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Before the  
 MAY 5 3 00 PM '00 FEDERAL COMMUNICATIONS COMMISSION  
 Washington, D.C. 20554

In the Matter of )  
 )  
 Implementation of the Subscriber Carrier )  
 Selection Changes Provisions of the )  
 Telecommunications Act of 1996 )  
 )  
 Policies and Rules Concerning )  
 Unauthorized Changes of Consumers )  
 Long Distance Carriers )

CC Docket No. 94-129

### FIRST ORDER ON RECONSIDERATION

Adopted: April 13, 2000

Released: May 3, 2000

By the Commission: Commissioner Furchtgott-Roth approving in part, dissenting in part, and issuing a statement; Commissioner Powell issuing a statement.

#### I. INTRODUCTION

1. In our Second Report and Order and Further Notice of Proposed Rulemaking (*Section 258 Order*),<sup>1</sup> we adopted rules to implement section 258 of the Communications Act of 1934 (Act), as amended by the Telecommunications Act of 1996 (1996 Act).<sup>2</sup> The goal of section 258 is to eliminate the practice of "slamming," which is the unauthorized change of a subscriber's preferred carrier. In the *Section 258 Order*, we adopted various rules addressing verification of preferred carrier changes and preferred carrier freezes. We also adopted liability rules designed to take the profit out of slamming. In this First Order on Reconsideration (*Order*), we amend certain of our liability rules, granting in part petitions for reconsideration of our *Section 258 Order*. Specifically, the revised rules provide for slamming disputes between consumers and carriers to be brought before appropriate state commissions, or this Commission in cases where the state has not opted to administer our rules, rather than to authorized carriers. In light of this decision, we deny a petition filed by several long distance carriers seeking waiver

<sup>1</sup> *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*, CC Docket No. 94-129, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508 (1998) (*Section 258 Order*), stayed in part, *MCI WorldCom, Inc. v. FCC*, No. 99-1125 (D.C. Cir. May 18, 1999) (*Stay Order*).

<sup>2</sup> 47 U.S.C. § 258. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

of the slamming liability rules and proposing an industry-sponsored slamming liability administrator.<sup>3</sup> In this order, we also modify the liability rules that apply when a consumer has paid charges to a slamming carrier. In such instances, our new rules require slamming carriers to pay out 150% of the collected charges to the authorized carrier, which, in turn, will pay to the consumer 50% of his or her original payment. Finally, the order sets forth certain notification requirements to facilitate carriers' compliance with the liability rules. We believe these modifications will strengthen the ability of our rules to deter slamming, while addressing concerns raised with respect to our previous administrative procedures.

## II. BACKGROUND

2. In the *Section 258 Order*, we strengthened the procedures by which carriers must obtain customer verification of preferred carrier change requests. We broadened the scope of these verification procedures to apply to changes to local as well as long distance carriers. Additionally, the *Section 258 Order* set forth rules governing preferred carrier freezes, which prohibit carriers from changing a consumer's preferred carrier without that consumer's express authorization to "lift the freeze."

3. Recognizing that our previous rules had failed to deter carriers from engaging in slamming, we also adopted more aggressive new rules to take the profit out of slamming by absolving subscribers of liability for some slamming charges. These new liability rules were designed to ensure that carriers cannot profit from slamming activities, as well as to compensate subscribers for the inconvenience and confusion experienced due to slamming. The new rules absolve a subscriber of liability for all calls made within the first 30 days after being slammed. Under these rules, any charges for calls made beyond the 30-day limit must be paid by the subscriber to the authorized carrier at the authorized carrier's rates. If the subscriber has paid his or her bill to the unauthorized carrier, however, section 258(b) requires the unauthorized carrier to remit this payment to the authorized carrier. Upon receipt of this amount, the rules adopted in the *Section 258 Order* require the authorized carrier to provide the subscriber with a refund or credit of any amount the subscriber paid in excess of the authorized carrier's rates. The rules adopted in the *Section 258 Order* also require the authorized carrier to conduct investigations to provide an alleged unauthorized carrier with the opportunity to prove that it did not slam the customer.<sup>4</sup>

4. Although the majority of our new slamming rules took effect on April 27, 1999, the new liability rules were stayed by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) at the request of MCI WorldCom, Inc.<sup>5</sup> These liability rules were, however, at the core of the Commission's renewed efforts to eliminate slamming by giving consumers meaningful redress and by preventing carriers from profiting from this practice.

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<sup>3</sup> Joint Petition for Waiver filed by AT&T Corp., MCI WorldCom, Inc., Sprint Corp., Competitive Telecommunications Assn., Telecommunications Resellers Assn., Excel Telecommunications, Inc., Qwest Communications Corp., and Frontier Corp. (March 30, 1999) (Joint Waiver Petition).

<sup>4</sup> *Section 258 Order*, 14 FCC Rcd at 1521, ¶ 18; 1529, ¶ 34; 1531, ¶ 38; 1533-35, ¶¶ 42-45.

<sup>5</sup> *MCI WorldCom, Inc. v. FCC*, No. 99-1125 (D.C. Cir. May 18, 1999).

Indeed, we saw a decline in slamming complaints during the period immediately prior to the May 1999 stay of these rules that may well have been attributable to carriers' recognition that the new liability rules would make it costly to continue slamming. In May 1999, the Common Carrier Bureau's Enforcement Division received only 840 slamming complaints, a sharp decrease from the 1,355 slamming complaints it received in April 1999.<sup>6</sup> Local telephone companies have reported similar declines in the number of complaints they have received. For example, SBC's records show that in May 1999 it received 15,271 slamming complaints, compared to 23,484 slamming complaints received in April 1999.<sup>7</sup> Similarly, Bell Atlantic's records reveal that in May 1999 it received 15,951 slamming complaints, down from the 19,263 slamming complaints it received in April 1999 and the 35,556 slamming complaints it received in March 1999.<sup>8</sup>

5. Twelve entities filed petitions for reconsideration and/or clarification of the rules adopted in the *Section 258 Order*,<sup>9</sup> and many parties filed comments in response to the petitions. Although the petitions raise a broad range of issues relating to the slamming rules, this *Order* addresses only those issues relating to the liability rules stayed by the D.C. Circuit. We will address the remaining reconsideration and clarification issues in a subsequent order.

6. In this *Order* we reaffirm our decision to provide limited absolution of charges to consumers who are slammed. However, we modify the liability rules that apply when a consumer has paid charges to a slamming carrier. In addition, we grant, in part, several of the petitions requesting that we modify the obligations and procedures set forth in the *Section 258 Order* for administering these liability rules. These modifications are intended to resolve concerns raised in this proceeding and in the petitions for stay filed both with this Commission and with the D.C. Circuit.<sup>10</sup> In support of certain issues in their petitions for reconsideration,

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<sup>6</sup> Slamming Complaint Trends, Common Carrier Bureau, Enforcement Division, Consumer Protection Branch (September 1999).

<sup>7</sup> Letter from Chris Jines, SBC, to Glenn Reynolds, FCC, dated October 22, 1999, at Attachment A (SBC Carrier Dispute Activity).

<sup>8</sup> Letter from Marie Breslin, Bell Atlantic, to Glenn Reynolds, FCC, dated October 25, 1999.

<sup>9</sup> The petitions filed are: AT&T Corp. Petition for Partial Reconsideration or, in the Alternative, for Clarification (AT&T Petition); Excel Telecommunications, Inc. Petition for Clarification and Reconsideration (Excel Petition); Frontier Corp. Petition for Reconsideration (Frontier Petition); GTE Service Corp. Petition for Reconsideration (GTE Petition); MediaOne Group Petition for Reconsideration (MediaOne Petition); National Association of State Utility Consumer Advocates Petition for Reconsideration of the Second Report and Order (NASUCA Petition); National Telephone Cooperative Association Petition for Reconsideration (NTCA Petition); New York State Consumer Protection Board Petition for Reconsideration (NYSCPBB Petition); RCN Telecom Services, Inc. Petition for Clarification and Reconsideration (RCN Petition); Rural LECs Petition for Reconsideration (Rural LECs Petition); SBC Communications, Inc. Petition for Reconsideration and for Clarification (SBC Petition); Sprint Corp. Petition for Reconsideration (Sprint Petition).

<sup>10</sup> Joint Parties' Motion for Extension of the Effective Date of the Rules or, in the Alternative, for a Stay filed by AT&T Corp., MCI WorldCom, Inc., Sprint Corp., Competitive Telecommunications Assn., Telecommunications Resellers Assn., Excel Telecommunications, Inc., Qwest Communications Corp., and Frontier Corp. (March 29, 1999); Motion for Stay Pending Judicial Review or, in the Alternative, for Expedited Consideration and Consolidated Response to the FCC's Motion to Hold in Abeyance filed by MCI WorldCom, Inc. (D.C. Cir. May 10, 1999) (MCI WorldCom Motion for Stay).

several petitioners make arguments that are the same as or substantially similar to those we previously addressed in the *Section 258 Order*. Most of these petitioners do not offer new information to persuade us that our decisions on these issues in the *Section 258 Order* were erroneous. After reaffirming the importance of absolution to consumer protection, therefore, we address, with respect to the liability rules, only those new arguments raised in the petitions for reconsideration that we have not already considered and rejected.<sup>11</sup> In this *Order* we also deny the Waiver Petition because we conclude that it is not in the public interest.

### III. DISCUSSION

#### A. Absolution

##### 1. Retaining Limited Absolution

7. We restate our conviction that the limited absolution of consumer charges ordered by our slamming rules is essential to deterring slamming. By depriving unauthorized carriers of slamming revenues in the first instance, absolution takes the profit out of this illegal practice. Several petitioners and commenters, including all of the groups representing consumer and state interests, agree that absolution is "a reasonable and practical extension of the statutory intent reflected in section 258 that the slamming carrier not be allowed to keep any of its ill-gotten gains."<sup>12</sup> The only commenters who oppose absolution are carriers that would be subject to the more stringent liability created by these rules.<sup>13</sup>

8. As detailed in the *Section 258 Order*, we concluded that more aggressive slamming liability rules are essential because our previous rules had failed to stem the growth of slamming.<sup>14</sup> As we summarized in that order:

. . . our experience in this area leads us to the inescapable conclusion that slamming has become a profitable business for many carriers. For this reason, the rules we adopt in this *Order* not only seek to strengthen the existing verification rules, but are more broadly designed to prevent carriers from making any profits when they slam consumers . . . the strongest incentive for such carriers to implement strictly our verification rules is to know that failure to

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<sup>11</sup> See 47 C.F.R. § 1.429(b).

<sup>12</sup> SBC Response to Petitions for Reconsideration at 3. See also NASUCA Petition at 4; NTCA Opposition to Petitions for Reconsideration at 6; NYSCP B Petition at 6.

<sup>13</sup> See, e.g., AT&T Petition; Frontier Petition; Sprint Petition; Cable & Wireless Comments; Qwest Reply Comments; MCI Comments.

<sup>14</sup> *Section 258 Order*, 14 FCC Rcd at 1518-20, ¶¶ 13-16. In 1995, the Commission processed fewer than 9,000 slamming complaints. In 1996, the Commission processed fewer than 13,000 slamming complaints. In 1997 and 1998, the number of processed slamming complaints jumped to over 20,000 each year. Consumer Protection Branch, Enforcement Division, Common Carrier Bureau, Consumer Complaint Statistics (October 1999).

comply may mean that they will not get paid or any services rendered after such an unauthorized switch.<sup>15</sup>

Accordingly, we reject the arguments of those long distance carriers that assert we failed to explain our departure from the slamming liability policies adopted in the *1995 Order*.<sup>16</sup> Under those previous rules, consumers remained obligated to pay charges to their slamming carriers in the amount they would have paid their authorized carriers absent the unauthorized change.<sup>17</sup> Several commenters quote piecemeal from the *1995 Order* to support their argument that our current approach to slamming liability is inexplicably inconsistent.<sup>18</sup> We note, however, that those commenters fail to include in their filings the cautionary language in that order. In particular, the Commission there specifically warned that absolution might be an appropriate rule if the prior rules failed to abate the growth of slamming:

Despite the compelling arguments of those favoring total absolution of all toll charges from unauthorized IXCs, we are not convinced that we should, *as a policy matter*, adopt that option *at this time*. . . We recognize, however, that [liability limited to re-rating] may not be the best deterrent against slamming. Some IXCs engaging in slamming may not be deterred unless all revenue gained through slamming is denied them. *At this time*, we believe that the equities tend to favor the “make whole” remedy and therefore support the policy of allowing unauthorized IXCs to collect from the consumer the amount of toll charges the consumer would have paid if the PIC had never been changed. . . *However, we recognize that if “slamming” continues unabated* – perhaps through abuses in areas other than the use of the LOA – *we may have to revisit this question at a later date*.<sup>19</sup>

As noted above, the number of slamming complaints processed by this Commission have more than doubled since adoption of the *1995 Order*. The state commissions, which cumulatively receive a larger share of slamming complaints than this Commission, have seen a similar growth.<sup>20</sup> Thus, consistent with our previous warning, and in light of the need for stronger and more effective deterrents to slamming, we are convinced that absolving consumers of liability for charges incurred over a limited time-period is now the appropriate policy. We point out that consumer groups and states support absolution from slamming charges as an effective method of

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<sup>15</sup> *Section 258 Order*, 14 FCC Rcd at 1518-19, ¶¶ 13-14.

