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BEFORE THE ARIZONA CORPORATON COMMISSION

JAMES M. IRVIN
Chairman
TONY WEST
Commissioner
CARL J. KUNASEK
Commissioner

DOCKET NO. RT-00000J-99 0034

IN THE MATTER OF RULES TO ADDRESS SLAMMING AND OTHER DECEPTIVE PRACTICES	))))	DOCKET NO. _____ APPLICATION FOR EMERGENCY RULEMAKING

U S WEST Communications, Inc. ("U S WEST"), by its undersigned attorneys, hereby requests that the Arizona Corporation Commission (the "Commission") adopt the anti-slamming rules promulgated by the Federal Communications Commission on December 17, 1998 and that the Commission a rulemaking proceeding to determine whether additional safeguards against slamming.are justified. In support of this application, U S WEST states the following:

I. INTRODUCTION

1. Slamming, the unauthorized change of a customer's telecommunications' carrier, has become all too pervasive. In order to combat this deceptive marketing practice, the Federal Communications Commission (FCC) issued rules on December 17,

1998, which govern the steps that all carriers must take before changing any aspect of a customer's current service. *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, CC Docket No. 94-129 (Dec. 17, 1998) (hereinafter "FCC Order") (copy of rules attached as *Exhibit 1*). The rules "ultimate" objective is "protecting consumers and consumer choice." FCC Order at ¶ 16.

2. Although slamming is traditionally thought of as the unauthorized change of a customer's interLATA carrier, the FCC rules state that slamming also occurs when an unauthorized change of a customer's intraLATA toll or local provider takes place. In order to prevent slamming in each of these unique markets, the FCC rules require "separate authorization and verification" for interLATA toll, intraLATA toll and local service.

3. Despite this, U S WEST has substantial evidence that even the largest interexchange carriers are failing to obtain a separate authorization and verification for each service. The net effect is <u>over 65%</u> of the customers who change their intraLATA carrier do not know or understand that the change has occurred. If this practice is allowed to continue, many thousands of customers in this state will be slammed in the few months before the FCC rules become effective. U S WEST seeks

immediate implementation of the rules to stymie this deceptive practice to ensure that customers, not unscrupulous businesses, make the choice of which telecommunications carrier to use to provide each of their services.

4. The problem that remains, however, is that the FCC rules do not become effective until after they have been published in the Federal Register for 70 days. FCC Order at ¶ 252. Each day that passes without the rules in effect is one additional day that companies can utilize marketing practices that take advantage of unsuspecting customers.

5. As a result, U S WEST hereby petitions this Commission for an emergency rulemaking and requests immediate implementation of the attached FCC rules to ensure that all carriers utilize procedures that inform, rather than take advantage of customers. Immediate implementation of the rules is warranted under state rules because, even as the FCC recognized, slamming is an important consumer issue that effects the public welfare. FCC Order at ¶ 21. U S WEST also requests that this Commission open a formal rulemaking to assess whether additional safeguards should be implemented to further combat slamming.

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II. THIS COMMISSION SHOULD ADOPT THE FCC's NEW SLAMMING RULES IMMEDIATELY.

A. SLAMMING IS AN IMPORTANT CONSUMER ISSUE

6. Statistical evidence shows that slamming is an important consumer issue that, sadly, is all too prevalent. Consumers are the unsuspecting victims of unscrupulous business practices that prey on their lack of knowledge. Slamming has become so pervasive that it warrants, in fact demands, this Commission's immediate attention. The facts show that the problem is increasing at an alarming rate. In 1997, the FCC processed over 20,500 slamming complaints and inquiries, an increase of 61% over 1996 and 135% over 1995. FCC Order at ¶ 2. The number of slamming complaints is but a mere fraction of the actual number of slamming incidents. *Id.*

7. The FCC acknowledges that consumers suffer a great deal of confusion and outrage upon discovering that they have been slammed. FCC Order at ¶ 21. The FCC also acknowledges that consumers often experience difficulty and inconvenience in correcting the slamming situation and being restored to their authorized carrier. *Id.*

8. Moreover, slamming nullifies consumers' ability to select the telecommunications provider(s) of their choice. FCC Order at ¶ 1. Slamming also distorts the entire

telecommunications market because it rewards those companies who engage in deceptive and fraudulent practices by unfairly increasing their customer base at the expense of companies that market in a fair and informative manner. *Id.* The FCC rules are intended to protect consumers by establishing a comprehensive framework to close loopholes used by carriers to slam consumers and to bolster the deterrent effect of the rules. FCC Order at ¶ 4.

9. As stated earlier, the ultimate objective of the FCC's slamming rules is to protect consumers and consumer choice. FCC Order at ¶ 16. Consumer choice must be protected vigorously in order to foster healthy competition. *Id.* The FCC rules are intended to strike a balance between the competing goals of consumer protection and promotion of competition. Moreover, the FCC specifically found that its rules will actually help to "foster meaningful competition." FCC Order at ¶ 16.

B. <u>THE intraLATA TOLL MARKET PROVIDES A NATURAL MARKET FOR DECEPTIVE BUSINESS PRACTICES.</u>

10. To date, slamming has generally occurred in the interLATA toll market. FCC Order at ¶ 81. U S WEST data shows that approximately 5% of the interLATA changes, or "PICs", are unauthorized. Thus, even in this traditional long distance market where a large percentage of consumers understand what they

are purchasing, slamming is a pervasive consumer problem. FCC Order at ¶ 2.

11. Not every market in the telecommunications business is well understood, however. The intraLATA toll market is a prime example. LATA lines are a creature of divestiture about which very few consumers are even aware. Most consumers think of their phone service as comprised of local and long distance service. This well known fact creates a natural opportunity for unscrupulous carriers to prey on consumer confusion.

12. U S WEST polling data reveals troubling information in all five states in which U S WEST currently has intraLATA "1-plus" dialing parity. After polling over 75,000 customers in five states, over 65% of the consumers who had their intraLATA provider changed were unaware that they had changed both their interLATA and intraLATA toll carriers. Thus, customer confusion was the rule, not the exception.

13. The FCC anticipated, in fact predicted, this confusion and, as a result, included preventative measures within its rules. The FCC requires that "all changes to a subscriber's preferred carrier, including local exchange, intraLATA toll, and interLATA toll services must be authorized by that subscriber and verified in accordance with our procedures." FCC Order at ¶ 81. The reason is to prevent telecommunications carriers from taking

advantage of customers' inherent confusion between the intraLATA and interLATA toll markets. The FCC's language is unequivocal:

> We also require carriers to identify specifically the types of service or services being offered (*e.g.*, interLATA toll, intraLATA toll, local exchange) in any preferred carrier solicitation or letter of agency, and to obtain separate authorization and verification for each service that is being changed. . . . The separate authorization and verification may be received and conducted during the same telemarketing solicitation or obtained in separate statements on the same LOA form. We merely require that each service be identified and delineated clearly to the subscriber. For example, a carrier that calls a subscriber to market both intraLATA toll and interLATA toll services must explain to the subscriber the difference between the two services. Then the carrier must obtain separate authorization for each service. The subscribers authorizations to change intraLATA toll and interLATA carriers must also be verified separately. We adopt this rule in response to the concerns of carriers such as Ameritech and CBT that consumers may experience considerable confusion about the differences among telecommunications services, especially the distinction between intraLATA toll and interLATA toll. <u>By requiring carriers to describe fully the services they offer, and obtain separate authorization and verification for different services, carriers will be prevented from taking advantage of consumer confusion and changing the preferred carriers for all of a subscribers telecommunications services where the subscriber merely intended to change one.</u>

FCC Order at ¶ 82 (emphasis supplied). The FCC determined that this should "help to prevent carriers from slamming consumers in the first place." FCC Order at ¶ 83.

14. The FCC explained that separate verification of each service - interLATA toll and intraLATA toll - is "intended to

deter slamming and protect consumers from unauthorized changes in their preferred carriers." FCC Order at ¶ 83.

15. The separate verification requirement is just one piece of a comprehensive set of rules to prevent and discourage slamming. The rules contain three principal components all of which emphasize the ultimate objective - consumer rights. In addition to the requirement that carriers obtain separate and specific verification from the customer before changing carriers, the rules also allow authorization for a customer to "freeze" his or her existing carrier, and provide substantial relief for slamming victims. FCC Order at ¶ 5.

16. The FCC rules also contain explicit standards that apply to every company in the telecommunications industry so as to ensure that it penalizes companies "who engage in deceptive and fraudulent practices by unfairly increasing their customer base at the expense of those companies that market in a fair and informative manner and do not use fraudulent practices." FCC Order at ¶ 1. Some key aspects of these rules are:

A. The rules "seek to close loopholes used by carriers to slam consumers and to bolster certain aspects of the rules to increase their deterrent effect." FCC Order at ¶ 4. The heart of the rules is to "take the profit out of slamming." *Id.*

B. Letters of agency (LOAs) that authorize a change in carrier must be "written in clear and unambiguous language." FCC Order at ¶ 10. The LOA "shall be a separate document . . . whose *sole* purpose is to authorize . . . a primary interexchange carrier (PIC) change." FCC Order at ¶ 79 (emphasis in original). "All calls that generate the submission of a carrier change on a subscriber's behalf, regardless of the carrier receiving it or how the request was received, must be verified." FCC Order at ¶ 66; *see also* FCC Order at ¶ 78 ("We clarify that, regardless of the solicitation method used, all carrier changes must be verified.").

C. <u>Oral verification of a PIC change by the telecommunications carrier itself is never authorized</u> because the FCC found that such verification offers "little protection to a consumer against an unscrupulous carrier." FCC Order at ¶ 67.

D. "[E]ven where carriers have not engaged in an intentional pattern of slamming, the strongest incentive for such carriers to implement strictly our verification rules is to know that failure to comply may mean that they will not get paid for any services rendered after an unauthorized switch." FCC Order at ¶ 14. Thus, even if the consumer is the victim of an innocent mistake, the FCC rules consider the unauthorized change of

carriers to be the result of slamming activity. FCC Order at ¶ 50 ("strict liability standard is required by the statute").

E. The FCC has determined that its "bright line rules" "will make all carriers more vigilant in preventing unauthorized carrier changes, whether such changes are inadvertent or intentional." FCC Order at ¶ 189.

17. Thus, the FCC verification rules apply to all telecommunications carriers in connection with PIC changes, including changes to intraLATA toll service and local exchange service. The FCC rules provide for three verification options: (1) consumer's written authorization; (2) consumer's electronic authorization; and (3) consumer's oral authorization confirmed by an appropriately qualified independent third party.

C. <u>EVEN THE LARGE IXC's SLAM CUSTOMERS THROUGH DECEPTIVE MARKETING PRACTICES THAT VIOLATE THE FCC's RULES.</u>

18. The importance of this Commission ordering immediate implementation of the FCC rules simply cannot be overstated. It is generally believed that slamming is the marketing tool of relatively unknown carriers trying to get a foothold in the market. However, even carriers whose names are quite familiar, such as AT&T and MCI, are currently slamming customers though the use of the deceptive marketing practices that the FCC chastises and forbids. These carriers fail to explain the difference

between interLATA toll and intraLATA toll and thereby prevent many customers from making a conscious choice about which company to use as their intraLATA toll carrier. This very practice may even constitute consumer fraud. A.R.S. § 13-2203. As the FCC explained, "[r]egardless of size, no carrier has the right to commit unlawful acts." FCC Order at ¶ 189.

19. U S WEST employees have obtained AT&T marketing materials that contain a verification which, in its entirety, reads as follows:

> My signature confirms my authorization to switch my service to AT&T Long Distance Service, and Local Toll Service (if available in my area). I understand that only one long distance company may be designated for the telephone number listed on the front, and that my selection will apply only to that number. My local telephone company may charge me a fee to switch my long distance service; if so it will appear on a future phone bill. If you have any questions about this certificate, call 1-800-254-7818.

In some instances, AT&T also sends along a check for as much as $100 to convince the customer to change carriers.

20. Thus, AT&T's marketing materials violate the rules by, *inter alia*, failing to obtain separate authorization and verification for both intraLATA toll and interLATA toll services. In addition, the AT&T materials are deceptive in that they suggest that the customer can only choose "one long distance company" to serve the customer's "telephone number." In reality,

customers can choose one carrier for their interLATA toll and a separate carrier for intraLATA toll services.

21. Similarly, U S WEST employees have also obtained MCI marketing materials, which are equally flawed and confusing. They read as follows:

> Enroll me in MCI WorldCom residential long distance (and local toll service where available) and send me my MCI/Mileage Plus calling cards. Add 5,000 miles to my Mileage Plus account after 30 days of MCI WorldCom service, 1000 a month for each of the next five months, and five more miles for every dollar I spend with MCI WorldCom, excluding taxes and credits.

These materials violate the FCC rules for many of the same reasons.

22. These deceptive marketing practices are further complicated by the fact that some of the sales representatives from AT&T and MCI do not understand the difference between interLATA toll and intraLATA toll. U S WEST employees have been solicited by AT&T and MCI and agreed to change their interLATA toll provider, but wanted to keep U S WEST as their intraLATA toll provider. However, both the AT&T and MCI sales representative did not understand the difference between the two. Even after these discussions, when the U S WEST employee spoke to a third party verifier, that verifier was also unaware of the difference between intraLATA toll interLATA toll. Thus, as this

example shows, the FCC's separate verification requirement serves a very important consumer function.

23. These deceptive marketing practices do not just impact U S WEST employees, however. These exact practices have been used in all five U S WEST states in which intraLATA "1-plus" dialing parity has already been implemented. As explained earlier, after polling over 75,000 customers in these states who had changed their intraLATA provider, 65% were unaware of the change. Moreover, U S WEST data from these five states shows that about 25% of the customers whom U S WEST contacted and sought to win back, in fact, immediately returned to U S WEST. Although the data was not collected so as to permit a precise calculation, the raw data suggests that approximately 25% of those uninformed customers did not want to have their intraLATA carrier changed.

24. U S WEST wants to make itself clear. Through this request, U S WEST is simply requesting an order from this Commission implementing the FCC slamming rules immediately so that competition in the interLATA, intraLATA and local markets is fair, not fraudulent or deceptive. As the FCC explained so well: "As competition develops further, however, so does the need to ensure that consumers are receiving accurate and sufficient information about the assortment of telecommunications services

and carriers in order to avoid customer confusion. Confusion over carriers and the services they provide can negate competition because confused customers cannot make informed choices." FCC Order at ¶ 144.

25. U S WEST's purpose through this filing is to request immediate implementation of the FCC rules and to request this Commission to open a separate docket to consider whether additional verification procedures may be appropriate. Although the FCC requires that all states accept the FCC's verification procedures, this Commission has express authority to provide carriers with additional options for verifying carrier changes. FCC Order at ¶ 88. Longer term, U S WEST believes this Commission should consider implementation of a PIN number system; specifically, placement of separate PIN numbers for interLATA toll, intraLATA toll, and local exchange service on each customer's bill. The PIC change would not be processed unless it contained the appropriate PIN number. This system would require separate discussion of each service and, thus, should remove most, if not all, of the principal concerns raised by U S WEST here. It is true that the FCC considered a similar, but different, proposal and rejected it. However, the procedure rejected by the FCC would have required customers to remember their PIN, which the FCC thought would act to limit competition.

FCC Order at ¶ 75. Placement of the PIN numbers on customer's bill, however, should eliminate this concern.

III. CONCLUSION

26. U S WEST urges this Commission to utilize its emergency rulemaking powers and immediately implement the FCC's slamming rules to combat this critical consumer welfare issue. Immediate implementation is necessary to prevent the oft utilized deceptive marketing practice of confusing the difference between interLATA toll and intraLATA toll services. Although the FCC rules will become effective in a few months, carriers should not receive this Commission's tacit authorization to continue with these deceptive practices in the interim. To the contrary, this Commission should send a strong consumer based message that these deceptive practices will simply not be tolerated. Immediate implementation of the FCC rules will do just that. U S WEST also encourages the Commission to open a separate docket to develop additional long term solutions such as verification through use of PIN numbers as advocated by U S WEST.

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

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

SECOND REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: December 17, 1998 Released: December 23, 1998

Comment Date: 30 days from publication in the Federal Register
Reply Comments Date: 45 days from publication in the Federal Register

By the Commission: Commissioners Ness and Tristani issuing statements; Commissioner Powell concurring in part, dissenting in part and issuing a statement and Commissioner Furchtgott-Roth dissenting and issuing a statement

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I. INTRODUCTION

1. In this Second Report and Order and Second Further Notice of Proposed Rulemaking (*Order*), we adopt rules proposed in the First Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration (*Further Notice and Order*)[1] to implement section 258 of the Communications Act of 1934 (Act), as amended by the Telecommunications Act of 1996 (1996 Act).[2] 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 service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe."[3] The goal of section 258 and this *Order* is to eliminate the practice of "slamming." A subscriber may authorize a change of his or her long distance carrier, or other telecommunications carrier, by requesting the change directly from his or her local exchange carrier (LEC), or by authorizing the new carrier to request a change on his or her behalf. Slamming occurs when a company changes a subscriber's carrier selection without that subscriber's knowledge or explicit authorization. Slamming nullifies the ability of consumers to select the telecommunications providers of their choice. Slamming also distorts the telecommunications market because it rewards those companies who engage in deceptive and fraudulent practices by unfairly increasing their customer base at the expense of

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1 *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 Rulemaking and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 10,674 (1997) (*Further Notice and Order*).

2 47 U.S.C. § 258. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act). The principal goal of the Act is to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." *See* Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996) (Joint Explanatory Statement).

3 47 U.S.C. § 258(a).

those companies that market in a fair and informative manner and do not use fraudulent practices.

2. The numerous complaints we continue to receive and the input of the state commissions and the state attorneys general provide ample evidence that slamming is an extremely pervasive problem.[4] Indeed, slamming is so rampant that it garnered significant attention in Congress in 1998 during the post-legislative session, although ultimately no legislation was passed.[5] Despite the Commission's existing slamming rules, our records indicate that slamming has increased at an alarming rate. In 1997, the Commission processed approximately 20,500 slamming complaints and inquiries, which is an increase of approximately 61% over 1996 and an increase of approximately 135% over 1995.[6] From January to the beginning of December 1998, the Commission processed 19,769 slamming complaints.[7] Furthermore, the number of slamming complaints filed with the Commission is a mere fraction of the actual number of slamming incidents that occur.[8]

3. The Commission recently has increased its enforcement actions to impose severe financial penalties on slamming carriers. Since April 1994, the Commission has imposed final forfeitures totaling $5,961,500 against five companies, entered into consent decrees with eleven companies with combined payments of $2,460,000, and has proposed $8,120,000 in penalties against six carriers.[9] Additionally, the Commission may sanction a carrier by revoking its

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4 *See, e.g.*, National Association of Attorneys General (NAAG) Comments at Appendix (containing sampling of consumer complaints); Florida Commission Comments at 1 (stating that it received 2,393 slamming complaints in 1996 and that slamming is the number one telecommunications complaint received by the Florida Commission); NCL Comments at 3 (stating that in 1997, slamming ranked as the sixth most frequent subject of complaint to the National Fraud Information Center, a hotline for reporting fraud). A list of the commenters and their identifying abbreviations is in Appendix C.

5 William E. Kennard, Chairman of the FCC, received letters from Congress urging the Commission to implement anti-slamming rules and acknowledging that Congress did not pass slamming legislation. *See* Letter from Senator John McCain to William E. Kennard, Chairman, FCC (Oct. 30, 1998); Letter from Congressman Tom Bliley, *et al.* to William E. Kennard, Chairman, FCC (Dec. 11, 1998).

6 Consumer Complaints and Inquiries, Consumer Protection Branch, Enforcement Division, Common Carrier Bureau, Federal Communications Commission (Oct. 31, 1998).

7 *Id.*

8 For example, AT&T estimates that 500,000 of its customers were slammed in 1997. Mike Mills, *AT&T Unveils Plan to Cut "Slamming,"* Wash. Post, Mar. 4, 1998, at C1.

