

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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| <i>In the Matter of</i> |) | |
| |) | |
| Implementation of the Subscriber Carrier |) | |
| Selection Changes Provisions of |) | |
| The Telecommunications Act of 1996 |) | CC Docket No. 94-129 |
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| Polices and Rules Concerning |) | |
| Unauthorized Changes of Consumers' |) | |
| Long Distance Carriers |) | |
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**VOICELOG LLC'S PETITION FOR
PARTIAL STAY PENDING RECONSIDERATION**

Pursuant to Section 1.429(k) of the Commission's rules, VoiceLog LLC ("VoiceLog"), a third-party verification ("TPV") services provider, petitions the Commission to stay, in part, pending reconsideration, the effective date of Section 64.1120(3)(ii), as adopted in the *Third Report and Order*.¹ VoiceLog is not a carrier or carrier's sales representative, but provides TPV services to carriers and carrier's sales representatives. At present, VoiceLog provides TPV services to approximately 200 carriers, the overwhelming majority of whom are very small carriers. VoiceLog itself is a very small business.

VoiceLog requests that the Commission stay application of the rule requiring a carrier or carrier's sales representative to drop off the call after initiating a three-way conference call or a call through an automated verification system, but only to the extent that the rule would prohibit the carrier or carrier's sales representative from remaining silently on the line for the purposes of

¹ *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, FCC 00-255 (rel. Aug. 15, 2000) ("*Third Report and Order*").

assisting the subscriber in reaching a live person or terminating the call connection.² A copy of VoiceLog's petition for reconsideration, which is being separately filed concurrently with this petition, is attached hereto. By granting this partial stay, the Commission will accomplish the consumer protection goals served by the "drop off" requirement, but avoid imposing substantial, irreparable and unnecessary costs on VoiceLog, the carriers and marketing agents for whom VoiceLog provides TPV services, and consumers who would face greater difficulty implementing their decision to switch carriers.

ARGUMENT

A stay is warranted if the moving party can demonstrate that (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent a stay; (3) interested parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay.³

I. VOICELOG IS LIKELY TO PREVAIL ON THE MERITS.

As demonstrated in the attached petition for reconsideration, the Commission failed to consider alternatives to the drop off rule or to explain why comments objecting to the rule were not discussed. The law is absolutely clear that, "[f]or an agency's decisionmaking to be rational, it must respond to significant points raised during the public comment period. . . . [and] must also consider significant alternatives to the course it ultimately chooses."⁴ In addition, the Regulatory Flexibility Act requires the Commission to consider why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small

² The drop off rule provides that "[a] carrier or a carrier's sales representative initiating a three-way conference call or a call through an automated verification system must drop off the call once the three-way connection has been established." 47 C.F.R. § 64.1120(3)(ii).

³ *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958); *Application of Cumulus Licensing Corp. (Assignor) and Clear Channel Broadcasting Licenses, Inc. (Assignee)*, FCC 00-391 ¶ 5 (rel. Jan. 17, 2001).

⁴ *Allied Local and Regional Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (DC Cir. 2000).

entities was rejected.⁵ In the *Third Report and Order*, the Commission did not even consider permitting a silent sales representative to remain on the line or to provide information requested by the consumer, let alone proffer any reasons for rejecting more limited and narrowly tailored alternatives to the drop off rule. The failure to address significant points raised by the public and the lack of any evidentiary support for a broad, *per se* prohibition on sales agents remaining on the line during TPV ensures that VoiceLog will be successful on the merits.

Moreover, permitting the sales representative to remain silently on the line, to assist consumers in reaching a live operator, and to assist consumers in terminating TPV sessions represents a better balance between the consumer's interest in being protected against undue influence during the verification process and the consumer's interest in having all the information they need to make an informed choice to switch carriers at the time they are exercising and verifying that choice. Grant of the partial stay will reduce the number of sales terminated because the consumer becomes confused during the verification process, or has difficulty navigating to reach the live-operator alternative required for automated verification. Many consumers still have trouble using touchpad menu prompts, and may find such assistance useful, without any risk of undue influence. In addition, compliance with the requested stay can be easily enforced by auditing the audio recordings that are now required by rule.