<sup>16</sup> *See, e.g.*, AT&T Petition at 2; MCI Comments at 10; Qwest Comments at 4.

<sup>17</sup> *Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Docket 94-129, Report and Order, 10 FCC Rcd 9560, 9579 (1995) (*1995 Order*).

<sup>18</sup> *See, e.g.*, AT&T Petition at 2; MCI Comments at 10.

<sup>19</sup> *1995 Order* 10 FCC Rcd at 9579, ¶ 37 (emphasis added).

<sup>20</sup> A survey by the United States General Accounting Office found that the number of slamming complaints reported to the various state commissions had grown from 20,741 in 1996 to 39,688 in 1988. *Report of the General Accounting Office on State and Federal Actions to Curb Slamming and Cramming*, July 1999, at 6.

detering slamming.<sup>21</sup> Indeed, many states have adopted absolution as a remedy for their own consumers.<sup>22</sup>

9. As we stated in the *Section 258 Order*, absolution minimizes slamming carriers' physical control over slamming revenues, and thereby minimizes the incentive to slam consumers. The Commission has seen several cases in which slamming carriers went out of business or declared bankruptcy after the Commission or state enforcement agencies detected their illegal activities. Such evasion has made it difficult to provide restitution to injured consumers. Accordingly, it is important to deprive a slamming carrier of slamming revenues in the first instance.

10. Our absolution rules also place appropriate incentives on both consumers and carriers. They encourage consumers to scrutinize their telephone bills immediately and carefully. In doing so, absolution engages the general public in detecting slamming. Absolution also provides carriers with the incentive to verify all carrier changes properly, in order to protect themselves against any possible inappropriate consumer claims of slamming. The rules will motivate carriers not only to comply strictly with our verification procedures, but also to use methods that provide convincing proof of a subscriber's authorization.

11. Finally, limited absolution compensates a slammed subscriber, at least in part, for the inconvenience and frustration that results from an unauthorized change. In our extensive experience handling slamming complaints since the *1995 Order*, it has become evident that consumers often experience a high level of confusion upon being slammed. After discovering the unauthorized change, consumers frequently have great difficulty in returning to their authorized carriers and in getting their telephone bills adjusted correctly. Indeed, as long as slamming carriers continue to receive payment, they have little incentive to be responsive to consumer complaints. Therefore, absolution also furthers Congress' desire to "provide that consumers are made whole."<sup>23</sup>

12. As stated previously, the only parties that oppose the concept of absolution are the carriers themselves. States and consumer groups overwhelmingly support absolution as the best method to deter slamming. We are unpersuaded by the arguments of TRA and others that our absolution rule is inconsistent with the provisions of section 258 requiring slamming carriers to reimburse authorized carriers for forgone revenue.<sup>24</sup> As we explained in the *Section 258 Order*, we believe that our absolution remedies are complementary to the congressional scheme and not inconsistent. The language of section 258 does not mandate that slammed consumers pay either

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<sup>21</sup> See, e.g., NASUCA Petition at 4; NTCA Opposition to Petitions for Reconsideration at 6.

<sup>22</sup> See, e.g., Ariz. Rev. Stat. Ann. § 44-1572 (1999); Minn. Stat. Ann. § 237.661 (1998); Mont. Code Ann. § 69-3-1305 (1999).

<sup>23</sup> Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. At 136 (1996) (Joint Explanatory Statement).

<sup>24</sup> See, e.g., TRA Comments to Petitions for Reconsideration at 3; AT&T Petition at 5; Frontier Petition at 5; Sprint Petition at 7.

the authorized or the unauthorized carrier. Rather, by its terms, section 258(b) applies only when a consumer in fact has made a payment. Furthermore, section 258 specifically states that its remedies are “in addition to any other remedies available by law.”<sup>25</sup> We emphasized in the *Section 258 Order* that the authorized carrier is free to seek compensation for lost profits or other damages in proceedings against the slamming carrier before the Commission or in a state or federal court.<sup>26</sup> Furthermore, our rules do not deprive the authorized carrier of all charges incurred by the subscriber. The subscriber only receives absolution for service provided during the first 30 days after being slammed. The authorized carrier is entitled to collect charges for service provided after the first 30 days, even though that service was provided by the slamming carrier.

## 2. Time Period for Absolution

13. We decline to extend the absolution period beyond the 30-day limit, as suggested by several petitioners,<sup>27</sup> because we find that the 30-day limit strikes a reasonable balance between the interests of consumers and carriers. We find that the period of absolution should be limited in order to give consumers the incentive to look at their bills promptly and not to delay reporting slams.<sup>28</sup> We also find that the time limitation should be tied to an event that is verifiable and easily tracked, such as the date a slam occurs, rather than an event that is not verifiable, such as the date the consumer notices an unauthorized change.<sup>29</sup> Accordingly, we retain the limitation that absolution is only available for charges incurred within the first 30 days after the unauthorized change.

14. Furthermore, as explained in the *Section 258 Order*, we will grant waivers where special circumstances warrant a longer period of absolution, such as where the subscriber's telephone bill does not provide reasonable notice of a carrier change.<sup>30</sup> We disagree with NTCA's contention that we should extend the time period for absolution because the waiver process is not a practical solution for consumers.<sup>31</sup> NTCA's viewpoint appears to be based on the assumption that large numbers of consumers will be unable to detect carrier changes on their telephone bills. We acknowledged in the Truth-In-Billing proceeding that unclear telephone bills

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<sup>25</sup> 47 U.S.C. § 258(b).

<sup>26</sup> We stated that, for example, an authorized carrier could file suit in state court for tortious interference with a business contract. *Section 258 Order*, 14 FCC Rcd at 1525-26, ¶ 27 and n.88.

<sup>27</sup> See NASUCA Petition at 8; NYSCPБ Petition at 6; NTCA Petition at 27.

<sup>28</sup> See, e.g., AT&T Comments to Petitions for Reconsideration at 6, n.9; Sprint Opposition to Petitions for Reconsideration at 6; GTE Comments to Petitions for Reconsideration at 4; Qwest Comments to Petitions for Reconsideration at 8.

<sup>29</sup> See, e.g., GTE Comments to Petitions for Reconsideration at 4.

<sup>30</sup> *Section 258 Order*, 14 FCC Rcd at 1524-25, ¶ 24.

<sup>31</sup> See NTCA Petition at 27.

can prevent customers from recognizing that their carrier of choice has been switched.<sup>32</sup> The principles adopted in that order address these concerns by requiring telephone bills to highlight when a consumer's preferred interLATA or intraLATA carrier has been changed. Our Truth-In-Billing Order also requires that telephone bills contain clear and conspicuous disclosure of consumer inquiry information, enabling consumers to report slamming and begin the process of returning to their authorized carrier.<sup>33</sup> Accordingly, in the future, consumers should be better-equipped to detect and respond to unauthorized carrier changes. We also note that deliberate efforts by a carrier to conceal an unauthorized carrier switch may be the basis for extending the 30-day limit<sup>34</sup>, and may also warrant additional enforcement action by the Commission.

## B. Liability Where Consumer Has Paid Unauthorized Carrier

15. Frontier has requested reconsideration of the requirement in the *Section 258 Order* that an authorized carrier that collects slamming proceeds from an unauthorized carrier remit to the subscriber the difference between what the subscriber paid the unauthorized carrier and what he would have paid the authorized carrier absent a slam. Frontier asserts that this "re-rating" requirement is inconsistent with the specific statutory language of section 258, which mandates that the unauthorized carrier "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."<sup>35</sup>

16. In the *Section 258 Order*, we concluded that requiring authorized carriers to remit to the subscriber amounts in excess of what they would have received but for the slam was consistent with the statute and the Congressional intent underlying section 258.<sup>36</sup> Pointing to the language of the legislative history specifically directing that the Commission's rules implementing section 258 "should also provide that consumers be made whole,"<sup>37</sup> we concluded that Congress intended that subscribers who pay for slamming charges should pay no more than they would have paid their authorized carrier for the same service had they not been slammed.<sup>38</sup> We also noted in the *Section 258 Order* that such a rule was consistent with existing Commission policy requiring slamming carriers to refund to subscribers amounts in excess of what the

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<sup>32</sup> *Truth-in-Billing and Billing Format*, CC Docket. No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7511-12, ¶¶ 31, 33 (1999).

<sup>33</sup> *Id.* at 7505, ¶ 23.

<sup>34</sup> *Section 258 Order* 14 FCC Rcd at 1524-25, ¶ 24 (explaining the 30-day period may be extended where a carrier engages in "practices used to delay the subscribers' realization of the carrier change.")

<sup>35</sup> Frontier Petition at 16-17. *See also* MCI Petition for Stay Pending Judicial Review at 8.

<sup>36</sup> Commissioners Furchgott-Roth and Powell dissented from this part of the *Section 258 Order*.

<sup>37</sup> The Conference Report on Section 258 provides that "The conferees adopt the House provision as a new section 258 of the Communications Act. It is the understanding of the conferees that in addition to requiring that the carrier violating the Commission's procedures must reimburse the original carrier for foregone revenues, the Commission's rules should also provide that consumers are made whole." Joint Explanatory Statement at 136.

<sup>38</sup> *Section 258 Order*, 14 FCC Rcd at 1531, ¶ 38.

subscriber would have paid its preferred carrier; while the interpretation proffered by Frontier on reconsideration would leave consumers worse off than before passage of the legislation.<sup>39</sup>

17. On reconsideration of this issue, we have considered comments filed in response to the Further Notice of Proposed Rulemaking (FNPRM) in this proceeding. Among the issues raised in the FNPRM, we asked whether we had authority under section 258 or other provisions of the Act to require the unauthorized carrier to pay to the authorized carrier double the amount of charges paid by the subscriber during the first 30 days after a slam, with the authorized carrier then remitting one-half that amount back to the subscriber.<sup>40</sup> The modified liability approach we adopt here is a variation on that proposal in that it requires unauthorized carriers to disgorge more than the amount collected from the subscriber in order to compensate both the subscriber and the authorized carrier. In light of the comments received on the FNPRM and petitions for reconsideration, we now adopt a different liability scheme, for cases where the subscriber has paid charges to the unauthorized carrier, that we conclude more fully implements the congressional intent underlying section 258. Specifically, we now establish a remedy that both allows the authorized carrier to retain an amount of money equal to “all charges paid by the subscriber” to the unauthorized carrier, and also ensures that subscribers are “made whole” by reimbursing them the amount they paid in excess of what they would have paid their preferred carrier absent the slam (or a proxy for such amount). Thus, once a state commission or the FCC has made a finding that a slam has occurred,<sup>41</sup> the unauthorized carrier will be required to disgorge to the authorized carrier an amount adequate to satisfy both of these obligations. As discussed below, we find that an appropriate proxy for this harm is 150% of the amounts collected by the unauthorized carrier from the subscriber following a slam. Upon receipt of this money, the authorized carrier will then be required to remit one-third of this amount (*i.e.*, 50% of what the subscriber paid to the unauthorized carrier) to the injured subscriber.

