

DIRECT COMMENTS OF THE NATIONAL ASSOCIATION OF
STATE UTILITY CONSUMER ADVOCATES

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

IMPLEMENTATION OF THE SUBSCRIBER CARRIER SELECTION CHANGES
PROVISIONS OF THE TELECOMMUNICATIONS ACT OF 1996; UNAUTHORIZED
CHANGES OF CONSUMERS' LONG DISTANCE CARRIERS

FURTHER NOTICE OF PROPOSED RULEMAKING

CC DOCKET 94-129; FCC 98-334

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In its Second Report and Order in this proceeding, the FCC adopted final rule changes governing the minimum procedures that must be followed to assure proper customer authorization of a change in a telephone provider and proposed further changes for public comment, for which comments are due on March 18, 1999. The purpose of these comments by the National Association of State Utility Consumer Advocates (NASUCA) is to respond to the Commission's Further Notice of Proposed Rulemaking on its slamming rules.

NASUCA is an association of 42 consumer advocates in 39 states and the District of Columbia. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

I. Executive Summary

The overall objective of the FCC rules and enforcement policy should be to hold the customer, who has been the victim of a fraud, harmless. The customer should not have to incur any burden or suffer any loss due to the actions of a telephone provider who has engaged in slamming.

Recovery of Additional Amounts from Unauthorized Carriers. The Commission's approach focuses on the obligation of the unauthorized carrier to reimburse the customer's authorized carrier for any sums paid by the customer. This approach is explicitly authorized by Section 258 of the Telecommunications Act. However, there is nothing in the Telecommunications Act that suggests that this approach is exclusive. It is a grant of authority to the Commission, not an exclusive remedy. Therefore, NASUCA strongly recommends that in addition to any remedy provided in the rules between the authorized carrier and the unauthorized carrier, that the rule explicitly provide a remedy to the consumer in the form of an absolution of the need for any payment to a carrier that has slammed the customer.

Identification of Resellers. NASUCA strongly supports the development of a unique numbering system for resellers so that their actions in soliciting and billing customers for their services can be easily identified and tracked for purposes of regulatory oversight.

Independent Third Party Verification Procedures. NASUCA proposes that the Commission adopt more specific guidelines in its rules to assure the independence and fair operation of any third party verification system. Of primary concern to state consumer advocates is that the Commission enforce the requirement that the verification process provide evidence of the customer's knowing assent to a change in their primary carrier. Our comments outline a number of specific provisions that should be included in the Commission's rules.

Use of the Internet for Verification. NASUCA does not object to the development of a authorization method that makes use of the Internet. However, this customer authorization should be verified separately by means of a recording by a third party verification system. Unlike the use of an LOA or a third party oral verification system, the use of the Internet to both select a provider and serve as a means of customer verification does not provide any independent method to prove the customer's identity.

Definition of "Subscriber." If the person who selects a telecommunications carrier is billed for this carrier through another carrier, such as the LEC, the LEC cannot and should not accept change orders on a particular account from someone other than the customer of record. If the customer will be billed independently of the LEC, any consenting adult or individual with authority to bind an organization or corporation should be able to select telecommunications services and authorize the subsequent billing for charges by the selected carrier. Since states have defined subscriber either in their own regulations governing the LEC or the LEC's tariffs

include a definition of subscriber, there is no need for the Commission to do more than refer to state law or regulation on this matter.

Submission of Reports by Carriers. NASUCA urges the Commission to require all carriers that are registered to provide interstate services to retail residential and small commercial customers to file annual reports of customer complaints on all topics, including slamming, cramming, service quality, and other issues that should be specified in a uniform reporting format. This data should be incorporated in the Commission's evaluation of service quality and provide a basis for further action by the Commission with respect to whether the carrier should retain its registration.

Carrier Registration. NASUCA strongly supports the development of a registration and licensing requirement for interstate service providers. This process would complement the certification and registration requirements in effect in almost every state for intrastate service providers. We suggest that the Commission's purpose also recognize the importance of the suspension and revocation process to halt the activities of a telecommunications provider that has demonstrated a pattern or practice of violation of the Commission's rules, including its rules to prevent slamming and (when they are adopted) cramming. Our comments suggest a number of specific provisions to assure that the Commission's approach to registration is comprehensive and designed to effectuate the overall consumer protection focus of this long overdue initiative.