II. VOICELOG WILL BE IRREPARABLY HARMED IF THE STAY IS NOT GRANTED.

Although VoiceLog is not itself a regulated carrier, nor does it act as a sales representative for a regulated carrier, VoiceLog will suffer irreparable harm in the absence of the stay because compliance difficulties will force carriers to shift away from TPV—and in particular, automated TPV provided by VoiceLog—to letters of authorization or other forms of

⁵ 5 U.S.C. § 604(a)(5).

verification provided by VoiceLog's competitors. This harm is unnecessary because the Commission can fully accomplish its consumer protection objectives without imposing these harms.

As noted in VoiceLog's petition for reconsideration, many small carriers or marketing agents do not have the technical ability to comply with the drop off requirement,⁶ and in some cases are in areas where they are unable to procure the services necessary to allow the party initiating the conference call to drop the call without terminating it. Thus, to use automated TPV, such a carrier or its agent would have to remain on the line, but put down the phone. For these carriers or agents, the drop off rule presents a significant barrier to implementation of TPV, making other methods of verification, such as using letters of authorization, significantly more attractive.⁷ Because the drop off rule precludes the sales representative even from remaining on the line to help the consumer reach the live operator or to terminate the TPV so that, for example, the sales representative can answer the consumer's questions, the drop off rule needlessly hampers the use of TPV, particularly automated TPV, as compared with other forms of verification, such as LOAs. By comparison, the Commission has not imposed a requirement that a LOA be executed outside the presence of the carrier or its sales representative. VoiceLog will suffer irreparable harm as its customers are pulled away from using VoiceLog's TPV products and toward other forms of verification, without any increase in consumer protection.

III. NO OTHER INTERESTED PARTY WILL BE HARMED IF A STAY IS GRANTED.

VoiceLog is asking for a limited interim order that will fully satisfy the Commission's objective without completely compromising the TPV process. Because there is no opportunity

⁶ See Letter from Tony Sauer, Manager, Isterra, to Larry Leiken VoiceLog LLC (March 26, 2001) (attached hereto).

⁷ *Id.*

for undue influence if the sales representative is allowed to stay silently on the line, to provide assistance in reaching the live operator, or to terminate the verification, the relief VoiceLog seeks cannot possibly harm the public, which is the “party” the Commission intended the drop off rule to protect.

IV. THE PUBLIC INTEREST FAVORS GRANT OF A STAY.

Granting the partial stay requested by VoiceLog will promote the public interest by protecting consumers against undue influence during third party verification, but provide sufficient flexibility so that a carrier or marketing agent can provide minimal, but crucial, assistance to the consumer. By permitting the sales agent to remain on the line, the stay would allow a consumer who becomes confused to be able to terminate the verification, obtain the needed clarification or information from the sales agent, and then initiate a new verification. Similarly, if the agent is on the line, and the customer has difficulty reaching the live operator or forgets that there is a live-operator option, the agent can help direct the consumer to the live operator. In these circumstances, the sales agent’s presence will facilitate informed choice by the consumer without risking undue influence.

If the sales agent is not on the line, the consumer will likely be unable to reconnect to the sales agent to obtain the necessary information, and even where the consumer is reconnected to the marketing agent’s call center, it is very unlikely that the consumer will be connected to the sales agent the consumer had worked with, and who is in the best position to provide the assistance that consumer needs. Likewise, if a consumer has difficulty reaching the live operator or forgets about that option, and the sales agent is not on the line, the consumer will simply hang-up. Taking away a consumer’s choice to talk to a sales agent or to get assistance in reaching the

live operator is not pro-consumer, and is thus directly contrary to the purpose the drop off requirement is intended to serve.