18. We specifically reject Frontier’s petition to the extent it asserts that *any* re-rating of the consumers’ bill would be inconsistent with the statute. To the contrary, Frontier’s interpretation would completely ignore the congressional intent that consumers be “made whole,” by leaving consumers that pay money to an unauthorized carrier having paid more than they would have paid absent the slam. Even setting aside any time and expense incurred by the consumer in remedying the slam, such an approach cannot be considered making the subscriber “whole” in any meaningful sense. We note, in particular, that many of the long distance carriers favoring reconsideration of the absolution requirement apparently agree that the dual Congressional intent of section 258 mandates that slammed consumers should pay no more than they would have paid absent the slam.<sup>42</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1591-93, ¶¶ 140-144.

<sup>41</sup> See discussion ¶¶ 22-28, *infra*.

<sup>42</sup> See, e.g., Sprint Petition at 5-6 (“section 258 envisions (1) that the consumer would pay for the services received while on the unauthorized carriers network at his authorized carrier’s rates and would receive all premiums to which he would otherwise be entitled . . . ); Qwest Comments at 3-5 (“Qwest agrees with Sprint that the goal of Section 258 is to make both victims of the slamming incident – the subscriber and the authorized carrier – whole . . .

19. We conclude that the approach we adopt here is both authorized by section 258, and is the most appropriate method for satisfying the dual congressional purposes reflected in the legislative history. The specific language of section 258 provides that the unauthorized carrier shall be liable to the authorized carrier for all amounts collected from the subscriber.<sup>43</sup> As Frontier asserts, a reasonable interpretation of this language is that Congress intended for the authorized carrier to retain all such amounts, even though they likely will be more than the authorized carrier would have received from the subscriber absent a slam.<sup>44</sup> Such a bonus may serve as additional incentive for the authorized carrier to go after the unauthorized carrier to collect these amounts, thereby acting as an additional disincentive to slamming. Section 258 also specifically provides that this remedy is “in addition to any other remedies available at law.”<sup>45</sup> One such remedy that assuredly is available is the ability of consumers to bring a claim to the Commission or in federal court, or where allowed under state law to the state commissions, for damages due to slamming. For example, pursuant to sections 206-208 of the Act, a consumer bringing a complaint is entitled to actual and consequential damages following a finding of a slam.<sup>46</sup> Indeed, prior to the *Section 258 Order*, Commission orders compensated slammed consumers by requiring slamming carriers, pursuant to sections 201(b) and 208 of the Act, to refund to the subscriber any amounts paid to the slamming carrier in excess of what he would have paid his preferred carrier absent the slam.<sup>47</sup> Our modified liability requirements thus satisfy the congressional mandate of making consumers “whole,” by retaining the availability of other existing remedies to ensure that subscribers pay no more for service than they would have but for being slammed. Accordingly, we find that the modifications to our liability rules adopted here most fully satisfy the dual congressional mandate of section 258. Thus, our decision to require the slamming carrier to disgorge 150% of the amount paid to it by the subscriber relies on our section 258 authority only with respect to that provision’s express permission for the Commission to use “any other remedies available by law.”<sup>48</sup>

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Therefore, as long as subscribers receive service at rates equal to that of their preferred carrier, the subscriber is made whole and should not be entitled to any further compensation.”); *see also* AT&T Petition at 2, 9-11 (supporting the Commission’s previous re-rating policy); MCI Comments at 10 (asserting that the Commission had not adequately explained why our previous re-rating rules were no longer appropriate).

<sup>43</sup> 47 U.S.C § 258(b).

<sup>44</sup> Frontier Petition at 15-18. Our experience handling slamming complaints affirms that, when the consumer has taken the time and effort to pursue such a complaint, that consumer has usually paid more to the slamming carrier than he would have paid to his preferred carrier. Nothing in the record of this proceeding appears to contradict this conclusion.

<sup>45</sup> 47 U.S.C § 258(b).

<sup>46</sup> 47 U.S.C. §§ 206-208.

<sup>47</sup> In the *1995 Order*, we explained that “through the complaint process, we will prohibit unauthorized carriers from collecting more than the original IXC’s rates.” *1995 Order*, 10 FCC Rcd at 9579-80, ¶ 37. Indeed, the Commission has entertained such complaints for damages from slamming since the effective date of our rules establishing presubscription. *See, e.g., Franks v. U.S. Telephone, Inc.*, File No. E-86-11 (Com.Car.Bur. 1986); *In the Matter of Illinois Citizens Utility Board Petition for Rulemaking*, FCC 87-89, Memorandum Order and Opinion (1987) (“Section 208 complaint remedies can be invoked to recover actual damages” arising from slamming).

<sup>48</sup> 47 U.S.C. § 258(b).

20. We note that, in response to the FNPRM, some carriers assert that we do not have jurisdiction to require the unauthorized carrier to disgorge more than it collected from the subscriber because this would result in punitive damages not authorized by the Act. We disagree. Even if such damages can be considered punitive, rather than purely compensatory,<sup>49</sup> any punitive aspect arises from the specific statutory provision providing that the authorized carrier is entitled to amounts over and above what it would have collected if the slam had not occurred. The amount going to the subscriber, on the other hand, is no more than compensatory, and well within the range of relief authorized in other statutory provisions.<sup>50</sup> As the statute specifically authorizes this additional liability to the authorized carrier, we find that it is clearly within our jurisdiction.

21. Finally, as noted above, we find that 50% of the amount collected from the subscriber by the unauthorized carrier is an appropriate proxy for re-rating that also responds to concerns raised by the carriers that actual re-rating is administratively difficult and expensive. Frontier, for example, argues that obtaining the necessary call detail from the offending carrier, collecting the revenues from the offending carrier, re-rating calls, and remitting the difference to affected customers is a time-consuming, manual and expensive process.<sup>51</sup> Other long-distance carriers similarly argue that administrative systems (such as electronic interfaces between carriers) would have to be developed to allow for accurate re-rating, imposing costs on the authorized carrier that has not been accused of slamming.<sup>52</sup> In response to this perceived difficulty, the long-distance carriers themselves (including Frontier and MCI) have argued in conjunction with the Joint Waiver Petition that the Commission should provide carriers the option of refunding 50% to the subscriber, rather than requiring them to engage in an actual calculation of the amount paid by the subscriber in excess what he would have paid his preferred carrier. These carriers assert that such a proxy fully compensates the subscriber while not requiring the carriers to engage in a difficult and expensive comparison of rates of other carriers.<sup>53</sup> As discussed more thoroughly below, we agree that this is an appropriate remedy for these purposes and will significantly simplify the flow of money from the unauthorized carrier to the authorized carrier and subscriber.<sup>54</sup>

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<sup>49</sup> As we have previously recognized, both carriers and subscribers incur costs associated with remedying the slam, and we believe the Commission would be within its authority to award compensatory and consequential damages above the amounts collected in order to compensate these entities for these costs directly resulting from the unauthorized carrier's violation of the Act. *See* 47 U.S.C. § 206.

<sup>50</sup> *See, e.g.*, 47 U.S.C. § 206.

<sup>51</sup> *See* Frontier Petition at 18 ("re-rating simply cannot be implemented in any cost-effective manner . . . [that] would likely cost more than the revenues the authorized carrier would ever realize.").

<sup>52</sup> *See, e.g.*, AT&T Petition at 9; Sprint Petition at 13; Joint Waiver Petition at 33 ("Re-rating is a particular problem.").

<sup>53</sup> Joint Waiver Petition at 36-37.

<sup>54</sup> *See, e.g.*, Reply Comments of Competition Policy Institute on Joint Waiver Petition at 5 (use of "50% of the slamming carrier's bill as a proxy for the credit due a slammed customer . . . is a sensible approach: the use of a proxy is intended to avoid the potentially high cost of re-rating the bill."); Comments of National Association of Attorneys General to Joint Waiver Petition at 7 ("Based on the experience of some state Attorneys General with re-

## C. Administration of the Slamming Liability Rules

### 1. Overview.

22. We find that the record supports modifications to the administrative processes set forth in the *Section 258 Order*. As discussed below, the modified rules we adopt in this *Order* provide that disputes between alleged slamming carriers, authorized carriers, and subscribers now will be brought before an appropriate state commission, or this Commission in cases where the state has not elected to administer these rules, rather than to the authorized carriers, as adopted in the *Section 258 Order*.<sup>55</sup> We make this change to ensure that the slamming dispute is brought before a neutral entity, as well as to remove administrative burdens from the authorized carrier. We also provide authorized carriers the option of either re-rating customer overcharges or using a 50% proxy for excess overcharges. The rule adopted in the *Section 258 Order* required the authorized carrier to provide actual re-rating in every instance to determine the amount of charges to be collected from a subscriber for calls made outside the 30-day absolution window.<sup>56</sup> We have revised this rule in response to contentions from the carriers that requiring the authorized carrier to re-rate the charges imposed by another carrier is time-consuming and expensive.<sup>57</sup> We also recognize that similar industry concerns were raised in the MCI Motion for Stay.<sup>58</sup> Accordingly, these modifications are intended, in part, to address some of the issues that may have been considered by the D.C. Circuit in granting the stay.<sup>59</sup>

### 2. Forum for Administration of Slamming Liability Rules.

23. In the *Section 258 Order*, we set forth rules that imposed on authorized carriers certain responsibilities for resolving disputes between subscribers and allegedly unauthorized carriers. Recognizing that other alternatives might better serve consumer interests under our slamming liability scheme, however, we agreed to entertain requests for waiver of our rules if carriers implemented an independent third party administrator to discharge carrier obligations for resolving slamming disputes. We specified that such a proposal should give consumers a single point of contact to resolve slamming problems and provide consumers with a neutral forum for resolving disputes regarding slamming liability.<sup>60</sup> On March 30, 1999, a coalition of

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rating, we agree that the fifty-percent proxy proposed by the Joint Parties provides simplicity which may prove beneficial to consumers.”); Comments of SBC on Joint Waiver Petition at 3 (50% proxy approach “is a good, practical solution to what could be a very sticky problem.”)

<sup>55</sup> *Section 258 Order*, 14 FCC Rcd at 1533-34, ¶ 42.

<sup>56</sup> *Id.* at 1524, ¶ 23.

<sup>57</sup> *See, e.g.*, Frontier Petition at 18.

<sup>58</sup> MCI Worldcom, Inc. Motion for Stay at 7-8, 15-17.

<sup>59</sup> The *Stay Order* did not provide the D.C. Circuit’s analysis beyond stating that the requirements for a stay had been satisfied.

<sup>60</sup> *Section 258 Order*, 14 FCC Rcd at 1542, ¶ 55.

interexchange carriers filed a Waiver Petition proposing a plan for an industry-funded third party to administer our slamming liability rules.<sup>61</sup> On April 20, 1999, state commissions, through the National Association of Regulatory Utilities Commissions (NARUC), filed a letter asserting that they are well-equipped to handle slamming complaints and requesting that the Commission consider allowing them to be the primary adjudicators of slamming disputes.<sup>62</sup> NARUC argues that the state commissions are more appropriate than the industry's proposed third-party administrator to execute our slamming liability provisions because the states have existing, neutral, and comprehensive mechanisms to handle slamming disputes.<sup>63</sup>

24. We conclude that it is in the public interest to have state commissions,<sup>64</sup> rather than a third party designated by carriers, perform the *primary* administrative functions of our slamming liability rules. In fact, it appears to be both appropriate and effective to establish this type of alliance with the states. The language of Section 258 itself contemplates a state and federal partnership to deter slamming.<sup>65</sup> In addition, the states and the Commission have been working together for some time to share information and develop new and creative solutions to combat slamming. For example, the State and National Action Plan (SNAP), comprising staff from NARUC, the FCC, and the National Regulatory Research Institute, regularly meet to develop joint public information strategies to increase awareness of telecommunications issues affecting consumers, coordinate enforcement actions to protect consumers against abuses in the telecommunications marketplace, and coordinate regulatory initiatives.<sup>66</sup> Joint state-federal activities have been very effective in protecting consumers against various types of telecommunications fraud. It is imperative that the states and the FCC continue to cooperate, and expand their interaction, in order to eradicate slamming.

