, the authorized carrier shall provide a complete refund or credit to the subscriber of all charges paid by the subscriber to the unauthorized carrier. If the authorized carrier does not receive the amount described in subsection (a)(2)(A), then the authorized carrier is not required to provide a complete refund or credit to the subscriber. The authorized carrier must, within 60 days after it receives notification of the unauthorized change, inform the subscriber if it has failed to collect any charges from the unauthorized carrier and inform the subscriber of his or her right to pursue a claim against the unauthorized carrier for a refund of all charges paid to the unauthorized carrier.

3. Part 64, Subpart K, is further proposed to be amended by adding section 64.1195 to read as follows:

§ 64.1195 Registration Requirement

(a) Applicability. A telecommunications carrier shall not begin to provide interstate telecommunications service unless it has filed a registration with the Commission in accordance with subsection (b) and had such registration approved by the Commission.

(1) Any telecommunications carrier already providing service on the effective date of these rules shall comply with the registration requirements of subsection (b) within 90 days of the effective date of these rules. The provision of service shall not be affected by the filing of the registration.

(b) Contents of registration. The registration shall contain the following information:

(1) the carrier's business address;

(2) the names and addresses of all officers and other principals;

(3) a statement of the carrier's financial viability;

(4) a verification that the carrier, its officers, and other principals have no prior history of committing fraud on the public.

(c) Approval or Rejection of Registration. Any registration shall be deemed approved by the Commission 30 days after filing unless the Commission issues an order rejecting or suspending such registration. The Commission may reject or suspend such registration for any of the reasons identified in subsection (d) of this section.

(d) Revocation or Suspension of Operating Authority. After notice and opportunity to respond, the Commission may revoke or suspend the authorization of any telecommunications carrier to provide service upon any of the following grounds:

(1) the carrier fails to file the registration in accordance with subsection (a) of this section; or

(2) the carrier provides materially false or incomplete information in the course of the registration required by subsection (a) of this section ; or

(3) the carrier, or any predecessor in interest, or any of its officers or other principals has failed to pay a forfeiture imposed for violations of section 258.

APPENDIX C

PARTIES FILING COMMENTS TO THE *FURTHER NOTICE AND ORDER* RESPONSIVE PLEADINGS CC DOCKET NO. 94-129

Air Touch Communications (Air Touch)
America's Carriers Telecommunications Association (ACTA)
Ameritech
AT&T
Bell Atlantic
Bell Atlantic Mobile, Inc. (Bell Atlantic Mobile)
BellSouth Corp. (BellSouth)
Billing Information Concepts Corp. (BIC)
Brittan Communications International Corp. (BCI)
Cable and Wireless, Inc. (CWI)
Cincinnati Bell Telephone (CBT)
Citizens Communications (Citizens)
Competitive Telecommunication Association (CompTel)
Direct Marketing Association (DMA)
Excel Communications, Inc. (Excel)
Florida Legal Services (FLS)
Florida Public Service Commission (Florida Commission)
Frontier Corp. (Frontier)
GTE Service Corp. (GTE)
Illinois Commerce Commission (Illinois Commission)
Intermedia Communications (Intermedia)
IXC Long Distance, Inc. (IXC Long Distance)
LCI International Telecom Corp. (LCI)
Maryland Public Service Commission (Maryland Commission)
MCI Telecommunications Corp. (MCI)
Montana Public Service Commission (Montana Commission)
National Association of Attorneys General (NAAG)
National Consumers League (NCL)
New York State Consumer Protection Board (NYSCPB)
New York State Department of Public Service (NYSDPS)
Office of the People's Counsel (for the District of Columbia) (OPC)
Ohio Consumers' Counsel (OCC)
Pennsylvania Office of Consumer Advocate (PaOCA)
People of the State of California and the Public Utilities Commission of the State of