Third Party Administrator for Carrier Changes and Carrier Freezes. NASUCA is unable to provide the type of detailed operational and cost information sought by the Commission for the development of a third party administrator for carrier changes and carrier freezes. However, we support the development of an independent entity for such a purpose. Obviously, the development and funding of an administrator must consider both local exchange carriers and interexchange providers. To the extent that the Commission can create a climate in which such a development occurs, we support this effort. However, we do not support the delay in the implementation of any slamming rules to allow for the development of such an entity. Consumers have waited long enough. The FCC must move forward promptly to implement a comprehensive program to prevent slamming and to hold telecommunications providers responsible for the actions of their employees and agents.

II. Introduction

NASUCA appreciates the opportunity to file comments with the Commission on its further initiatives to prevent slamming, the unauthorized change of a customer's telephone provider. Slamming is a fraudulent, unfair and deceptive practice by a telecommunications provider. This practice establishes a contractual relationship between a customer and a provider that is based on misrepresentation, deceit, and, in some cases, forgery. The customer does not know or understand that his or her telephone provider has been changed. A customer who has been slammed has been deprived of the contractual benefits associated with the authorized provider, has perhaps paid higher prices to the unauthorized carrier, and has suffered losses in

time and aggravation to set the matter straight. Companies who practice slamming or tolerate its results make money. Customers who are their victims suffer direct and indirect damages and losses.

While the FCC rules, both final and proposed, are aimed at removing the profit incentive from slamming and making the practice more difficult by improving customer authorization and verification procedures, they do not slam the door on slamming. NASUCA urges the Commission to take further action as set forth in our comments to slam the door on slamming.

III. The Customer Should be Held Harmless

The overall objective of the FCC rules and enforcement policy should be to hold the customer, who has been the victim of a fraud, harmless. The customer should not have to bear any burden or suffer any loss due to the actions of a telephone provider who has engaged in slamming. The slamming provider does not have a valid contract with the customer who has been slammed. Under traditional commercial and consumer law, the customer does not owe any funds to an entity that has not entered into a valid contract for services rendered. The customer who has been slammed is similar to the postal patron who has received a product in the mail that has not been ordered. The customer can keep the product and refuse to pay for it. Similarly, the customer should receive whatever telephone services have been provided and owe nothing to the unauthorized provider. If there are losses incurred as a result, the authorized carrier should be required to obtain restitution from the unauthorized carrier, but this action should not interfere

with the customer's ability to be fully reimbursed for all payments made to a slamming provider and to refuse to make further payment for any services received during the period of the invalid contract.

NASUCA has adopted a Resolution which summarizes our views on slamming at our annual meeting in Boston, MA in November 1997. With respect to any obligation by the customer, we recommend that federal policy provide, "... for slammed consumers to be exempt from any payment requirement..." Our comments on the FCC's proposals for further rule changes reflect this overall policy objective.

IV. Specific FCC Proposals

A. Recovery of Additional Amounts from Unauthorized Carriers. The Commission's approach focuses on the obligation of the unauthorized carrier to reimburse the customer's authorized carrier for any sums paid by the customer. Section 258 of the Telecommunications Act requires such an approach. However, there is nothing in the Telecommunications Act that suggests that this approach is exclusive. It is a grant of authority to the Commission, not an exclusive remedy. Therefore, NASUCA strongly recommends, in addition to any remedy provided in the rules between the authorized carrier and the unauthorized carrier, that the rule explicitly provide a remedy to the consumer in the form of an absolution from any payment to a carrier that has slammed the customer. The focus of the Commission's remedy should be

ordering the offending carrier to make the consumer whole and only secondarily to focus on reimbursing the customer's authorized carrier.