9 Slamming Enforcement Actions, Enforcement Division, Common Carrier Bureau, Federal Communications Commission (Dec. 17, 1998).

operating authority under section 214 of the Act.[10] The Commission recently has resorted to such sanctions against carriers for repeated slamming and other egregious violations of the Act and our rules.[11]

4. The new rules we adopt in this *Order* are not merely intended to conform our existing rules with the provisions of section 258, but also operate to establish a new comprehensive framework to combat aggressively and deter slamming in the future.[12] With our new rules, we seek to close loopholes used by carriers to slam consumers and to bolster certain aspects of the rules to increase their deterrent effect. At the heart of the new slamming rules is our determination to take the profit out of slamming. Our new rules absolve subscribers of liability for some slamming charges in order to ensure that carriers do not profit from slamming activities, as well as to compensate subscribers for the confusion and inconvenience they experience as a result of being slammed. As an additional deterrent, we strengthen our verification procedures and broaden the scope of our slamming rules.

5. Our new rules strengthen the rights of consumers in three areas: (1) the relief given to slamming victims; (2) the method by which a carrier must obtain customer verification of preferred carrier change requests; and (3) the method by which a consumer can "freeze" his or her existing carrier, thus prohibiting another carrier from claiming that it has been authorized to request a carrier change on behalf of the consumer. More specifically, with respect to compensation, under our new rules a subscriber will be absolved of liability for all calls made within 30 days after being slammed.[13] If however, the subscriber fails to notice that he or she has been slammed and pays the unauthorized carrier for such calls, section 258(b) of the Act requires the unauthorized carrier to remit such payments to the authorized carrier.[14] Upon receipt of this

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10 *See* 47 U.S.C. § 214; *see also CCN, Inc. et al.*, Order, 12 Comm. Reg. (P & F) 104 (1998) (revoking the operating authority of the Fletcher Companies because they slammed long distance telephone subscribers and committed other violations of the Communications Act of 1934, as amended) (*Fletcher Order*).

11 *Fletcher Order*, 12 Comm. Reg. (P & F) at 104.

12 In light of this new framework, and the addition of new rules, we have redesignated and renumbered the existing verification rules such that the current section 64.1100 is redesignated as 64.1150, and the current section 64.1150 is redesignated as 64.1160. *See* Appendix A. *See also* 47 C.F.R. §1.412(c) (stating that rule changes may be adopted without prior notice if the Commission for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest).

13 *See infra* discussion on Liability of the Slammed Subscriber. This modifies our current rule under which a slammed consumer is liable for the amount he or she would have paid the authorized carrier for absent the unauthorized change. *See Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, 10 FCC Rcd 9560, 9579 (1995) (*1995 Report and Order*).

14 *See infra* discussion on Investigation and Reimbursement Procedures.

amount, the authorized carrier shall provide the subscriber with a refund or credit of any amounts the subscriber paid in excess of the authorized carrier's rates.[15] The unauthorized carrier must also pay the authorized carrier for any expenses incurred by the authorized carrier in restoring the subscriber's service or in collecting charges from the unauthorized carrier.[16] These liability rules will not take effect for 90 days, however to enable interested carriers to develop and implement an alternative independent entity to administer compliance with these rules on their behalf.[17] If carriers successfully implement such a plan, we will entertain carriers' requests for waiver of the administrative requirements of our liability rules.[18]

6. This *Order* also modifies the methods by which a carrier can fulfill its obligation to obtain consumer verification of carrier change requests. In particular, we eliminate the "welcome package"[19] as a verification option because we find that it has been subject to abuse by carriers engaged in slamming.[20] Also in connection with verification, we (1) extend our verification rules to apply to carrier change[21] requests made during consumer-initiated (in-bound)

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15 *See infra* discussion on Subscriber Refunds or Credits.

16 *See infra* discussion on Investigation and Reimbursement Procedures.

17 *See infra* discussion on Third Party Administrator for Dispute Resolution.

18 The following rule provisions in Appendix A impose administrative requirements on the authorized carrier: section 64.1100(c), (d); section 64.1170; section 64.1180. Upon being granted an above-mentioned waiver, the authorized carrier would be permitted to discharge its obligations under these rules by having the neutral third party perform the administrative functions in these rules. *See infra* discussion on Third Party Administrator for Dispute Resolution.

19 The welcome package is an information package mailed to a consumer after the consumer has agreed to change carriers. It includes a prepaid postcard, which the customer can use to deny, cancel, or confirm the change order.

20 *See infra* discussion on The Welcome Package.

21 In the *Further Notice and Order*, we stated that we would use the term "preferred carrier" or "PC" to describe the subscriber's properly authorized or primary carrier(s) (a subscriber may have multiple preferred carriers - one for local exchange service and one for long distance service), as contemplated by the Act. We will use the term "carrier change," however, instead of "PC change," to further distinguish a change in telecommunications carrier from the former term "PIC change," which referred only to a change in a subscriber's primary interexchange carrier. Furthermore, for consistency, we amend the text of the rules to use the term "preferred" in place of the term "primary." *See* Appendix A, §§ 64.1100, 64.1150. *Cf.* 47 C.F.R. § 1.412(c) (stating that rule changes may be adopted without prior notice if the Commission for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest). We note that, where appropriate, we will continue to use the term "PIC" in the text of this *Order* to describe a subscriber's primary interexchange carrier prior to the 1996 Act.

calls to carriers,[22] rather than being applicable solely to outbound calls made by carriers to consumers; (2) extend our verification rules to apply, with a limited exception, to all telecommunications carriers in connection with changes of all telecommunications service, including local exchange service;[23] and (3) clarify that all carrier changes must be verified in accordance with one of the options provided in our rules, regardless of the manner of solicitation.[24] Finally, we set forth rules governing the preferred carrier freeze process, including verification requirements for imposing a freeze and mandating certain methods for lifting a freeze.[25]

7. This *Order* also contains a Further Notice of Proposed Rulemaking, in which we propose several additional changes to further strengthen our slamming rules and otherwise prevent slamming. In particular, we seek comment on: (1) requiring unauthorized carriers to remit to authorized carriers certain amounts in addition to the amount paid by slammed subscribers; (2) requiring resellers to obtain their own carrier identification codes (CICs) to prevent confusion between resellers and their underlying facilities-based carriers; (3) modifying the independent third party verification method[26] to ensure that it will be effective in preventing slamming; (4) clarifying the verification requirements for carrier changes made using the Internet; (5) defining the term "subscriber" to determine which person or persons should be authorized to make changes in the selection of a carrier for a particular account; (6) requiring carriers to submit to the Commission reports on the number of slamming complaints received by

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22 *See infra* discussion on Application of the Verification Rules to In-Bound Calls. In 1995, we concluded that the Commission's verification rules should apply to in-bound calls. *See 1995 Report and Order*, 10 FCC Rcd 9560 (1995). The Commission, on its own motion, stayed its *1995 Report and Order* insofar as it extends the primary interexchange carrier change (PIC-change) verification requirements set forth in section 64.1100 of the Commission's rules to consumer-initiated calls. *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Order, 11 FCC Rcd 856 (1995) (*In-bound Stay Order*).

23 *See infra* discussion on Application of the Verification Rules to the Local Market and discussion on Application of the Verification Rules to All Telecommunications Carriers. At this time, however, we exclude commercial mobile radio services (CMRS) carriers from compliance with our verification requirements. *See infra* discussion on Application of the Verification Rules to All Telecommunications Carriers.

24 *See* Appendix A, §§ 64.1150, 64.1160.

25 A preferred carrier freeze prevents a change in a subscriber's preferred carrier selection unless the subscriber gives the carrier from whom the freeze was requested his or her express written or oral consent. *See infra* discussion on Preferred Carrier Freezes.

26 *See* 47 C.F.R. § 64.1100(c).

such carriers to alert the Commission as soon as possible about carriers that practice slamming; (7) imposing a registration requirement to ensure that only qualified entities enter the telecommunications market; (8) implementing a third party administrator for execution of preferred carrier changes and preferred carrier freezes.

8. We emphasize that the way to attack the slamming problem is to combat it on several fronts: improving the verification rules, imposing forfeitures and creating other financial disincentives for unscrupulous carriers, and increasing consumer awareness. In addition to prescribing rules to eliminate slamming, the Commission will continue to mete out swift, meaningful punishment for carriers that slam subscribers. Furthermore, the Commission will continue to work with the states to alert consumers about slamming and other telecommunications trends that may affect them, so that consumers can protect themselves from these practices.[27]

II. BACKGROUND

9. The Commission first established safeguards to deter slamming when it implemented equal access requirements in 1985. Equal access, which facilitated the entry of multiple competitors into the long distance service market following the divestiture of American Telephone & Telegraph Company (AT&T), allows subscribers to access the facilities of a designated IXC by dialing "1" only, rather than having to dial a multi-digit access code for some IXCs.[28] At the time of the divestiture of AT&T, IXCs began to compete for presubscription agreements with potential customers.[29] Slamming did not occur prior to the advent of competition in the long distance telephone marketplace because consumers did not have any choices in long distance service. We note that slamming does not include instances where a subscriber is dropped from a carrier's service, for reasons such as nonpayment of service, and

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27 The Commission started its consumer outreach program in 1995, with the publication of the Common Carrier Scorecard. Furthermore, the Commission's Call Center staff, at 1-888-CALL-FCC, is trained to answer consumer inquiries on slamming.

28 *See Investigation of Access and Divestiture Related Tariffs*, Memorandum Opinion and Order, 101 FCC 2d 911 (1985) (*Allocation Order*); *recon. denied*, 102 FCC 2d 503 (1985) (*Allocation and Waiver Recon Order*); *Investigation of Access and Divestiture Related Tariffs, Allocation Plan Waivers and Tariffs*, Memorandum Opinion and Order, 101 FCC 2d 935 (1985) (*Waiver Order*). Equal access for IXCs is that which is equal in type, quality, and price to the access to local exchange facilities provided to AT&T and its affiliates. *United States v. American Tel. & Tel.*, 552 F.Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983), *vacated*, *United States v. Western Elec. Co.*, 2 Comm. Reg. (P & F) 1388 (D.D.C. 1996) (*Modification of Final Judgment* or *MFJ*).

29 Presubscription is the process that enables each subscriber to select one primary IXC, from among several available carriers, for the subscriber's phone line(s). *Allocation Order*, 101 FCC 2d at 928.

ends up not being presubscribed to any carrier. Even though this may be a "change" in a subscriber's carrier, the subscriber has not been changed to a new carrier and therefore has not been slammed.

10. The Commission's original approach required IXCs to obtain written letters of agency (LOAs)[30] authorizing the IXC to request on behalf of a subscriber, a change in the subscriber's preferred interexchange carrier.[31] Because some carriers continued to engage in slamming, however, the Commission in 1992 adopted procedures for verification of telemarketing sales of long distance services.[32] In 1995, the Commission, on its own motion and in response to continuing complaints from consumers regarding slamming by IXCs, adopted rules establishing further anti-slamming safeguards to deter the use of misleading LOAs.[33] The *1995 Report and Order* specifically prohibited the potentially deceptive and confusing practice of combining LOAs with promotional materials, such as sweepstakes entry forms, in the same document.[34] The *1995 Report and Order* also prescribed the minimum content of LOAs, required that the LOA be written in clear and unambiguous language, prohibited "negative option" LOAs,[35] and required that LOAs contain complete translations if they employ more than one language.[36] In the *Further Notice and Order*, the Commission clarified that carriers using LOAs must fully translate their LOAs into the same language(s) as their associated promotional materials or oral descriptions and instructions.[37]

11. The Commission's current slamming rules, which apply only to long distance carriers, require such carriers to first obtain authorization from subscribers for preferred carrier

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30 *See* 47 C.F.R. § 64.1150.

31 *See Allocation Order*, 101 FCC 2d at 929; *Waiver Order*, 101 FCC 2d at 942.

32 *See generally Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, Report and Order*, 7 FCC Rcd 1038 (1992) (*PIC Verification Order*), *recon. denied*, 8 FCC Rcd 3215 (1993) (*PIC Verification Reconsideration Order*).

33 *See generally 1995 Report and Order*.

34 *1995 Report and Order*, 10 FCC Rcd at 9561.

35 "Negative option" LOAs require consumers to take some action to avoid having their telecommunications carrier switched.

36 *1995 Report and Order*, 10 FCC Rcd at 9561.

37 *Further Notice and Order*, 12 FCC Rcd at 10677.

changes and then to verify that authorization.[38] The current rules also require IXCs to verify all PIC changes using either a written LOA[39] or, if the carrier has used telemarketing to solicit the customer, one of the following four procedures: (1) obtain an LOA from the subscriber; (2) receive confirmation from the subscriber via a call from the subscriber to a toll-free number provided exclusively for the purpose of confirming change orders electronically;[40] (3) use an independent third party to verify the subscriber's order; or (4) send an information package, also known as the "welcome package," that includes a postage-paid postcard which the subscriber can use to deny, cancel, or confirm a service order, and wait 14 days after mailing the packet before submitting the PIC change order.[41] A carrier that makes unauthorized changes to a subscriber's selection of telecommunications provider and charges rates higher than that of the authorized carrier must re-rate that subscriber's bill to ensure that the subscriber pays no more than what he or she would have paid the authorized carrier.[42] The unauthorized carrier must also pay for any carrier-change charges assessed by the LEC.[43]

12. As part of the 1996 Act, Congress for the first time established a specific statutory prohibition against "slamming." Section 258(a) of the Act makes it unlawful for any telecommunications carrier[44] to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such

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38 *See* 47 C.F.R. §§ 64.1100, 64.1150.

39 47 C.F.R. § 64.1150.

40 We note that this method of verification may not be used to obtain the initial authorization for a carrier change because the toll-free number must be provided exclusively for the purpose of verifying previously-obtained change orders.

41 47 C.F.R. § 64.1100.

42 *1995 Report and Order*, 10 FCC Rcd at 9579.

43 *Illinois Citizens Utility Board Petition for Rulemaking*, 2 FCC Rcd 1726, 1729 (1987) (*Illinois CUB Order*).

44 The Act defines "telecommunications carrier" in pertinent part as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)." 47 U.S.C. § 153(44). "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

verification procedures as the Commission shall prescribe."[45] The section further provides:

> Any telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber 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.[46]

The enactment of section 258 by the 1996 Act necessitates that we reexamine our existing slamming rules to ensure that they conform with Congress' directives. The 1996 Act is intended, *inter alia*, to encourage competition in the provision of local exchange services and further enhance competition in the long distance market. In the environment created by the 1996 Act, LECs, IXCs, and other carriers will compete with each other to provide local exchange, intraLATA toll, interLATA toll, intrastate, and interstate services.[47] Furthermore, because LECs will be competing with other carriers for consumers' local and long distance services, LECs may not be neutral third parties in implementing carrier changes. Because the anti-slamming provisions of section 258 apply to all telecommunications carriers, we must assess whether existing safeguards against slamming are adequate in a marketplace in which carriers can compete for local as well as long distance service customers, and where there may no longer be a disinterested party executing changes in subscribers' telecommunications carriers.

III. DISCUSSION

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45 47 U.S.C. § 258(a).

46 47 U.S.C. § 258(b).

47 In the *Further Notice and Order*, we modified section 64.1150(e)(4) to use the terms "interstate/intrastate" and "interLATA/intraLATA" in order to adopt rules that would be generally relevant to all jurisdictions. *Further Notice and Order*, 12 FCC Rcd at 10,705. For convenience, throughout this *Order* we will use generally the terms "interLATA/intraLATA" except where "interstate/intrastate" would be more appropriate (*e.g.*, in discussion of federal and state jurisdiction issues). We will use generally the term "intraLATA" to refer to intraLATA interexchange, and "local exchange" will refer to intraLATA exchange. We note that a LATA (Local Access and Transport Area) is defined in Section 3(25) of the Act as a contiguous geographic area:

> (A) established before the date of enactment of the Telecommunications Act of 1996 by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, of State, except as expressly permitted under the AT&T Consent Decree; or
>
> (B) established or modified by a Bell operating company after such date of enactment and approved by the Commission.

47 U.S.C. § 153(25).

13. Until now, our efforts to deter slamming have concentrated on enhancing the verification of carrier changes and on issuing monetary forfeitures against carriers who violate our verification rules. Despite the safeguards established by our existing rules, however, the problem of slamming has continued to grow. While some unauthorized changes may be inadvertent,[48] and while it is too early to measure the impact of our recently heightened prosecution of slamming carriers, 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.

14. An essential element of this effort is the adoption of rules absolving consumers of liability to slamming carriers for charges incurred for a limited period of time after an unauthorized change. Where a subscriber does pay the slamming carrier, section 258 requires the slamming carrier to pay the charges it collects from the slammed subscriber to the properly authorized carrier.[49] Hence, carriers that violate our verification procedures will either be deprived of, or be required to forfeit, revenues they heretofore have been able to keep.[50] We have seen many cases where unscrupulous carriers have generated huge profits through slamming, only to disappear or declare bankruptcy when finally caught. One way to deter this behavior is to ensure that these carriers never receive any money from slammed consumers in the first instance. Moreover, even where carriers have not engaged in an intentional pattern of slamming, the strongest incentive for such carriers to implement strictly our verification rules is to know that failure to comply may mean that they will not get paid for any services rendered after an unauthorized switch.

15. Our new rules confront the problem of slamming in three ways by (1) adopting liability provisions that take the economic incentive out of slamming; (2) adopting more stringent verification requirements; and (3) broadening the scope of our rules. We conclude that this rigorous approach will combat effectively the slamming problem in the long distance telecommunications market, as well as prevent slamming occurrences as competition develops in the local exchange and intraLATA toll markets. The majority of commenters support our approach as outlined in the *Further Notice and Order*. Some commenters contend that we

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48 *See, e.g.*, ACTA Comments at 4; Sprint Comments at 3.

49 47 U.S.C. § 258(b).

50 Prior to the passage of section 258, a carrier that slammed a consumer was permitted to collect from the consumer the amount that the consumer's properly authorized carrier would have charged. *See 1995 Report and Order*, 10 FCC Rcd at 9579.

should not adopt additional slamming rules without further analysis of the causes of slamming.[51] Our experience with consumer slamming complaints, however, as well as the very thorough record that has been compiled in this docket, have supplied us with abundant evidence concerning the problem and causes of slamming to adopt the rules contained herein.

16. We emphasize that the rules we adopt strike a balance between our goals of protecting consumers and of promoting competition. Rules that make it more difficult for carriers to slam consumers may also make it more difficult for carriers to gain new subscribers in a legitimate manner. Nonetheless, our ultimate concern in this proceeding is protecting consumers and consumer choice. We can not allow this fraudulent practice to grow unabated as it has in recent years. Moreover, for healthy competition to flourish, consumer choice must be protected vigorously. Thus, the slamming rules we adopt herein operate to foster meaningful competition that is not at the expense of important consumer protection.

A. Section 258(b) Liability

1. Liability of the Slammed Subscriber

a. Background

17. In the *Further Notice and Order*, the Commission stated that section 258(b) of the Act makes it clear that any unauthorized carrier is not entitled to keep any revenue gained through slamming.[52] The Commission noted, however, that the Act did not address whether subscribers must pay any unpaid charges assessed by an unauthorized carrier to the properly authorized carrier, or whether charges collected from the unauthorized carrier should be returned to the subscriber who has been slammed.[53] In the *1995 Report and Order*, the Commission supported the policy of allowing unauthorized IXCs to collect from the consumer the amount of charges the consumer would have paid if the preferred carrier had never been changed.[54] The

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51 *See, e.g.*, Sprint Comments at 25; U S WEST Reply Comments at 4. ACTA, Sprint, and Frontier contend, for example, that an alleged slam may occur for a number of reasons, ranging from the error of an incumbent local exchange carrier (ILEC) to a consumer's change of heart, and that the problem of slamming has been exaggerated by the media. ACTA Comments at 4; Frontier Comments at 4; Sprint Comments at 3.

52 *Further Notice and Order*, 12 FCC Rcd at 10689; *see also* 47 U.S.C. § 258(b).

53 *Further Notice and Order*, 12 FCC Rcd at 10689.

