Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Subscriber	)	
Carrier Selection Changes	)	
Provisions of the	)	
Telecommunications Act of 1996	)	CC Docket No. 94-129
	)	
Policies and Rules Concerning	)	
Unauthorized Changes of	)	
Consumers' Long Distance	)	
Carriers.	)	

THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES'
REPLY
TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION
OF THE SECOND REPORT AND ORDER

Pursuant to 47 CFR § 1.429(g), the National Association of State Utility Consumer Advocates (NASUCA)[1] herewith respectfully replies to the oppositions to NASUCA's request for reconsideration of the Commission's Second Report and Order (Order) filed in this docket. Despite the clear language of 47 CFR § 1.429(f), many of those "oppositions" are styled as mere "comments." Further, some of the "oppositions" and/or "comments" do not specifically identify NASUCA as a party they are "opposing"; fundamentally, however, any party that challenges the Commission's authority to order

[1] NASUCA is an association of 42 consumer advocate offices in 39 states and the District of Columbia. Our members are designated by laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

absolution of the subscriber from slammed charges opposes NASUCA's petition for reconsideration, because that petition argued that the Commission's absolution rule is too limited in ordering absolution. NASUCA hereby replies to "oppositions" and "comments" submitted by the following parties: AT&T Corp. (AT&T); Cable & Wireless USA, Inc. (C&W); GTE Service Corporation (GTE); MCI WorldCom, Inc. (MCI); Qwest Communications Corporation (Qwest); Telecommunications Resellers Association (TRA); Sprint Corporation (Sprint); and U S WEST Communications, Inc. (USW). The portions of the oppositions and comments to which NASUCA replies are identified herein.[2]

I. Those who argue that the Commission has no authority to order absolution from slammers' charges are in error.

AT&T (at 3-5), C&W (at 5-7), GTE (at 2-3), MCI at (8-11), Qwest (at 2-3), TRA (at 2-5), and USW (at 3-6)[3] argue that absolution conflicts directly with the statutory scheme as set out in 47 U.S.C. § 258(a), and that absolution "supplants" and "eviscerates" the scheme by which slammers are made liable to authorized carriers in the amount paid by the slammed customers to the slammers. Yet Congress did not mandate that subscribers have to pay anything to slammers. Qwest states that "[t]his scheme necessarily implies that subscribers *must* pay for the service they receive in order for the authorized carrier to collect such charges." Qwest at 2 (emphasis added). A better

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[2] The implementation of the Commission's rules has been stayed by the D.C. Circuit Court of Appeals. That stay does not effect the merits of the Petitions for Reconsideration opposed herein.

[3] USW's vituperative mischaracterizations of the Commission's motives (USW at 3-4) are worthy of mention, but not response.

formulation would be that *if* the subscribers pay for the service, the authorized carrier can collect an amount equal to the charges from the slammer.

Qwest admits that it may be "technically true" that the statute does not require the customer to pay either the authorized carrier or the unauthorized carrier, but states that "Congress clearly anticipated subscribers would obey other laws that *do* require them to pay for services received." Qwest at 3 (emphasis in original). Qwest does not cite any such law. A subscriber has no contractual relation with a slammer. In the absence of such a contract, neither law nor equity requires the subscriber to pay the carrier that has -- by stealth or incompetence -- provided service in place of the subscriber's authorized carrier. Qwest states that "[m]ost consumers, except those perpetuating a fraud, expect to pay for services received; therefore the Commission is not fulfilling consumer expectations by adopting this absolution period." Qwest at 5. Consumers expect to pay for services provided by the carrier they have contracted with; they have no expectation of paying another carrier for the services that carrier has -- fraudulently or not -- provided to them. To the extent that a subscriber has not (through inadvertence or intention) paid the slammer, the slammer has not benefited from the slamming, and the statutory scheme is simply irrelevant. Where (through inadvertence), the subscriber has paid, the statute requires the slammer to pay an equal amount to the authorized carrier.

As argued by NASUCA, many of the complexities of the Commission's rules arise from the Commission's limitation of absolution to thirty days. Most of the carriers overlook that limitation, as well as the limitation that where the subscriber has paid the slammer, that money is lost to the subscriber (until the authorized carrier rerates the charges and refunds the difference). The carriers also neglect to recognize that the statutory remedy is a true windfall for the authorized carrier, which receives revenues for service never provided.

MCI characterizes the petitioners' arguments as "challenging the legality of requiring carriers to provide up to 30 days free service as a matter of right." MCI at 8. In fact, none of the petitioners oppose the statutory scheme that requires the slammer to reimburse the authorized carrier for all moneys paid by the subscriber. In that event, the carrier that provides the service (the slammer) *does* provide "free service" to the subscriber. And, of course, the authorized carrier receives revenue for services it never provided.[4]

II. Extending absolution beyond 30 days is proper.

Only AT&T (at 6, n. 9), Qwest (at 5-6) and Sprint (at 6-7) directly address NASUCA's arguments that the 30 day absolution period is, in fact, too short. AT&T's response focuses on the question of incentives for fraud, which is addressed in the next section.