The Commission seeks comment on whether it can order an unauthorized carrier to reimburse the authorized carrier in an amount equal to double the charges paid by the subscriber for the first 30 day period if the subscriber has in fact paid charges to the unauthorized carrier. This will be in addition to any subsequent charges paid by the subscriber. If the subscriber has not paid any charges, the unauthorized carrier is only required to pay what the authorized carrier would have charged the customer for the first 30 days. Further, if the subscriber has already paid charges to the unauthorized carrier, the Commission proposes that the subscriber will receive a refund of all charges paid to the carrier, but this provision is not applicable if the subscriber's authorized carrier does not receive from the unauthorized carrier the amounts described above. Therefore, the Commission's rules first protect the customer's original carrier and require any reimbursement to be paid not to the customer, but to the customer's authorized carrier, who in turn then reimburses the customer for any charges paid. This seems convoluted, administratively complex and should be changed in favor of a straightforward rule that relieves the customer of any obligation to pay a slamming carrier and orders such a carrier to reimburse the customer for any charges paid.

B. Identification of Resellers. NASUCA strongly supports the development of a unique, nationally uniform numbering system for resellers so that their actions in soliciting and billing customers for their services can be easily identified and tracked for purposes of regulatory oversight. As pointed out by the Commission, the lack of a unique identification number for switchless resellers has resulted in the phenomenon known as a “soft slam” in which a customer’s long distance carrier is switched without authorization by the facilities-based interexchange carrier and not the customer’s local exchange provider. Because the LEC is bypassed, the slamming reseller also bypasses the customer’s preferred carrier freeze protection, which is offered and administered by the local exchange provider. Furthermore, the name of the customer’s facilities-based carrier continues to appear on the customer’s bill and not the name of the switchless reseller who uses the facilities-based carrier’s Carrier Identification Code (CIC). This frustrates the regulatory policy at both the state and federal level to clearly identify the customer’s telephone provider on the customer’s monthly bill. We also point out that the lack of a unique identifier for every telecommunications provider that offers retail services to end-use customers frustrates the potential for registration and enhanced regulatory oversight also contemplated by the FCC in this proposed rulemaking proceeding. Therefore, the Commission should take whatever steps are necessary to remedy this problem as soon as possible. Whatever method the Commission chooses to use should result in the clear identification of the carrier that has the contract with the customer to provide services on the customer’s monthly bill. The first option suggested by the Commission, to assign each reseller a unique CIC seems preferable

because of its potential for a clear linkage to the registration requirement proposed and discussed below and because it would appear to be the least administratively complex to implement. Any solution should be adopted promptly and should not involve what appears to be the needless complexity implied by the other options presented by the Commission.

C. Independent Third Party Verification Procedures. NASUCA proposes that the Commission adopt more specific guidelines in its rules to assure the independence and fair operation of any third party verification system. We support the proposal of the National Association of Attorneys General (NAAG) that the verification process should be completely separate from the customer's underlying sales transaction. This could still allow for a "hot transfer" from the sales individual to the third party verifier, but the sales agent should disconnect from the conversation upon a successful transfer. NASUCA opposes automated third party verification systems because of the potential for fraud in that the customer's assent could be easily "forged" into an automated voice response system or a customer could become confused and provide unintended responses that would be interpreted as verification. Of primary concern to state consumer advocates is that the Commission enforce the requirement that the verification process provide evidence of the customer's knowing assent to a change in their primary carrier. The Commission should require the following specific provisions in its rules: that any script used for this verification be read in the same language as that used to make the underlying sales transaction;

- that the script must use words and phrases easily understood by individuals with an 8th grade education;
- that the entire conversation with the customer be recorded so that evidence of a customer's assent can be reviewed and investigated if a subsequent complaint is filed;
- that the script and conversation with the customer proceed in a normal conversational speed and that the name of the company to which the customer is being switched is given in its entirety and in the same form used to register the provider with the FCC;
- that the verification agent should be required to state clearly after the company's name that the company is a provider of the specific service for which customer's assent is being verified. As required by the FCC, each presubscribed service should be clearly identified and a separate verification obtained for each;
- that the customer understands and agrees to the call being recorded;
- that the recording reveal that the person whose authorization for a provider change is being verified is the subscriber on the account, or a person authorized by the subscriber to make decisions regarding the telephone account on behalf of a subscriber, whether that subscriber is an individual or a business, and the telephone number on the account;
- that any recording should contain both the consumer's voice and the voice of the individual providing third party verification; and

that any use of a name for the purposes of trickery or to obtain a customer's assent based on confusion or inability to understand the import of the name of the company and the services offered should be prohibited.