54 *See 1995 Report and Order*, 10 FCC Rcd at 9579 (concluding that "the slammed consumer does receive a service, even though the service is being provided by an unauthorized entity").

National Association of Attorneys General (NAAG), in its petition for reconsideration of the *1995 Report and Order*, urged the Commission to consider absolving slammed consumers of all liability for charges assessed by unauthorized IXCs.[55] In the subsequent *Further Notice and Order*, the Commission concluded that it did not have sufficient information to determine whether total forgiveness of charges would further deter IXCs from slamming and sought further comment on the issue.[56]

b. Discussion

18. Our experience with slamming and the failure of our existing rules to stem the growth of this fraudulent practice convince us that strong prophylactic measures are necessary to ensure that consumers' choices of telecommunications service providers are respected. We therefore conclude that subscribers should not have to pay for slamming charges, a change that should prevent carriers from gaining any revenues from slamming activities. Moreover, consumers deserve some compensation for the inconvenience and confusion they experience from being slammed. Therefore we adopt a rule absolving consumers of liability for unpaid charges assessed by unauthorized carriers for 30 days after an unauthorized carrier change has occurred.[57] Any carrier that the subscriber calls to report the unauthorized change, whether that entity is the subscriber's LEC, unauthorized carrier, or authorized carrier, is required to inform the subscriber that he or she is not required to pay for any slamming charges incurred for the first 30 days after the unauthorized change.[58] If a subscriber pays charges to his or her unauthorized carrier, however, such subscriber's liability will be limited to the amount he or she would have paid the authorized carrier.[59] We note that, as explained fully in the discussion on Third Party Administrator for Dispute Resolution, we delay the effective date of the liability rules for 90 days to provide interested carriers an opportunity to implement a dispute resolution mechanism involving an independent administrator.[60]

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55 NAAG Petition for Reconsideration at 5.

56 *Further Notice and Order*, 12 FCC Rcd at 10690, 10706.

57 *See* Appendix A, § 64.1100(d). In a separate proceeding, we have proposed changes to consumer telephone bills to make it easier for consumers to identify changes in preferred carriers. *Truth-in-Billing and Billing Format,* Notice of Proposed Rulemaking, 13 FCC Rcd. 18176 (1998) *(Truth-in-Billing NPRM)*.

58 *See* Appendix A, § 64.1100(d).

59 *See infra* discussion on Subscribers Refunds or Credits.

60 *See infra* discussion on Third Party Administrator for Dispute Resolution.

19. Many state commissions and consumer protection organizations support absolving the consumer of liability for charges incurred after being slammed.[61] We agree with those commenters, such as NCL, NAAG, and the Virginia Commission, that absolving slammed consumers of liability for charges will discourage slamming by taking the profit out of this fraudulent practice. Specifically, our liability rules that provide for limited absolution for slamming charges will deter slamming by minimizing the opportunity for unauthorized carriers to physically take control of slamming profits for any period of time.[62] Even though section 258(b) requires the unauthorized carrier to remit to the authorized carrier all charges collected from the subscriber,[63] this does not mean that the unauthorized carrier will be deprived of revenue, nor that the authorized carrier will receive such money. Several commenters state that absolution is preferable to using the remedy in section 258(b) because the slamming carrier is likely to refuse to remit revenues to the authorized carrier.[64] In practice, unscrupulous carriers will have many excuses for not remitting any money to authorized carriers, including going bankrupt or simply disappearing.[65] We have seen several carriers go bankrupt during or after our investigations for slamming violations,[66] and have concerns that such carriers will simply reappear in another location, under a different name, and continue to slam consumers. We have also seen carriers change business locations frequently in order to avoid liability for slamming.[67] We find, based on our experience, that unscrupulous carriers will attempt to take such evasive

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61 *See, e.g.*, NAAG Comments at 5; NCL Comments at 9; Virginia Commission Comments at 3-4; Citizens Comments at 2. Montana Commission states that Montana's law absolves subscribers of liability for all charges incurred after slamming. Montana Commission Comments at 2.

62 *See*, NCL Comments at 9; Montana Commission Comments at 3-4; Virginia Commission Comments at 3-4.

63 47 U.S.C. § 258(b).

64 *See, e.g.*, Citizens Reply at 4; NYSDPS Comments at 11; PaOCA Comments at 8.

65 *See, e.g.*, NYSDPS Comments at 11; PaOCA Comments at 8.

66 The Commission has rescinded Notices of Apparent Liability for slamming violations because the subject carriers have filed for bankruptcy. *See, e.g.*, *Interstate Savings D/B/A ISI Telecommunications*, Notice of Apparent Liability for Forfeiture, 10 FCC Rcd 10877 (1995); *Interstate Savings D/B/A ISI Telecommunications*, Memorandum Opinion and Order, 12 FCC Rcd 2934 (1997).

67 For example, in April 1998, we assessed forfeitures of $5,681,500 against a carrier for slamming and other violations of the Act and our rules. *Fletcher Order*, 12 Comm. Reg. (P&F) 104 (1998). During the course of our investigation, the Fletcher Companies deliberately eluded Commission staff by moving to different addresses and by failing to provide legitimate business addresses or telephone numbers.

actions to avoid having to pay financial penalties to authorized carriers for slamming.[68] Unscrupulous carriers would therefore be able to continue to profit from slamming if we require the consumer to pay the unauthorized carrier. Eliminating the cash flow to slamming carriers in the first instance prevents slamming carriers from keeping any slamming profits.

20. This rule also makes slamming unprofitable because it provides consumers with incentive to scrutinize their monthly telephone bills early and carefully. By encouraging consumers to police their own telephone bills, this rule enlists the public's help in detecting occurrences of slamming.[69] By providing subscribers with a remedy that is easy to administer, *i.e.*, consumers simply refuse to pay telephone bills containing slamming charges, we provide a quick and simple process to stop slamming. Although requiring consumers to pay charges to their authorized carriers would also prevent slamming carriers from obtaining slamming profits, this would involve a more complicated mechanism. Payment of slamming charges to authorized carriers at the rates of the authorized carriers would require re-rating of bills in every instance of slamming. It also would result in the authorized carrier being paid for services it never provided. Absolution provides consumers with the incentive to help themselves with an easily administered remedy. For these reasons, we believe that absolving consumers of liability for slamming charges will be far more effective than requiring them to pay charges to their authorized carriers, as many commenters suggested.[70]

21. We also choose to absolve consumers of liability for a limited time because it provides some compensation to consumers for the time, effort, and frustration they experience as a result of being slammed, as well as for the loss of choice and privacy.[71] We find that consumers suffer a great deal of confusion and outrage upon discovering that they have been slammed. We further find that a consumer often experiences great difficulty and inconvenience in correcting the slamming situation and being restored to his or her rightful carrier. Because slamming inflicts these burdens on consumers, slammed consumers should receive reparation for their troubles.

22. We balance this need to compensate the consumer, however, against the possibility of consumers improperly reporting that they were slammed in order to obtain free

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68 In the accompanying Further Notice of Proposed Rulemaking, we discuss requiring carriers to file a registration with the Commission to enable us to locate and track carriers in the future.

69 *See Truth-in-Billing NPRM*, 13 FCC Rcd at 18186 (proposing that telephone bills include a section that highlights any changes in a consumer's service status).

70 *See, e.g.*, Bell Atlantic Comments at 2; CompTel Comments at 11; USTA Comments at 10.

71 *See, e.g.*, Montana Commission Comments at 3-4; OCC Reply Comments at 7.

telephone service. The likelihood of this type of fraud is the main objection of most carriers to a rule absolving consumers of liability.[72] To address such concerns about fraud, we point out that subscribers may only be absolved of liability if they have in fact been slammed. Carriers can, as described below, produce proof of valid verification to refute a subscriber's claim that he or she was slammed. This approach has the added benefit of strengthening carriers' incentive to comply strictly with our verification procedures in order to protect themselves from inappropriate claims by consumers that they have been slammed. Our rules will motivate carriers that submit legitimate carrier changes not only to verify carrier changes properly, but also to use forms of verification that provide solid evidence that a consumer has authorized and verified a carrier change.[73] Specifically, we set forth in the Investigation and Reimbursement Procedures section of this *Order* the mechanism by which a carrier may refute a subscriber's claim of being slammed.[74]

23. In the *Further Notice and Order*, the Commission asked commenters to consider, if subscribers were to be absolved of liability for unpaid charges, whether it should limit the time during which subscribers would not be liable for charges, and it asked for recommendations regarding what that time should be.[75] Commenters state that if consumers are to be absolved of liability for charges incurred after being slammed, it should be for only a limited time.[76] We agree that restricting the period of time for which the consumer is absolved of charges not only limits opportunities for consumers to take possible unfair advantage of carriers, but also provides incentive for consumers to review their bills carefully and promptly. We limit the absolution period to 30 days after an unauthorized change has occurred. Several carriers support a 30-day limit to absolution.[77] To the extent that the subscriber receives additional charges from the

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72 *See, e.g.*, Ameritech Comments at 28; Illinois Commission Comments at 6; TRA Comments at 14.

73 For example, a carrier may wish to provide an audio tape recording of an independent third party verification.

74 *See infra* discussion in Investigation and Reimbursement Procedures.

75 *Id.*

76 *See, e.g.*, Excel Comments at 6-7; NYSCPB Comments at 9; WorldCom Comments at 13.

77 *See, e.g.*, Citizens Reply at 4; WorldCom Reply at 11; MCI Ex Parte Letter from Mary L. Brown, MCI WorldCom, Inc. to Magalie Roman Salas, FCC (Nov. 17, 1998) (stating that MCI WorldCom supported the provision in recent slamming legislation that would have required carriers to provide up to 30 days of free service to consumers where the carrier could not produce evidence of compliance with the Commission's rules); Telecommunications Resellers Association Ex Parte Presentation at 9 (Dec. 3, 1998) (suggesting a 30-day limit on the extent to which consumers may be relieved from paying for telephone service received from slamming carriers).

slamming carrier after the 30-day absolution period, the subscriber shall pay such charges to the authorized carrier at the authorized carrier's rates after the authorized carrier has re-rated such charges.[78] In most cases, the consumer will discover the unauthorized change upon receipt of the first monthly bill after the unauthorized change occurs, because that bill generally provides the consumer with the first notice that a carrier change has been made.[79] The balanced approach we adopt today encourages consumers to become more vigilant in detecting slamming by giving them incentive to review their telephone bills carefully.

24. The limitation on absolution for the first 30 days after an unauthorized change may be waived by the Commission in circumstances where it is necessary to extend the period of absolution in order to provide a subscriber with a fair and equitable resolution. Waiver of the Commission's rules is appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.[80] As explained above, we conclude that a 30-day limit is reasonable because subscribers generally discover within one month that an unauthorized change has occurred. The special circumstances that may affect this period of absolution would likely be practices used to delay the subscriber's realization of the carrier change. For example, a waiver of the 30-day limit might be appropriate if the subscriber's telephone bill failed to provide reasonable notice to the subscriber of a carrier change, or if the slamming carrier did not have a monthly billing cycle. Another factor that could extend the absolution period would be a situation in which the slamming carrier did not immediately bill the subscriber for calls made, but instead withheld charges for several months and placed all such charges on a later bill, such that the subscriber did not realize that a slam occurred until months after the fact. We note, however, that we expect these instances to be infrequent and will not grant waivers of the 30-day limit unless the request meets all of the criteria for waivers.

25. We recognize that in 1995 the Commission decided that slammed consumers should pay their unauthorized carriers for charges incurred after being slammed at the rate they would have paid if the unauthorized change had never occurred.[81] The Commission based its decision on the fact that the slammed subscriber does receive a service, even though the service is provided by a carrier not of the consumer's choosing.[82] The Commission recognized, however,

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78 *See* Appendix A, § 64.1100(d)(3).

79 In the *Truth-in-Billing* rulemaking proceeding, we proposed that all telephone bills include a section that highlights all changes to a subscriber's service, including carrier changes. *See Truth-in-Billing NPRM*, 13 FCC Rcd at 18186.

80 *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

81 *See 1995 Report and Order*, 10 FCC Rcd at 9579.

82 *Id.*

that this solution "may not be the best deterrent against slamming . . . if 'slamming' continues unabated . . . we may have to revisit this question at a later date."[83] Because slamming continues to be a major consumer problem, we now find that our approach to consumer liability must be revised. We conclude that the most effective deterrent to slamming is to absolve consumers of liability for a limited time. This will deprive slamming carriers of revenue while creating incentives both for consumers to read their telephone bills and for carriers to ensure that carrier changes are made in accordance with our rules.

26. Several carriers argue that slammed consumers should pay all charges because absolving them of liability would give consumers a windfall.[84] We disagree. This argument fails to recognize that consumers who are slammed have suffered both the personal intrusion of having their choices denied, as well as the imposition of having to remedy the unauthorized change. That is, the consumer has been the subject of fraud, or even mistake, on the part of the unauthorized carrier and deserves some compensation for the intrusion, as well as for the time and effort expended in reinstating the preferred carrier.

27. Furthermore, we agree with those commenters that state that a limited absolution rule does not substantially harm the authorized carrier, who has not provided service to the slammed consumer during the period of absolution.[85] In the *Further Notice and Order*, the Commission sought comment on the effect of absolving slammed subscribers of liability for unpaid charges, in light of the fact that the authorized carrier might be deprived of foregone revenue.[86] We now conclude that, although the authorized carrier is deprived of profits that it would have received but for the unauthorized change, it also has not actually provided any service to the subscriber and it appears that the authorized carrier is not out of pocket for most costs that it would have borne if it had in fact provided service. This includes not only the cost of transmission, but other costs of providing service, such as access charges and other fees.[87] We emphasize that, should the authorized carrier conclude that it is entitled to any compensation

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83 *Id.*

84 *See, e.g.*, CWI Comments at 10; SBC Comments at 11. *See also* ACTA Comments at 35; TRA Comments at 14 (stating that authorized carriers should not be deprived of revenue).

85 *See, e.g.*, Citizens Comments at 4; NCPSUC Comments at 5; NYSCPB Reply at 4; OCC Comments at 4.

86 *Id.*

87 In the Commission's most recent estimates, the combined access charges paid by long distance carriers are approximately four cents per minute. *Trends in Telephone Service*, Federal Communications Commission, July 1998. By comparison, many long distance carriers have been advertising residential *rates* of ten cents per-minute or less.

from the slamming carrier that it does not receive under our rules, such as lost profits or other damages, the authorized carrier has recourse against the slamming carrier in the appropriate forum, such as before the Commission or in a state or federal court.[88] We conclude that the approach to liability we adopt herein strikes a reasonable balance between the interests of carriers and consumers. We also note that, in the Further Notice of Proposed Rulemaking section of this *Order*, we propose to permit the authorized carrier to collect from the slamming carrier either: (1) double the amount of charges paid by a slammed subscriber, or (2) the amount for which a subscriber has been absolved of liability.[89] This proposal would provide limited absolution for all consumers -- thus satisfying Congress' policy that "consumers be made whole"[90] -- while at the same time ensuring that authorized carriers are no worse off as a result of an unauthorized change.

28. Several commenters, including AT&T and GTE, state that consumers should pay for services received in order to give effect to the remedy in section 258(b), which requires unauthorized carriers to give authorized carriers all charges collected from slammed subscribers.[91] By its terms, that remedy applies only when the consumer has in fact made payment to the unauthorized carrier. Section 258(b) does not *require* the consumer to pay either the authorized carrier or the unauthorized carrier.[92] As discussed in the following section, if a subscriber does pay his or her unauthorized carrier, the authorized carrier will be entitled to collect that amount from the unauthorized carrier in accordance with section 258(b). Although we recognize that encouraging subscribers not to pay the slamming carrier may reduce the amounts authorized carriers may collect from slamming carriers pursuant to section 258(b), absolving subscribers of the responsibility to pay their slamming carriers in the first instance does not abrogate the section 258(b) remedy for authorized carriers.

29. We do recognize that by absolving the consumer of liability for a certain period of

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88 *See, e.g.*, 47 U.S.C. § 208. The authorized carrier may take many different avenues to make additional claims against the slamming carrier. For example, the authorized carrier could file suit in state court for tortious interference with a business contract. If the slamming carrier is a reseller of the authorized carrier's services, the authorized carrier might also have a claim against the slamming carrier for violation of contract terms.

89 *See infra* Further Notice of Proposed Rulemaking, Recovery of Additional Amounts from Unauthorized Carriers.

90 Joint Explanatory Statement at 136.

91 *See, e.g.*, AT&T Comments at 10; GTE Reply Comments at 6.

92 47 U.S.C. § 258(b).

time, our remedy goes beyond the specific statutory remedy that is explicitly set forth in section 258(b) of the Act. Section 258(b) also states, however, that "the remedies provided by this subsection are in addition to any other remedies available by law."[93] Absolving slammed subscribers of liability for a limited period of time is within the Commission's authority under section 201(b) to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the] Act," as well as under section 4(i) to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions."[94] Pursuant to such authority, we have determined that the most effective method of deterring slamming is to deprive carriers of revenue from slamming by absolving consumers of liability for 30 days after the unauthorized change. As we have already stated, by enabling the consumer to forgo payment to the slamming carrier, we limit the opportunities for slamming carriers to profit from slamming. Furthermore, the absolution remedy we adopt is not inconsistent with section 258 because the section 258(b) remedy only applies to charges that have been paid to the slamming carrier and does not reference charges that have not been paid.

30. We also recognize that, to the extent that our rules permit authorized carriers to collect some charges, at their rates, for services provided by slamming carriers beyond the 30-day absolution period, these requirements are not in accordance with Section 203(c), which requires carriers to collect charges in accordance with their filed tariffs.[95] Because tariffs only permit carriers to collect charges for service they actually provide, our new rule requiring authorized carriers to collect charges for service provided by slamming carriers would not be in accordance with their tariffs. Section 10 of the Act, however, permits the Commission to forbear from applying section 203 tariff requirements to interstate, domestic, interexchange carriers if the Commission determines that three statutory forbearance criteria are satisfied.[96] We conclude that these criteria are met.

31. First, we find that enforcement of section 203(c) in this instance is not necessary

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93 *Id.*

94 *See* 47 U.S.C. §§ 201(b); 4(i).

95 Section 203(c) states that no carrier shall "(1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule than in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." 47 U.S.C. § 203(c).

96 47 U.S.C. § 160(a).

to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that carrier or service are just and reasonable and are not unjustly or unreasonably discriminatory.[97] The circumstances under which we permit the authorized carrier to collect charges that are not in accordance with its tariff are very limited. In fact, by requiring the subscriber to pay the authorized carrier rather than the slamming carrier, our rule helps to deter the unlawful, unjust, and unreasonable practices of slamming carriers by preventing them from making profits from slammed consumers. Under these limited circumstances, our rule is not necessary to ensure that the authorized carrier's charges, practices, classifications, or regulations from being just and reasonable, and not unjustly or unreasonably discriminatory.

32. Second, enforcement of section 203(c) under these circumstances is not necessary for the protection of consumers.[98] On the contrary, requiring subscribers to pay their slamming carriers rather than their authorized carriers would be harmful to consumers. Our rule operates to protect consumers from the abusive practices of slamming carriers by depriving such carriers of slamming profits. Therefore enforcement of section 203(c) in this particular situation is not necessary to protect consumers.

33. Third, forbearance from applying section 203(c) in this instance is consistent with the public interest.[99] In making this determination, section 10(b) also requires us to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.[100] We conclude that permitting the subscriber to pay the authorized carrier for charges imposed by slamming carriers after the 30-day absolution period is consistent with the public interest. Slamming distorts competition in the marketplace because it rewards carriers who employ fraud and deceit over carriers that are conducting lawful activities. Slamming also deprives a consumer of choice. Because our rule deters slamming by making slamming unprofitable, it promotes the public interest, including enhancing competition for telecommunications services.

2. When the Slammed Subscriber Pays the Unauthorized Carrier

34. We concluded above that a slammed subscriber is not liable for charges incurred during the first 30 days after an unauthorized carrier change.[101] In the event that a subscriber

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97 *See id.* at § 160(a)(1).