In addition to directly assisting consumers, granting the partial stay will permit carriers or their sales representatives who cannot drop off the line after initiating third party verification to continue to use this cost-effective and efficient verification method, without increasing the risk of undue influence. Automated third-party verification is extremely cost-effective, and these carriers should not be needlessly denied the use of this tool, which would ultimately have the effect of increasing the cost of their services for consumers.

CONCLUSION

Because VoiceLog's request satisfies the four factors that the Commission must consider in deciding whether a stay is appropriate, VoiceLog requests that the Commission expeditiously stay the *Third Report and Order* to the extent and in the manner discussed herein, pending full reconsideration on the merits.

Respectfully submitted,

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March 28, 2001

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VOICELOG LLC'S PETITION FOR RECONSIDERATION

VoiceLog LLC (“VoiceLog”), a third-party verification (“TPV”) services provider, requests reconsideration of the Commission’s decision to require a carrier or a carrier’s sales representative initiating a three-way conference call or a call through an automated verification system to drop off the call once the three-way connection has been established.¹ VoiceLog fully supports the goal of this requirement, which is meant to ensure that consumers are not misled by sales agents into verifying their desire to change carriers. As adopted, however, the requirement is overbroad, impractical, and unenforceable. The Commission failed to consider significant, effective, and enforceable alternatives proposed by several commenters, including VoiceLog, that would fully accomplish the objectives of verification while minimizing the adverse economic impact of such regulation, and preserving the utility of TPV as a verification mechanism. Reconsideration is therefore required in order to give full consideration to the “drop

¹ *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, FCC 00-255 at ¶ 38 (rel. Aug. 15, 2000) (“*Third Report and Order*”). VoiceLog does not market telecommunications services.

off” rule’s impact on TPV as a verification method and its effect on consumers and small entities, and to consider the adoption of the more practical, enforceable, and narrowly tailored alternatives that have been proposed.

BACKGROUND

Section 258 of the Communications Act prohibits carriers from changing a subscriber’s selection of telephone providers without verification.² The purpose of verification is to prevent “slamming,” i.e., a change in a subscriber’s carrier selection without that subscriber’s knowledge or explicit authorization.³ Regardless of the solicitation method used, a carrier may verify a subscriber’s assent to a change in carriers by written letter of authorization (“LOA”), electronic authorization, or TPV.⁴

Prior to adoption of the *Third Report and Order*, there were no particular procedures for obtaining TPV. The Commission’s rules required that the TPV provider be independent of both the carrier and any telemarketing agent, that the third-party provider not be compensated in a manner that creates incentives to engage in deceptive verification practices, and that the TPV clearly and conspicuously confirm the previously obtained authorization to switch carriers.⁵ In the *Further NPRM*, the Commission sought comment on whether it should impose additional procedures on TPV, including whether the carrier’s sales representative should be prohibited from remaining on the line while the third-party verifies the subscriber’s intent.

VoiceLog and several other parties filed comments in support of permitting the sales representative to remain on the line during a three-way conference call with the subscriber and

² 47 U.S.C. § 258.

³ *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd. 1508 ¶ 1 (1998) (“*Further NPRM*”).

⁴ *Id.* at ¶ 78.

⁵ *Id.* at ¶ 165; 47 C.F.R. § 64.1120(c)(3) (2000).

the third-party verifier.⁶ In its comments on this issue, VoiceLog noted that there are legitimate reasons for the participation of sales representatives in TPV calls. In particular, VoiceLog stated that carrier participation provides the customer with an opportunity to clarify any questions he or she may have about the carrier's service.⁷ VoiceLog also pointed out that the goal of all verification—ensuring the consumer intended to switch carriers—can be met without requiring the sales representative to completely drop off the line.⁸ Finally, VoiceLog illustrated the practical difficulties of implementing a drop off requirement, including the fact that many smaller carriers do not have the ability to do a “hot transfer,” and that drop off requirements are impossible to enforce.⁹

In contrast to VoiceLog's comments, the comments cited by the Commission in support of the drop off requirement wholly failed to provide any rational basis or evidentiary support for the “drop off” rule.¹⁰ None of the cited comments offered any support for the rule beyond a bare assertion, in a single sentence, that the sales agent's presence would unduly influence the subscriber during the verification process.