D. Use of the Internet for Verification. NASUCA does not object to the use of the Internet by a customer to select a telecommunications provider. Such methods are in use in Ohio for retail gas competition and Pennsylvania for retail electric competition. However, we are concerned that such a method of entering into a contract does not provide any independent means to assure verification of the customer's intent. With a signed LOA the customer can determine whether the signature is valid or not. With a third party verification recording, the customer can determine whether the voice of the individual is theirs. However, there is no means of which we are aware that can be used to determine if the customer, in fact, sent an e-mail message or to prove that an e-mail message is fraudulent. We encourage the Commission to continue exploring this method, but suggest that for the time being a customer's contractual assent given over the Internet should be verified by a third party and recorded for evidentiary purposes. The means to reduce slamming will, in the final analysis, rest primarily on removing the profit associated with the practice and revoking the ability of slammers (and their principals) to continue operating given their repeated violations of the law.

E. Definition of "Subscriber." If the person who selects a telecommunications carrier is billed for this carrier through another carrier, such as the LEC, the LEC cannot and should not accept change orders on a particular account from someone other than the customer of record. If

the customer will be billed independently of the LEC, any consenting adult or individual with authority to bind an organization or corporation should be able to select telecommunications services and authorize the subsequent billing for charges by the selected carrier. Since states have defined subscriber either in their own regulations governing the LEC or the LEC's tariffs include a definition of subscriber, there is no need for the Commission to do more than refer to state law or regulation on this matter.

F. Submission of Reports by Carriers. NASUCA urges the Commission to require all carriers that are registered to provide interstate services to retail residential and small commercial customers to file annual reports of customer complaints on all topics, including slamming, cramming, service quality, and other specified issues in a uniform reporting format. This data should be incorporated into the Commission's evaluation of service quality and provide a basis for further action by the Commission with respect to whether the carrier should retain its registration. The information contained in the reports should be readily available to consumers, consumer advocates and state agencies.

G. Carrier Registration. NASUCA strongly supports the development of a registration and licensing requirement for interstate service providers. This process would complement the certification and registration requirements in effect in almost every state for intrastate service providers. We also agree with the Commission's preliminary purpose for such a registration requirement: "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.” ¶27. We suggest first that the Commission’s purpose also recognize the importance of the suspension and revocation process to halt the activities of a telecommunications provider that has demonstrated a pattern or practice of violation of the Commission’s rules, including its rules to prevent slamming and (when they are adopted) cramming.

The Commission seeks comment on the information that should be contained in a registration and suggests certain minimum information content: carrier’s business name; names and addresses of 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. While we agree that the registration requirement should not be unduly burdensome¹, we recommend that the Commission model its information requirements, as well as procedures for issuance, suspension and revocation, on those already in place in the various states for intrastate registration and certification. The concept of registration or certification is absolutely crucial to any consumer protection enforcement effort. It provides the vital link between the ability to conduct business with residential and small business consumers and an entity’s compliance with the Commission’s consumer protection and public purpose rules. It is of little import to consumers that the regulatory agency has imposed a significant fine on an entity for violation of consumer protection programs and policies if the principals in the firm can easily form another and commit fraud anew. Furthermore, it is much more effective to halt an entity’s ability to sell

¹We also support an effort to coordinate the provision of information for the registration with other data gathering activities of the Commission.

telecommunications services to send a message that fraud will not be tolerated than it is to impose a fine that is probably not collectable in light of the financial structure and assets of the particular enterprise which was the subject of the investigation. A well designed and enforced registration and revocation program can resolve many of these difficulties. Indeed, our recommended approach is a tried and true approach that states have used for over 100 years to regulate competitive businesses.