California (California Commission)
Public Staff - North Carolina Utilities Commission (North Carolina Commission)
Public Utilities Commission of Ohio (Ohio Commission)
Public Utilities Commission for Texas (Texas Commission)
Quick Response
RCN Corp. Telecom Services, Inc. (RCN)
SDN Users Association, Inc. (SDN)
Southern New England Telephone Company (SNET)
SouthWestern Bell Telephone Company, Pacific Bell, & Nevada Bell (SBC)
Sprint Corp. (Sprint)
Telecommunications Resellers Association (TRA)
Tennessee Regulatory Authority (TNRA)
Texas Office of Public Utilities (TOPC)
360o Communications Company (360o)
Time Warner Communication Holdings Incorporated (TW Comm.)
TPV Services, Inc. (TPV)
United States Telephone Association (USTA)
U S WEST, Inc. (U S WEST)
Vermont Public Service Board (VTPSB)
Virginia State Corp. Commission Staff (Virginia Commission)
VoiceLog LLC (VoiceLog)
Winstar Communications (Winstar)
Working Assets
WorldCom, Inc. (WorldCom)

PARTIES FILING REPLY COMMENTS TO *FURTHER NOTICE AND ORDER*
RESPONSIVE PLEADINGS
CC DOCKET NO. 94-129

America's Carriers Telecommunications Association (ACTA)
Ameritech
AT&T
Bell Atlantic
BellSouth Corp. (BellSouth)
Cable and Wireless, Inc. (CWI)
Cellular Telecommunication Industry Association (CTIA)
Citizens Communications (Citizens)
Direct Marketing Association (DMA)
Excel Communications, Inc. (Excel)

GTE Service Corp. (GTE)
IXC Long Distance, Inc. (IXC Long Distance)
LCI International Telecom Corp. (LCI)
MCI Telecommunications Corp. (MCI)
New York State Consumer Protection Board (NYSCPB)
Ohio Consumers' Counsel (OCC)
Oklahoma Corp. Commission (Oklahoma Commission)
People of the State of California and the Public Utilities Commission of the State of California (California Commission)
RCN Corp. Telecom Services, Inc. (RCN)
Southern New England Telephone Company (SNET)
Sprint Corp. (Sprint)
Telecommunications Resellers Association (TRA)
Telco Communication Group (Telco)
Texas Office of Public Utility Counsel (TOPC)
TPV Services, Inc. (TPV)
United States Telephone Association (USTA)
U S WEST, Inc. (U S WEST)
VoiceLog LLC (VoiceLog)
WorldCom, Inc. (WorldCom)

PARTIES FILING COMMENTS TO MCI PETITION FOR RULEMAKING CCB/CPD FILE NO. 97-19

ALLTEL Telephone Services Corporation (ALLTEL)
Ameritech
Association for Local Telephone Service (ALTS)
AT&T
Bell Atlantic and NYNEX
BellSouth Telecommunications, Inc. (BellSouth)
Citizens Communications (Citizens)
Competitive Telecommunications Association (CompTel)
Cox Communications, Inc. (Cox)
GTE Service Corporation (GTE)
MIDCOM Communications, Inc. (MIDCOM)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell (SBC)
Sprint Communications Company, L.P. (Sprint)
Telecommunications Resellers Association (TRA)
United States Telephone Association (USTA)

Worldcom, Inc. (Worldcom)

PARTIES FILING REPLY COMMENTS TO MCI PETITION FOR RULEMAKING CCB/CPD FILE NO. 97-19

Ameritech
AT&T
BellSouth Telecommunications, Inc. (BellSouth)
Citizens Communications (Citizens)
GTE Service Corporation (GTE)
MCI Telecommunications Corporation (MCI)
Puerto Rico Telephone Company (PRTC)
Southern New England Telephone Company (SNET)
Sprint Communications Company, L.P. (Sprint)
Telecommunications Resellers Association (TRA)
U S WEST, Inc. (U S WEST)

Separate Statement
of
Commissioner Susan Ness

Re: Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, CC Docket No. 94-129

This Commission receives more complaints about slamming than any other telephone-related complaint, and despite past efforts by this Commission and state commissions the number of complaints is still rising. With this Order and Further Notice of Proposed Rulemaking, we take strong measures both to empower consumers and to punish carriers that engage in slamming practices.