98 *See id.* at § 160(a)(2).

99 *See id.* at § 160(a)(3).

100 *Id.* at § 160(b).

101 *See supra* discussion on Liability of Subscribers to Carriers.

nevertheless pays the unauthorized carrier for slamming charges, two rules shall govern. First, the unauthorized carrier is obligated to remit to the authorized carrier all charges paid by the subscriber. Second, after receiving this amount from the unauthorized carrier, the authorized carrier shall provide the subscriber with a refund or credit for any amounts the subscriber paid in excess of what he or she would have paid the authorized carrier absent the unauthorized change.

a. Liability of the Unauthorized Carrier

35. We adopt the rule proposed in the *Further Notice and Order* to provide that any telecommunications carrier that violates the Commission's verification procedures and that collects charges for telecommunications service from a subscriber shall be liable to the subscriber's properly authorized carrier in an amount equal to all charges paid by such subscriber after such violation. This remedy is directed specifically by the language in section 258(b) of the Act.[102] All of the parties commenting on the proposed rule support this approach.[103] Consistent with the discussion above, this rule will apply in situations in which the subscriber has paid charges to an unauthorized carrier.

36. We also impose certain additional penalties on unauthorized carriers. As proposed in the *Further Notice and Order*, we also require the unauthorized carrier to pay for reasonable billing and collection expenses, including attorneys' fees, incurred by the authorized carrier in collecting charges from the unauthorized carrier.[104] Several commenters support the imposition of these additional penalties.[105] Although section 258 only requires the unauthorized carrier to remit to the authorized carrier all charges collected from the slammed subscriber, we conclude that we have authority to grant the authorized carrier additional remedies.[106] Requiring

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102 *Further Notice and Order*, 12 FCC Rcd at 10691. *See* Appendix A, §§ 64.1100(c); 64.1170(a)(2)(A).

103 *See, e.g.*, ACTA Comments at 36; GTE Comments at 15; Sprint Comments at 26; Telco Comments at 9.

104 *Further Notice and Order*, 12 FCC Rcd at 10,691. See also Appendix A, § 64.1170(b). Although the authorized carrier may collect attorneys' fees incurred in collecting charges from the unauthorized carrier prior to the filing of a formal complaint with the Commission, the Commission has no authority to award attorneys' fees incurred *during* litigation before the Commission. *See Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Co.*, 11 FCC Rcd 11202, 11208 (1996); *Comark Cable Fund III v. Northwestern Indiana Telephone Co.*, 100 FCC 2d 1244, 1259 (1985).

105 *See, e.g.*, Ameritech Comments at 27, n.6; Bellsouth Comments at 14; GTE Comments at 15, n.33; MCI Comments at 20; NAAG Comments at 8; SBC Comments at 12.

106 Because section 258 states that "the remedies provided by this subsection are in addition to any other remedies available by law," the Commission is not limited to using only the remedy contained in section 258. 47 U.S.C. § 258. *See also* 47 U.S.C. §§ 4(i); 201(b).

the unauthorized carrier to pay for expenses incurred by the authorized carrier in collecting charges from the unauthorized carrier ensures that the authorized carrier does not suffer further economic loss because of the unauthorized change, and adds an economic incentive for the authorized carrier to seek reimbursement for slamming. Additionally, since the rule increases the penalty for slamming, the unauthorized carrier may facilitate reimbursement to the authorized carrier in order to avoid payment of any additional expenses for billing and collection. Although several commenters support this rule,[107] several other commenters object, arguing that such expenses would be difficult to determine.[108] We disagree because we find that carriers are sophisticated business entities that are well aware of the expenses of collection, including litigation costs. Moreover, we believe that collection expenses likely will become standardized among carriers in the relatively near future. More importantly, we conclude that an unscrupulous carrier should bear full financial responsibility for the costs of its unlawful actions.

37. We also require the unauthorized carrier to pay for the expenses of restoring the subscriber to his or her authorized carrier.[109] We have previously stated that where an interexchange carrier submits a request that is disputed by a subscriber and the interexchange carrier is unable to produce verification of that subscriber's change request, the LEC must assess the applicable change charge against that interexchange carrier.[110] We codify and expand our prior requirement to encompass any carrier, not just an interexchange carrier, that is unable to provide verification of a subscriber's change request. By requiring the unauthorized carrier to pay the change charge to the authorized carrier, we ensure that neither the authorized carrier nor the subscriber incurs additional expenses in restoring the subscriber to his or her preferred carrier. Furthermore, requiring the unauthorized carrier to pay these additional charges will serve as a further deterrent to unauthorized changes.

b. Subscriber Refunds or Credits

38. Our new rules will enable subscribers to prevent carriers from profiting by absolving them of liability for the first 30 days after an unauthorized change. We conclude, however, that the specific provisions of section 258(b) appear to prevent us from absolving consumers of liability to the extent that they have already made payments to their unauthorized

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107 *See, e.g.*, Ameritech Comments at 27, n.16; BellSouth Comments at 14.

108 *See, e.g.*, BIC Comments at 8; Texas Commission Comments at 6.

109 *See* Appendix A, §§ 64.1100(d)(2), 64.1170(a)(2)(B). *See, e.g.*, SBC Comments at 12; TRA Comments at 15; WorldCom Comments at 14.

110 *See Illinois CUB Order*, 2 FCC Rcd at 1729.

carriers.[111] We conclude that Congress intended that subscribers who pay for slamming charges should pay no more than they would have paid to their authorized carriers for the same service had they not been slammed.[112] Indeed, the legislative history reflects Congressional intent that "the Commission's rules should also provide that consumers be made whole."[113] Therefore our rules will require the authorized carrier to refund or credit the subscriber for any charges collected from the unauthorized carrier in excess of what the subscriber would have paid the authorized carrier absent the switch. This approach is consistent with the Commission's current rules that ensure that the slammed subscriber pays no more for service than he or she would have paid before the unauthorized switch. Furthermore, we conclude that requiring a refund of the excess amounts paid by the subscriber does not harm the authorized carrier who has in fact received payment for service that it did not provide to the subscriber. Should the authorized carrier conclude that it is suffering some financial harm, nothing in our rules would preclude the carrier from filing a claim against the unauthorized carrier for lost profits or other damages.[114]

39. We require the authorized carrier to refund or credit the subscriber with any amounts the subscriber paid in excess of the authorized carrier's rates, after the authorized carrier has received from the slamming carrier all amounts paid by the subscriber to the slamming carrier.[115] This will prevent the slammed consumer from being financially harmed by the unauthorized change, in accordance with the Commission's belief, as stated in the *Further Notice and Order*, that a slammed subscriber should receive prompt and full reparation for harm suffered as a consequence of unauthorized carrier changes.[116] We note that section 258 only

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111 Section 258(b) states that "[a]ny telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber 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." 47 U.S.C. § 258(b).

112 *See* Appendix A, §§ 64.1100(d)(1). We realize that this rule appears to treat slammed consumers differently, by absolving of liability those consumers who do not pay unauthorized charges, while not providing a complete refund to consumers who may inadvertently pay such charges. We propose in the Further Notice of Proposed Rulemaking a way to provide a complete refund to subscribers who have paid their slamming carriers while still complying with the language of Section 258. *See infra* Further Notice of Proposed Rulemaking, Recovery of Additional Amounts from Unauthorized Carriers.

113 Joint Explanatory Statement at 136.

114 For example, a carrier could file a complaint with the Commission pursuant to section 208. *See* 47 U.S.C. § 208.

115 *See* Appendix A, § 64.1170(d).

116 *Further Notice and Order*, 12 FCC Rcd at 10691.

requires that the unauthorized carrier remit to the authorized carrier all charges paid by the subscriber after the unauthorized change.[117] We conclude that we have authority to impose these requirements on authorized carriers to prevent subscribers from suffering further harm from slamming.[118] Moreover, the legislative history, which mentions restoring lost premiums to slammed subscribers, demonstrates Congressional concern that subscribers do not suffer losses due to being slammed.[119] The authorized carrier may keep the amount that it would have earned absent the unauthorized switch and refund or credit the difference to the subscriber.

40. If the authorized carrier fails to collect the charges paid by the subscriber from the unauthorized carrier, the authorized carrier is not required to provide a refund or credit to the subscriber.[120] The authorized carrier, who has done no wrong, should not be penalized by having to provide the subscriber with a refund paid out of the authorized carrier's pocket. The authorized carrier, however, has an affirmative obligation to notify the subscriber in a timely fashion of its failure to collect the charges paid by the subscriber to the unauthorized carrier. We require the authorized carrier to notify the subscriber within 60 days after the subscriber has notified the authorized carrier of an unauthorized change, if the authorized carrier has failed to collect from the unauthorized carrier the charges paid by the slammed subscriber.[121] This failure to collect may be due to the slamming carrier's refusal to cooperate, or it may stem from the authorized carrier's decision not to pursue its claims against the slamming carrier. Upon receipt of the notification, the subscriber will have the opportunity to pursue a claim against the slamming carrier for a full refund of all amounts paid to the slamming carrier. The subscriber is entitled to the entire amount paid, rather than merely a refund or credit of charges paid in excess of the authorized carrier's rates. This is because it is the subscriber who is collecting the charges from the slamming carrier rather than the authorized carrier. The language of section 258(b) generally prevents the subscriber from being absolved of liability for charges paid because it

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117 *See* 47 U.S.C. § 258(b).

118 *See* 47 U.S.C. §§ 201(b) (granting the Commission authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the] Act"); 4(i) (granting the Commission authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions").

119 Congress states that "the Commission's rules should require that carriers guilty of 'slamming' should be liable for premiums, including travel bonuses, that would otherwise have been earned by telephone subscribers but were not earned due to the violation of the Commission's rules. . . ." Joint Explanatory Statement at 136.

120 *See* Appendix A, § 64.1170(d)(1).

121 *Id.*

indicates that the authorized carrier may make a claim for, and keep, amounts paid to the slamming carrier.[122] Where the authorized carrier has failed in collecting charges from the slamming carrier, however, the language of section 258(b) would not apply. Therefore the subscriber, who is not bound by the carrier remedy in section 258(b), would be entitled to a refund from the slamming carrier of all slamming charges paid. If the subscriber has difficulty in obtaining this refund from the slamming carrier, the subscriber has the option of filing a complaint with the Commission pursuant to section 208.[123] We anticipate that, with continued consumer awareness and education about our slamming liability rules, fewer and fewer consumers will find themselves in the situation of having paid their slamming carriers. We are confident that eventually slamming carriers will be completely unable to profit because consumers will refuse to pay them.

3. Investigation and Reimbursement Procedures

a. When the Subscriber Has Not Paid the Unauthorized Carrier

41. A subscriber may refuse to pay any charges imposed by the slamming carrier for 30 days after the unauthorized change occurred.[124] As stated above, we conclude that this simple remedy will prevent slamming carriers from profiting and will also compensate the consumer for the confusion and inconvenience of being slammed. The record supports, however, giving the carrier who has been deprived of charges the opportunity to refute a subscriber's slamming claim.[125] We therefore impose the following mechanism to limit the ability of subscribers to fraudulently claim that they have been slammed.

42. After the subscriber has reported an allegedly unauthorized change and requested to be switched back to the authorized carrier, the slamming carrier shall remove from the subscriber's bill, whether billed through a LEC or otherwise, all charges that were incurred for

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122 *See* 47 U.S.C. § 258(b) (stating that an unauthorized carrier must remit to the authorized carrier all charges paid by a subscriber after being slammed).

123 *See* 47 U.S.C. § 208. We note that in the *Further Notice and Order*, we proposed to require carriers to pursue private settlement negotiations prior to filing a formal complaint with the Commission to resolve slamming liability. The Commission subsequently revised its formal complaint rules to require parties to certify that they have attempted to discuss settlement prior to filing any formal complaint. Therefore we decline to adopt any specific rule requiring parties to certify that they have attempted settlement in complaints regarding slamming liability.

124 *See* Appendix A, § 64.1100(d).

125 *See, e.g.*, AT&T Comments at 13.

the first 30 days after the unauthorized change occurred.[126] Several commenters stated that the carrier that is accused of slamming must have the opportunity to provide proof of verification.[127] Therefore, if the allegedly unauthorized carrier has proof of the consumer's valid verification of authorization to change to it, however, then such carrier may make a claim to the consumer's originally authorized carrier. Specifically, the allegedly unauthorized carrier shall, within 30 days of the subscriber's return to the originally authorized carrier, submit to the originally authorized carrier a claim for the amount of charges for which the consumer was absolved, along with proof of the subscriber's verification of the disputed carrier change.[128] The proof of verification should contain clear and convincing evidence that the subscriber knowingly authorized the carrier change, such as a written LOA or audiotape of an independent third party verification. The authorized carrier shall conduct a reasonable and neutral investigation of the claim, including, where appropriate, contacting the subscriber and the carrier making the claim.[129] Within 60 days after receipt of the claim and the proof of verification, the originally authorized carrier shall issue a decision to the subscriber and the carrier making the claim.[130] We note here that, regardless of the originally authorized carrier's decision on the validity of the disputed change, that carrier shall remain the subscriber's authorized carrier, since the subscriber has validly switched back to it. If the originally authorized carrier decides that the subscriber did in fact authorize a carrier change to the carrier making the claim, it shall place on the subscriber's bill a charge equal to the amount of charges for which the subscriber was previously absolved.[131] Upon receiving this amount, the originally authorized carrier shall forward this amount to the carrier making the claim.[132] If the authorized carrier determines that the subscriber was slammed by the carrier filing the claim, the subscriber shall not be required to make any payments for the charges for which he or she was absolved.[133] If either the subscriber or the carrier making the claim believes that the authorized carrier's investigation or adjudication of the dispute was in any

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126 *See* Appendix A, § 64.1180(b). These charges shall be removed from the bill upon a subscriber's allegation that he or she was slammed.

127 *See* AT&T Comments at 13, MCI *Ex Parte* Presentation of Nov. 17, 1998 at 2.

128 *See* Appendix A, § 64.1180(c).

129 *Id.* at § 64.1180(d).

130 *Id.* at § 64.1180(e).

131 *Id.* at § 64.1180(e)(1).

132 *Id.*

133 *Id.* at § 64.1180(e)(2).

way improper or wrong, then it has the option of filing a section 208 complaint.[134]

b. When the Subscriber Has Paid the Unauthorized Carrier

43. When the subscriber has paid charges to the slamming carrier, the following procedures shall apply. First, we require the authorized carrier to submit to the allegedly unauthorized carrier, within 30 days of notification of an unauthorized change, a request for proof of verification of the subscriber's requested carrier change.[135] Our reimbursement procedure, as originally proposed in the *Further Notice and Order*, required the authorized carrier to make demand for payment on the unauthorized carrier within ten days of notification from its subscriber of an unauthorized change.[136] Some commenters contend, however, that the authorized carrier may need more time than the proposed ten days.[137] We agree that, under certain circumstances, a carrier may need more than ten days to make demand on an allegedly unauthorized carrier. Such circumstances could include, for example, situations in which the authorized carrier has difficulty in determining the identity of the unauthorized carrier or in contacting the unauthorized carrier.[138] Therefore, we require the authorized carrier to make demand on the allegedly unauthorized carrier within 30 days, which gives the authorized carrier sufficient time to prepare its demand while still enabling both carriers to resolve the dispute in a timely manner, thus permitting the authorized carrier to resolve issues of overcharges and lost premiums as quickly as possible for the subscriber.

44. Second, we require the allegedly unauthorized carrier to provide proof of verification, such as a copy of a written LOA or an audiotape recording of an independent third party verifier, to the authorized carrier within ten days of the authorized carrier's request.[139] If the allegedly unauthorized carrier does provide proof of verification, consistent with the Commission's verification procedures, of the disputed carrier change request, then the burden shifts to the authorized carrier to prove that an unauthorized change occurred.[140] The proof of

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134 *See* 47 U.S.C. § 208.

135 *See* Appendix A, § 64.1170(a).

136 *Further Notice and Order*, 12 FCC Rcd at 10732.

137 *See, e.g.*, AT&T Comments at 12; MCI Comments at 19 n.22; U S West Reply Comments at 31.

138 *See, e.g.*, AT&T Comments at 12; MCI Comments at 19 n.22; U S West Reply Comments at 31.

139 *See* Appendix A, § 64.1170(a)(1).

140 The authorized carrier might attempt to prove that an unauthorized change occurred in a section 208 complaint proceeding, for example.

verification must provide clear and convincing evidence that the subscriber provided knowing authorization of a carrier change.

45. If the allegedly unauthorized carrier cannot provide proof of verification, then it must provide to the authorized carrier, also within ten days of the authorized carrier's request for proof of verification, a copy of the subscriber's bill, an amount equal to any charge required to return the subscriber to his or her authorized carrier, and an amount equal to any charges paid by the subscriber, if applicable.[141] In adopting these rules, we take into account several of the commenters' viewpoints. AT&T suggests that the unauthorized carrier be required to provide proof of compliance with the Commission's verification rules by a certain deadline,[142] while TOPC and U S West suggest that the unauthorized carrier be required to forward all bills and money paid by a certain deadline.[143] We therefore provide the allegedly unauthorized carrier with the opportunity to prove that it did comply with our verification rules. We also require the allegedly unauthorized carrier to respond by a set deadline. If it is determined that an unauthorized change has occurred, timely receipt by the authorized carrier of the subscriber's bill and any charges paid will enable the authorized carrier to provide a quick resolution for the subscriber. In the event that the authorized carrier is unable to obtain an appropriate response from the slamming carrier, the authorized carrier may bring an action in federal or state court, where appropriate, or before the Commission, against the slamming carrier.[144] Furthermore, as discussed above, the authorized carrier must also notify the subscriber of its failure to collect charges within 60 days after the subscriber has notified the authorized carrier of an unauthorized change, so that the subscriber may also attempt to collect a full refund of all amounts paid to the slamming carrier for charges incurred during the first 30 days after the unauthorized change.[145]

46. We note that NAAG suggests that the unauthorized carrier's duty to send information and reimbursement to the authorized carrier should be triggered additionally by notification from the LEC, another carrier, or a government agency.[146] ACTA opposes expanding the number of parties who can set the reimbursement procedure in motion because the

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141 *See* Appendix A, § 64.1170(a)(2).

142 AT&T Comments at 13. *See also* MCI *Ex Parte* Presentation of Nov. 17, 1998 at 2.

143 TOPC Comments at 4; U S WEST Reply Comments at 31.

144 *E.g.*, the authorized carrier would have a cause of action in a formal complaint filed pursuant to section 208 of the Act. 47 U.S.C. § 208.

145 *See* Appendix A, § 64.1170(d)(1).

146 NAAG Comments at 8.

only relevant parties to the dispute are the unauthorized carrier, the properly authorized carrier, and the subscriber.[147] We find that the authorized carrier should be the party to make demand on the unauthorized carrier, although the authorized carrier may do so upon notification by the subscriber or the executing carrier. We find that confusion could result if unauthorized carriers are required to respond to several different parties within the deadlines we have set. This rule does not negate any other obligations an unauthorized carrier may have to respond to service of a complaint, such as the obligation to respond within 30 days to a notice of a consumer complaint issued by the Commission, pursuant to section 208 of the Act.[148] We also do not purport to preempt the activities of states who take action against slamming carriers.[149]

3. Restoration of Premiums

47. Premiums are bonuses, such as frequent flier miles, that are given to subscribers as rewards for each dollar spent on telecommunications services. The Commission noted in the *Further Notice and Order* that although section 258 does not specifically address the restoration of premiums, the legislative history states that "the Commission's rules should require that carriers guilty of 'slamming' should be liable for premiums, including travel bonuses, that would otherwise have been earned by telephone subscribers but were not earned due to the violation of the Commission's rules. . . ."[150] We find, based on the legislative history, that Congress intended for subscribers to be reinstated in their premium programs and receive restoration of premiums that were lost due to slamming.[151]

48. We require an authorized carrier to reinstate the subscriber in any premium program in which the subscriber was enrolled prior to being slammed, if that subscriber's participation in the premium program was terminated because of the unauthorized change.[152] The record also supports a requirement that the authorized carrier restore to the subscriber any premiums that the subscriber lost due to slamming if a subscriber has paid the unauthorized

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147 ACTA Reply Comments at 22.