With respect to the information that should be required by a registration program, we recommend the following:

- Name, address, and telephone number of the applicant;
- The name under which the applicant will provide telecommunications services if different than the legal name;
- The organizational form under which the applicant will conduct business, and, if a corporation, the state in which it is incorporated, the date of incorporation, and a copy of the certificate of incorporation;
- The names and addresses of each corporation, association, partnership, cooperative or individual holding a 20 percent or greater ownership or management interest in the applicant and the amount and character of the ownership or management interest;
- The names and addresses of the principal officers or partners (both general and limited) of the applicant;

- A description of the telecommunications services the applicant intends to offer and a detailed statement of the means by which the applicant will provide the services;
- Current financial statements, including a balance sheet, income statement, and cash flow statement, a copy of the applicant's latest annual report, a copy of the applicant's report to stockholders, if any;
- A copy of the applicant's disclosure of information provided to residential consumers upon initiating service;
- The names, addresses, telephone number, fax number, e-mail address and toll free number of the applicant's representatives to whom all inquiries must be made regarding customer complaints and regulatory matters, and a description of how the applicant handles customer billing and service matters;
- A list of states in which the applicant is registered or certified to provide telecommunications services, whether the applicant has ever been denied registration or certification in any state and the reasons for any such denial, a statement as to whether or not the applicant is in good standing with the appropriate regulatory agency in the states where it is registered or certificated, and a detailed explanation of any formal investigations, court proceedings or fines and penalties in which the applicant, or an affiliated interest, has been subject to by any regulatory authority in any state for the conduct of its telecommunications services;
- The applicant's federal tax identification number;

- The number and nature of complaints filed against the applicant with any state or federal regulatory agency by customers concerning billing, slamming, cramming, and other related customer service issues; and
- Any information requested by the Commission needed to demonstrate that the applicant has sufficient technical, financial and managerial capabilities to provide the interstate telecommunications services it intends to offer consistent with the requirements of this chapter and other applicable rules and laws.

With respect to the procedural rules that should be in place to govern the granting, suspension and renewal of a registration, we attach the rules in effect in South Dakota, which should be used as a model by the Commission. We wish to emphasize that the adoption of a registration requirement without well-designed suspension and revocation procedures will be hollow indeed. It is only by means of a threat to prevent an entity who violates consumer protection rules from continuing to sell telecommunications services that the registration process will be meaningful. It will not be possible for the Commission to determine whether the applicant is likely to commit fraud based on an application alone, unless the applicant and its affiliates have already exhibited fraudulent conduct in other states. It is only by means of monitoring the entity's actual conduct in its interactions with consumers and then taking appropriate enforcement action the Commission will be able to do its job to protect consumers in the competitive market for telecommunications services.

H. Third Party Administrator for Carrier Changes and Carrier Freezes. NASUCA is unable to provide the type of detailed operational and cost information sought by the Commission for the development of a third party administrator for carrier changes and carrier freezes. However, we support the development of an independent entity for such a purpose. Obviously, the development and funding of an administrator would have to involve both local exchange carriers and interexchange providers. To the extent that the Commission can create a climate in which such a development occurs, we support this effort. However, we do not support a delay in the implementation of any slamming rules to allow for the development of such an entity. Consumers have waited long enough. The FCC must move forward promptly to implement a comprehensive program to prevent slamming and to hold telecommunications providers responsible for the actions of their agents.

V. Conclusion.

NASUCA recommends that the Commission act promptly to adopt the proposals we have recommended in these comments. Our comments are designed primarily to make the Commission's initiatives more effective based on the many years of experience we have had with state slamming regulations and carrier registration procedures. We will be happy to provide additional state examples upon request or to participate in formal or informal forums to further explore these issues. While the Commission has acted forthrightly in its recent Second Opinion and Order, it has not gone far enough to slam the door on slamming. The remedies embodied in

this initiative are not sufficient to achieve the goal the Commission itself has announced, to take the profit out of slamming. We hope that our comments will be viewed as helpful to the Commission to achieve this worthwhile and long overdue goal.

Respectfully submitted,

A handwritten signature in cursive script that reads "Michael J. Travieso". The signature is written in black ink and is positioned above the printed name and address.

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A small, handwritten mark or initials in cursive script, possibly "J", located to the right of the printed contact information.

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