25. We also find that the state commissions are, for several reasons, more appropriate for resolving slamming disputes than the administrator proposed by the long distance carriers. We agree with NARUC that the states are particularly well-equipped to handle complaints

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<sup>61</sup> See generally, Joint Waiver Petition.

<sup>62</sup> Letter from Bob Rowe, Chairman, NARUC Telecommunications Committee, to William Kennard, Chairman, Federal Communications Commission, dated April 20, 1999 (NARUC April 1999 Letter); see also, Letter to William E. Kennard, Chairman of the FCC, from Bob Rowe, NARUC First Vice President and Chairman, Telecommunications Committee, and Bill Gillis, NARUC Chairman, Consumer Affairs Committee, dated Sept. 1, 1999, at 2 (NARUC September 1999 Letter).

<sup>63</sup> NARUC September 1999 Letter.

<sup>64</sup> In most states, slamming disputes are resolved by the state public utility commission. We note, however, that some states may designate an entity other than the state public utility commission to resolve its slamming complaints. Accordingly, references to "state commissions" in this order, and in the rules adopted herein, shall include all entities that each individual state chooses to designate to resolve its residents' slamming complaints. See Appendix A, 47 C.F.R. § 64.1170(a).

<sup>65</sup> See 47 U.S.C. § 258 (stating that "nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services").

<sup>66</sup> See Report of State and National Action Plan Activities to the National Association of Regulatory Utility Commissioners at 1-2 (July 1999).

because they are close to the consumers and familiar with carrier trends in their region. As NARUC describes, establishing the state commissions as the primary administrators of slamming liability issues will ensure that “consumers have realistic access to the full panoply of relief options available under both state and federal law. . . .”<sup>67</sup> Moreover, state commissions have extensive experience in handling and resolving consumer complaints against carriers, particularly those involving slamming. In fact, the General Accounting Office (GAO) has reported that all state commissions have procedures in place for handling slamming complaints, and that those procedures have been effective in resolving such complaints.<sup>68</sup> We specifically note that at present more than 35 states have committed to provide the resources necessary to resolve slamming disputes in a timely and fair manner.<sup>69</sup>

26. Based upon these representations and the proven track record of customer satisfaction, we conclude that state commissions have the ability and desire to provide prompt and appropriate resolution of slamming disputes between consumers and carriers in a manner consistent with the rules adopted by this Commission. In most situations, state commissions will be able to provide consumers with a single point of contact for each state, thereby enabling slammed consumers to rectify their situations, receive refunds, and get appropriate relief with one phone call. State commissions also will be able to provide consumers and carriers with timely processing of slamming disputes. Finally, but of critical importance, states will provide a neutral forum for the resolution of slamming disputes. As noted above, this was one of the essential criteria we set forth for the approval of a slamming liability administrator. We do not conclude here that an industry-sponsored administrator could not act as a “neutral” adjudicator of disputes between carriers and consumers. Nonetheless, we are troubled by the concerns raised by several consumer groups that such an entity would be perceived by consumers as biased in favor of carriers. The slamming liability rules are intended to protect consumers, and the effectiveness of any administrative mechanism we select will be dependent upon consumers having confidence in the fairness and impartiality of the process. We agree with the arguments of NARUC that state commissions will be perceived by consumers as more “neutral” adjudicators of disputes than the third-party administrator proposed by the interexchange carriers.<sup>70</sup>

27. We recognize, however, that not all states have the resources to resolve these slamming complaints, or may choose not to take on this primary responsibility. Consumers in these states accordingly may seek resolution of their slamming disputes by filing a complaint with this Commission. To provide consumers who opt to file complaints with this Commission

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<sup>67</sup> *Id.*

<sup>68</sup> GAO Report on Telecommunications, State and Federal Actions to Curb Slamming and Cramming at 8 (July 1999).

<sup>69</sup> See Letter to William E. Kennard, Chairman of the FCC, from Bob Rowe, NARUC President, Joan Smith, NARUC Chair, Telecommunications Committee, and Bill Gillis, NARUC Chairman, Consumer Affairs Committee, dated April 6, 2000 (NARUC April 2000 Letter).

<sup>70</sup> See NARUC April 1999 Letter.

the full complement of rights and remedies contemplated by this order,<sup>71</sup> we are amending our own rules for the adjudication of slamming complaints.<sup>72</sup>

28. Our conclusion that states should have primary responsibility for administering our slamming liability rules shall not preclude a consumer from electing to file a slamming complaint with this Commission. In cases where the state has indicated it will administer our rules, however, this Commission will refer informal complaints to the appropriate state commission for resolution, unless the complainant expressly indicates it wishes to have the matter resolved by this Commission. This Commission will not adjudicate a complaint based on an allegation of slamming while the complainant has a complaint arising from the same set of facts pending before a state commission that has opted to administer our slamming rules. Additionally, these rules do not preclude the filing of a petition for declaratory ruling alleging that a state has improperly implemented our verification or liability rules.<sup>73</sup> Finally, nothing in these procedures is intended to abrogate any party's right to pursue relief for a slamming violation in state or federal court.

### **3. Administrative Procedures.**

#### **a. State Notification of Participation in Adjudication of Complaints.**

29. To ensure full and seamless administration of complaints among this Commission and the states, each state commission that chooses to take on the primary responsibility for resolving consumer slamming complaints must notify this Commission of the procedures it will use to adjudicate individual slamming complaints on the effective date of these revised rules.<sup>74</sup> Each state commission's notification should explain how consumers may file complaints (including where the complaint is to be filed, what if any filing fees a consumer must pay, and what documentation a consumer must provide in its complaint), any and all deadlines parties must adhere to that are shorter than those explicitly stated in these rules, what safeguards exist to

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<sup>71</sup> See discussion *infra*. at ¶¶ 31-43.

<sup>72</sup> Currently, slamming complaints filed with this Commission are adjudicated under the FCC's informal complaint rules, see 47 C.F.R. §§ 1.716-1718. The informal complaint rules do not provide for the FCC to order monetary payments by carriers against a slammed consumer. While a consumer could proceed under the formal complaint rules, see 47 C.F.R. § 1.720, such a process may not be cost-effective for many consumers. To maximize consumer protection in this particular area, we are amending our informal complaint rules for the adjudication of slamming actions. See Appendix A, 47 C.F.R. § 1.719. This new manner of adjudication resembles the existing informal complaint rules, but gives the consumer a wider array of remedies. We also amend the function statement of the Consumer Information Bureau to expressly accommodate the the new informal complaint rules. See Appendix A, 47 C.F.R. § 0.141(b)(1)(C).

<sup>73</sup> See discussion *infra*. At ¶ 37.

<sup>74</sup> See Appendix A, 47 C.F.R. § 64.1110. States which file such notification are referred to as "participating states"; states that do not file such notification are referred to as "non-participating states." We note that the rules we modify in this Order have been stayed by the Court. See *MCI Worldcom v. FCC*, No. 99-1125 (D.C. Cir., May 18, 1999). Accordingly, we will publish a notification in the Federal Register of the effective date of the rules adopted herein to ensure that the states have sufficient notice to comply with this filing deadline.

ensure procedural fairness to consumers and carriers, and what rights parties have to appeal an initial decision.<sup>75</sup>

**30.** If, after the effective date of these rules, additional states opt to administer complaints under the rules, they may do so by filing such notification in the above-captioned docket and sending a copy to the Chief of the FCC Consumer Information Bureau.<sup>76</sup> In addition, state notification of an intention to discontinue administering complaints under the rules shall be filed in the above-captioned docket, with a copy of such notification provided to the Chief of the FCC Consumer Information Bureau.<sup>77</sup>

**b. Preliminary Consumer Relief is Granted upon Slamming Allegation.**

**31.** We retain the requirement that an alleged unauthorized carrier must remove all charges assessed for the first 30 days of services from a subscriber's bill upon the subscriber's allegation that he or she was slammed.<sup>78</sup> Several carriers state that the allegation of a slam should not trigger preliminary relief because many slamming complaints will turn out to be invalid or fraudulent.<sup>79</sup> As we explained in the *Section 258 Order*, the fact that a subscriber can only be absolved of liability if he or she has in fact been slammed minimizes our concerns about fraud by consumers.<sup>80</sup> In accordance with the revised rules described above, if a carrier is able to produce proof of verification, it is entitled to receive full payment from the subscriber for all services provided. Our rules will motivate carriers to comply strictly with our verification procedures to protect themselves from inappropriate claims of slamming. We also explained in the *Section 258 Order* that the absolution remedy we adopted provides an easily administered remedy for consumers who have been slammed. The absolution remedy would not be as effective if the consumer had to pay for slamming charges in the first instance; we have emphasized repeatedly how essential it is to minimize the opportunity for unauthorized carriers to physically take control of slamming profits for any period of time.<sup>81</sup> Accordingly, our rules will continue to require that, upon an allegation of a slam, the alleged unauthorized carrier must remove all charges assessed for the first 30 days of service immediately from the subscriber's bill.

**32.** Our retention of the requirement that an alleged unauthorized carrier must remove all charges assessed for the first 30 days of service from a subscriber's bill upon the subscriber's allegation that he or she was slammed, along with our modification of the administration procedures, creates the need for an additional administrative rule. Specifically, because the

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<sup>75</sup> See Appendix A, 47 C.F.R. § 64.1110(a).

<sup>76</sup> *Id.*

<sup>77</sup> See Appendix A, 47 C.F.R. § 64.1110(b).

<sup>78</sup> *Section 258 Order*, 14 FCC Rcd at 1533, ¶ 42.

<sup>79</sup> See, e.g., Frontier Petition at 14-15, 16; TRA Comments to Petitions for Reconsideration at 5; Cable & Wireless Comments to Petitions for Reconsideration at 8; Qwest Comments to Petitions for Reconsideration at 2.

<sup>80</sup> *Section 258 Order*, 14 FCC Rcd at 1523, ¶ 22.

<sup>81</sup> *Id.* at 1521, ¶ 19.

subscriber receives preliminary relief pending a final determination of whether or not a slam occurred, our rules need to ensure that the subscriber benefiting from the relief promptly files a complaint with the state commission (or the FCC), thus giving the alleged unauthorized carrier an opportunity to provide proof of verification. Therefore, we modify our rules to require that the allegedly unauthorized carrier notify the subscriber that it must file a complaint with the appropriate state commission (or the FCC) within 30 days of the date it notifies the allegedly unauthorized carrier that a slam occurred, or be subject to re-billing for charges incurred.<sup>82</sup> The allowance of such re-billing does not, however, prohibit the subscriber from subsequently filing a complaint alleging that a slam occurred with the state commission (or the FCC) and proceeding in accordance with the Commission's rules.

**c. General procedures.**

33. As discussed above, when an allegedly unauthorized carrier is informed by a subscriber of an alleged slam, that carrier is required to remove charges for the first 30 days of service from the subscriber's bill.<sup>83</sup> The subscriber must then file a complaint with a state commission (or the FCC) seeking a factual determination that a slam occurred.<sup>84</sup> We recognize that some carriers may choose to make it their practice not to challenge allegations of slamming and to provide subscribers who allege a slam has occurred with all the relief to which they would be entitled under our rules.<sup>85</sup> We do not intend for these rules to discourage carriers from providing subscribers with the most expedient relief possible. Accordingly, where an allegedly unauthorized carrier chooses to not challenge the allegation of a slam and provides the subscriber alleging that a slam occurred with all the relief to which the subscriber would be entitled pursuant to our rules, had the subscriber prevailed on a slamming complaint, the allegedly unauthorized carrier shall inform the subscriber of the remedies our rules provide and that the subscriber has the option of filing a complaint with the appropriate state commission (or the FCC) if the subscriber is not satisfied with the resolution of its dispute with the carrier.<sup>86</sup>

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<sup>82</sup> We note that the requirement is that the complaint be filed within the 30-day period, not that the carrier be served with a complaint within the 30-day period. Any carrier seeking to re-bill for charges removed based on a subscriber's failure to file a complaint in accordance with this rule must first contact the subscriber and provide the subscriber with a reasonable opportunity to demonstrate that the requisite complaint was filed within the 30 day-period. See Appendix A, 47 C.F.R. § 64.1160(c).