Nonetheless, in the *Third Report and Order*, the Commission adopted the “drop off” rule without any discussion of the myriad issues raised by commenters opposing it. The Commission

⁶ See, e.g., Reply Comments of VoiceLog LLC (filed May 3, 1999); Comments of RCN Telecom Services, Inc.; Comments of Sprint Corporation; Comments of Bell Atlantic; Comments of Cable & Wireless.

⁷ Reply Comments of VoiceLog LLC at 4.

⁸ *Id.* at 2, 4.

⁹ *Id.* at 2. VoiceLog supported requiring that all TPV sessions be audio recorded and conducted in the same language as the solicitation. *Id.* at 3. The Commission adopted both requirements. *Third Report and Order* at ¶ 41.

¹⁰ See Comments of the Nat'l Ass'n of Attorneys Gen. Telecomm. Subcommittee at 17 (filed Sep. 11, 1997) (“NAAG”); Comments of the Montana Pub. Serv. Comm'n at 3; Comments of the New York State Dept. of Pub. Serv. at 6; Comments of the Nat. Ass'n of State Utility Consumer Advocates at 10; Comments of Teltrust, Inc. at 3. It should be noted that Teltrust, Inc. is a live-operator TPV provider with a strong economic incentive to argue against sales agent participation in the automated TPV process, and that the NAAG did not even file comments in response to the *Further NPRM*.

asserted—without any citation, analysis or record support—that “[o]nce the connection has been established between the subscriber and the third party verifier, there is no need for the carrier’s sales representative to stay on the line.”¹¹ The Commission cursorily concluded—again without any citation, analysis or record support—that the drop off rule “would help ensure the independence of the third party verification process . . . without burdening the verification process.”¹² Significantly, the Commission failed to respond to—or even acknowledge—VoiceLog’s observation that the sales agent’s silent presence on the line presents no opportunity to influence the outcome of the TPV, and that in many instances, the sales agent may be able to provide helpful, but neutral, assistance that facilitates, rather than frustrates, consumer choice.¹³

DISCUSSION

I. AS ADOPTED, THE DROP OFF RULE IS OVERBROAD, IMPRACTICAL, UNENFORCEABLE, NOT COMPETITIVELY NEUTRAL, AND THEREFORE, ARBITRARY AND CAPRICIOUS.

The rule requiring a sales agent to completely drop off a call after initiating the connection between the consumer and the TPV provider is overbroad, impractical, and unenforceable. The Commission’s stated and laudable objective in adopting this rule was to “prevent the carrier’s sales representative from improperly influencing subscribers.”¹⁴ The Commission, however, never articulated how the sales agent’s mere presence on the line would *per se* create an improper influence on consumer choice. The rare instance in which a sales agent does engage in improper influence usually results from some affirmative act on the part of the sales agent, such as misrepresenting a TPV question or supplying misleading information.

¹¹ *Third Report and Order* at ¶ 38.

¹² *Id.*

¹³ Reply Comments of VoiceLog LLC at 2.

¹⁴ *Third Report and Order* at ¶ 38.

The presence of the sales agent on the line is not *per se* misleading or coercive, and the Commission did not cite any evidence to support such a *per se* determination.

In its reply comments—comments completely ignored by the Commission—VoiceLog expressly pointed out the overbreadth of the proposed drop off requirement. As VoiceLog observed, there is no opportunity for undue influence if the sales representative is allowed to stay silently on the line, providing assistance in reaching the live operator.¹⁵ Likewise, there is no undue influence when a sales representative provides only neutral, factual information in response to the subscriber’s specific request for assistance or information from the agent.¹⁶ Neither of these examples constitutes the type of improper influence—such as encouraging the customer to give a particular answer—that the Commission seeks to prohibit. The drop off rule would nonetheless foreclose such beneficial participation by the sales agent right along with less benign behavior, denying consumers information that may help them make an informed choice.