Slammers are nothing if not bold. Victims of slamming cut across socio-economic lines and political parties, and include CEOs, grandmothers, and members of my own staff. I know how outraged consumers are when they are slammed. They feel violated. I have received innumerable e-mails expressing consumers' frustration, and I am certain my colleagues have had the same experience. Three times in the past several years, I have testified on slamming at field hearings before Senate committees, and I have heard the outrage loud and clear from legislators and their constituents.

There is no doubt that we must take additional steps to act swiftly and punish wrongful carriers severely.

The rules we adopt today are about empowering the victim -- the consumer -- and preventing slamming carriers from ever receiving payment for their wrongful actions. Once a payment enters the hands of a wrongful carrier, there is always the chance that the wrongful carrier will disappear or file for bankruptcy, as we have now learned from experience. "Absolution" -- permitting the customer not to pay for service received from a slamming carrier -- should make it less likely that carriers will engage in slamming in the first place.

I share the concern that unlimited absolution might lead to false claims of slamming. But we have followed the lead of Congress in limiting absolution to a period of 30 days. I also would have entertained establishing a dollar cap on the amount of absolution, so as to dissuade those who might be tempted to abuse the process. To those who object to any rule providing an absolution remedy, I ask: why penalize all consumers for fear that some might game the system? Should such abuse arise, the Commission can always modify this rule. For now, our primary focus is on deterring injury to consumers, and providing a meaningful remedy when it occurs.

Of course, it is not just the consumer but the rightful carrier that is injured by slamming. During this interim period, before we can adopt even stronger anti-slamming rules proposed in the Further Notice, we are faced with a difficult decision: when no payment has been made, we can give priority to compensating the authorized carrier or to compensating the consumer. I choose the consumer.

It is the consumer whose choice has been taken away; it is the consumer who has been troubled and inconvenienced; it is the consumer upon whom we rely to notice the problem and to register the complaint. I am confident that we will adopt further measures to ensure that authorized carriers are also compensated, and that slammers are doubly penalized. But in the interim our first concern must be the consumer. Limited absolution is a form of compensation, not a windfall.

In addition to harming the consumer and the authorized carrier, slamming also threatens competition. The centerpiece of competition is consumer choice. If consumers choose a carrier and their selection is changed against their will, then consumers are not reaping the benefits of competition. We are committed to making competition a success. So, in addition to adopting pro-consumer rules, we are also increasing our enforcement efforts and instituting new procedures that will make it quicker and easier for consumers to file and resolve slamming complaints.

Congress has sent us a clear message: stop carriers from slamming. In turn, we are sending slammers a clear message: we have zero tolerance for such practices.

Separate Statement of
Commissioner Gloria Tristani

Re: 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.

I enthusiastically support the rules adopted today by the Commission to combat slamming. The problem of slamming has become rampant, and it is the FCC's job to stop it. I believe our new anti-slamming rules are a major victory for millions of consumers. I expect that these new rules, in concert with our aggressive enforcement actions against slammers, will drastically reduce the frequency of slamming.

The highlight of the Commission's new rules is that a customer who is slammed need not pay the slammer. This is good public policy for two reasons. First, allowing consumers to withhold payment from the slammer helps takes the profit out of slamming. That should substantially reduce the frequency of slamming. Second, allowing a slammed customer to withhold payment compensates the slamming victim for the trouble and aggravation of having been slammed. Anyone who has experienced the frustration and inconvenience of being slammed knows that some compensation is appropriate.

For this new approach to work, however, consumers must read their telephone bills carefully. When a customer receives a bill and notices that his or her preselected carrier has been changed without consent, the customer should immediately call the carrier they had previously selected and get switched back to that carrier. At that point, the customer likely has accumulated charges from the slammer for one month, or part of a month. Our new rules say that the customer need not pay those charges.

If, however, the customer does not realize that his or her preselected carrier has been changed and ends up paying the slammer, the customer is still relieved of payment to the slammer for the first month of service once the slam is discovered. After the one-month period, the customer's payments to the slammer can be recovered by the customer's authorized carrier. The authorized carrier must refund to the customer any amount paid by the customer that exceeds what that customer would have been charged under the authorized carrier's rates. Thus, to take fullest advantage of the Commission's new slamming rules, consumers need to uncover slams the first time the slamming carrier's name appears on the bill.