<sup>83</sup> See Appendix A, 47 C.F.R. § 64.1160(b).

<sup>84</sup> See Appendix A, § 64.1160(c).

<sup>85</sup> We note that carriers may designate other carriers to act as their agents in resolving slamming disputes and that such designation would not change our determination herein. For example, an IXC may reach an agreement with a LEC that the LEC act on the IXC's behalf by providing any subscriber that alleges a slam by that IXC with all of the remedies such subscriber would be entitled to under our rules.

<sup>86</sup> We note that a carrier choosing to satisfy a slamming complaint as described in this paragraph is electing to *not* challenge the subscriber's allegation that an unauthorized change of carrier occurred. Thus, the satisfied subscriber would *not* be required to file a complaint with a state commission (or the FCC) pursuant to section 64.1160(c) of our rules within 30 days of such carrier's notification that a slam occurred.

34. We require any carrier that is informed by a subscriber of a slam to direct each unsatisfied subscriber<sup>87</sup> to the proper state commission (or the FCC) for resolution of the slamming problem and inform such unsatisfied subscriber of all the relevant filing requirements.<sup>88</sup> We conclude that this will achieve one of our objectives for a slamming liability administrator set forth in the *Section 258 Order* -- minimizing the effort consumers must expend to resolve slamming disputes.<sup>89</sup> We also expect that the states that have sufficient resources will launch public information campaigns to inform consumers of their rights and responsibilities with regard to slamming liability. We anticipate a productive state and federal partnership in this effort. Additionally, in order to fulfill our responsibilities under section 258 of the Act and to assist our enforcement efforts, we will require states that choose to administer the Commission's rules to regularly file information with the Commission that details slamming activity in their regions. Such filings should identify the number of slamming complaints handled, including data on the number of valid complaints per carrier; the identity of top slamming carriers; slamming trends; and other relevant information.<sup>90</sup> Such reports will help the Commission to identify appropriate targets for slamming enforcement actions, such as forfeiture or section 214 revocation proceedings.<sup>91</sup>

35. We also revise our rules to add a notification requirement to facilitate the administration of long distance slamming complaints.<sup>92</sup> SBC, AT&T, and Sprint state that, because our rules lack a notification requirement that would enable carriers to learn each others' identity, the carriers involved in a slamming incident might not be able to take appropriate action against each other.<sup>93</sup> Furthermore, this notification issue was also raised in the MCI WorldCom Motion for Stay filed with the D.C. Circuit.<sup>94</sup> We will require an executing carrier<sup>95</sup> who is informed of a slam by the subscriber to immediately notify both the authorized and alleged

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<sup>87</sup> A subscriber is unsatisfied by the resolution of its slamming dispute for purposes of our rules in all circumstances other than those that are specifically described in paragraph 33 of this order.

<sup>88</sup> See Appendix A, §64.1150(b). In particular, we note that the carrier must inform the unsatisfied subscriber that, if all charges for the first 30 days of service are being removed from such subscriber's bill, pending resolution of the slamming complaint, the subscriber must file the complaint with the state commission (or the FCC) within 30 days of notifying the carrier of the alleged slam. See Appendix A, 47 C.F.R. § 64.1160(c).

<sup>89</sup> See *Section 258 Order* at 1544, ¶ 57.

<sup>90</sup> These reports should be filed with the Commission's Enforcement Bureau, Telecommunications Consumers Division.

<sup>91</sup> See 47 U.S.C. §§ 214(c), 503(b)(1); see also, *CNN, Inc. et al.*, Revocation Order, 13 FCC Rcd 13599 (1998); *CNN, Inc. et al.*, Order to Show Cause and Notice of Opportunity for Hearing, 12 FCC Rcd 8547 (1997).

<sup>92</sup> See Appendix A, 47 C.F.R. § 64.1150(c).

<sup>93</sup> SBC Petition at 10; AT&T Petition at 9, n.14; Sprint Reply to Petitions for Reconsideration at 4.

<sup>94</sup> See MCI WorldCom Motion for Stay at 16-17.

<sup>95</sup> An executing carrier is generally any carrier that effects a request that a subscriber's telecommunications carrier be changed. See *Section 258 Order*, 14 FCC Rcd. at 1565, ¶ 94.

unauthorized carriers of the incident, including the identity of each carrier involved.<sup>96</sup> We note that the industry has already taken steps to facilitate the transfer of this information between carriers.<sup>97</sup> We agree that a notification requirement is important to the correct functioning of the liability mechanism. Requiring the LEC to notify both the authorized and the alleged unauthorized carriers of the other's identity in a slamming incident will enable the unauthorized carrier to forward appropriate amounts collected from the subscriber if it is determined that a slam occurred. This will also enable the authorized carrier to bring appropriate actions, such as a complaint before a state commission (or the FCC), against the unauthorized carrier should the unauthorized carrier fail to fulfill its responsibilities to the authorized carrier.

36. Upon receipt of a slamming complaint, the state commission (or this Commission if the complainant is from a non-participating state or has expressly indicated that it wants this Commission to resolve its complaint) will notify the allegedly unauthorized carrier of the slamming complaint and ensure that the carrier removes immediately all unpaid charges from the subscriber's bill, if it has not done so already.<sup>98</sup> Within 30 days after notification of the slamming complaint, or such lesser time as required by the state commission, the alleged unauthorized carrier shall provide to the state commission (or the FCC) a copy of the valid proof of verification of the carrier change.<sup>99</sup> This proof of verification should contain clear and convincing evidence that the subscriber knowingly authorized the carrier change, such as a written Letter of Agency (LOA) or an audiotape of an independent third party verification.<sup>100</sup> The state commission (or the FCC) will make a determination on whether a slam occurred using proof supplied by the allegedly unauthorized carrier and any evidence supplied by the subscriber.<sup>101</sup>

37. The following review procedures apply when a state commission has resolved a slamming complaint. Challenges to the factual determinations made by a state commission applying our rules shall be made in accordance with the relevant review provisions that are applicable to each state commission. Challenges to whether a state commission's process for

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<sup>96</sup> See Appendix A, 47 C.F.R. § 64.1150(c). Notification is not a problem with regard to local slamming because the executing carrier is also one of the LECs that is involved in the slamming incident, either as the allegedly unauthorized carrier or the authorized carrier.

<sup>97</sup> The industry's Ordering and Billing Forum (OBF) has agreed to add two new data elements to the mechanized carrier change process to facilitate notification of all affected carriers when a customer claims a carrier change was unauthorized. Carriers are free to voluntarily implement these new data elements. See Letter from Marie Breslin, Bell Atlantic, to Magalie Roman Salas, Secretary of FCC, dated January 6, 2000.

<sup>98</sup> See Appendix A, §64.1150(c). All subsequent references to the FCC refer to situations in which the complaint is from a non-participating state or the complainant has expressly indicated that it wants this Commission to resolve its complaint.

<sup>99</sup> See Appendix A, §64.1150(d).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* We note that the factual determinations made by the FCC on slamming complaints filed pursuant to new section 1.719 of the Commission's rules will be made by the Consumer Information Bureau pursuant to its delegated authority. 47 C.F.R. § 0.361.

resolving slamming complaints are consistent with this order must be brought to the FCC in the form of a petition for declaratory ruling. The following review procedures apply when the staff of this Commission has resolved a slamming complaint. A subscriber seeking to challenge the FCC staff's determination of whether a slam occurred may file a formal complaint against the allegedly unauthorized carrier in accordance with our formal complaint rules.<sup>102</sup> An allegedly unauthorized carrier seeking to challenge the FCC staff's determination of whether a slam occurred may file a petition for declaratory ruling with this Commission.

**d. Where the subscriber has not paid charges.**

38. The following procedures shall apply when the subscriber has not paid charges to the allegedly unauthorized carrier.<sup>103</sup> If the state commission (or the FCC) determines that the carrier change was authorized, the carrier may re-bill the subscriber for charges incurred.<sup>104</sup> If the state commission (or the FCC) determines that the subscriber was slammed, then the subscriber is entitled to absolution from the charges incurred during the first 30 days after the slam occurred, and the carrier may not pursue any collection actions against the subscriber to recover these charges.<sup>105</sup>

39. If the subscriber has incurred charges for more than 30 days after the slam occurred, then the unauthorized carrier shall forward to the authorized carrier the billing information for service provided from the 31<sup>st</sup> day after the slam occurred through the date the unauthorized carrier stopped providing service.<sup>106</sup> The authorized carrier has the option of billing the subscriber for calls made after the first 30 days after the slam at the rates the subscriber would have paid the authorized carrier absent the slam.<sup>107</sup> After receiving billing information from the unauthorized carrier, the authorized carrier may re-rate such service according to its own rates and then bill the subscriber for such service.<sup>108</sup> If the authorized carrier so chooses,

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<sup>102</sup> 47 C.F.R. § 1.720-36.

<sup>103</sup> See Appendix A, §64.1160. In recognition of the statutory language of section 258(b) establishing liability of unauthorized carriers to authorized carriers "in an amount equal to all charges paid by the subscriber after" a slamming violation, we concluded in the *Section 258 Order* that different liability procedures are necessary depending upon if the subscriber has or has not already paid charges to the unauthorized carrier. See *Section 258 Order* 14 FCC Rcd at 1520-39, ¶¶ 17-49.

<sup>104</sup> See Appendix A, §64.60(g). We note that a carrier may re-bill a subscriber in several different ways. For example, a carrier may request the LEC or billing agent to place the charge on the subscriber's bill. Alternatively, a carrier may choose to pursue collection of the charge on its own. We decline to impose any specific requirements governing the contractual relationship between carriers and their billing agents.

<sup>105</sup> See Appendix A, §64.1160(d). We note that nothing in this Order prohibits states from taking more stringent enforcement actions against carriers not inconsistent with section 258 of the Act.

<sup>106</sup> See Appendix A, 47 C.F.R. § 64.1160(e).

<sup>107</sup> *Id.*

<sup>108</sup> Under section 258(b) and the rules adopted in this proceeding, authorized carriers are entitled to receive this billing information from unauthorized carriers. Authorized carriers may need to take enforcement action against recalcitrant unauthorized carriers, if necessary, to exercise these rights before being able to rebill

rather than actually re-rating the service provided by the unauthorized carrier, it may bill the subscriber in accordance with a 50% proxy rate.<sup>109</sup> In other words, it may bill the subscriber for 50% of the rate the unauthorized carrier would have charged. If the subscriber believes, however, that paying 50% results in a greater charge than re-rating to the authorized carrier's rates, at the request of the subscriber, the authorized carrier shall perform actual re-rating.<sup>111</sup>

40. We note that we do not necessarily agree with the carriers' assessment of the administrative difficulty of re-rating. Although the carriers admit that the only information needed for re-rating is the length and time of the call, they fail to explain why the re-rating process, as described in the *Section 258 Order*, would require "electronic systems that interconnect with other carrier's billing and usage systems, so that they can exchange relevant price and call data electronically."<sup>112</sup> Indeed, the carriers admit that manual re-rating can be easily accomplished for any particular complainant.<sup>113</sup> Nevertheless, we permit authorized carriers to have the option of using a 50% proxy because the carriers assert that re-rating is an administrative burden, and because we are persuaded that a 50% proxy will generally yield a reasonable and fair result for the subscriber.<sup>114</sup> Giving carriers this option will ensure that, in most cases, the authorized carrier is able to collect charges without having to perform re-rating and that the subscriber will receive adequate compensation.

**e. Where the subscriber has paid charges.**

41. The following procedures shall apply when the subscriber does not discover a slam until after he or she has already paid charges to the alleged unauthorized carrier.<sup>115</sup> As explained in the *Section 258 Order*, section 258 requires the unauthorized carrier to pay the authorized carrier any charges collected following an unauthorized switch. We concluded in that

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subscribers. We note that several carriers have indicated informally that they do not intend to bill their subscribers for service provided by a slamming carrier. In any event, however, unauthorized carriers may not rebill subscribers for any such amounts.

<sup>109</sup> See Appendix A, 47 C.F.R. § 64.1160(e)(2).