148 47 U.S.C. § 208.

149 *See infra* discussion in The States' Role.

150 *See Further Notice and Order*, 12 FCC Rcd at 10692, *citing* Joint Explanatory Statement at 136.

151 *Cf.* LCI Reply Comments at 18-19 (stating that because section 258 does not reference any carrier-subscriber liability, the Commission should not adopt any requirements as to restoration of premiums).

152 *See* Appendix A, § 64.1170(e).

carrier for slamming charges.[153] Once an authorized carrier receives from the slamming carrier all charges that the subscriber paid, the authorized carrier has been made whole and is obligated to restore the subscriber's premiums. Since the authorized carrier in this event has received at least what it would have been entitled to absent the slam, they are no worse off from having to provide any premiums that subscribers would have received. We emphasize that the authorized carrier is entitled to receive from the slamming carrier charges paid by the slammed subscriber, and we expect that authorized carriers will make every effort to pursue their claims against slamming carriers.[154] In the event that an authorized carrier is unable to recover from the unauthorized carrier charges that were paid by the subscriber, however, the authorized carrier is still required to restore the subscriber's premiums.[155] A subscriber who has paid slamming charges deserves to receive the premiums that would have accompanied such payment in the absence of the unauthorized carrier change. Although this rule may result in some authorized carriers having to restore premiums without being compensated, we conclude that this is necessary to fulfill the intent of Congress and to prevent the subscriber from suffering any losses from being slammed. The authorized carrier is the only entity that is in a position to compensate subscribers for lost premiums and we believe that a carrier's cost of providing premiums is minimal. Furthermore, an authorized carrier that knows that it must restore premiums to subscribers who have paid slamming charges will make greater efforts to recover such charges from the unauthorized carrier. Encouraging carriers to pursue their claims against unauthorized carriers will increase enforcement efforts against all carriers who make unauthorized changes. On the other hand, an authorized carrier is not required to restore any premiums lost by that subscriber if the subscriber has not paid for the charges incurred after being slammed. Several commenters agree with our view that premiums should not be restored to subscribers who do not pay any charges.[156] To do otherwise would grant the subscriber a windfall. It is sufficient that the subscriber be reinstated in any premium program from which he or she was terminated due to the unauthorized change.

49. Although the Commission proposed in the *Further Notice and Order* to require the unauthorized carrier to remit to the properly authorized carrier an amount equal to the value

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153 *See, e.g.*, Ameritech Comments at 28-29; TOPC Reply Comments at 6.

154 Authorized carriers may, in addition to the remedies in the rules adopted in this *Order*, take legal action in the appropriate forum, including a complaint before the Commission or in a state or federal court.

155 *See* Appendix A, § 64.1170(e). *See also* NYSCPB Comments at 11 (stating that the authorized carrier should promptly restore premiums even if the slamming carrier has not remitted the amounts paid by the subscriber).

156 *See, e.g.*, Ameritech Comments at 29; North Carolina Commission Comments at 6-7; Virginia Commission Comments at 4; Working Assets Comments at 44.

of premiums to be restored to the subscriber,[157] we find that this is not necessary to enable the authorized carrier to restore premiums to its subscribers. If the unauthorized change had never occurred, the authorized carrier would have provided the premium to the subscriber on the basis of the subscriber's payment to the authorized carrier. Therefore the authorized carrier is no worse off than it would have been if it is required to restore subscriber premiums upon receipt of the amount paid by the subscriber to the unauthorized carrier. In other words, we believe that charges for telephone service incorporate the cost of any premiums that may be given to subscribers. The authorized carrier does not need to collect from the slamming carrier both the charges paid by the subscriber and an amount equal to the cost of the premiums because the cost of the premiums has already been incorporated into the charges paid by the subscriber.

4. Liability for Inadvertent Unauthorized Changes

50. We reiterate that the statute and our rules impose liability for any unauthorized change in a subscriber's preferred carrier, whether intentional or inadvertent.[158] Section 258 of the Act makes it illegal for a carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe."[159] Although several commenters assert that our rules should apply only to intentional acts that result in slamming,[160] the statutory language does not establish an intent element for a violation of section 258. Several commenters, such as Ameritech, BellSouth, and the North Carolina Commission, support the application of a strict liability standard, in which a carrier would be liable for slamming if it was responsible for an unauthorized change, regardless of whether the unauthorized carrier did so intentionally.[161] We agree that such a strict liability standard is required by the statute.

51. GTE, Frontier, and U S WEST argue that imposing liability for actions that are

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157 *Further Notice and Order*, 12 FCC Rcd at 10691.

158 We note that a CMRS provider's change of a subscriber's toll carrier would not be considered an unauthorized change under our rules because CMRS providers may change their toll carriers without the approval of their subscribers, unless they have contracted otherwise with their subscribers. *See supra* discussion on Application of the Verification Rules to All Telecommunications Carriers.

159 47 U.S.C. § 258(a).

160 *See, e.g.*, ACTA Comments at 10; Frontier Comments at 3.

161 *See, e.g.*, Ameritech Reply Comments at 27; BellSouth Reply Comments at 3; North Carolina Commission Comments at 12.

not intentional or willful would abrogate common carriers' limited liability tariff provisions.[162] We disagree because we cannot condone allowing carriers to protect themselves from liability for unlawful or fraudulent conduct through the use of tariff provisions. Furthermore, the language of section 258 prohibits all unauthorized carrier changes and does not impose any requirement that such carrier change be intentional.[163] ACTA contends that defining slamming to include inadvertent acts is so vague that it "creates numerous constitutional concerns."[164] ACTA contends that imposing liability on carriers who are merely negligent may infringe upon First Amendment rights because "it is feared that regulators are consciously stretching the definition of slamming to encompass those customers who switch carriers based on allegedly misleading marketing materials."[165] We do not agree that, by including unintentional unauthorized changes, we are "stretching" the definition of slamming, since it is Congress, not the Commission, that has concluded that any unauthorized change in subscriber selection is considered to be slamming.[166] Further, the First Amendment does not provide absolute immunity for negligent or other non-intentional conduct simply because that conduct relates to speech.[167] ACTA also argues that defining slamming to include inadvertent acts is so vague that it will lead to selective enforcement.[168] Again, we disagree. We conclude, in fact, that defining slamming to include all unauthorized carrier changes, whether inadvertent or intentional, is in fact a bright line standard that will minimize the threat of selective enforcement because it does not depend on divining the subjective intent of the violator. Finally, ACTA contends that requiring a carrier who is merely negligent to remit revenues to the former carrier would constitute a taking in violation of the Fifth Amendment, because that carrier has done no wrong.[169] We disagree with ACTA that our rules impact any takings issues because we conclude that a slamming carrier has no property

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162 GTE Comments at 7; Frontier Comments at 14; US WEST Comments at 48-49.

163 *See* 47 U.S.C. § 258.

164 ACTA Comments at 11.

165 ACTA Comments at 15.

166 Joint Explanatory Statement at 136.

167 *See, e.g.*, *Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110 (1992) (stating that the First Amendment permits the imposition of liability for negligently publishing a commercial advertisement that makes it apparent that there is a substantial danger of harm to the public), *cert. denied*, *Soldier of Fortune Magazine, Inc. v. Braun*, 506 U.S. 1071 (1993).

168 ACTA Comments at 16.

169 *Id.* at 17.

rights in the charges for unauthorized service collected from another carrier's subscribers. More importantly, ACTA's assertion is simply mistaken in assuming that a carrier committing a negligent act has not committed a "wrong." Negligent conduct gives rise to liability and in this context, carriers have an affirmative obligation to both obtain authorization from the consumer and to verify that authorization. Any failure to fully and accurately comply with these requirements is not acceptable under either the statute or our rules.

52. We conclude that holding carriers liable for both inadvertent and intentional unauthorized changes to subscribers' preferred carriers will reduce the overall incidence of slamming and is consistent with section 258. We find that the rights of the consumer and the authorized carrier to remedies for slamming should not be affected by whether the slam was an intentional or accidental act. Regardless of the intent, or lack thereof, behind the unauthorized change, the consumer and the authorized carrier have suffered injury. We agree with those commenters who assert that imposing liability for both inadvertent and intentional carrier changes will make all carriers more vigilant in preventing unauthorized carrier changes and provide carriers with incentive to correct errors in a speedy and efficient manner.[170] We conclude that holding carriers liable for all unauthorized changes provides appropriate incentives for carriers to obtain authorization properly and to implement their verification procedures in a trustworthy manner. We recognize, however, that even with the greatest care, innocent mistakes will occur and may result in unauthorized changes. In such cases, we will take into consideration in any enforcement action the willfulness of the carriers involved.

4. Determining Liability Between Carriers

53. Section 258 requires both the submitting and executing telecommunications carriers to ensure that a carrier change comports with procedures established by the Commission to protect consumers and promote fair competition.[171] Hence, to the extent that a submission or execution fails to comport with established procedures, the Act contemplates that either or both telecommunications carriers could be liable for an unauthorized change in a subscriber's telecommunications service. In order to avoid or minimize disputes over the source or cause of unauthorized carrier changes, or over liability for such carrier changes, we delineate the duties and obligations of the submitting and executing carriers.

54. As proposed in the *Further Notice and Order*, we adopt the following "but for" liability test: (1) where the submitting carrier submits a carrier change request that fails to

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170 *See, e.g.*, BellSouth Reply Comments at 3.

171 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 service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." 47 U.S.C. § 258.

comply with our rules and the executing carrier performs the change in accordance with the submission, only the submitting carrier is liable as an unauthorized carrier;[172] (2) where the submitting carrier submits a change request that conforms with our rules and the executing carrier fails to execute the change in conformance with the submission, only the executing carrier is liable for the unauthorized change;[173] and (3) finally, where the submitting carrier submits a carrier change request that fails to comply with our rules and the executing carrier fails to perform the change in accordance with the submission, only the submitting carrier is liable as an unauthorized carrier.[174] The majority of parties commenting on this issue support the adoption of the proposed liability test.[175] They agree that this test not only properly allocates liability for unauthorized carrier changes, but also establishes clear standards for when liability will be imposed. With these clear standards, carriers can take appropriate measures to protect themselves against liability and therefore reduce all instances of slamming, whether intentional or inadvertent.[176]

B. Third Party Administrator for Dispute Resolution

55. We have formulated several mechanisms in this *Order* that rely on the authorized carrier to provide relief to its slammed subscribers and to determine whether its subscriber was slammed.[177] We believe that these requirements form a necessary baseline for ensuring that consumer problems arising from slamming are addressed adequately. We recognize, however, that some carriers may find it to be in their interest to make other mutually agreeable arrangements that might better serve to address our concerns. For instance, several carriers,

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172 Where a submitting carrier is liable for an unauthorized change, the subscriber is absolved of liability for charges incurred during the first 30 days after being slammed. If the subscriber pays slamming charges, the submitting carrier will be liable to the authorized carrier for such charges, as well as for additional amounts such as billing and collection expenses. *See* Appendix A, §§ 64.1100, 64.1170.

173 Where an executing carrier is liable for an unauthorized carrier change, it may be subject to liability for damages proved in state or federal court, Commission proceedings, or forfeiture penalties imposed by the Commission pursuant to section 503(b) of the Act. *See, e.g.*, 47 U.S.C. §§ 208, 503(b).

174 *Further Notice and Order*, 12 FCC Rcd at 10693. As a practical matter, a carrier change request submission should always precede a carrier change execution; thus, the liability of an executing carrier for unauthorized carrier changes would only be addressed after the actions of the submitting carrier are considered.

175 *See, e.g.*, Ameritech Comments at 30; Sprint Comments at 27; CompTel Comments at 13.

176 *See, e.g.*, Ameritech Comments at 30; IXC Long Distance Reply Comments at 4.

177 *See supra* discussions on Investigation and Reimbursement Procedures and Liability Between Carriers.

particularly MCI, have indicated that they are willing and able to create quickly a system using an independent third party administrator to discharge carrier obligations for resolving disputes among carriers and subscribers with regard to slamming, including re-rating subscriber telephone bills and returning the subscriber to the proper carrier.[178] We agree that this concept has merit. Consumers would benefit by having one point of contact to resolve slamming problems. Carriers would benefit by having a neutral body to resolve disputes regarding slamming liability. LECs would no longer be the recipients of angry phone calls from consumers who have been slammed by long distance carriers, while IXCs would be able to divert their resources to preventing slamming rather than resolving slamming disputes. Although this approach holds promise, we do not believe that we should abandon the rules adopted herein because they provide an appropriate mechanism for all carriers to render appropriate relief and dispute resolution to slammed consumers and carriers. We do, however, encourage carriers to work out such arrangements and we will be open to receiving requests for waiver of the liability provisions of our rules for carriers that agree to implement an acceptable alternative.

56. To afford carriers time to develop and implement an industry-funded independent dispute resolution mechanism and to file waiver requests as described above, we delay the effective date of the liability rules set forth above until 90 days after Federal Register publication of this *Order*.[179] We note that this is not a substantial delay in light of the fact that, due to statutory constraints, the rules adopted in this *Order*, aside from the liability rules, will not be effective until 70 days after publication in the Federal Register.[180] Any waiver request must be

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178 *See, e.g.*, Letter from Leonard S. Sawicki, MCI WorldCom, to Magalie Roman Salas, FCC (November 25, 1998). In response to the Commission's request for comment in the *Further Notice and Order* on the use of an independent third party to execute carrier changes neutrally, MCI suggests that an independent third party administrator could also provide a negotiation or dispute resolution function for the industry. MCI Comments at 24, n.24. *Further Notice and Order*, 12 FCC Rcd at 10644. More generally, some carriers are concerned that as the competitive marketplace changes, LECs may have a conflict of interest between their role as LEC and their role as an affiliate of an interexchange competitor. *See, e.g.*, Letter from Bruce K. Cox, AT&T, to John Muleta, Federal Communications Commission (Sept. 27, 1996). AT&T suggests that "to avoid the inherent conflict of interest between competing carriers, serious consideration should be given to establishing procedures under which neutral third parties administer PIC protection." *Id.*

179 The effective date of the following rule provisions in Appendix A would be delayed for 90 days: section 64.1100(c), (d); section 64.1170; section 64.1180. Section 64.1100(c) deals with the slamming carrier's liability to the authorized carrier for charges paid by a slammed subscriber. Section 64.1100(d) deals with the subscriber's liability for slamming charges. Section 64.1170 deals with the reimbursement procedures for subscribers who have paid charges to their slamming carriers. Section 64.1180 deals with investigation procedures for carriers who wish to dispute a subscriber's claim of slamming after the subscriber has refused to pay charges. During this 90-day period, the Commission's current slamming liability policies will remain in place -- that is, the subscriber shall be liable to the slamming carrier for charges incurred after being slammed at the authorized carrier's rates.

180 The rules adopted in this *Order* contain new and revised collections of information that must be approved, prior to their effective date, by the Office of Management and Budget (OMB) pursuant to the Paperwork

filed in a timely manner so that the Commission may evaluate and grant or deny such request in enough time to enable carriers to implement and utilize the mechanism by the effective date of the liability rules. In submitting waiver requests, carriers should bear in mind that we would be inclined to grant a waiver only if we are satisfied that any such neutral entity would fulfill the obligations imposed by our rules with regard to liability, in the timeframes specified in the rules.[181] Therefore, for example, with regard to charges imposed on slammed subscribers, the neutral administrator would be charged with ensuring that subscribers are absolved of liability for unpaid charges assessed by slamming carriers for the first 30 days after an unauthorized carrier change has occurred and that such charges are removed from the subscribers' telephone bills. Any charges assessed by the slamming carrier after this 30-day period would be re-rated to the authorized carrier's rates, if lower, to enable the subscriber to pay the authorized carrier. If the subscriber pays the slamming carrier, the neutral administrator also would be charged with ensuring that the slamming carrier remits all such amounts to the authorized carrier, as well as reasonable billing and collection expenses and any applicable change charges. The administrator should also ensure that, under appropriate circumstances, the subscriber receives a refund or credit of any amounts paid in excess of what the authorized carrier would have charged, as well as premiums if applicable. If the administrator fails to collect any amounts from the slamming carrier, it would be responsible for informing the subscriber of his or her rights with respect to charges paid. The third party administrator should be the investigator and arbiter for resolving disputes where the slamming carrier claims that it had proper authorization and verification of the subscriber's request to change carriers. We note that nothing in the Commission's liability rules or the use of the third party administrator shall preclude a consumer or carrier from filing a section 208 complaint or other action in state or federal court.[182]

57. We encourage carriers to develop a plan that ideally enables the consumer to resolve his or her slamming problem with a single contact. We find that it would be greatly beneficial to provide the consumer with the ability to call one entity to explain the slamming problem, and have that entity switch the consumer back to the proper carrier, re-rate bills,

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Reduction Act of 1995. 44 U.S.C. § 3502, *et seq.* The OMB has 60 days after the publication of any new or revised information collection in the Federal Register to review such information collection. *See* 44 U.S.C. § 3507. Therefore all of the rules adopted in this *Order* would not be effective until 70 days after publication in the Federal Register (some extra time is added in the event of a delay by OMB). By delaying the effective date of the liability rules until 90 days after publication in the Federal Register, we only delay their effective date for 20 days after the effective date of the remaining rules adopted in this *Order*.

181 We note that 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. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

182 *See, e.g.*, 47 U.S.C. § 208.

provide refunds, and determine whether a slam has occurred in the event that a carrier claims that a change was authorized. This would provide the consumer with a convenient way to undo the damage caused by slamming. Furthermore, having one neutral party administer these numerous and complicated tasks would lessen any confusion that might be caused if several parties -- the consumer, the slamming carrier, the LEC, and the authorized carrier -- attempt to resolve the same problem at the same time.

C. Verification Rules

1. The Welcome Package

a. Background

58. One of the verification procedures available to carriers under the Commission's rules is the "welcome package." As set forth in section 64.1100(d), after obtaining the subscriber's authorization to make a carrier change, the IXC may send the consumer a welcome package containing information and a prepaid postcard, which the customer can use to deny, cancel, or confirm the change order. Section 64.1100(d)(8) provides that the package must contain a statement that if the subscriber does not return the postcard, the subscriber's long distance service will be switched within 14 days after the date the package was mailed.[183] In its petition for reconsideration of the *1995 Report and Order*, the National Association of Attorneys General (NAAG) asked the Commission to eliminate the automatic switching of consumers who do not return a postcard to the IXC because this aspect of the welcome package was a "negative-option" LOA.[184] A negative-option LOA, which is prohibited under section 64.1150(f), is an unsolicited notice of a pending carrier change that requires a consumer to take some action to *avoid* the change.[185] In the *Further Notice and Order*, the Commission sought comment on whether the welcome package verification option should be eliminated because it could be used in the same manner as a negative-option LOA.[186]

b. Discussion

59. The record, as well as our experience with consumer complaints, supports our

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183 47 C.F.R. § 64.1100(d)(8).

184 NAAG Petition for Reconsideration at 16-17.

185 47 C.F.R. § 64.1150(f).

186 *Further Notice and Order* at 10685.

decision to eliminate the welcome package as a verification option.[187] The welcome package has been a significant source of consumer complaints regarding slamming. As many of the commenters note, consumers often fail to receive the welcome package, or they throw it away as junk mail, or they have their service switched despite the fact that they returned postcards requesting that their service not be changed.[188] The welcome package becomes a particularly ineffective verification method when used in combination with a misleading telemarketing script. If a subscriber does not even realize that he or she has agreed to change his or her service because the telemarketing solicitation was so misleading, that subscriber would reasonably conclude that the welcome package is a solicitation, not a confirmation, and thus discard it without examination.[189] In all instances, however, we find that the welcome package is an ineffective verification method because it does not provide evidence, such as a written signature or recording, that the subscriber has in fact authorized a carrier change. Moreover, even where the subscriber actually receives and reads the information in a welcome package, this approach places an affirmative burden on the subscriber to avoid having his or her preferred carrier switched. As with negative-option LOAs, we do not think consumers should have to take affirmative action to avoid being slammed.