Qwest alleges that NASUCA's support of a two-year absolution period provided no reason for connecting the two-year period during which carriers must retain records to absolution. Qwest at 5, n. 10. Obviously, we must make the point again: The Commission's rules require accused slammers to produce records demonstrating that the "slam" was, in fact, an authorized carrier change. Under those rules, if the carrier is

[4] MCI quibbles with the Commission rule that requires the authorized carrier to give the subscriber any lost premiums, because "the customer has not used the authorized carrier' services." MCI at 8. Here again, MCI misses the point that it will be getting revenue from the slammer for service that MCI never provided.

unable to produce those records, an unauthorized change has occurred and the § 258(a) remedy will become effective, if the subscriber has paid the carrier. Since the Commission's rules only require retention of record for two years, after that time, a carrier will not be able to prove that a slam did not occur. An absolution period -- if the subscriber has not paid the slammer -- tied to the same limitation on carrier record retention only makes sense.

Sprint's response to NASUCA's position calls into question the argument raised by NASUCA that -- strictly speaking -- § 258(a) may not even apply in many situations. NASUCA's argument was based on the fact that many LECs buy the accounts receivable of IXCs before billing. In that situation, it is the LEC that has paid a slammer, and the subscriber's payment goes to the billing LEC, not to the slamming IXC. Sprint's response is simply "[t]hat the LECs may have already paid the IXCs and therefore do not actually remit the payments received from the customers to the IXCs is of no legal consequence for purposes of applying Section 258 and is otherwise irrelevant." Sprint at 7. How a situation could be irrelevant in which the specific criterion of the statute ("any carrier that violates the verification procedures … and that collects charges … from a subscriber") does not apply is hard to understand.

III. The absolution rules will not lead to an increase in fraud; any increase in slamming complaints is fully justified.

AT&T (at 6), C&W (at 7-8), Qwest (at 4-5, 8-9), Sprint (at 7), TRA (at 6-7) and USW (at 3, 4, 5) all argue that absolution will increase the incentive and opportunity for fraud by subscribers who allege slamming where none has occurred, in order to get free service. To begin with, it is important to focus on the overall purpose of the statute and the Commission's rules: That is, to prevent the fraudulent change -- or the inadvertent change -- of a subscriber's preselected carrier.[5] The Commission does this by requiring carriers to keep accurate records demonstrating that carrier changes are carried out with the subscriber's knowledge and consent.

Absolution will occur only where the alleged slammer is unable to demonstrate the subscriber's knowledge and consent. Where the alleged slammer is able to demonstrate that there was in fact, an authorized change, the subscriber will continue to be billed for those charges. Characterizing this as "another avenue for obtaining free service" (Sprint at 7) ignores the fact that if the carriers' records are adequate, the service will not be free.

Absolution is another means of taking the economic incentive out of slamming. If the carriers maintain adequate records, the potential for subscriber fraud -- as opposed to carrier fraud -- will be minimized.

Of course the Commission sought to see the number of slamming complaints reduced. This was to occur as a result of decreases in the incidents of slamming. Order ¶ 20. In the short term, it will probably be that the number of slamming complaints does increase. TRA at 2. That will be an inevitable part of carriers' learning curve -- that they may only switch subscribers with the subscribers' knowledge and consent, and that the records must be adequate to demonstrate that.

[5] MCI's plea that the Commission apply the statutory remedy only upon showing of an intentional violation of the Commission's rules (MCI at 8) ignores the fact that the statute is a "no fault" statute: If a carrier fails to comply with the Commission's verification rules -- whether that failure is deliberate or inadvertent -- the remedy applies. This is especially appropriate in this situation, where verification of carrier's -- or its marketing agent's -- intentions is difficult if not impossible to accomplish. Of course, the impact on the subscriber is the same regardless of whether the slam was due to avarice or incompetence.

The carriers' claim that absolution -- a remedy designed to provide a disincentive to carrier fraud and bad record-keeping -- must be eliminated because of the potential for subscriber fraud ignores the fact that, absent absolution, the subscriber will be required to pay the slammer for service the subscriber never requested, and then the slammer will reimburse the authorized carrier for service that the authorized carrier never provided. If, in fact, absolution does result in some amount of unsubstantiated customer claims of slamming, that must be measured against the activity that absolution is intended to deter.

V. Conclusion

At this point, it is appropriate for NASUCA and the Commission to recognize that SBC Communications Inc. (SBC), apparently alone among major carriers, supports the absolution rule. SBC at 2-5. As SBC states, "Section 258 does not detail how slams are to be handled in situations where the customer has not yet paid any money to the slamming carrier. Thus, the FCC had to address that situation in order to have a workable rule." SBC at 3. NASUCA agrees with SBC that the absolution policy is a necessary part of a workable rule. For the reasons set forth herein, the Commission should reject the arguments raised by AT&T, C&W, GTE, MCI, Qwest, TRA, Sprint, and USW that challenge the Commission's authority to absolve subscribers from making payments to slamming carriers. In fact, as argued in NASUCA's Petition for Reconsideration, the absolution period should be extended.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply to Oppositions To Petitions For Reconsideration Of The Second Report And Order was served by first class mail, postage prepaid, or hand-delivered on the parties identified below this 23rd day of July, 1999.

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