<sup>111</sup> See, e.g., Comments of State Attorneys General and Ohio Public Utilities Commission to Waiver Petition (stating that, in cases where a 50% rebate would not sufficiently compensate the consumer, the authorized carrier should perform actual re-rating for the consumer).

<sup>112</sup> See MCI WorldCom Motion for Stay at 16.

<sup>113</sup> In essence, the carriers complain only about the potential volume of slamming complaints and re-rating, rather than any impossibility of performing re-rating. See, e.g., Joint Petition for Waiver at 33.

<sup>114</sup> See, e.g., SBC Reply to Petitions for Reconsideration at 7; GTE Comments to Petitions for Reconsideration at 9.

<sup>115</sup> See generally Appendix A, 47 C.F.R. § 64.1170.

order that this provision of the statute prevents us from providing absolution to slammed subscribers who have already paid charges to their unauthorized carriers.<sup>116</sup>

42. As explained above, however, we have herein modified the liability rules applicable in cases where the consumer has paid charges to the unauthorized carrier in order to more fully implement the dual goals of section 258 of compensating both the subscriber and the authorized carrier.<sup>117</sup> Pursuant to this modified liability scheme, a carrier found to have slammed will be required to disgorge to the authorized carrier 150% of the amounts collected by that slamming carrier from the subscriber. Accordingly, when the state commission (or the FCC) determines that the alleged unauthorized carrier did slam the consumer, then it shall direct such carrier to forward to the authorized carrier 150% of (or one and one-half times) all amounts collected from the subscriber, as well as a copy of the customer's bill for the amounts paid.<sup>118</sup> Upon receipt of these charges from the unauthorized carrier, the authorized carrier shall remit (either directly or through bill credits) one-third of this amount to the subscriber.<sup>119</sup> As explained above, this amount, which equals 50% of the charges paid by the subscriber to the unauthorized carrier, constitutes a reasonable proxy for the damages sustained by the subscriber, while not requiring the authorized carrier to engage in the arguably difficult and expensive task of actually re-rating the subscriber's bill. The authorized carrier shall also notify the state commission (or the FCC) that it has paid this amount to the subscriber.<sup>120</sup> If the subscriber is failed to be made whole by the 50% proxy, the subscriber may ask the authorized carrier to re-rate the unauthorized carrier's charges based on the rates of the authorized carrier and, on behalf of the subscriber, seek an additional refund from the unauthorized carrier, to the extent that the re-rated amount exceeds the 50% of all charges paid by the subscriber to the unauthorized carrier.<sup>121</sup>

43. Finally, we note that if the authorized carrier does not collect any amounts from the unauthorized carrier, the authorized carrier is not responsible for providing refunds or credits to the subscriber.<sup>122</sup> As explained in the *Section 258 Order*, the authorized carrier should not be, in effect, penalized for the wrongdoing of another carrier by having to pay a refund out of its own pocket.<sup>123</sup> In such cases, of course, both the subscriber and the authorized carrier retain any other existing avenues to obtain relief from the unauthorized carrier.

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<sup>116</sup> *Section 258 Order*, 14 FCC Rcd at 1531, ¶ 38.

<sup>117</sup> *See* ¶¶ 15-21, *supra*.

<sup>118</sup> *See* Appendix A, 47 C.F.R. § 64.1170(b).

<sup>119</sup> *See* Appendix A, 47 C.F.R. § 64.1170(c).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *See* Appendix A, 47 C.F.R. § 64.1170(e). We note that nothing would prevent the subscriber from taking action against the unauthorized carrier in federal or state court.

<sup>123</sup> *See Section 258 Order*, 14 FCC Rcd at 1532, ¶ 40.

## D. Waiver Petition

44. As explained above, petitioners filed a Waiver Petition setting forth a proposal for a third-party administrator to administer the liability aspects of the slamming rules.<sup>124</sup> Petitioners seek a waiver of the following liability rules for those carriers electing to participate in the proposed third-party administrator plan: section 64.1100(c); section 64.1100(d); section 64.1170; and section 64.1180.<sup>125</sup> On April 8, 1999, the Commission issued a public notice seeking comment on the third-party administrator proposal.<sup>126</sup> Because we believe that it is in the public interest for state commissions to undertake the responsibilities envisioned for the third-party administrator, we deny the waiver request.<sup>127</sup>

45. Waiver of the Commission's rules is appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest. A waiver of the Commission's general rules may only be granted if such waiver would not undermine the policy underlying that general rule.<sup>128</sup> Petitioners have failed to demonstrate that the third party administrator proposal is in the public interest. In evaluating whether a waiver of these rules is in the public interest, our overriding criterion is whether a waiver would further the policy goals of section 258 and our implementing rules: to protect the rights of consumers who are slammed and, ultimately, to eliminate this type of fraud.

46. We find that adopting the third-party administrator proposal would not be in the public interest because, as described above, we have revised our rules to address many of the concerns that prompted the filing of the waiver petition. The Waiver Petition sets forth an alternative administration scheme that would place a neutral, industry-endorsed entity in the role of resolving disputes between alleged slamming carriers and subscribers.<sup>129</sup>

47. In addition to the fact that the state commissions (or the FCC) will better serve the public interest in administering the slamming liability rules, the record demonstrates that segments of the industry have failed to reach consensus on the operation and administration of a third-party administrator. The local exchange and long distance carriers disagree strongly on

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<sup>124</sup> Joint Waiver Petition.

<sup>125</sup> See 47 CFR § 64.1100(c) (in cases where the customer has paid the unauthorized carrier, the unauthorized carrier is liable to the preferred carrier in an amount equal to the charges paid); 47 CFR § 64.1100(d) (30-day absolution period; for periods after the 30<sup>th</sup> day, preferred carrier must re-rate and bill for calls and refund to customer any monies collected from the unauthorized carrier in excess of re-rated bill); 47 CFR § 64.1170 (governs reimbursement of charges where customer has paid unauthorized carrier; requires restoration of premium programs of preferred carrier); 47 CFR § 64.1180 (investigation procedures to be utilized by preferred carrier to determine whether unauthorized conversion occurred; unauthorized carriers must remove 30 days of charges from customer's bill).

<sup>126</sup> Public Notice, CC Docket No. 94-129, DA 99-683 (released April 8, 1999).

<sup>127</sup> See discussion ¶¶ 23-28, *supra*.

<sup>128</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT*).

<sup>129</sup> Waiver Petition at i.

many important aspects of the third-party administrator proposal.<sup>130</sup> In inviting the industry to submit proposals for a third-party administrator, the Commission did not anticipate that the third-party administrator would be a mandatory requirement for all carriers. We did contemplate, however, that a workable third-party slamming liability administrator would have broad acceptance among different segments of the industry as well as the states and consumer interest groups. As reflected in the comments, the proposal put forth by the petitioning long distance carriers has not engendered such broad support, particularly among state and consumer interest representatives.<sup>131</sup> We find this discord troubling. Despite many months of discussion between the local exchange and long distance carriers, and despite input from consumer groups and the states, the Commission has seen these various groups settle more firmly into their disparate positions rather than moving closer to resolution.

48. This lack of comprehensive industry participation and consumer group support undermines several important potential benefits of the third-party administrator proposal. We find that the lack of consensus will prevent the third-party administrator from being the single point of contact for the consumer.<sup>132</sup> Without local exchange carrier participation and support of the third-party administrator mechanism, we are concerned that local exchange carriers will have no incentive to refer consumers to the third-party administrator. Accordingly, consumers may continue to call several entities in order to resolve their slamming disputes, undermining one of the primary benefits of a third-party administrator identified in the *Section 258 Order* – providing a single point of contact for slammed subscribers. We have additional concerns that, if a substantial portion of the industry does not participate in the third party administrator process, the non-participants may be able to derail the time limits and other procedures set by the third-party administrator, resulting in the delayed resolution of slamming complaints.

49. We believe that our revised rules address the concerns raised in the Waiver Petition in a manner that more fully satisfies the criteria set forth in the *Section 258 Order*. Our revised rules provide for state commissions (or the FCC) to handle administration of our slamming liability rules, rather than imposing burdens on authorized carriers, as originally provided in the *Section 258 Order*. Furthermore, authorized carriers now have the option of using a 50 % proxy to calculate refunds and subscriber charges, rather than performing actual re-rating, as was prescribed in the *Section 258 Order*.

50. In sum, we conclude that our revised rules will protect consumers more effectively than the third-party administrator proposed by the long distance industry. Consumer interest groups disagree with many aspects of the third-party administrator proposal, contending that the administrator will not be neutral towards consumers.<sup>133</sup> Accordingly, the revised rules

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<sup>130</sup> See, e.g., Ameritech Comments to Waiver Petition at 4; GTE Comments to Waiver Petition at 6-7.

<sup>131</sup> See, e.g., NARUC April 2000 Letter; Letter to William E. Kennard, Chairman of FCC, from Susan Grant, National Consumers League, dated July 30, 1999.

<sup>132</sup> *Section 258 Order*, 14 FCC Rcd at 1542, ¶ 55 (stating that “consumers would benefit by having one point of contact to resolve slamming problems”).

<sup>133</sup> See State Attorneys General Comments to Waiver Petition at 8-9; Ohio PUC Comments to Waiver Petition at 8 (stating that the proposal lacks consumer and state voting representation on the board); National Consumers

provide that state commissions (or the FCC) will resolve slamming disputes, thereby alleviating any neutrality concerns. Based on the states' representations discussed above, we find that the majority of states have the resources and knowledge to provide prompt and effective resolution of slamming disputes. For these reasons, the public interest favors adoption of the revised rules, which utilize appropriate state commissions as reliable, timely, and neutral dispute-resolution forums, rather than the proposed industry-sponsored third-party administrator.

#### IV. CONCLUSION

51. In this *Order*, we grant in part and deny in part petitions for reconsideration or clarification of the slamming liability rules adopted in the *Section 258 Order*. We emphasize that eliminating the profitability of slamming by absolving consumers of certain charges incurred after being slammed is essential to eliminating slamming itself. Absolution deprives unscrupulous carriers of access to slamming revenues, thereby preventing them from profiting from slamming activities. Absolution provides appropriate incentives for consumers to examine their telephone bills carefully, as well as motivating carriers to comply strictly with our verification procedures. Finally, absolution provides necessary compensation to consumers who experience confusion, frustration, and wasted time as a result of being slammed. Our experience to date convinces us that adoption of rules absolving consumers from paying these charges is the most effective way to significantly reduce the ever-growing number of slamming incidents.

52. We also revise our rules to place primary responsibility for resolving slamming disputes on state commissions. We find that state commissions have the resources and the necessary experience to give slammed consumers a single point of contact, a neutral forum for dispute resolution, and timely relief. Where state commissions choose not to take on this primary responsibility, we revise our rules to provide consumers in such states the full complement of rights and remedies contemplated by this order.<sup>134</sup> We also deny the Waiver Petition filed by certain interexchange carriers because it is not in the public interest to grant the waiver. Finally, we make nonsubstantive modifications to our rules to reorder these rules where necessary and otherwise simplify these rules.<sup>135</sup>

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League Letter to FCC, CC Docket 94-129, dated July 30, 1999 (any FCC-approved third party administrator must include voting representation by consumer organizations); NARUC Comments to Waiver Petition at 4-5; Ohio PUC Comments to Waiver Petition at 7-8; California PUC Reply Comments to Waiver Petition at 10; Consumer Federation of America Comments to Waiver Petition at 5 (stating concern at the lack of information on costs); NASUCA Comments to Waiver Petition at 1; California PUC Reply Comments to Waiver Petition at 3, 6; State Attorneys General Comments to Waiver Petition at 2; Ohio PUC Comments to Waiver Petition at 5; NARUC Comments to Waiver Petition at 1-2 (stating that the proposal may restrict consumer remedies).

<sup>134</sup> See Appendix A, 47 C.F.R. § 1.719.

<sup>135</sup> See Appendix A.