This new approach to preventing slamming relies on the customer realizing that he or she

has been slammed. Because telephone bills today are not always clear, it is possible for the customer not to be aware of a change in presubscribed carriers. To deal with misleading or unclear billing information, the FCC recently proposed requiring carriers to organize their bills more clearly. I expect the Commission will take up consideration of those rules shortly. Adoption of those rules would greatly facilitate discovery of an unauthorized change in presubscribed carriers, thereby ensuring that the customer does not pay the slamming carrier.

Thus, with the adoption of the customer absolution policy, the imposition of two more significant fines against slammers and crammers, and the simplification of complaint filings, it should be clear that this Commission is serious about bringing slamming and cramming to an end.

STATEMENT OF COMMISSIONER MICHAEL K. POWELL, CONCURRING IN PART AND DISSENTING IN PART

Re: *Second Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers (CC Docket No. 94-129).*

I write separately to explain the bases upon which I partially dissent from and partially concur in this action.

As an initial matter, I wish to express my firm support for the Commission taking steps, pursuant to section 258 of the 1996 Act, to establish policies and rules designed to combat unauthorized changes of consumers' long distance carriers ("slamming"). The Act mandates that we turn the ship of federal telecommunications regulation smartly in the direction of competitive markets and away from the traditional central planning model. It is critical to the functioning of competitive markets that consumers make effective choices in the marketplace, as these choices tell self-interested firms what to sell, how much and where. Slamming robs consumers of choices they have made, and thus I am more than pleased to support its prevention and vigorous prosecution.

I have some nagging concerns, however, about the manner in which this action combats slamming, which I describe briefly here. I agree that an important way to combat slamming is to prevent carriers from reaping the financial benefits of slamming. Further, I generally support making slamming carriers pay for what they have done, to the extent we have authority to require such remedies.

But I am concerned that some of the steps taken in this item may not adequately compensate authorized carriers, which are no more responsible for a particular incident of slamming than the slammed subscriber. There are two dimensions to my concerns in this regard.

First, I must respectfully and reluctantly dissent from the narrow part of this action that requires authorized carriers to forward to the subscriber charges the subscriber has paid to the slamming carrier (which the authorized carrier then collects from the slammer) to the extent those monies exceed the amount the subscriber would normally have paid the authorized carrier. While I agree that it is a worthy end for us to do what we can to restore slammed subscribers to their original positions, I feel strongly that the means for achieving this end must comport, as always, with the express language of the Act. Section 258(b) could not be more clear that a slamming carrier is liable to the authorized carrier for the *entire* amount the

slammed subscriber has paid to the slammer:

> Any telecommunications carrier that violates the verification procedures described in 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 . . .[1]

The statute provides for no exception to this all-inclusive language regarding charges paid to the subscriber, and I respectfully reject the suggestion that we can trump the express language of section 258(b) by relying on tidbits from the legislative history, comments detailing the parties' preferences or inferences regarding what Congress must have meant in enacting the provision in the context of existing Commission rules.

I also reject the suggestion that simple adherence to the statutory language would lead to an anomalous policy result. For example, allowing the authorized carrier to keep all of the money it collects from slamming carriers would tend to maximize the incentive authorized carriers have to collect from slammers. Moreover, in light of the public outcry against slamming, it seems likely that many authorized carriers would have freely chosen to refund charges in excess of what the subscriber normally would have paid, just to keep their subscribers happy and retain them in an increasingly competitive market. By mandating this remedy, we have overstepped our legal authority and precluded potential market-based remedies that could have achieved the same purpose.

Given these objections, I would have preferred to make use of other express language in section 258(b), which provides that "[t]he remedies provided by this subsection are in addition to any other remedies available by law."[2] In particular, I would have preferred to consider alternative legal means by which the slammed subscriber could collect an amount equal to the "excess" it paid from the *slamming carrier,* provided that such means did not undermine the statutory remedy available to the authorized carrier. If such means could not be implemented in this action I would have been open to considering them in the next phase of this proceeding, in which we will consider additional financial penalties for slamming carriers.