Not only is the drop off rule overbroad, it is utterly impractical. Many of the smaller carriers or agents VoiceLog serves simply do not have the sophisticated central office equipment necessary to allow a sales representative to initiate a three-way conference call and then drop off the line.¹⁷ For these carriers, “dropping off” the line would require putting the line on hold until the call is finished. But, since the sales representative would have no way of knowing when the TPV is complete, the sales representative would have to periodically recheck the line to see if the subscriber is finished. This is extremely inefficient (resulting in an increase in costs for the carrier), and may even be a technical violation of the drop off rule.

¹⁵ Reply Comments of VoiceLog LLC at 2.

¹⁶ *Id.*

¹⁷ *Id.*; see also Letter from Tony Sauer, Manager, Isterra, to Larry Leiken VoiceLog LLC (March 26, 2001) (attached hereto).

The drop off rule is also impossible to enforce. The primary method of determining whether the sales representative remains on the line is the use of an audio recording of the verification transaction. With this method, if the sales representative is silent during the call, the audio recording will not reveal whether or not the sales representative remained on the line.¹⁸ Moreover, as long as the dialogue between the customer and the other “voice” is limited to information—such as repeating the question—that could be provided by the TPV provider’s live operator, the recording will not create a record sufficient to determine whether the voice is that of the live operator or the carrier’s sales representative.

Finally, the “drop off” rule is not competitively neutral as between TPV and other verification methods, such as LOAs. Where LOAs are used, for example, it is typically the carrier’s sales representative that is solely responsible for obtaining the verification while engaging the subscriber in a face-to-face conversation. This situation allows the sales representative to exert far more influence over the subscriber than can be exercised during telephone verification.¹⁹ Yet, the Commission does not consider verifications obtained by LOA to be the product of improper influence. Even if the sales representative is still making the sale right up to the moment of signature, the fact remains that the signature is an “independent” indicia of verification. There is no competitively neutral justification for subjecting TPV to more onerous “independence” requirements than LOAs.

Because the Commission did not address VoiceLog’s comments, and because the record provides no support for the drop off requirement beyond a series of single sentence assertions regarding its necessity, the Commission’s decision to adopt the drop off rule was arbitrary and capricious. “For an agency’s decisionmaking to be rational, it must respond to significant points

¹⁸ Reply Comments of VoiceLog LLC at 2.

raised during the public comment period. . . . [and] must also consider significant alternatives to the course it ultimately chooses.”²⁰ VoiceLog respectfully submits that the Commission failed to do so here, and that had it done so, it would have rejected the drop off rule as VoiceLog requested.

II. THE DROP OFF RULE IMPOSES SIGNIFICANT BURDENS ON THIRD-PARTY VERIFICATION, IMPEDES COMPETITION, AND WILL INCREASE CONSUMER CONFUSION.

The Commission’s conclusion—reached without any analysis whatsoever—that the drop off rule will not burden the TPV process is erroneous. There are many instances in which a neutral presence by the sales representative will ensure that a subscriber properly completes the TPV process.²¹ Many subscribers may be confused by automated verification systems, have difficulty understanding a particular question, have difficulty reaching the alternative live operator, or have additional questions concerning the carrier’s service. These customers may desire the carrier’s service, but be unable or unwilling to complete verification without speaking with the sales representative. In those circumstances, prohibiting neutral, objective participation by the sales representative may result in frustrating consumer choice or in an unnecessary delay in the provision of service as a result of having to repeat the verification process, to the detriment of both the carrier and the subscriber.²² The fact that these problems do not exist in the LOA context, where face-to-face participation by the carrier’s sales representative is the norm,

¹⁹ *Id.* at 4.