60. Despite these consumer problems, many of the IXCs contend that the welcome package option should be kept because it is an economical method of verification.[190] These commenters argue that the welcome package does not work like a negative-option LOA because the welcome package confirms consent already given.[191] Although we agreed in the *Further Notice and Order* that there is a distinction between a post-sale verification and a negative-option LOA, we stated that, in practice, this distinction is easily blurred because a welcome package can be used to switch a subscriber who has not previously consented to a carrier change.[192] We have seen many instances where unscrupulous carriers used the welcome package as a negative-option LOA by sending it to consumers from whom they have not obtained prior consent, and where

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187 *See, e.g.*, Ameritech Comments at 18; NAAG Comments at 4.

188 *See, e.g.*, Florida Commission Comments at 3; NYSDPS Comments at 7; TOPC Comments at 2. *See, e.g.*, Informal Complaint of James E. Robertshaw, IC 97-22801 (alleging that even though the customer returned the postcard to cancel the carrier change, his phone service was switched).

189 For example, an unscrupulous telemarketer may convince a subscriber to consolidate his or her long distance and local exchange bill without explaining to the subscriber that this involves a change in carriers.

190 *See, e.g.*, ACTA Comments at 25; TRA Comments at 11.

191 *See, e.g.*, AT&T Comments at 5-6; 360O Comments at 4.

192 *Further Notice and Order*, 12 FCC Rcd at 10705.

such oral consent was obtained based on false or misleading telemarketing pitches.[193] Thus, the argument that the welcome package is a benign form of verification because it merely confirms consent already given begs the question of whether consent in fact has been given. Also, like negative-option LOAs, there is no evidence after the switch that the welcome package was ever received, or mailed for that matter, by the correct party or that the party to whom it was sent was in fact authorized to change the preferred carrier for that telephone line.

61. We decline to adopt modifications to the welcome package, rather than eliminate the option, as suggested by several commenters,[194] because we do not believe that any of the proposed changes would decrease significantly the fraudulent potential of the welcome package without also decreasing its utility. For example, several commenters, including NYSDPS and WorldCom, suggest that if the welcome package is not eliminated, then it should contain a positive-option postcard, so that a carrier change would not be considered verified until the customer signed and returned the postcard.[195] Although requiring a positive-option postcard requirement might minimize one of the fraudulent aspects of the welcome package, we agree with AT&T that such a requirement merely transforms the welcome package into a written LOA requirement, which is already a verification option under our rules.[196] ACTA states that carriers could prove that consumers received a welcome package by using certified mail, or by maintaining mailing manifests.[197] We decline to adopt these proposals. Although such proposals may prove that a customer received a welcome package, they would not prevent carriers from sending welcome packages to consumers with whom they have never spoken or from whom they have not obtained valid consent. Nor would such proposals address the problem of consumers throwing away welcome packages as junk mail. We conclude that it is better to eliminate the welcome package entirely, rather than attempt to "fix" it with modifications that fail to provide adequate protection against fraud or that curtail its usefulness.

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193 *See, e.g.*, Ameritech Comments at 18; Illinois Commission Comments at 3; NAAG Comments at 4; NYSDPS Comments at 7; OCC Comments at 3. We have received many consumer complaints in which consumers allege that their service was changed despite the fact that they only asked for information to be mailed to them, but did not agree to switch their service. *See, e.g.*, Informal Complaint of J. Brian Lison, IC 98-42237 (stating that the customer's long distance carrier was changed even though the customer only agreed to receive a brochure about the carrier's service).

194 *See, e.g.*, ACTA Comments at 26; TNRA Comments at 2.

195 *See, e.g.*, NYSDPS Comments at 7; WorldCom Comments at 7.

196 AT&T Reply Comments at 4. *See* 47 C.F.R. §§ 64.1100(a), 64.1150.

197 ACTA Comments at 26.

2. Application of the Verification Rules to In-Bound Calls

a. Background

62. The Commission concluded in the *1995 Report and Order* that it should extend our verification procedures to consumer-initiated "in-bound" calls.[198] On its own motion the Commission stayed the application of the verification rules to in-bound calls pending its decision on several petitions for reconsideration by AT&T, MCI, and Sprint.[199] In the *Further Notice and Order*, the Commission denied the petitions for reconsideration to the extent that they requested that the Commission decline to apply its verification rules to in-bound calls, but continued the stay.[200] In the *Further Notice and Order*, the Commission stated its belief that it serves the public interest to offer consumers who initiate calls to carriers the same protection under the verification rules as those consumers who are contacted by carriers and tentatively concluded that verification of in-bound calls is necessary to deter slamming.[201]

b. Discussion

63. We find that verification of in-bound calls is necessary to deter slamming and, accordingly, we lift the stay imposed in the *In-bound Stay Order*. Our decision is supported by state commissions and some IXCs, including MCI and AT&T.[202] These commenters argue, and we agree, that the opportunity for slamming is as great with in-bound calls as with out-bound

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198 *1995 Report and Order*, 10 FCC Rcd at 9560.

199 *See* Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Order, 11 FCC Rcd 856 (1995) (*In-bound Stay Order*). The stay was imposed before the effective date of the *1995 Report and Order*. The consumer-initiated or in-bound telemarketing provision was the only component of the slamming rules that the Commission stayed.

200 *Further Notice and Order*, 12 FCC Rcd at 10701.

201 *Id.*

202 *See, e.g.*, BCI Comments at 6; NAAG Comments at 9; Ohio Commission Comments at 9; MCI Comments at 2. AT&T was originally opposed to verification of in-bound calls in its comments. *See* AT&T Comments at 21. Subsequently, AT&T announced its intention to require third party verification of all telemarketing sales, including those generated by in-bound calls. *See, e.g.*, John J. Keller, *Inside AT&T, A Crackdown on 'Slamming,'* Wall St. J., Mar. 3, 1998, at B1. TRA states that excluding in-bound calls from the verification requirements would favor large carriers over small carriers because large carriers are able to launch marketing campaigns in order to encourage consumers to call in to change their service. TRA Comments at 10-11.

calls.[203] Equally important, we recognize that excluding in-bound calls from our verification requirements would open a loophole for slammers.[204] Through this loophole, unscrupulous carriers could slam not only consumers who initiate calls for reasons other than to change carriers, but also consumers who have simply never called in. Consumers slammed in this way would have difficulty proving that they had never initiated calls to a carrier. We find that the commenters who opposed verification of in-bound calls failed to offer any solutions to the problem that no record is created during an in-bound call that can adequately demonstrate both that the subscriber called in and that the call was for the purposes of authorizing a carrier change.[205]

64. Furthermore, we find that exempting in-bound calls from the verification requirements would undermine the policy underlying section 258, which we conclude was intended to provide protection for all changes to a subscriber's telecommunications service, regardless of the manner of solicitation.[206] We also disagree with the arguments of some commenters who claim that customers will become frustrated if their in-bound carrier change requests are verified.[207] Slamming has been a much publicized issue and we receive many calls and letters and complaints on a daily basis from consumers regarding slamming. We believe that consumers will welcome additional efforts to combat slamming from all of its sources.

65. Several commenters state that slamming from in-bound calls currently is not a significant problem.[208] We conclude, however, that consumers who call carriers are just as vulnerable to being slammed as consumers who are called by carriers and are entitled to the same protection under section 258.[209] We further conclude that, with the imposition of the more

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203 *See, e.g.*, Intermedia Comments at 5; Telco Comments at 6. In fact, the Florida Commission reports that it has received complaints about slams resulting from in-bound calls. Florida Commission Comments at 3.

204 *See, e.g.*, NYSCPB Reply Comments at 8; TOPC Reply Comments at 3; TW Comm. Comments at 7.

205 The Florida Commission states in its comments that when questioned, carriers accused of in-bound call slamming stated that their records indicated nothing but that the consumer had requested a change. *See* Florida Commission Comments at 4.

206 *See, e.g.*, Intermedia Comments at 5; NYSCPB Comments at 21.

207 *See, e.g.*, BellSouth Comments at ii; USTA Comments at 5.

208 *See, e.g.*, BellSouth Comments at 11; SDN Comments at 2.

209 *See* Informal Complaint of Kathleen M. Simpson, IC # 98-04051 (alleging that her long distance service was switched without her authorization when she called the carrier's 800-number to ask it to stop mailing her promotional material).

stringent verification rules that we are adopting in this *Order*, unscrupulous carriers will attempt to devise other schemes to make unauthorized carrier changes. If in-bound calls were not required to be verified, they would become an easy opportunity for slamming carriers to take advantage of consumers. For example, a carrier may advertise a sweepstakes for which a consumer must call a certain number to register for the drawing. The carrier could use this in-bound call to slam consumers, who would not have the benefit of subsequent verification to prevent themselves from being slammed. Our experiences with slamming carriers demonstrate the vital importance of foreclosing potential sources of fraud *before* they become a major subject of consumer complaints. In addition, we conclude that slamming using in-bound calling will become even more prevalent when carriers begin to combine services to market to consumers, *e.g.*, combining intraLATA and interLATA toll services together. For example, if a consumer calls an unscrupulous carrier to order interLATA toll service, that carrier could make an unauthorized change to the consumer's intraLATA toll service as well. By imposing verification requirements on sales made from in-bound calls, we take an aggressive approach to combating slamming before it occurs. The magnitude of the slamming problem reveals that the Commission cannot simply wait for problems to appear before attempting to fix them. The Commission must take a pro-active approach to slamming and foreclose opportunities for slamming before unscrupulous carriers use them.

66. Our verification rules will apply to all carriers who receive calls that result in the submission of a carrier change request on a subscriber's behalf. We decline to apply our verification requirements only to certain carriers, based on their ILEC status or the fact that they conduct contests or sweepstakes, as suggested by some commenters.[210] All calls that generate the submission of a carrier change on a subscriber's behalf, regardless of the carrier receiving it or how the request was received, must be verified. This uniform rule will ease administration by eliminating any possible confusion or disputes regarding the applicability of call verification. We agree, for example, with U S WEST that if verification of in-bound calls is applied only to carriers using contests or sweepstakes, it may be difficult to determine whether any particular promotional campaign is a contest or sweepstakes.[211] We also find that uniform application of the verification requirements to all in-bound and out-bound calls will decrease consumer confusion about what to expect when making changes to their telecommunications services. We note that several commenters appear to believe that verification would be required only of calls made to a carrier's sales department or only for purposes of inquiry concerning a possible change request.[212] We clarify that the in-bound call verification requirement applies to *any* call made to

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210 *See, e.g.*, BIC Comments 5-6; CompTel Comments at 10; WorldCom Comments at 8; Working Assets Comments at 6.

211 U S WEST Reply Comments at 18 n.50.

212 For example, NYSCPB argues that the verification requirements should apply not just to calls to sales or marketing centers but to all calls on which sales or marketing activities occur. NYSCPB Comments at 22. We agree.

a carrier that results in a carrier change request being submitted on behalf of a subscriber.[213] In this way, our verification rules will protect those consumers who may call a carrier for reasons other than to change service, but end up having their service changed.

67. We apply the same verification requirements to in-bound and out-bound calls. This will enable carriers to adopt uniform verification procedures for all calls. We conclude that the verification rules for out-bound calls will sufficiently protect consumers from in-bound call slamming. We note that several commenters propose that less burdensome verification procedures apply to in-bound telemarketing. ACTA and RCN, for example, suggest that the telemarketer be permitted to confirm the order verbally, just as a mail order telemarketer would.[214] BellSouth, GTE, IXC Long Distance, and TOPC propose to allow carriers to make audio recordings of inbound calls.[215] We decline to adopt these proposals because we find that they offer little protection to a consumer against an unscrupulous carrier. We have previously rejected in-house verification procedures as providing carriers with too much incentive and opportunity to commit fraud.[216] Because we conclude that consumers deserve the same protection from in-bound call slamming as they do from out-bound call slamming, we cannot permit carriers to use less secure procedures to verify sales generated from in-bound calls. Furthermore, we find that our rules provide a carrier with sufficient flexibility to choose a verification method that is appropriate for that carrier.

68. U S WEST included in its comments a Petition for Reconsideration of that portion of the *1995 Report and Order* that applied the Commission's verification rules to in-bound calls.[217] U S WEST states that because the *1995 Report and Order* pertained only to interexchange services and IXCs, a LEC such as U S WEST would not have been expected to seek reconsideration of those rules at that time.[218] We find that U S WEST's Petition for Reconsideration of the Commission's *1995 Report and Order* is untimely filed.[219] Nevertheless,

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213 *See 1995 Report and Order*, 10 FCC Rcd 9560; *see also* 47 U.S.C. § 258(a).

214 ACTA Comments at 27; RCN Comments at 5.

215 BellSouth Comments at 11; GTE Comments at 10-11; IXC Long Distance Comments at 3; TOPC Reply Comments at 4.

216 *See PIC Verification Order*, 7 FCC Rcd at 1041.

217 *See* U S WEST Comments at 33.

218 U S WEST Comments at 33, n.76.

219 47 C.F.R. § 1.429(d).

in making our decision regarding in-bound verification in this *Order*, we have taken into consideration the comments regarding in-bound verification submitted by U S WEST in its Petition for Reconsideration. Based on the evidence in the record, the additional comments sought and received, and the anticipated competitive climate, we conclude that imposing verification rules on in-bound calls is in the public interest and that U S WEST's request to the contrary should be denied. We note additionally that we have concluded earlier in this *Order* that, in accordance with the mandate of section 258, the Commission's verification rules apply to all telecommunications carriers that submit or execute carrier changes, including LECs.[220]

3. Independent Third Party Verification

69. Several commenters submitted proposals regarding the independent third party verification method in response to the Commission's request in the *Further Notice and Order* for additional mechanisms for reducing slamming.[221] Based on some of these proposals, and also to address some of the problems we have seen in conjunction with the use of this verification method, we modify our rules to set forth explicit criteria to meet the requirement of independence for an independent third party verifier. We also seek comment on additional modifications to our rules regarding independent third party verification in our Further Notice of Proposed Rulemaking.[222]

70. Our existing rules provide for verification by using an "appropriately qualified and independent third party operating in a location physically separate from the telemarketing representative" who obtained the carrier change request.[223] When we adopted independent third party verification as a verification option in the *PIC-Verification Order*, we stated that this verification procedure should create evidence that is "totally independent of the IXC's marketing operations."[224] We have seen many instances in which carriers use third party verification in a manner that is calculated to confuse and mislead consumers. These carriers slam consumers by first using misleading telemarketing to induce consumers to change carriers, for example, by telling them that their local and long distance bills will be consolidated. Then third party

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220 We note, however, that we exclude CMRS carriers from compliance with our verification requirements. *See supra* discussion on Application of the Verification Rules to All Telecommunications Carriers.

221 *Further Notice and Order*, 12 FCC Rcd at 10694. *See, e.g.*, MCI Comments at 21; TPV Services Comments at 7.

222 *See infra* Further Notice of Proposed Rulemaking, Independent Third Party Verification.

223 *See* 47 C.F.R. § 64.1100(c)(3).

224 *PIC Verification Order*, 7 FCC Rcd at 1045.

verifiers close the deal for these slamming carriers by assuring the consumers that they have merely authorized billing consolidation, not any carrier changes.[225] We emphasize that our existing rules mandate that a third party verification must be truly independent of both the carrier and the telemarketer in order to constitute a valid verification. In particular, a third party verifier that has any incentive, financial or otherwise, to approve a carrier switch would violate our rules and such verification would not serve as evidence to rebut a subscriber's allegation of an unauthorized switch.

71. We set forth the following specific criteria to determine a third party verifier's independence. These criteria are not intended to be exhaustive, but rather the Commission will evaluate the particular circumstances of each case. First, the third party verifier should not be owned, managed, controlled, or directed by the carrier.[226] Ownership by the carrier would give the third party verifier incentive to affirm carrier changes, rather than to determine whether the consumer has given authorization for a carrier change. Second, the third party verifier should not be given financial incentives to approve carrier changes.[227] For example, an independent third party verifier should not receive commissions for telemarketing sales that are confirmed because such a compensation scheme provides the third party verifier with incentive to falsely confirm sales. As another example, a carrier should not require an independent third party verifier to agree to an exclusive contract with the carrier, such that the independent verifier is wholly dependent on that particular carrier for revenue. Third, we reiterate that the third party verifier must operate in a location physically separate from the carrier. We note that our rules already require this, but we highlight this requirement because we find it to be an important one.[228] Requiring third party verifiers to be in different physical locations from carriers reinforces the arms-length nature of their relationship.

72. Several commenters also propose disclosure requirements for the scripts used by third party verifiers. NAAG, for example, suggests that third party verification should include the disclosure of all material information, such as the information disclosures required for written LOAs.[229] TPV Services also states that the verifier should only confirm that the subscriber

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225 *See, e.g., Business Discount Plan, Inc.*, Notice of Apparent Liability for Forfeiture, ¶¶ 13-15, ENF-98-02, NAL/Acct. No. 916EF0004, FCC 98-332 (Dec. 17, 1998) (*BDP NAL*).

226 *See* MCI Comments at 21; *see also* TPV Services Comments at 7.

227 *See* MCI Comments at 21; *see also* TPV Services Comments at 7.

228 47 C.F.R. § 64.1100(c).

229 NAAG Comments at 17. *See also* 47 C.F.R. § 64.1150.

understands the transaction and should refrain from telemarketing for the carrier.[230] Based on the record, we conclude that the scripts used by the independent third party verifier should clearly and conspicuously confirm that the subscriber has previously authorized a carrier change. The script should not mirror any carrier's particular marketing pitch, nor should it market the carrier's services. Instead, it should clearly verify the subscriber's decision to change carriers. We note that we seek additional comment on proposals for script requirements in the Further Notice of Proposed Rulemaking.[231]

4. Other Verification Mechanisms

73. The Commission sought comment in the *Further Notice and Order* on additional mechanisms for reducing slamming.[232] We received multiple proposals and have evaluated them accordingly. We adopt a proposal made by certain commenters to require a retention period for proof of verification and decline to adopt several other proposals made by commenters. We also highlight or clarify certain aspects of our verification rules, including the application of our verification rules to all carrier changes, and our LOA requirements.

74. We adopt a rule requiring carriers to retain LOAs and other verification records for two years.[233] Previously, we required LOAs to be retained for one year[234] and we did not impose any retention period for other methods of verification. NAAG suggests that carriers be required to retain LOAs and verification records for three years.[235] We conclude that requiring carriers to retain verification records for greater than two years would be an unnecessary burden for carriers and instead will require verification records to be retained for a period of two years. We choose a retention period of two years because any person desiring to file a complaint with the Commission alleging a violation of the Act must do so within two years of the alleged violation.[236] A two-year retention period will enable carriers to produce documentation to support their claims regarding an alleged unauthorized change. Any carrier who is unable to

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230 TPV Services Reply Comments at 6.

231 *See infra* Further Notice of Proposed Rulemaking, Independent Third Party Verification.

232 *Further Notice and Order*, 12 FCC Rcd at 10694.

233 *See* Appendix A, § 64.1100(a)(1).

234 *Allocation Order*, 101 FCC 2d. 911, 930 (1985).

235 NAAG Comments at 8.

236 *See* 47 U.S.C. § 415.

provide evidence of verification during this period will be subject to a rebuttable presumption in any action before the Commission that the carrier has failed to obtain authorization before making a carrier change.

75. Other commenters make other suggestions that, although they might be helpful in preventing slamming, are impractical to implement. For example, NCL suggests that all subscribers be assigned a personal identification number (PIN) by their interexchange carriers to use when authorizing carrier changes.[237] We conclude that, at this time, such proposal would be impractical. Allowing one party, the IXC, to control confirmation of PIN numbers could deter competition. Furthermore, because such PINs would be infrequently used, most subscribers would probably forget their PINs, resulting in considerable inconvenience to them.