## V. PROCEDURAL ISSUES

### A. Supplemental Regulatory Flexibility Analysis.

53. As required by the Regulatory Flexibility Act (RFA),<sup>136</sup> an Initial Regulatory Flexibility Analysis (IRFA)<sup>137</sup> was incorporated in the First Further Notice of Proposed Rulemaking and Memorandum Opinion and Order and Order on Reconsideration.<sup>138</sup> The Commission sought written public comment on the proposals in the *Further Notice and Order*, including comment on the IRFA. Based on comments received in the *Further Notice and Order*, a Final Regulatory Flexibility Analysis (FRFA)<sup>139</sup> was incorporated in the Second Report and Order and Further Notice of Proposed Rulemaking.<sup>140</sup> Petitions for Reconsideration and a Joint Petition for waiver of certain rules were filed in response to the rules adopted in the *Section 258 Order*. This present Supplemental Final Regulatory Flexibility Analysis (SFRFA) conforms to the RFA.

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

54. The goal of Section 258 of the Act is to eliminate the illegal practice of slamming – the unauthorized change of a subscriber’s preferred carrier.<sup>141</sup> Faced with over 20,000 slamming complaints a year from individuals and small businesses, the Commission created a comprehensive framework for combating slamming in the *Section 258 Order* by adopting rules to implement section 258 and strengthening existing anti-slamming rules.<sup>142</sup> The cornerstone of that framework was a set of aggressive liability rules designed to take the profit out of slamming.<sup>143</sup> In this *Order*, we make certain modifications to our liability rules, granting in part

<sup>136</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, was amended by the Contract with America Advancement Act of 1996, Pub. L. 104-121, 110 Stat. 87 (1996) (CWAA). Title II of the CWAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>137</sup> 5 U.S.C. § 603.

<sup>138</sup> *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*, Further Notice of Proposed Rule Making and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 10674 (1997) (*Further Notice and Order*).

<sup>139</sup> 5 U.S.C. § 604.

<sup>140</sup> *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*, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508 (1998) (*Section 258 Order*).

<sup>141</sup> Section 258 makes it unlawful for any telecommunications carrier “to submit or execute a change in a subscriber’s selection of a provider of telephone exchange services or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe.” 47 U.S.C. § 258.

<sup>142</sup> See *supra* ¶ 1; see also *Section 258 Order*, 14 FCC Rcd at 1510-12, ¶¶ 1-4.

<sup>143</sup> See *supra* n.14.

petitions for reconsideration of the *Section 258 Order*. The modifications are intended to resolve concerns raised in this proceeding and in the petitions for stay filed both with this Commission and with the D.C. Circuit.<sup>144</sup>

55. Specifically, in this *Order*, we retain our policy of limited absolution of consumer charges, where the consumer has not paid the slammer, but we modify the liability rules that apply when a consumer has paid charges to a slamming carrier. The revised rules provide that a slamming carrier must pay 150% of the collected charges to the authorized carrier, which, in turn, must pay the consumer 50% of the consumer's original payment. This modified remedy increases penalties for slamming and increases incentives for authorized carriers to go after slammers, while ensuring that slammed consumers receive compensation.<sup>145</sup> In this *Order*, we also modify the administration of consumer slamming complaints, to ensure that such complaints are addressed in the most expedient and equitable manner. To this end, we relieve authorized carriers of the obligation to administer the liability rules and accept the proposal, proffered by NARUC, that state commissions serve as the primary administrators of most slamming disputes.<sup>146</sup> In addition, we adopt certain notification requirements to facilitate carriers' compliance with the liability rules. These include a requirement that, when an executing carrier (typically, the LEC that effects a carrier change) learns about an alleged slam, it must immediately notify both the authorized and alleged unauthorized carriers of the slamming allegation and the identities of the carriers involved.<sup>147</sup> The objectives of the modified rules adopted in this *Order* are to implement section 258 by reducing incidents of slamming and ensuring that authorized carriers and slammed consumers are compensated, and to address concerns raised with respect to our previous administrative procedures.

## 2. Summary of Significant Issues Raised by Public Comments.

56. We received no petitions for reconsideration directly addressing issues in the previous FRFA.

57. *Re-Rating Rules*. Commenters contend that requiring each authorized carrier to perform a re-rating to determine the size of the refund to each slammed subscriber would place a complex and costly administrative burden on them.<sup>148</sup> Although we do not necessarily agree with carriers about the dimensions of this burden, we believe that the 50% proxy that authorized carriers propose to give to their slammed subscribers will benefit consumers in most cases. In those instances where a subscriber does not believe that it will benefit from the 50% proxy, the

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<sup>144</sup> See *supra* ¶¶ 4-6 & n.10.

<sup>145</sup> See *supra* ¶ 6; see also *supra* discussion on Absolution and discussion on Liability Where Consumer Has Paid Unauthorized Carrier.

<sup>146</sup> See *supra* ¶ 1; see also *supra* discussion on Administration of the Slamming Liability Rules.

<sup>147</sup> *Id.*

<sup>148</sup> See, e.g., MCI Worldcom Motion for Stay at 16.

subscriber may request an actual re-rating. In most circumstances, however, authorized carriers will be able to avoid the alleged burden.<sup>149</sup>

58. *Creation of an industry-sponsored third-party administrator.* As discussed in this *Order*,<sup>150</sup> some commenters proposed that slamming complaints be adjudicated by an industry-funded third-party administrator. These commenters aver that the third-party administrator would benefit consumers and industry alike by creating a single point of contact to resolve slamming complaints and simplifying the complaint process.<sup>151</sup> We reject this proposal, and instead conclude that state commissions should perform the primary function in administering our slamming liability rules.

59. The benefit claimed by proponents of the third-party administrator was belied by the fact that no workable proposal was offered. Various industry segments disagreed on the form and workings of the proposed third-party administrator, and states and consumer groups expressed their disapproval of, and lack of confidence in, the idea.<sup>152</sup> The absence of consensus, and the accompanying possibility that a substantial portion of the industry would not participate in the third-party administrator, could result in greater confusion for consumers and authorized carriers. The system we adopt, which requires all carriers to forward complaints they receive to the appropriate governmental agency (in most cases, the state commission) will provide a more efficient and comprehensive mechanism for all parties, including small entities. Moreover, the experience, neutrality, and resources of state commissions make them well-equipped forums for resolving slamming complaints.

### **3. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply.**

60. 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 proposed rules, if adopted.<sup>153</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," "small governmental jurisdiction," and "small business concern" under Section 3 of the Small Business Act.<sup>154</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>155</sup> A small organization is generally "any not-for-profit enterprise which is independently owned and

<sup>149</sup> See *supra* ¶¶ 15-22, 38-43.

<sup>150</sup> See *supra* ¶¶ 24-27, 45-49.

<sup>151</sup> See *supra* n.114.

<sup>152</sup> See *supra* ¶¶ 48-49.

<sup>153</sup> 5 U.S.C. § 603(b)(3).

<sup>154</sup> 5 U.S.C. § 601(3).

<sup>155</sup> 15 U.S.C. § 632.

operated and is not dominant in its field."<sup>156</sup> Nationwide, as of 1992, there were approximately 275,801 small organizations.<sup>157</sup> "Small governmental jurisdiction"<sup>158</sup> generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."<sup>159</sup> As of 1992, there were approximately 85,006 such jurisdictions in the United States.<sup>160</sup> This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.<sup>161</sup> The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (96 percent) are small entities. According to SBA reporting data, there were 4.44 million small business firms nationwide in 1992.<sup>162</sup> Below, we further describe and estimate the number of small entity licensees and regulatees that may be affected by the proposed rules, if adopted.

61. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be data the Commission publishes in its *Trends in Telephone Service* report.<sup>163</sup> In a recent news release, the Commission indicated that there are 4,144 interstate carriers.<sup>164</sup> 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 service, providers of telephone exchange service, and resellers.

62. 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.<sup>165</sup> Below, we discuss the total estimated number of telephone companies falling within the two categories and the number of

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<sup>156</sup> 5 U.S.C. § 601(4).

<sup>157</sup> 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

<sup>158</sup> 47 CFR § 1.1162

<sup>159</sup> 5 U.S.C. § 601(5).

<sup>160</sup> U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

<sup>161</sup> *Id.*

<sup>162</sup> 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

<sup>163</sup> FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

<sup>164</sup> FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

<sup>165</sup> 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).

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.

63. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."<sup>166</sup> The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.<sup>167</sup> We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

64. 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.<sup>168</sup> 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, covered specialized mobile radio providers, and resellers. It seems certain that some of these 3,497 telephone service firms may not qualify as small entities or small ILECs because they are not "independently owned and operated."<sup>169</sup> 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 new rules.

65. 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.<sup>170</sup> According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more

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<sup>166</sup> 5 U.S.C. § 601(3).

<sup>167</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 CFR § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. See, *e.g.*, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996), 61 FR 45476 (Aug. 29, 1996).

<sup>168</sup> 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).

<sup>169</sup> See generally 15 U.S.C. § 632(a)(1).

<sup>170</sup> 1992 Census, *supra*, at Firm Size 1-123.

than 1,500 persons.<sup>171</sup> 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 communications companies other than radiotelephone companies are small entities or small ILECs that may be affected by the new rules.

66. 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.<sup>172</sup> According to the most recent *Telecommunications Industry Revenue* data, 1,348 incumbent carriers reported that they were engaged in the provision of local exchange services.<sup>173</sup> 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 1,348 providers of local exchange service are small entities or small ILECs that may be affected by the new rules.

67. 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.<sup>174</sup> According to the most recent *Trends in Telephone Service* data, 171 carriers reported that they were engaged in the provision of interexchange services.<sup>175</sup> 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 171 small entity IXCs that may be affected by the new rules.

68. Competitive Access Providers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services

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<sup>171</sup> 13 CFR § 121.201, SIC code 4813.

<sup>172</sup> *Id.*

<sup>173</sup> FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

<sup>174</sup> 13 CFR § 121.201, SIC code 4813.

<sup>175</sup> FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

providers (CAPs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.<sup>176</sup> According to the most recent *Trends in Telephone Service* data, 212 CAP/CLECs carriers and 10 other LECs reported that they were engaged in the provision of competitive local exchange services.<sup>177</sup> 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 212 small entity CAPs and 10 other LECs that may be affected by the new rules.

69. Operator Service Providers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.<sup>178</sup> According to the most recent *Trends in Telephone Service* data, 24 carriers reported that they were engaged in the provision of operator services.<sup>179</sup> 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 operator service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 24 small entity operator service providers that may be affected by the new rules.

70. Pay Telephone Operators. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.<sup>180</sup> According to the most recent *Trends in Telephone Service* data, 615 carriers reported that they were engaged in the provision of pay telephone services.<sup>181</sup> 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 pay telephone operators that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 615 small entity pay telephone operators that may be affected by the new rules.

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<sup>176</sup> 13 CFR § 121.201, SIC code 4813.

<sup>177</sup> FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

<sup>178</sup> 13 CFR § 121.201, SIC code 4813.

<sup>179</sup> FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

<sup>180</sup> 13 CFR § 121.201, SIC code 4813.

<sup>181</sup> FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

71. 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.<sup>182</sup> According to the most recent *Trends in Telephone Service* data, 388 toll and 54 local entities reported that they were engaged in the resale of telephone service.<sup>183</sup> 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 388 small toll entity resellers and 54 small local entity resellers that may be affected by the new rules.

72. Toll-Free 800 and 800-Like Service Subscribers.<sup>184</sup> Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to 800 and 800-like service ("toll free") subscribers. The most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, and 877 numbers in use.<sup>185</sup> According to our most recent data, at the end of January 1999, the number of 800 numbers assigned was 7,692,955; the number of 888 numbers that had been assigned was 7,706,393; and the number of 877 numbers assigned was 1,946,538. We do not have data specifying the number of these subscribers 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 toll free subscribers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 7,692,955 small entity 800 subscribers, fewer than 7,706,393 small entity 888 subscribers, and fewer than 1,946,538 small entity 877 subscribers may be affected by the new rules.

73. 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.<sup>186</sup> According to the Census Bureau, only twelve radiotelephone firms from a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.<sup>187</sup> 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

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<sup>182</sup> 13 CFR § 121.201, SIC code 4813.

<sup>183</sup> FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

<sup>184</sup> We include all toll-free number subscribers in this category, including 888 number subscribers.

<sup>185</sup> FCC, CCB Industry Analysis Division, *FCC Releases, Study on Telephone Trends*, Tbls. 21.2, 21.3 and 21.4 (February 19, 1999).