²⁰ *Allied Local and Regional Mfrs. Caucus v. U.S. EPA*, 215 F.3d 61, 80 (DC Cir. 2000); *see also Illinois Public Telecomm. Ass’n v. FCC*, 117 F.3d 555 (DC Cir. 1997), *clarified on reh’g*, 123 F.3d 693 (1998), *cert. denied*, 118 S.Ct. 1361 (1998) (“FCC’s *ipse dixit* conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking.”).

²¹ Reply Comments of VoiceLog LLC at 2.

²² *See* Letter from Tony Sauer, Manager, Istera, to Larry Leiken VoiceLog LLC (March 26, 2001).

provides an incentive for those carriers that can afford it to switch from TPV to LOAs.²³ By making TPV less useful, the Commission is also discouraging customer choice through telemarketing, which has been an effective means for consumers to become aware of and to exercise their competitive choices in the telecommunications marketplace.

Moreover, as noted above, many small carriers or agents do not have the technical ability to comply with the drop off requirement. These carriers will either be forced to upgrade their equipment—an expensive proposition—or severely curtail the efficient use of TPV.²⁴ Although these carriers could require their sales representative to put the line on hold, that method entails costs in the form of lost productivity, and may risk a violation of the drop off rule. For those carriers that cannot afford these additional costs, or are unwilling to take that risk, the drop off rule effectively prevents use of the three-way conference call, if not automated TPV altogether. And as the Commission has recognized, “the three-way call is often the most efficient means of accomplishing third party verification.”²⁵

As the above discussion demonstrates, the drop off rule will impose significant burdens on the TPV process, and in turn, on carriers and consumers. The Commission reached a contrary conclusion without discussing VoiceLog’s opposing arguments, and despite the fact that none of the commenters that supported a drop off requirement suggested that such a rule could be implemented without adversely affecting TPV. The Commission acted arbitrarily in adopting

²³ Therefore, the unintended effect of the drop off rule is to push people into an even more coercive environment. Ironically, this would have the perverse effect of resulting in more, rather than fewer, slamming complaints, since the vast majority of slamming complaints are generated by LOAs.

²⁴ See Letter from Tony Sauer, Manager, Isterra, to Larry Leiken VoiceLog LLC (March 26, 2001).

²⁵ *Third Report and Order* at ¶ 36.

the drop off requirement without addressing significant concerns and alternatives presented in the record.²⁶

III. THERE ARE SIGNIFICANT ALTERNATIVES TO THE DROP OFF RULE THAT WOULD FULLY ACCOMPLISH THE CONSUMER PROTECTION OBJECTIVES OF THIRD-PARTY VERIFICATION WHILE ENSURING CONSUMERS HAVE ACCESS TO NECESSARY INFORMATION, AND MINIMIZING THE BURDEN ON THIRD-PARTY VERIFICATION AND THE SMALL CARRIERS THAT USE IT.

VoiceLog continues to believe that TPV is an “independent” method of verification regardless of whether restrictions are placed on carrier participation in the call. However, when restrictions are imposed, they must be narrowly tailored in order to balance preventing undue influence of subscribers by sales representatives while preserving consumer access to information helpful to informed consumer choice, and avoiding unnecessary and impractical burdens upon TPV, and in turn, on the small carriers that are most likely to use it. Rather than requiring that the sales representative drop off the line, VoiceLog proposes that the Commission modify its requirement as follows:

- A carrier or carrier’s sales representative initiating a three-way conference call or a call through an automated verification system may remain silently on the line, assist the subscriber in reaching a live person, or terminate the call connection.
- The carrier or carrier’s sales representative must remain silent during the third-party verification call unless the subscriber requests assistance or information from the carrier or carrier’s sales representative, or the subscriber needs assistance in reaching a live person or terminating the call connection.
- If the subscriber requests information from the carrier or carrier’s sales representative, the carrier or carrier’s sales representative may only provide neutral, objective information that responds specifically to the subscriber’s inquiry.
- If the carrier or carrier’s sales representative does not comply with these requirements, the verification is invalid.