Second, I am concerned that our rules do not provide for compensation to the authorized carrier (either from the slamming carrier or the subscriber) when the subscriber does not pay the slammer. I worry that this shortcoming does not afford the authorized carrier the benefit of the bargain it struck with the subscriber.

Authorized carriers generally have a relationship of indefinite duration with their subscribers, according to which the authorized carrier expects to profit from doing business

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1 47 U.S.C. § 258(b) (emphasis added).

2 47 U.S.C. § 258(b).

with that subscriber. The authorized carrier relies on that expectation in crafting its pricing policies and otherwise running its business, at least until the subscriber acts to sever his relationship with the authorized carrier. Without further information on the record, I am not prepared to say that authorized carriers are not harmed when this expectation is not satisfied.[3] I also would point out that this potential harm would tend to disfavor smaller authorized carriers who are now entering the market to bring consumers the benefits of additional competition. By declining to compensate authorized carrier for this potential harm, I believe our rules fall short of keeping the authorized carrier whole.

In contrast, our rules are more favorable to slammed subscribers. I agree that subscribers may suffer harms and incur costs as a result of being slammed, and I would support penalizing slammers in a way that forces them to compensate subscribers for such harms and costs. But the fact generally remains that a slammed subscriber expected to be able to *make* calls, expected to *pay* for those calls and actually *made* the calls. The primary difference is that the slamming carrier, rather than the authorized carrier, actually served the subscriber -- a fact which will generally go unnoticed until the subscriber sees a new carrier on his bill. Thus, in many cases, the subscriber will pretty much receive the benefit of his bargain, albeit based on the performance of a substitute carrier.

While in principle, I do not object to our rules compensating slammed subscribers, I do wish we were doing more in this action to compensate authorized carriers. This view is consistent with the plain language of the section 258, which appears to provide a remedy for the authorized carrier. Indeed, as I have said, section 258 specifically allows the authorized carrier to collect *all* monies paid by the subscriber to the slammer, without reference to whether or not the amount paid to the slammer is greater than the amount the authorized carrier would normally receive from the subscriber. Thus, under the statute, the authorized carrier could, in some cases, receive *more* than it would have received had the slam not occurred.

In light of these concerns, I would have preferred to defer considering rules to free slammed subscribers from paying either the slamming or authorized carrier until the next phase of this proceeding, in which we will consider additional financial penalties for slamming carriers. By imposing these additional penalties on slammers, I believe we could more adequately compensate authorized carriers without necessarily reducing compensation to slammed subscribers. I do, however, take some comfort in knowing that (1) a solution that would provide more compensation to authorized carriers (based on harsher penalties to

[3] Conversely, I reject the notion that authorized carriers would obtain a windfall if the subscriber paid them for service actually provided by the slamming carrier. The authorized carrier made capacity on its network available for the subscriber's use in reliance on the expectation that the subscriber would use that network and pay for such use. Thus, payment to the authorized carrier would merely afford the authorized carrier with the benefit of the bargain it struck with the subscriber. In any event, the plain language of section 258 clearly contemplates authorized carriers obtaining money paid by the subscriber (to the slammer) even though another carrier has provided service.

slammers) can still be implemented after reviewing the submissions responding to this action; and (2) authorized carriers that feel they have not been adequately compensated under our rules may have additional remedies available in state or federal fora.[4] These considerations mitigate my concerns sufficiently that I feel comfortable concurring in the remainder of this action.

Having expressed these concerns, I look forward to working with my colleagues in the next phase of this proceeding to ensure that all of the innocent parties associated with slamming violations -- both subscribers and authorized carriers -- have full opportunity to be compensated for such violations. My colleagues and, in particular, our dedicated Common Carrier Bureau staff are to be commended for their tireless work in addressing this important consumer protection issue.

[4] For example, it is my understanding that authorized carriers may be able to sue slamming carriers for lost profits before the Commission pursuant to Title II of the Act or before state authorities. Other possible remedies based on state law might include actions alleging tortious interference with contracts, interference with business relationships, and punitive damages (for willful slamming violations), or contract violations (*e.g.*, where the slamming carrier is a reseller that can be said to have violated a contract with the authorized carrier).

DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: *Second Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers (CC Docket No. 94-129).*

The unauthorized change of a customer's long distance carrier ("slamming") is a growing concern for consumers and this agency, and I congratulate the Commission on taking steps to reduce it. I appreciate that we must take action to combat slamming, but we cannot and should not do so in a manner that conflicts with the safeguards and incentives established in the Act. With that in mind, I write separately to explain why I must dissent from the regulations outlined in today's Order.

Before I begin, let me note that everyone here at the Commission shares the same goal -- significantly reducing and eventually eliminating slamming. I express my firm support for the Commission, pursuant to section 258 of the 1996 Act, to enact rules and regulations designed to eliminate these unauthorized changes. I have serious reservations, however, about the method of achieving these goals that the Commission adopts in this Order. Specifically, I believe that the consumer absolution scheme created here will lessen the incentives of the party most able to take appropriate action to combat slamming -- i.e. the authorized carrier -- and may also inadvertently lead to an increase in fraudulent claims of slamming.

First, I am concerned that the absolution of consumer liability proposed here is not found in the statute and even conflicts with the statutory goals. Section 258 seems to anticipate that it would be the authorized carrier who would have the greatest incentive to police against slamming, as that carrier would be entitled to recover the charges paid to the slamming carrier. The rules adopted today, however, do not provide for any compensation to the authorized carrier when the subscriber does not pay the slamming carrier. In this manner, the adoption of consumer absolution may act to discourage the authorized carrier from policing these practices because frequently there will be no payments by the consumer to the slamming carrier available for them to collect.

I agree with Commissioner Powell that we should be -- and indeed the statute envisioned -- doing more to compensate the authorized carriers. These carriers are also harmed by slamming, as they lose the compensation that would have been due to them had one of their customers not been taken away in an unauthorized manner. Indeed, the authorized carrier may suffer a greater harm. The subscriber was still able to make telephone calls using the service of the slamming carrier. The authorized carrier, however, will be unable to recoup the payments that should have been made by their customer.

In addition, at least in one regard, the Commission's rules directly conflict with the statute. Section 258 states that the authorized carrier should be entitled to "an amount equal to all charges paid by such subscriber after such violation." The Order, however, requires that authorized carriers, once obtaining monies paid by the subscriber to the slammer, must refund any excess of what the subscriber would normally have paid. Such a requirement is not what the statute requires and is especially troubling in concert with the consumer absolution provisions.

At bottom, the statute seemed to ensure that the authorized carrier would be made at least whole, maximizing their incentive to collect from slammers. By absolving consumer liability for the first 30 days and requiring the authorized carriers to refund any excess that they do collect from a slamming carrier, the Commission is eviscerating the incentives that Congress provided to the authorized carries.

Finally, I fear that the consumer absolution mechanism adopted today may add further complications by encouraging false claims of slamming. While I appreciate the expedited industry-driven process for evaluating slamming claims, informing customers that they may have 30 days of free service with the mere allegation of a slam will only encourage fraudulent claims of slamming. Moreover, it will necessitate increased costs to be borne by all consumers for either adjudicating those claims or providing free service to those claiming to be slammed. I cannot endorse such an outcome.

There are countless markets in the United States that work well for both consumers and businesses alike. The vast majority of these markets work on a common-law basis, without the striking level of government intervention found in this item. The Commission's decision today presents the extraordinary situation in which consumers recognize that a service has a price, willingly purchase that service, are satisfied with the service itself, and yet the federal government interferes to instruct the consumer not to pay for that service. Indeed, I can think of no other industry in which a federal agency has decreed such an outcome by rule.

This form of supposedly free service is not cost-less. These costs are borne by legitimate carriers in the telephone industry. The long distance industry is extremely competitive and, according to one of the basic principles of economics, additional costs in a competitive industry are always reflected in higher prices. And these higher prices will be paid by all telephone consumers. That is an outcome that I see in conflict with the Telecommunications Act of 1996.