76. Several commenters suggest limiting our verification options to only written LOAs[238] or to independent third party verification,[239] while others propose to add more options, such as audio recording.[240] Many commenters object to any proposals that would limit the verification options available, arguing that carriers should be granted flexibility in their verification procedures.[241] We decline to further limit the verification options. A range of verification options - written LOA, electronic authorization, and independent third party verification[242] - is necessary to continue to give carriers the maximum flexibility to choose a verification method appropriate for their needs. Furthermore, the verification rules, as we have modified them in this *Order* will provide consumers with protection against slamming while still providing them with the ability to change carriers without unnecessary burdens.

77. Some commenters propose that the Commission adopt regulations to prohibit directly deceptive or abusive sales tactics.[243] NAAG states that some carriers claim that Federal Trade Commission regulations prohibiting deceptive sales practices do not apply to common

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237 NCL Comments at 7.

238 *See, e.g.*, Virginia Commission Comments at 5; FLS Comments at 2.

239 *See, e.g.*, MCI Comments at 4; California Commission Comments at 7.

240 *See, e.g.*, Ameritech *ex parte* presentation of June 16, 1998; Virginia Commission Comments at 5; U S WEST Reply Comments at 19.

241 *See, e.g.*, SNET Reply Comments at 9.

242 *See* Appendix A, § 64.1150.

243 *See, e.g.*, NAAG Comments at 14-15; FLS Comments at 3.

carriers.[244] FLS states that some carriers claim that state consumer protection laws do not apply to common carriers.[245] We decline to adopt any specific regulations at this time. We note that the Commission has authority under section 201(b) to prohibit all carrier practices that are unjust and unreasonable,[246] including deceptive or abusive sales tactics. For example, recently we took enforcement action against a carrier because its fraudulent representation of itself as a billing consolidation service, rather than as an interexchange carrier, as well as its efforts to obscure the true nature of its service offering, appeared to constitute unjust and unreasonable practices in violation of Section 201(b).[247]

78. We clarify that, regardless of the solicitation method used, all carrier changes must be verified. We modify our rules to make clear that a carrier must use of one of our three verification options (written LOA, electronic authorization, and independent third party verification) to verify any carrier change. Specifically, the current rules appear to create a dichotomy between verification methods to be used when a carrier change is obtained through telemarketing, and when other marketing methods are used. A strict reading of the rules would indicate that, pursuant to current section 64.1100, a telemarketing carrier has several verification options, but that a carrier that does not telemarket must obtain a written LOA pursuant to current section 64.1150. This would seem to penalize carriers that use methods other than telemarketing, such as in-person solicitations or Internet sign ups,[248] by denying them flexibility in their verification methods. We are also aware that some carriers have interpreted the difference between current sections 64.1100 and 64.1150 to argue that they are not required to verify their carrier change requests because such changes were not obtained through telemarketing. This is incorrect, as the Commission's previous orders have clearly stated that *all* carrier changes must be authorized and verified.[249] Because some confusion appears to exist among carriers regarding this subject, we modify our rules accordingly.

79. With regard to LOAs, we have seen a disturbing trend in the practices of certain

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244 NAAG Comments at 14-15.

245 FLS Comments at 3.

246 *See* 47 U.S.C. § 201(b).

247 *BDP NAL* at ¶ 29.

248 *See infra* discussion on Carrier Changes using the Internet.

249 *See, e.g., Allocation Order*, 101 FCC 2d at 929; *PIC Verification Order*, 7 FCC Rcd at 1038. We note that the Commission had stayed the application of our verification rules to in-bound calls. *See In-Bound Stay Order*.

carriers and their agents of marketing telecommunications services in conjunction with sweepstakes and contests at events such as fairs and other public gatherings. Such carriers encourage people to fill out and sign contest forms that also contain LOA language printed in an inconspicuous manner, and to drop the forms into a box in order to win a prize that will be awarded on the basis of an entry drawn from the box.[250] Such practices are in violation of the Commission's rules. Our rules state that the LOA "shall be a separate document . . . whose *sole* purpose is to authorize an interexchange carrier to initiate a primary interexchange carrier change."[251] In situations such as the one we have described, the LOA is not being used for the sole purpose of authorizing a change in carriers. The LOA is being used for two purposes - to change a subscriber's long distance service and to enter a contest or sweepstakes. We adopted this rule specifically to address the situation in which a consumer is "deceived by an LOA that is disguised as a contest entry, prize claim form, or charitable solicitation."[252] We emphasize that carriers who utilize such practices are violating the Commission's rules and may be subject to the full range of sanctions at the Commission's disposal, including forfeitures and revocation proceedings.[253]

5. Use of the Term "Subscriber"

80. We modify current section 64.1100 to use the term "subscriber" in place of "customer," as proposed in the *Further Notice and Order*.[254] We also amend current section 64.1150(e)(4) to change the word "consumer" to "subscriber."[255] Because section 258 uses the

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250 *See, e.g.*, Informal Complaint of Federal Flange, IC 97-0826161027; Informal Complaint of Gregory G. Bentz, CPA, IC 97-0812114300.

251 47 C.F.R. § 64.1150(b), emphasis added. There is an exception to this rule for check LOAs. *See* 47 C.F.R. § 64.1150(d). Furthermore, in certain circumstances, we would consider an LOA's inclusion of information about the terms of service to which the subscriber is agreeing to change as not inconsistent with the requirement that the LOA's "sole purpose" be to authorize a change in carriers. *See Further Notice and Order*, 12 FCC Rcd at 10707 (stating that, to the extent that a telecommunications services contract authorizes a change in business or residential service, that contract must also be consistent with our LOA requirements).

252 *1995 Report and Order*, 10 FCC Rcd at 9572.

253 *See* 47 U.S.C. §§ 214, 503(b).

254 *See* Appendix A, § 64.1150. We note that, although throughout the text of this *Order* we use the terms "subscriber," "consumer," and "customer," the applicable term for the rules is "subscriber."

255 *See* Appendix A, § 64.1160(e)(4). We note that we inadvertently failed to propose this specific word change in the *Further Notice and Order*. *Further Notice and Order*, 12 FCC Rcd at 10683. Our rationale, however, for using the term "subscriber" in current sections 64.1100 and 64.1150 is the same. Although

term "subscriber" rather than "customer," this will make the language in our rules consistent with the statutory language.[256]

D. Extension of the Commission's Verification Rules to the Local Market

1. Application of the Verification Rules to the Local Market

81. In the *Further Notice and Order*, the Commission sought comment on whether the current verification rules, which apply only to IXCs, should be applied to the local market (*i.e.*, local exchange service and intraLATA toll service).[257] We conclude that Congress has expressed its intent in section 258 to have the Commission adopt verification rules applicable to changes in both local exchange and telephone toll service.[258]Xat each service be identified and

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we did not provide notice prior to making this amendment, we conclude that the substitution of terms is a minor, non-substantive change for which notice is not necessary. *See* 47 C.F.R. § 1.412(c) (stating that rule changes may be adopted without prior notice if the Commission for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest).

256 In the Further Notice of Proposed Rulemaking, we include proposals on how a "subscriber" should be defined. *See infra* discussion in Further Notice of Proposed Rulemaking, Definition of "Subscriber."

257 *Further Notice and Order*, 12 FCC Rcd at 10682.

ngly, all changes to a subscriber's preferred carrier, including local exchange, intraLATA toll, and interLATA toll services, must be authorized by that subscriber and verified in accordance with our procedures."[258] *See* Appendix A, §§ 64.1100, 64.1150, 64.1160. We note that changing a subscriber's local exchange carrier may be a very different transaction from changing a subscriber's interexchange carrier. For example, changes to interexchange service are executed by making a software change at the switch of the facilities-based local exchange carrier. Changes to local exchange service, however, do not involve software changes in the switch. For example, if a subscriber changes from a facilities-based incumbent local exchange carrier to a competitive LEC who is reselling the facilities-based carrier's local exchange service, the reseller competitive LEC would submit the change request to the facilities-based local exchange carrier, who would simply change the billing information for that subscriber. The facilities-based carrier does not make a software change at the switch because its facilities are still used to provide local exchange service to that subscriber, albeit through a reseller. We conclude that our verification rules provide sufficient protection for subscribers, regardless of the services changed. The slamming complaints we have received thus far are almost exclusively complaints about unauthorized changes in interexchange carriers. With the advent of competition in the provision of local exchange and intraLATA toll services, however, we anticipate an even greater incidence of slamming generally if effective rules are not put into place. State commissions are already receiving complaints concerning local service slamming."[258] For example, the Florida Commission reports that it received 27 complaints concerning local slamming in the first seven months of 1997. Florida Commission Comments at 2. The Commission processed approximately 80 complaints regarding local service slamming in 1997 and 120 local service slamming complaints from January through October 1998."[258]

Common Carrier Bureau, Enforcement Division, Consumer Protection Branch Databases Tracking Consumer Complaints (Oct. 1998). We agree with the majority of commenters that the current rules, with the modifications adopted in this Order,"[258] *See, e.g.*, *infra* discussion on The Welcome Package (eliminating the welcome package as a verification

method for carrier changes generated through telemarketing). should be effective in preventing slamming in the local market.[258] *See, e.g.*, AT&T Comments at 1; Bell Atlantic Comments at 10; NAAG Comments at 9.

82. We also require carriers to identify specifically the types of service or services being offered (*e.g.*, interLATA toll, intraLATA toll, local exchange) in any preferred carrier solicitation or letter of agency, and to obtain separate authorization and verification for each service that is being changed.[258] *See* Appendix A, §§ 64.1100(b), 64.1160(e)(4). Additionally, if a carrier were to use customer proprietary network information (CPNI) for marketing, such carrier would have to comply with section 222 requirements. *See* 47 U.S.C. § 222; *see also Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) (*CPNI Order*). The separate authorization and verification may be received and conducted during the same telemarketing solicitation or obtained in separate statements on the same LOA form. We merely require that each service be identified and delineated clearly to the subscriber. For example, a carrier that calls a subscriber to market both intraLATA toll and interLATA toll services must explain to the subscriber the differences between the two services. Then the carrier must obtain separate authorization for each service. The subscriber's authorizations to change intraLATA toll and interLATA carriers must also be verified separately. We adopt this rule in response to the concerns of carriers such as Ameritech and CBT that consumers may experience considerable confusion about the differences among telecommunications services, especially the distinction between intraLATA toll and interLATA toll.[258] *See* Ameritech Comments at 10; CBT Comments at 3-4. By requiring carriers to describe fully the services they offer, and obtain separate authorization and verification for different services, carriers will be prevented from taking advantage of consumer confusion and changing the preferred carriers for all of a subscriber's telecommunications services where the subscriber merely intended to change one. We note that this rule builds on the existing requirement in section 64.1150(e)(4) of our rules that an LOA must contain separate statements regarding the subscriber's choice of interexchange carriers where a jurisdiction allows the selection of additional primary interexchange carriers (*e.g.*, for intrastate toll or international calling).[258] 47 C.F.R. § 64.1150(e)(4). Our decision today expands the requirement of section 64.1150(e)(4) to encompass all telephone exchange and telephone toll services and establishes the same requirement for the verification of all carrier changes.

83. The verification rules are intended to deter slamming and protect consumers from unauthorized changes in their preferred carriers. Several commenters, however, support targeted proposals, rather than the general application of more rigorous verification rules, purportedly to avoid unnecessary costs and harm to competition.[258] *See, e.g.*, TRA Comments at 2; RCN Comments at 5. For example, Ameritech, SBC, and U S WEST propose systems that would impose fines or more stringent verification requirements on carriers with a history of slamming, as determined by the LEC or otherwise.[258] *See* Ameritech Comments at 12; SBC Comments at 4-5; U S WEST Comments at 20. Under SBC's "3 strikes and you're out" approach, Strike 1 would occur if a carrier's disputed change orders exceeded 2% of its service orders in one month. The carrier would be placed on probation. Strike 2 would occur if the dispute level continued to exceed 2% of its service orders in one month at the end of the probation period. That carrier would then be subjected to a fine of at least $5,000 per slamming occurrence. Strike 3 would occur if the dispute level continued to exceed 2% of its service orders in one month. The carrier would then be subject to $10,000 fines, as well as possible suspension of carrier-change privileges. SBC Comments at 5. In light of the high incidence of slamming violations we currently face, we prefer to adopt the approach taken in the rules in this *Order* because they will help to prevent carriers from slamming consumers in the first place. Furthermore, such proposals could permit LECs to target certain carriers, including those that are offering competing services. Considering that LECs may no longer be neutral parties in the carrier change process as a result of their entry or expected entry into the in-region long distance market and the advent of local competition, we do not believe that it would be prudent to provide LECs with incentive to act anti-competitively. We note that Ameritech states that, rather than permitting LECs to determine which carriers should be subject to fines or more stringent verification requirements, carriers could be targeted using a more neutral source of numbers of carrier change disputes, such as the Commission's Common Carrier Scorecard, which shows the number of disputed carrier changes for carriers.[258] *See* Ameritech Comments at 12. We share TRA's concern, however, about imposing disparate treatment before a carrier has the opportunity to prove that it did not slam a consumer.[258] *See* TRA Reply Comments at 9-11.

2. Application of the Verification Rules to All Telecommunications Carriers

84. In the *Further Notice and Order*, the Commission proposed to incorporate the specific language of section 258(a) of the Act into its rules to reflect the statutory prohibition on slamming by any telecommunications carrier, and not just IXCs as is the case under the current rules.[258] *Id.* We adopt the proposed rule requiring that no telecommunications carrier shall submit or execute a change on behalf of a subscriber in the subscriber's selection of a provider of telecommunications service except in accordance with the Commission's verification procedures, consistent with the language of section 258.[258] *See* Appendix A, §§ 64.1100, 64.1150, 64.1160. We note that the Commission's verification procedures

would not apply to a situation in which a carrier drops a subscriber from its service, resulting in the subscriber not having any presubscribed carrier, because such a change would not result in the subscriber being presubscribed to another carrier. The commenters support our finding that incorporating the broad language of section 258 into our rule will appropriately implement Congressional intent.[258] *See, e.g.*, BCI Comments at 9; PaOCA Comments at 4; USTA Comments at 2.

85. Based on the record, however, we create an exception for CMRS providers.[258] *See* Appendix A, § 64.1100(a)(3). *See also, e.g.*, Air Touch Comments at 2; BellSouth Reply Comments at 7; 360O Comments at 7. We conclude that CMRS providers should not be subject to our verification rules at this time because slamming does not occur in the present CMRS market.[258] *See* Appendix A, § 64.1100(a)(3). CMRS providers are not currently subject to equal access requirements.[258] Section 332(c)(8) of the Act states that CMRS providers "shall not be required to provide equal access to common carriers for the provision of telephone toll services." 47 U.S.C. § 332(c)(8). *See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Order, 11 FCC Rcd 12456 (1996). In other words, a CMRS provider is free to designate any toll carrier for its subscribers unless it has voluntarily chosen not to do so. We believe that many CMRS providers offer their subscribers telecommunications service packages that include local exchange, intraLATA toll, and interLATA toll services using particular carriers, and therefore any consumer who has agreed to subscribe to such a package as offered by a CMRS provider may have agreed to use only those carriers.[258] Because CMRS carriers compete with each other to provide the lowest overall rates for their subscribers, they presumably attempt to obtain the lowest rates for toll services from intraLATA toll and interLATA toll carriers. We anticipate that once wireline local competition is established, wireline carriers will also begin to offer telecommunications packages offering local exchange, intraLATA toll and interLATA toll services. Where a CMRS provider does not offer its subscribers any choices in toll carriers, verification of subscriber authorization to change toll providers would be inapplicable. We are aware, however, that some CMRS providers do provide their subscribers with choices in toll carriers. It is our understanding that the CMRS carrier, which has made contractual arrangements with the toll carriers, is in control of this selection process and must be contacted by the subscriber in order for any change in toll carriers to occur. Furthermore, Bell Atlantic Mobile and CTIA state that, at this time, a CMRS carrier cannot change a customer's wireless local exchange service without that customer's express approval, because the customer must typically physically reprogram the handset to initiate service with a new carrier.[258] Bell Atlantic Mobile Comments at 4; CTIA Reply Comments at 3-4. In light of these considerations, we believe that unauthorized changes are much less likely to occur and we are not aware of any slamming complaints in this area.[258] If a CMRS provider, however, changes a subscriber's toll carrier without authorization after contractually agreeing not to take such actions, such CMRS carrier could be acting unreasonably in violation of section 201(b). *See* 47 U.S.C. § 201(b). Accordingly, in the absence of evidence that slamming is a problem in this area, we decline to apply our verification procedures to CMRS carriers at this time.[258] *See* Appendix A, § 64.1100(a)(3). We may revisit this issue should slamming become a problem in the CMRS market.

3. The States' Role

86. Section 258 charges the Commission with the responsibility for establishing verification procedures for carriers who "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service."[258] 47 U.S.C. § 258(a). Therefore, section 258 explicitly grants the Commission authority to create verification procedures for both interstate and intrastate services, and our rules have indeed apply to both sets of services. Many carriers urge us generally to preempt state regulation of slamming by local exchange and intrastate interexchange carriers in order to create uniform rules.[258] *See, e.g.*, BellSouth Comments at 3; Working Assets Comments at 2. Carriers such as AT&T, BellSouth, and Excel state that compliance with multiple sets of federal and state rules would be expensive, delay competition, and confuse consumers.[258] AT&T Comments at 38; BellSouth Comments at 3; Excel Comments at 3. The issue of federal preemption of slamming regulation by states has also been raised in other fora.[258] *See, e.g.*, *Minnesota v. Minimum Rate Pricing, Inc. and Thomas N. Salzano*, No. C1-97-008435 (Minn. Apr. 13, 1998) (stating that section 258 of the Communications Act preempts state slamming rules).

87. We decline to preempt generally state regulation of carrier changes. The states and the Commission have a long history of working together to combat slamming, and we conclude that state involvement is of greater importance than ever before. We conclude that the Commission must work hand-in-hand with the states for the common purpose of eliminating slamming. In the context of this partnership, we expect the states and the Commission to continue sharing information about slamming and to develop together new and creative solutions to combat slamming. We conclude that, although a state must accept the same verification procedures as prescribed by the Commission, a state may accept additional verification procedures for changes to intrastate service if such state concludes that such action is necessary based on its local experiences.

88. In other words, absent a specific preemption determination, a state may provide carriers with further options for verifying carrier changes to intrastate service, in addition to the Commission's three verification options, if the state feels that such procedures would promote consumer

protection and/or competition in that state's particular region. In this regard, we agree with the Maryland Commission, which contends that states may have valuable insight because they have substantial contact with consumers and are near to the slamming problem.[258] Maryland Commission Comments at 3. We agree with the Oklahoma Commission, which states that a "one-size-fits-all approach," as recommended by the carriers, would not take into consideration the specific experiences and concerns of individual states in the slamming area.[258] Oklahoma Commission Reply Comments at 3. We further note that nothing in our rules prohibits states from deterring slamming through means other than regulation of verification procedures, such as general consumer protection requirements or direct regulation of telemarketing sales.[258] *See, e.g.*, Letter from Lawrence E. Strickling, Federal Communications Commission to David J. Gilles, Assistant Attorney General, State of Wisconsin (Aug. 12, 1998) (stating that the Commission's rules and the Communications Act of 1934, as amended do not preempt Wisconsin laws and rules that regulate telemarketing sales and home solicitation sales).