<sup>186</sup> 13 CFR § 121.201, SIC code 4812.

<sup>187</sup> *1992 Census, Series UC92-S-1*, at Table 5, SIC code 4812.

1,758 cellular licenses; however, a cellular licensee may own several licenses. In addition, according to the most recent *Telecommunications Industry Revenue* data, 808 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.<sup>188</sup> 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 cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 808 small cellular service carriers that may be affected by the new rules.

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

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

75. *Liability Rules That Apply When a Subscriber Has Not Paid Charges.* Our liability rules retain the requirement that, upon allegation of a slam, the unauthorized carrier must absolve the subscriber of charges for up to thirty days following the slam, where the subscriber has not paid the unauthorized carrier. If the relevant governmental agency ultimately determines that the carrier change was authorized, and the limited absolution granted to the subscriber was therefore unwarranted, the carrier may re-bill the subscriber for charges incurred. The carrier has the option of re-rating the subscriber's calls from the unauthorized carrier's rates to the authorized carrier's rates using a 50% proxy, that is, reducing what the subscriber would have been billed by the unauthorized carrier by 50%. If, however, the subscriber would prefer an actual re-rating of the calls to the authorized carrier's rates, it can require that of the authorized carrier.

76. *Liability Rules That Apply When a Subscriber Has Paid Charges.* The revised liability rules require that, where the subscriber has paid the unauthorized carrier, the unauthorized carrier must forward 150% of the charges it collected from the subscriber to the authorized carrier. The authorized carrier will pay the subscriber one-third of that amount (50% of the original payment) and retain the remainder of the money received from the unauthorized carrier. Use of this proxy will reduce administrative burdens on carriers and, we believe, will adequately compensate most subscribers. When a subscriber believes that the 50% proxy refund or credit of the charges it paid is too low, it may request an actual re-rating from the authorized carrier and the authorized carrier may seek any additional money owed as a result of this actual re-rating from the unauthorized carrier.

77. *State Resolution of Most Slamming Complaints.* Designating appropriate state commissions, or this Commission, as the primary administrators of the slamming liability rules, rather than authorized carriers, is likely to reduce significantly the administrative burdens on carriers associated with these rules. Under this scheme, carriers must comply with certain notification requirements, listed below. In addition, a carrier that is the subject of a slamming

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<sup>188</sup> *Trends in Telephone Service*, Table 19.3 (March 2000).

complaint must respond to the complaints filed with the relevant governmental agency, either the appropriate state commission or this Commission. If the carrier denies the alleged slam, it must provide the relevant governmental agency with evidence to refute the allegation, such as a valid carrier change authorization from the subscriber.

78. *Notification Requirements.* We revise our rules in this *Order* to add certain notification requirements to facilitate the resolution of slamming complaints. These include a requirement that, when an executing carrier (typically, the LEC that effects a carrier change) learns about an alleged slam, it must immediately notify both the authorized and alleged unauthorized carriers of the slamming allegation and the identities of the carriers involved. Requiring the LECS to notify the authorized and alleged unauthorized carriers of each others' identities will enable the unauthorized carrier to forward to the authorized carrier all amounts needed to satisfy the remedies this *Order* requires.

79. The revised rules also add a requirement that an allegedly unauthorized carrier that chooses not to challenge the allegation of a slam and provides the subscriber with all the relief to which the subscriber would be entitled pursuant to our rules, had the subscriber prevailed on a slamming complaint, must inform the subscriber of the remedies our rules provide. In addition, that carrier must inform the subscriber that it has the option to file a complaint with the appropriate state commission, or this Commission, if the subscriber is not satisfied with the resolution of its dispute with the carrier.

80. Under the revised rules, any carrier that is informed by a subscriber of a slam must direct each unsatisfied subscriber to the proper state commission, or this Commission, for resolution of the slamming problem and inform such unsatisfied subscriber of all the relevant filing requirements. To execute this notification requirement, carriers will be obligated to periodically request from this Commission a list of states that have opted to administer federal slamming rules. This modest notification requirement will help achieve an important objective: minimizing the effort consumers must expend to resolve slamming disputes.

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

81. *Liability Rules That Apply When a Subscriber Has Not Paid Charges.* Our liability rules retain the requirement that, upon allegation of a slam, the unauthorized carrier must absolve the subscriber of charges for up to thirty days following the slam, where the subscriber has not paid the unauthorized carrier. If the relevant governmental agency ultimately determines that the carrier change was authorized, and the limited absolution granted to the subscriber was therefore unwarranted, the carrier may re-bill the subscriber for charges incurred. The carrier has the option of re-rating the subscriber's calls from the unauthorized carrier's rates to the authorized carrier's rates using a 50% proxy, that is, reducing what the subscriber would have been billed by the unauthorized carrier by 50%. If, however, the subscriber would prefer an actual re-rating of the calls to the authorized carrier's rates, it can require that of the authorized carrier.

82. *Liability Rules that Apply When a Subscriber Has Paid Charges.* The new requirement, under the revised liability rules, that an unauthorized carrier forward 150% of the

charges collected from the subscriber to the authorized carrier is more advantageous to authorized carriers than the remedy provided under the old rules. The authorized carrier generally will pay the subscriber one-third of that amount (50% of the original payment) and retain the remainder of the money received from the unauthorized carrier. When a subscriber believes that the 50% proxy refund or credit of the charges it paid is too low, it may request an actual re-rating from the authorized carrier and the authorized carrier may seek any additional money owed as a result of this actual re-rating from the unauthorized carrier. This modification of the Commission's liability scheme will alleviate some problems of lost revenues that authorized carriers, including small carriers, face when slammed and will make slamming even more unprofitable for unauthorized carriers.

83. *Re-rating.* Several authorized carriers raised concerns about the administrative burden that re-rating may place on them. Although we do not necessarily agree with carriers about the dimensions of this burden, we revise our rules to address these concerns. The revision allows the authorized carrier to provide a refund or credit to the subscriber of one-third of the payment the unauthorized carrier must make to the authorized carrier, which is prescribed to be 150% of the charges collected from the subscriber. Only when a subscriber believes that the 50% proxy refund or credit of the charges it paid is too low, and requests an actual re-rating, must the authorized carrier provide such re-rating.

84. *State Resolution of Most Slamming Complaints.* The modifications we adopt in this Order provide that disputes between alleged slamming carriers and subscribers now will be brought before an appropriate state commission, or this Commission in cases where the state has not elected to administer these rules, rather than to the authorized carriers, as provided in the *Section 258 Order*. Although we considered the third-party administrator alternative proposed by certain carriers, the lack of a consensus among industry, state regulators, and consumer groups left the Commission with concerns about the efficacy of such a plan. Designating states as the primary adjudicators of slamming complaints, rather than authorized carriers, lessens the administrative burden on authorized carriers, including small carriers. By placing these disputes before a neutral arbiter with experience in resolving slamming complaints and resources to do so expeditiously, the new administrative scheme will benefit carriers and subscribers, both groups that include small businesses.

85. *Notification Requirements.* We believe that the modest notification requirements we have adopted in this Order are necessary to ensure the seamless administration of slamming complaints under this scheme and will not impose an undue burden on carriers who are small businesses. These include a requirement that, when an executing carrier (typically, the LEC that effects a carrier change) learns about an alleged slam, it must immediately notify both the authorized and alleged unauthorized carriers of the slamming allegation and the identities of the carriers involved. This requirement, as pointed out in comments and in the petition for stay filed in the D.C. Circuit, is important to the functioning of the liability mechanism.<sup>189</sup> With this information, the unauthorized carrier will be able to forward to the authorized carrier all amounts needed to satisfy the remedies this Order requires, and the authorized carrier will be able to bring

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<sup>189</sup> See *supra* ¶ 35 & nn.93, 94

appropriate action against the unauthorized carrier, if necessary. The industry has already taken steps to facilitate the transfer of this information between carriers.<sup>190</sup>

86. The revised rules also add a requirement that an allegedly unauthorized carrier that chooses not to challenge the allegation of a slam and provides the subscriber with all the relief to which the subscriber would be entitled pursuant to our rules, had the subscriber prevailed on a slamming complaint, must inform the subscriber of the remedies our rules provide. This requirement will ensure that the rules do not discourage carriers from providing subscribers with the most expedient relief possible. In addition, the unauthorized carrier in this situation must inform the subscriber of the subscriber's ability to file a complaint with the appropriate state commission, or this Commission, if it is unsatisfied with the resolution of its dispute with the carrier.

87. Under the revised rules, any carrier that is informed by a subscriber of a slam must direct each unsatisfied subscriber to the proper state commission, or this Commission, for resolution of the slamming problem and inform such unsatisfied subscriber of all the relevant filing requirements. To execute this modest notification requirement, carriers will be obligated to periodically request from this Commission a list of states that have opted to administer federal slamming rules. This notification requirement will achieve an important objective: minimizing the effort consumers must expend to resolve slamming disputes.

#### **6. Report to Congress.**

88. The Commission will send a copy of the *Order*, including this SFRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>191</sup> In addition, the Commission will send a copy of the *Order*, including the SFRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and SFRFA (or summaries thereof) will also be published in the Federal Register.<sup>192</sup>

#### **B. Final Paperwork Reduction Act Analysis.**

89. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the Act, and will go into effect upon announcement in the Federal Register of OMB approval.

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<sup>190</sup> See *supra* ¶ 35.

<sup>191</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>192</sup> See 5 U.S.C. § 604(b).

## VI. ORDERING CLAUSES

90. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 206, 207, 208, and 258 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 206, 207, 208, 258 and section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, that the petitions for reconsideration or clarification filed by AT&T Corp., Excel Telecommunications, Inc., Frontier Corp., GTE Service Corp., MediaOne Group, National Association of State Utility Consumer Advocates, National Telephone Cooperative Association, New York State Consumer Protection Board Petition for Reconsideration, RCN Telecom Services, Inc., Rural LECs, SBC Communications, Inc., and Sprint Corp. ARE GRANTED IN PART AND DENIED IN PART to the extent discussed above.

91. IT IS FURTHER ORDERED that the provisions of sections 0.141, 64.1100, 64.1150, 64.1160, 64.1170, and 64.1180 ARE AMENDED in accordance with our discussion above and as described in Appendix A, and that such rules shall be effective 30 days from publication of a summary of the text in the Federal Register or on the date when the requirements adopted in the Second Report and Order and Further Notice of Proposed Rulemaking in this proceeding become effective, whichever is later. The collections of information contained in sections 64.1150, 64.1160, and 64.1170 are contingent upon approval by the Office of Management and Budget. The procedures and relief described in these sections shall only be available to complainants who allege that the unauthorized carrier change occurred on or after the effective date of this section.

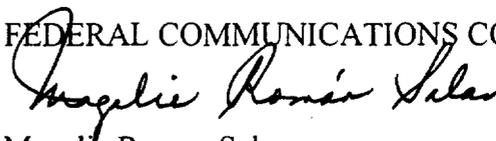
92. IT IS FURTHER ORDERED that sections 1.719, 64.1110, 64.1120, 64.1140, and 64.1160 ARE ENACTED in accordance with our discussion above, and that these rules are effective 30 days from publication of a summary of the text in the Federal Register or on the date when the requirements adopted in the Second Report and Order and Further Notice of Proposed Rulemaking in this proceeding become effective, whichever is later. The collections of information contained in sections 1.719, 64.1110, and 64.1140 are contingent upon approval by the Office of Management and Budget. The procedures and relief described in section 1.719 shall only be available to complainants who allege that the unauthorized carrier change occurred on or after the effective date of this section.

93. IT IS FURTHER ORDERED, pursuant to authority contained in Sections 1, 4, and 258, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 258, that the waiver request filed by AT&T Corp., MCI WorldCom, Inc., Sprint Corp., Competitive Telecommunications Assn., Telecommunications Resellers Assn., Excel Telecommunications, Inc., Qwest Communications Corp., and Frontier Corp. on March 30, 1999 IS DENIED.

94. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Order*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

95. IT IS FURTHER ORDERED that the Joint Parties' Motion for Extension of the Effective Date of the Rules or, In the Alternative, For a Stay, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary