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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

AT&T COMMENTS ON RECONSIDERATION PETITIONS

Pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, and the Commission's September 11, 2000 Public Notice in this proceeding,[1] AT&T Corp. ("AT&T") submits these comments on the petitions filed by Sprint Corporation ("Sprint") and Worldcom for reconsideration of the Commission's First Order on Reconsideration ("First Reconsideration Order") in the above-captioned rulemaking.[2]

Both Sprint and Worldcom (pp. 8-10) seek reconsideration of the Commission's procedural rules for resolution of slamming claims by state public utilities commissions ("PUCs") and (where a state has not opted to administer those rules) by the

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1 Report No. 2436, "Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings," September 11, 2000, published at 65 Fed. Reg. 55923 (September 15, 2000).

2 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, 15 FCC Rcd 8158 (2000)("First Reconsideration Order").

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Commission itself. Specifically, both petitioners point out that Section 64.1150 of the Commission's Rules (47 C.F.R. § 64.1150) requires carriers accused of slamming to provide "valid proof of verification of the [end user's] carrier change," in the form of a letter of authorization ("LOA") or evidence of third party verification ("TPV") of a telemarketed carrier selection.[3] However, as Sprint and Worldcom correctly point out, many consumers become presubscribed to an interexchange carrier ("IXC") through communications by those customers directly with a local exchange carrier ("LEC"), and that those transactions (referred to here as "LEC connects") do not result in the creation by the IXC of either an LOA or a TPV record.[4] Sprint (p. 4) and Worldcom (p. 9) therefore express concern that, under the Commission's current procedural rule, they and other IXCs may be found liable for slamming of such "LEC connect" customers due

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3 See 47 C.F.R. § 64.1150(d), see also 47 C.F.R. §§ 64.1120, 64.1130 (prescribing verification mechanisms and form of LOA). Since the adoption of these rules, the Commission has mandated voice recordings of TPV transactions. See 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, Third Report and Order and Second Order on Reconsideration, FCC 00-255, released August 15, 2000, ¶ 41; proposed 47 C.F.R. § 64.112(c)(2)(iv).

4 In these transactions, the LEC makes changes in its end offices and/or tandem switching systems to route the end user's "1+" and "0+" calls to a trunk group for transport to the IXC's point of presence ("POP"). The LEC may also provide information to the IXC after-the-fact via the Customer Account Records Exchange ("CARE") process, indicating that the end user has become presubscribed to that carrier through a transaction with the LEC. However, participation in the CARE process is not obligatory, and in many cases IXCs such as AT&T receive no notice (or delayed notice) from the LEC of the end user's presubscription, even though "1+" and "0+" calls from that customer are already being completed over the IXC's network.

simply to their inability to provide a LOA or TPV record for those carrier changes in the event of a dispute.

Sprint and Worldcom are clearly correct that Section 64.1150 in its current form is inartfully worded, and that it fails to take account of the realities of the carrier selection process. Substantial revisions to the procedures set forth there are manifestly warranted, both to clarify the rule's requirements and to assure fair adjudication of carrier selection disputes by state agencies and the Commission. However, even as currently worded the Commission's procedural regulation cannot lawfully impose liability upon a carrier where there has been no breach by that entity of its duties under either the statutes upon which the Commission's regulatory scheme is predicated or the substantive regulations adopted by the Commission to implement that statutory scheme.

Specifically, Section 258 of the Communications Act (47 U.S.C. § 258), which is the principal statutory predicate for the Commission's revised slamming regulations, prohibits a telecommunications carrier from "submit[ting] . . . a change in a subscriber's selection of a provider of . . . telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." Where a customer becomes presubscribed to an IXC as the result of a "LEC connect" transaction, the selected carrier does not submit *any* change in that customer's preferred carrier ("PC") to the executing carrier. It is thus clear that in these circumstances the IXC cannot be liable for any violation of Section 258[5]

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[5] It is likewise evident that by virtue of a "LEC connect" transaction the IXC cannot be deemed to have violated either Section 201(b) of Communications Act, (prohibiting unjust and unreasonable practices) or Section 202(a) (prohibiting

(footnote continued on following page)

The Commission's substantive regulations implementing this statutory mandate likewise make abundantly clear that no liability attaches to an IXC in a "LEC connect" transaction. Thus, Section 64.1120(a) of those rules provides that "no telecommunications carrier shall submit or execute" a carrier change except in accordance with the Commission's prescribed procedures; no such conduct by an IXC occurs where an end user becomes presubscribed as the result of a "LEC connect." Similarly, Section 64.1120(c) prohibits a telecommunications carrier from "submit[ting] a preferred carrier change order unless and until the order has been confirmed" in accordance with one of the Commission's prescribed verification procedures. Again, no such prohibited conduct by the IXC occurs where a preferred carrier change results from a "LEC connect" transaction.[6] Not surprisingly, therefore, an IXC that becomes the customer's presubscribed carrier through such a transaction does not satisfy the Commission's definition of an "unauthorized carrier":

> "The term *unauthorized carrier* is generally any telecommunications carrier that submits a change, on behalf of a subscriber, in the sub-

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(Footnote continued from preceding page)

unreasonable discrimination in the provision of common carrier services), which are the other statutory predicates for the Commission's slamming rules. All that an IXC has done in such circumstances is process calls routed to it as the result of the LEC's execution of a preferred carrier change based on its transaction with the end user.

6 See also 47 C.F.R. § 64.1140(a)("Carrier Liability for Charges")(prescribing such liability for "[a]ny submitting carrier that fails to comply with the procedures prescribed in this part)(emphasis supplied); 47 C.F.R. § 64.1100(a)(defining "submitting carrier" as "generally any telecommunications carrier that requests on behalf of a subscriber that the subscriber's telecommunications carrier be changed"). These provisions of the Commission's rules are not triggered where a customer becomes presubscribed to an IXC as the result of a "LEC connect."

> scriber's selection of a provider of telecommunications service but fails to obtain the subscriber's authorization verified in accordance with the procedures specified in this part [of the Commission's rules]."

See 47 C.F.R. § 64.1100 (d)(emphasis in original).

Nothing in the First Reconsideration Order purported to modify – much less to so radically change – the substantive liability provisions described above.[7] Rather, as the face of the order makes clear (15 FCC Rcd at 8158 (¶ 1)), the Commission in that decision simply substituted resolution of slamming claims by the PUCs or, alternatively, by the Commission for the grossly inequitable method previously prescribed in the Second Report and Order,[8] under which an accused IXC's competitor would have performed the slamming determination.

In sum, under the enabling statutes and the Commission's substantive rules implementing those statutes, IXCs may not be held liable for slamming in cases involving "LEC connect" preferred carrier changes, despite the IXC's inability to provide either an LOA or a TPV record for such transactions. The Sprint and Worldcom reconsideration petitions are thus superfluous, insofar as they appear to be premised on

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7 Indeed, any such construction of the First Reconsideration Order would be especially problematic, because the Commission neither provided interested parties notice of such a sea change in the liability provisions nor an opportunity for those parties to submit arguments concerning any such change. See Administrative Procedure Act, 5 U.S.C. § 553. But given the Commission's stated scope of that decision, there is no need to construe the First Reconsideration Order in a manner that would raise such serious issues regarding its legality.

8 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, 14 FCC Rcd 1508 (1998)("Second Report and Order").

the assumption that such liability may be imposed upon an IXC in the absence of any revision to the First Reconsideration Order.[9]

Nevertheless, the defect in the Commission's procedural rules described in both reconsideration petitions starkly demonstrates the imperative necessity of an immediate modification of the Commission's prescribed adjudicatory procedure to require "executing carriers" -- who in the overwhelming majority of cases are LECs -- to timely provide complete information necessary for a slamming determination by the state PUCs and/or the Commission.[10] First, these local service providers have exclusive custody and control of information regarding the circumstances under which a customer came to become presubscribed to an IXC in a "LEC connect" transaction.[11] Second, in "LEC connect" cases these local carriers must be made parties to the slamming resolution process to assure that affected consumers can obtain complete relief for any occurrence

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9 Worldcom is therefore correct in noting (at 9) that "the agency adjudicating the [slamming complaint] must first inquire into and have evidence of a [preferred carrier] change request as an initial matter, before finding a carrier guilty of a slam."

10 See 47 C.F.R. § 64.1100(b)(defining "executing carrier" as "generally any telecommunications carrier that effects a request that a subscriber's telecommunications carrier be changed").

11 In fact, LECs may often have exclusive access to information necessary to establish how, and under what circumstances, an end user has become presubscribed to an IXC. As explained above, to the extent that a LEC participates in the CARE process, an IXC may receive a Transaction Code Status Indicator ("TCSI") denoting that a customer has become presubscribed to the IXC as the result of a "LEC connect" transaction. However, because many LECs do not participate in the non-mandatory CARE process, IXCs often receive no information to reflect that such a transaction has occurred; in these instances, an IXC's records merely will not reflect that it submitted a preferred carrier change order to the LEC with respect to the customer.

of slamming from the party actually responsible for that conduct, without the necessity of instituting duplicative or successive proceedings.

In the longer term, moreover, the issue raised by these petitions underscores the urgent need for the Commission to adopt and implement competitively neutral administration of the carrier selection process. As Worldcom points out (p. 9), absent such relief LECs that already actively compete with IXCs in the provision of intraLATA toll services (and which also actively or potentially will compete with IXCs in the provision of interLATA service) will retain powerful incentives, and a corresponding ability, to "tilt" the marketplace by the manner in which they implement "LEC connect" transactions. Neutral administration of the carrier selection process will obviate the serious potential distortions of the competitive marketplace that is otherwise certain to occur in these circumstances.

Worldcom's petition (p. 10) also requests "clarification" that amounts refunded to an end user by the alleged unauthorized carrier will nevertheless be treated as "unpaid" for purposes of the liability rules where the customer later files a slamming complaint for resolution by an PUC or the Commission. Alternatively, Worldcom apparently requests (p. 11) that the Commission clarify that amounts owed by an unauthorized carrier to the customer as the result of a liability determination will be reduced by the amount of any prior refunds paid by the unauthorized carrier to that customer.

AT&T does not object to Worldcom's request, insofar as it would operate to reduce or eliminate a double recovery by the customer of sums due to that subscriber. Crediting the unauthorized carrier in these circumstances accords fully with prior

decisions which have recognized the defendant's right of set-off in complaint proceedings.[12] However, if it grants Worldcom's requested relief the Commission must take steps to assure that the refund by the unauthorized carrier does not impair the right of the customer's authorized carrier in the event of a liability determination to receive an amount at least equal to all sums paid by that customer, as provided for in Section 258(b) of the Communications Act and the Commission's implementing regulations.[13] Such a result would be squarely at odds with one of the principal underlying legislative purpose of Section 258, which was to compensate the authorized carrier for the unlawful diversion of its revenues resulting from a slam.[14]

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12 See, e.g., Ohio Bell Telephone Co. v. FCC, 949 F.2d 864, 872-74 (6th Cir. 1991)

13 See 47 C.F.R. § 64.1140(a)(making the unauthorized submitting carrier liable to the subscriber's properly authorized carrier "in an amount equal to 150% of all charges paid to the submitting telecommunications carrier by such subscriber after such violation"). Worldcom's petition (pp. 11-13) asserts that this provision of the Commission's rules exceeds what is necessary or appropriate to implement Section 258, insofar as it provides for an award to the authorized carrier of more than 100 percent of the customer's payment.

AT&T has not opposed in principle the award of a liquidated sum to the authorized carrier in instances of slamming to effectuate Section 258. See AT&T Comments on the December 23, 1998 Further Notice of Proposed Rulemaking, filed March 18, 1999 in CC Docket No. 94-129, pp. 31-32. But Worldcom ignores that under the Commission's procedure the 50 percent increment to which Worldcom objects is required to be turned over by the authorized carrier to the consumer. Thus, those sums do not accrue to the authorized carrier, which must in fact absorb the administrative costs of remitting those amounts to the consumer (for which the authorized carrier receives no compensation). The Commission's procedure is thus unfair to the authorized carrier, not the unauthorized carrier as Worldcom asserts.

14 See Conference Report on Telecommunications Act of 1996, H.R. Report 104-458 (104th Cong., 2d Sess.) at 136 (noting that unauthorized carrier "must reimburse the original carrier for forgone revenues").

Worldcom's petition (p. 14) further seeks modification of the Commission's procedures to require that customers who allege that they have been subject to slamming must file a complaint of such misconduct with the PUC or the Commission, as appropriate, as a precondition to absolution of charges by the alleged unauthorized carrier. As Worldcom correctly points out (p. 15), such a revision to the Commission's requirements would create appropriate economic incentives for customers promptly to initiate such complaints, unlike the current process in which absolution is provided prior to the filing of a complaint and it is unclear when -- or, indeed, even whether -- the customer will initiate such a proceeding. Carriers should not be subjected to the additional delay, billing costs, and risks of non-collection for rebilling customers who have not perfected their slamming claims by filing a complaint with a state PUC or the Commission.[15]

Finally, AT&T strongly supports Worldcom's proposal (pp. 5-8) that LECs and authorized carriers be required to direct customers who have alleged a slam to contact the alleged unauthorized carrier with their claims in the first instance, in addition to informing those customers of their legal rights under the Commission's rules. As Worldcom correctly points out, the alleged unauthorized carrier is uniquely positioned to determine the circumstances under which a customer became presubscribed to that carrier, and to correct or dispel misunderstandings on the part of the customer regarding those transactions. Additionally, the alleged unauthorized carrier is best situated to

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15 The change that Worldcom requests will also provide an effective incentive for state PUCs and the Commission to expeditiously notify the alleged unauthorized carrier that a proceeding has been initiated by the consumer.

implement any bill adjustments that may be warranted under those circumstances, either in the form of absolution or as an outright credit to, or adjustment of, the customer's bill. Absent such a requirement for LECs and authorized carriers to direct customers to the alleged unauthorized carrier, many consumers are certain to experience unnecessary delays in obtaining any adjustments to their bills, because the alleged unauthorized carrier will not learn of the carrier selection dispute until after a complaint has been filed with the Commission or the state PUCs. Moreover, these regulatory agencies can expect to receive many consumer complaints that could have been obviated if the alleged unauthorized carrier had been promptly made aware of those allegations. The relief Worldcom proposes would thus avoid unnecessary burdens on scarce administrative resources. For these reasons, the Commission should grant Worldcom's reconsideration petition and require LECs and authorized carriers to direct consumers to the alleged unauthorized carrier, as well as to inform them of their rights under the Commission's rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Theresa Donatiello Neidich, do hereby certify that on this 02nd day of October, 2000 a copy of the foregoing "AT&T Comments on Reconsideration Petitions" was served by US first class mail, postage prepaid, on the parties named on the attached service list.

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