²⁶ See *City of Brookings Mun. Telephone Co. v. FCC*, 822 F.2d 1153 (DC Cir. 1987) (holding that in light of anomalies in the data on which it relied, Commission acted irrationally in glossing over gaping holes in record).

This alternative proposal is directed at the specific concern the Commission attempted to address, which is the potential for the sales representative to engage in coercive behavior during the verification process. By requiring the sales representative to remain silent unless requested to respond by the subscriber, and by limiting that response to neutral, objective information, and by permitting the sales representative to assist the subscriber in reaching a live operator or terminate the verification, the proposed rule ensures that there is no opportunity for the sales representative to exert any undue influence over the subscriber, but allows the sales agent to provide the consumer with assistance and information the subscriber desires.

The proposed rule also has the advantage of being practical to implement and easily enforced. It allows the telecommunications marketer to make the most efficient use of their time by disconnecting the line when the verification is complete, while using equipment that is already available. Because the Commission now requires that all TPV transactions be audio-recorded in their entirety, a sales representative that engages in overreaching by, for example, encouraging the customer to respond to the TPV questions in a particular way, will necessarily be exposed. The audio-recording requirement ensures that there will always be a complete and accurate record available for investigation of any slamming complaint.

Finally, the proposed rule will accomplish the Commission's goal without significantly burdening the TPV process. Allowing sales representatives to speak with subscribers when the subscriber asks for assistance will ensure that subscribers have the information they need to properly complete verifications and receive timely service by their chosen provider. Because the proposed rule does not arbitrarily discriminate against TPV in favor of LOAs, it facilitates the course of consumer choice that is critical to a well-functioning competitive marketplace. The

proposed rule also allows those carriers that lack the ability to drop off the line to utilize three-way calling without a costly investment in equipment upgrades.

Several commenters suggested that the Commission adopt a requirement similar to that which is proposed;²⁷ but, the Commission simply ignored alternatives to the drop off rule. The law is clear that the Commission must address serious alternatives to a proposed regulation.²⁸ Because the Commission did not do so here, reconsideration is required.

IV. THE COMMISSION FAILED TO STATE THE FACTUAL, POLICY, AND LEGAL REASONS FOR SELECTING THE DROP OFF RULE AND REJECTING SUGGESTED ALTERNATIVES.

Reconsideration of the *Third Report and Order* is required to remedy the Commission's failure to consider alternatives to the drop off rule in its final regulatory flexibility analysis.²⁹ Despite the fact that the Commission's initial regulatory flexibility analysis made no mention of a drop off requirement,³⁰ several commenters suggested that the Commission allow sales representatives to remain on the line, if only to answer subscriber questions.³¹ Nevertheless, the Commission made no mention of this alternative to drop off in its final regulatory flexibility analysis.³² The failure to conduct any analysis of significant alternatives pursuant to the

²⁷ See, e.g., Comments of RCN Telecom Services, Inc.; Comments of Sprint Corporation.

²⁸ *Flagstaff Broadcasting Foundation v. FCC*, 979 F.2d 1566 (DC Cir. 1992).

²⁹ Under the Regulatory Flexibility Act, final agency rules must contain a final regulatory flexibility analysis describing the steps the agency has taken to minimize the significant economic impact on small entities consistent with its stated objectives, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected. 5 U.S.C. § 604(a)(5).

³⁰ See *Further NPRM* at 229. Although no commenters directly responded to the initial regulatory flexibility analysis, *Third Report and Order* at ¶ 91, that fact is hardly surprising considering the Commission did not propose any specific rules governing TPV. The initial regulatory flexibility analysis stated that "specific rules are not proposed to modify the independent third party verification process." Moreover, the Commission's initial regulatory flexibility analysis sought comment only on "the definition of an independent third party verifier and on the content of the independent third party verification," not on the process by which TPV should be conducted. *Further NPRM* at 229.

³¹ See, e.g., Comments of RCN Telecom Services, Inc.; Comments of Sprint Corporation.

³² See *Third Report and Order* at ¶ 112.

Regulatory Flexibility Act, as amended, requires reconsideration of the drop off rule.³³ As previously demonstrated, there are less burdensome alternatives that adequately meet the Commission's objectives, which must be adopted in lieu of the drop off rule. Anything less would violate the Regulatory Flexibility Act, and amount to the arbitrary and capricious imposition of the drop off rule by regulatory fiat.

CONCLUSION

For all the foregoing reasons, VoiceLog asks that the Commission reconsider its decision in the *Third Report and Order* and adopt VoiceLog's proposed modification to the drop off rule.

Respectfully submitted,

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March 28, 2001

³³ See *Allied Local and Regional Mfrs. Caucus v. U.S. EPA*, 215 F.3d 79-80.

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VoiceLog LLC
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March 26, 2001

Dear Mr. Leiken,

You are requesting for the FCC to hold off on the rule in which they are requesting that the sales agent drop off the call during the verification process. I would like to endorse this proposal.

Historically the sales agent will brief the customer prior to the Third Party Verification (TPV) process. After this briefing, the sales agent then begins the verification with the customer and remains silent throughout the rest of the call. Allowing the sales agent to stay on the line will enable them to ensure the verification of the customer's request for service is complete. The alternative could result where the customer's installation request is delayed.

From a technical standpoint, requiring the sales agent to drop off the line during verification would not be feasible for our company. This will result in loss of revenue for the business and loss of service for the customer.

In closing, I appreciate, and endorse again, your proposal to the FCC for a stay on this matter.

Sincerely,

Tony Sater
Manager
Isterra, a Primus Company

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MEMORANDUM OPINION AND ORDER

Adopted: April __, 2001

Released: April __, 2001

By _____:

1. By this Order, we grant VoiceLog LLC's ("VoiceLog") petition for partial stay of our *Third Report and Order* in this proceeding.¹ We find that VoiceLog has demonstrated sufficient good cause to justify a limited stay of the effective date of Section 64.1120(c)(3)(ii) of the Commission's rules pending further reconsideration.

DISCUSSION

2. Section 64.1120(c)(3)(ii) provides that "[a] carrier or a carrier's sales representative initiating a three-way conference call or a call through an automated verification system must drop off the call once the three-way connection has been established." VoiceLog has filed a petition for reconsideration seeking modification of this rule, and arguing that the Commission could achieve the goals of this rule through less burdensome alternatives.² In its request for a stay, VoiceLog alleges that it and its customer will suffer irreparable harm if the rule takes effect in full. VoiceLog, however, does not seek a complete stay of the effective date

¹ See *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, FCC 00-255 (rel. Aug. 15, 2000) ("*Third Report and Order*").

² See VoiceLog's Petition for Reconsideration (filed April __, 2001).

of Section 64.1120(c)(3)(ii). Instead, VoiceLog requests that, pending reconsideration, the effective date of the rule be stayed only to the extent that the rule would prohibits a carrier or carrier's sales representative from remaining silently on the line, assisting the subscriber in reaching a live person, or terminating the verification.

3. We have analyzed VoiceLog's petition, and conclude that VoiceLog has demonstrated good cause for a stay pursuant to Section 1.429 of the Commission's rules. VoiceLog has demonstrated that it (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent a stay; (3) interested parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay.³

ORDERING CLAUSE

4. Accordingly, IT IS ORDERED that, pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, VoiceLog LLC's Petition for Partial Stay Pending Reconsideration IS GRANTED; and

5. Section 64.1120(c)(3)(ii) is hereby STAYED to the extent that it would otherwise prohibit a carrier or carrier's sales representative from remaining silently on the line, assisting the subscriber in reaching a live person, or terminating the verification.

FEDERAL COMMUNICATIONS COMMISSION

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³ *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958).