88. States must, however, write and interpret their statutes and regulations in a manner that is consistent with our rules and orders, as well as section 258. For example, a state may not adopt the welcome package as an additional verification method because we have determined that the welcome package fails to protect consumers. Furthermore, we are obligated and willing to examine state rules on a case-by-case basis if it appears that they conflict with the purpose of our rules, for instance, by prohibiting or having the effect of prohibiting the ability of any entity to provide telecommunications service.[258] *See* 47 U.S.C. § 253(a) (providing that, subject to certain exceptions, no state or local statute or regulation may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service). With regard to the issue of preemption of state verification procedures, the Commission will not make a preemption determination in the absence of an adequate record clearly describing the state law or action to be preempted and precisely how that state law or action conflicts with federal law or obstructs federal objectives.[258] *See, e.g., Motion for Declaratory Ruling Concerning Preemption of Alaska Call Routing and Interexchange Certification Regulations as Applied to Cellular Carriers*, Memorandum Opinion and Order, 12 FCC Rcd 13987, 13,991 (1997). *Cf. California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, 12 FCC Rcd 14191 (1997) (Commission denied petition for preemption under section 253 because petitioner failed to present sufficient record demonstrating barrier to entry); *TCI Cablevision of Oakland County, Inc.*, 9 Comm. Reg. (P&F) 730 (1997) (petitioner seeking preemption under section 253 bears burden of proof to demonstrate that it is entitled to such relief). The record in this proceeding does not contain any comprehensive identification or analysis of which particular state laws would be inconsistent with our verification rules or would obstruct federal objectives. Some commenters reference state laws that differ from the Commission's rules, such as California's law that requires carriers to use third party verification for changes to residential service.[258] *See, e.g.*, AT&T Comments at 36-37, n.51. These commenters, however, do not ask for preemption of these specific statutes alone, but rather for wholesale preemption of all state statutes that may be inconsistent with the Commission's verification requirements.[258] *See, e.g.*, ACTA Comments at 19; AT&T Comments at 37; RCN Comments at 8; Sprint Reply at 9; Winstar Comments at 9. The commenters do not provide any detailed explanation of how a particular state's verification requirements differ from those of the Commission, nor how any state requirements are inconsistent with our rules or obstruct federal objectives. The commenters merely allege generally that carriers will find it easier to comply with one uniform set of federal rules rather than with federal rules and multiple sets of state rules.[258] *See, e.g.*, ACTA Comments at 23; IXC Long Distance Reply at 7; SDN Comments at 2. Accordingly, the record does not contain sufficient information about various state requirements to allow us to assess the ability of carriers to comply with both federal and state anti-slamming mechanisms. To the extent, however, that these laws require a verification procedure that is acceptable under our rules, they would appear to be in compliance with section 258 and would not be preempted.

89. Section 258 expressly grants to the states authority to enforce the Commission's verification procedure rules with respect to intrastate services.[258] *See* 47 U.S.C. § 258(a). A state therefore may commence proceedings against a carrier for violation of the Commission's rules governing changes to a subscriber's intrastate service. We conclude that enforcement is another area in which the states and the Commission may work together to eradicate slamming. A single unauthorized change may result in the switching of both a subscriber's intrastate and interstate service in violation of the Commission's verification procedures. In the case of an unauthorized change that results in changes to intrastate and interstate service, a state's proceeding to enforce the Commission's rules with respect to the intrastate violation will yield factual findings regarding the interstate violation as well. The state's factual finding in such a case will be given great weight in the Commission's proceeding to determine whether the carrier violated the Commission's interstate verification procedures. This will help to deter slamming by expediting the resolution of slamming complaints on a nationwide basis. We conclude that state regulation of carrier changes in the intrastate market that is compatible with our rules, along with state enforcement of our rules regarding carrier changes in the intrastate market, will enable states to play a valuable and essential role in the partnership with the Commission to combat slamming and protect consumers.

E. Submitting and Executing Carriers

delineated clearly to the subscriber. For example, a carrier that calls a subscriber to market both intraLATA toll and interLATA toll services must explain to the subscriber the difference

[illegible]

82. We adopt a modification to our proposed definition of a submitting carrier in order to take into account the roles of underlying carriers and their resellers. Many commenters, including Bell Atlantic, Frontier, the North Carolina Commission, and Sprint, note that our proposed definitions did not take into account the role shifting that occurs when a facilities-based LEC or IXC sells service to a switchless reseller.[258] *See, e.g.*, Bell Atlantic Comments at 8; Frontier Comments at 17; North Carolina Commission Comments at 4; and Sprint Comments at 26 n.20. For example, the reseller that generates carrier changes for interexchange service generally submits the change requests to the facilities-based IXC from which it purchases service. The facilities-based IXC then submits the change requests to the executing LEC. These commenters generally support redefining a submitting carrier so that the reseller, rather than its underlying facilities-based carrier, would have the obligations of being the submitting carrier.[258] *See e.g.*, Frontier Comments at 19; IXC Long Distance Reply Comments 10; and Sprint Comments at 26 n.20. The rules we adopt build on suggestions made by WorldCom for defining a submitting carrier.[258] *See* WorldCom Comments at 4. Under the rules we adopt, a submitting carrier will be generally any carrier that (1) requests on the behalf of a subscriber that the subscriber's telecommunications carrier be changed; and (2) seeks to provide retail services to the end user subscriber.[258] *See* Appendix A, § 64.1100(e)(1). We note, however, that either the reseller or the facilities-based carrier may be treated as a submitting carrier if it is responsible for any unreasonable delays in the submission of carrier change requests or if it is responsible for submitting unauthorized carrier change requests, including fraudulent authorizations. If, for example, a reseller submits a carrier change request to its underlying carrier, and that underlying carrier changes that carrier change request so that the subscriber ends up being subject to an unauthorized carrier change, the underlying carrier would be liable as a submitting carrier for the unauthorized change. The underlying carrier would not be liable as a submitting carrier, however, if it innocently submitted to the executing carrier a change request that was not verified properly by its reseller.

83. We note that in situations in which a customer initiates or changes long distance service by contacting the LEC directly, verification of the customer's choice would not need to be verified by either the LEC or the chosen IXC. In this situation, neither the LEC nor the IXC is the submitting carrier as we have defined it. The LEC is not providing interexchange service to that subscriber. The IXC has not made any requests - it has merely been chosen by the consumer. Furthermore, because the subscriber has personally requested the change from the executing carrier, the IXC is not requesting a change on the subscriber's behalf. If a LEC's actions in this situation resulted in the subscriber being assigned to a different interexchange carrier than the one originally chosen by the subscriber, however, then that LEC could be liable for violations of its duties as an executing carrier.

84. We adopt the definition proposed in the *Further Notice and Order* for an executing carrier, so that an executing carrier is generally any carrier that effects a request that a subscriber's telecommunications carrier be changed.[258] *See* Appendix A, § 64.1100(e)(2). This rule will apply even where a reseller competitive local exchange company (CLEC) receives carrier changes and submits such changes to its underlying facilities-based LEC. Some commenters argue that, in such a case, the reseller CLEC should be considered the executing carrier rather than the facilities-based LEC.[258] *See, e.g.*, Bell Atlantic Comments at 9. BellSouth argues that both the CLEC and the facilities-based LEC should be considered executing carriers in this scenario.[258] BellSouth Comments at 7. We conclude that the executing carrier should be the carrier who has actual physical responsibility for making the change to the subscriber's service, rather than a carrier that is merely forwarding a carrier change request on behalf of a subscriber. For example, if a consumer who is subscribed to a reseller CLEC for local exchange service requests a change in interexchange carriers, the executing carrier is the facilities-based LEC that makes the software change at its switch, not the CLEC that receives the change order from the IXC and forwards that change order to the facilities-based LEC. For a change from a facilities-based local exchange carrier to a reseller CLEC, the executing carrier would be the facilities-based local exchange carrier who makes the change in its billing records so that the subscriber is billed by the CLEC rather than the facilities-based LEC. In a carrier change situation, the reseller CLEC may have little responsibility except to forward the change request to the facilities-based LEC that actually makes the change. Defining the executing carrier as the carrier that actually makes the change is therefore most appropriate. We note that, where a subscriber is changing to a facilities-based local exchange carrier, that facilities-based local exchange carrier will both "submit" the change, al

between the two services. Then the carrier must obtain separate authorization for each service. The subscriber's authorizations to change intraLATA toll and interLATA carriers must also be verified separately. We adopt this rule in response to the concerns of carriers such as Ameritech and CBT that consumers may experience considerable confusion about the differences among telecommunications services, especially the distinction between intraLATA toll and interLATA toll.[259] By requiring carriers to describe fully the services they offer, and obtain separate authorization and verification for different services, carriers will be prevented from taking advantage of consumer confusion and changing the preferred carriers for all of a subscriber's telecommunications services where the subscriber merely intended to change one. We note that this rule builds on the existing requirement in section 64.1150(e)(4) of our rules that an LOA must contain separate statements regarding the subscriber's choice of interexchange carriers where a jurisdiction allows the selection of additional primary interexchange carriers (*e.g.*, for intrastate toll or international calling).[260] Our decision today expands the requirement of section 64.1150(e)(4) to encompass all telephone exchange and telephone toll services and establishes the same requirement for the verification of all carrier changes.

82. The verification rules are intended to deter slamming and protect consumers from unauthorized changes in their preferred carriers. Several commenters, however, support targeted proposals, rather than the general application of more rigorous verification rules, purportedly to avoid unnecessary costs and harm to competition.[261] For example, Ameritech, SBC, and U S WEST propose systems that would impose fines or more stringent verification requirements on carriers with a history of slamming, as determined by the LEC or otherwise.[262] In light of the high incidence of slamming violations we currently face, we prefer to adopt the approach taken in the rules in this *Order* because they will help to prevent carriers from slamming consumers in the first place. Furthermore, such proposals could permit LECs to target certain carriers, including those that are offering competing services. Considering that LECs may no longer be neutral parties in the carrier change process as a result of their entry or expected entry into the in-

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259 *See* Ameritech Comments at 10; CBT Comments at 3-4.

260 47 C.F.R. § 64.1150(e)(4).

261 *See, e.g.*, TRA Comments at 2; RCN Comments at 5.

262 *See* Ameritech Comments at 12; SBC Comments at 4-5; U S WEST Comments at 20. Under SBC's "3 strikes and you're out" approach, Strike 1 would occur if a carrier's disputed change orders exceeded 2% of its service orders in one month. The carrier would be placed on probation. Strike 2 would occur if the dispute level continued to exceed 2% of its service orders in one month at the end of the probation period. That carrier would then be subjected to a fine of at least $5,000 per slamming occurrence. Strike 3 would occur if the dispute level continued to exceed 2% of its service orders in one month. The carrier would then be subject to $10,000 fines, as well as possible suspension of carrier-change privileges. SBC Comments at 5.

region long distance market and the advent of local competition, we do not believe that it would be prudent to provide LECs with incentive to act anti-competitively. We note that Ameritech states that, rather than permitting LECs to determine which carriers should be subject to fines or more stringent verification requirements, carriers could be targeted using a more neutral source of numbers of carrier change disputes, such as the Commission's Common Carrier Scorecard, which shows the number of disputed carrier changes for carriers.[263] We share TRA's concern, however, about imposing disparate treatment before a carrier has the opportunity to prove that it did not slam a consumer.[264]

2. Application of the Verification Rules to All Telecommunications Carriers

83. In the *Further Notice and Order*, the Commission proposed to incorporate the specific language of section 258(a) of the Act into its rules to reflect the statutory prohibition on slamming by any telecommunications carrier, and not just IXCs as is the case under the current rules.[265] We adopt the proposed rule requiring that no telecommunications carrier shall submit or execute a change on behalf of a subscriber in the subscriber's selection of a provider of telecommunications service except in accordance with the Commission's verification procedures, consistent with the language of section 258.[266] We note that the Commission's verification procedures would not apply to a situation in which a carrier drops a subscriber from its service, resulting in the subscriber not having any presubscribed carrier, because such a change would not result in the subscriber being presubscribed to another carrier. The commenters support our finding that incorporating the broad language of section 258 into our rule will appropriately implement Congressional intent.[267]

84. Based on the record, however, we create an exception for CMRS providers.[268] We conclude that CMRS providers should not be subject to our verification rules at this time because slamming does not occur in the present CMRS market.[269] CMRS providers are not currently

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263 *See* Ameritech Comments at 12.

264 *See* TRA Reply Comments at 9-11.

265 *Id.*

266 *See* Appendix A, §§ 64.1100, 64.1150, 64.1160.

267 *See, e.g.*, BCI Comments at 9; PaOCA Comments at 4; USTA Comments at 2.

268 *See* Appendix A, § 64.1100(a)(3). *See also, e.g.*, Air Touch Comments at 2; BellSouth Reply Comments at 7; 360O Comments at 7.

269 *See* Appendix A, § 64.1100(a)(3).

subject to equal access requirements.[270] In other words, a CMRS provider is free to designate any toll carrier for its subscribers unless it has voluntarily chosen not to do so. We believe that many CMRS providers offer their subscribers telecommunications service packages that include local exchange, intraLATA toll, and interLATA toll services using particular carriers, and therefore any consumer who has agreed to subscribe to such a package as offered by a CMRS provider may have agreed to use only those carriers.[271] Where a CMRS provider does not offer its subscribers any choices in toll carriers, verification of subscriber authorization to change toll providers would be inapplicable. We are aware, however, that some CMRS providers do provide their subscribers with choices in toll carriers. It is our understanding that the CMRS carrier, which has made contractual arrangements with the toll carriers, is in control of this selection process and must be contacted by the subscriber in order for any change in toll carriers to occur. Furthermore, Bell Atlantic Mobile and CTIA state that, at this time, a CMRS carrier cannot change a customer's wireless local exchange service without that customer's express approval, because the customer must typically physically reprogram the handset to initiate service with a new carrier.[272] In light of these considerations, we believe that unauthorized changes are much less likely to occur and we are not aware of any slamming complaints in this area.[273] Accordingly, in the absence of evidence that slamming is a problem in this area, we decline to apply our verification procedures to CMRS carriers at this time.[274] We may revisit this issue should slamming become a problem in the CMRS market.

3. The States' Role

85. Section 258 charges the Commission with the responsibility for establishing

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270 Section 332(c)(8) of the Act states that CMRS providers "shall not be required to provide equal access to common carriers for the provision of telephone toll services." 47 U.S.C. § 332(c)(8). *See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Order, 11 FCC Rcd 12456 (1996).

271 Because CMRS carriers compete with each other to provide the lowest overall rates for their subscribers, they presumably attempt to obtain the lowest rates for toll services from intraLATA toll and interLATA toll carriers. We anticipate that once wireline local competition is established, wireline carriers will also begin to offer telecommunications packages offering local exchange, intraLATA toll and interLATA toll services.

272 Bell Atlantic Mobile Comments at 4; CTIA Reply Comments at 3-4.

273 If a CMRS provider, however, changes a subscriber's toll carrier without authorization after contractually agreeing not to take such actions, such CMRS carrier could be acting unreasonably in violation of section 201(b). *See* 47 U.S.C. § 201(b).

274 *See* Appendix A, § 64.1100(a)(3).

verification procedures for carriers who "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service."[275] Therefore, section 258 explicitly grants the Commission authority to create verification procedures for both interstate and intrastate services, and our rules here indeed apply to both sets of services. Many carriers urge us generally to preempt state regulation of slamming by local exchange and intrastate interexchange carriers in order to create uniform rules.[276] Carriers such as AT&T, BellSouth, and Excel state that compliance with multiple sets of federal and state rules would be expensive, delay competition, and confuse consumers.[277] The issue of federal preemption of slamming regulation by states has also been raised in other fora.[278]

86. We decline to preempt generally state regulation of carrier changes. The states and the Commission have a long history of working together to combat slamming, and we conclude that state involvement is of greater importance than ever before. We conclude that the Commission must work hand-in-hand with the states for the common purpose of eliminating slamming. In the context of this partnership, we expect the states and the Commission to continue sharing information about slamming and to develop together new and creative solutions to combat slamming. We conclude that, although a state must accept the same verification procedures as prescribed by the Commission, a state may accept additional verification procedures for changes to intrastate service if such state concludes that such action is necessary based on its local experiences.

87. In other words, absent a specific preemption determination, a state may provide carriers with further options for verifying carrier changes to intrastate service, in addition to the Commission's three verification options, if the state feels that such procedures would promote consumer protection and/or competition in that state's particular region. In this regard, we agree with the Maryland Commission, which contends that states may have valuable insight because they have substantial contact with consumers and are near to the slamming problem.[279] We agree with the Oklahoma Commission, which states that a "one-size-fits-all approach," as recommended by the carriers, would not take into consideration the specific experiences and

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275 47 U.S.C. § 258(a).

276 *See, e.g.*, BellSouth Comments at 3; Working Assets Comments at 2.

277 AT&T Comments at 38; BellSouth Comments at 3; Excel Comments at 3.

278 *See, e.g.*, *Minnesota v. Minimum Rate Pricing, Inc. and Thomas N. Salzano*, No. C1-97-008435 (Minn. Apr. 13, 1998) (stating that section 258 of the Communications Act preempts state slamming rules).

279 Maryland Commission Comments at 3.

concerns of individual states in the slamming area.[280] We further note that nothing in our rules prohibits states from deterring slamming through means other than regulation of verification procedures, such as general consumer protection requirements or direct regulation of telemarketing sales.[281]

88. States must, however, write and interpret their statutes and regulations in a manner that is consistent with our rules and orders, as well as section 258. For example, a state may not adopt the welcome package as an additional verification method because we have determined that the welcome package fails to protect consumers. Furthermore, we are obligated and willing to examine state rules on a case-by-case basis if it appears that they conflict with the purpose of our rules, for instance, by prohibiting or having the effect of prohibiting the ability of any entity to provide telecommunications service.[282] With regard to the issue of preemption of state verification procedures, the Commission will not make a preemption determination in the absence of an adequate record clearly describing the state law or action to be preempted and precisely how that state law or action conflicts with federal law or obstructs federal objectives.[283] The record in this proceeding does not contain any comprehensive identification or analysis of which particular state laws would be inconsistent with our verification rules or would obstruct federal objectives. Some commenters reference state laws that differ from the Commission's rules, such as California's law that requires carriers to use third party verification for changes to residential service.[284] These commenters, however, do not ask for preemption of these specific

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280 Oklahoma Commission Reply Comments at 3.

281 *See, e.g.*, Letter from Lawrence E. Strickling, Federal Communications Commission to David J. Gilles, Assistant Attorney General, State of Wisconsin (Aug. 12, 1998) (stating that the Commission's rules and the Communications Act of 1934, as amended do not preempt Wisconsin laws and rules that regulate telemarketing sales and home solicitation sales).

282 *See* 47 U.S.C. § 253(a) (providing that, subject to certain exceptions, no state or local statute or regulation may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service).

283 *See, e.g.*, *Motion for Declaratory Ruling Concerning Preemption of Alaska Call Routing and Interexchange Certification Regulations as Applied to Cellular Carriers*, Memorandum Opinion and Order, 12 FCC Rcd 13987, 13,991 (1997). *Cf. California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, 12 FCC Rcd 14191 (1997) (Commission denied petition for preemption under section 253 because petitioner failed to present sufficient record demonstrating barrier to entry); *TCI Cablevision of Oakland County, Inc.*, 9 Comm. Reg. (P&F) 730 (1997) (petitioner seeking preemption under section 253 bears burden of proof to demonstrate that it is entitled to such relief).

284 *See, e.g.*, AT&T Comments at 36-37, n.51.

statutes alone, but rather for wholesale preemption of all state statutes that may be inconsistent with the Commission's verification requirements.[285] The commenters do not provide any detailed explanation of how a particular state's verification requirements differ from those of the Commission, nor how any state requirements are inconsistent with our rules or obstruct federal objectives. The commenters merely allege generally that carriers will find it easier to comply with one uniform set of federal rules rather than with federal rules and multiple sets of state rules.[286] Accordingly, the record does not contain sufficient information about various state requirements to allow us to assess the ability of carriers to comply with both federal and state anti-slamming mechanisms. To the extent, however, that these laws require a verification procedure that is acceptable under our rules, they would appear to be in compliance with section 258 and would not be preempted.

89. Section 258 expressly grants to the states authority to enforce the Commission's verification procedure rules with respect to intrastate services.[287] A state therefore may commence proceedings against a carrier for violation of the Commission's rules governing changes to a subscriber's intrastate service. We conclude that enforcement is another area in which the states and the Commission may work together to eradicate slamming. A single unauthorized change may result in the switching of both a subscriber's intrastate and interstate service in violation of the Commission's verification procedures. In the case of an unauthorized change that results in changes to intrastate and interstate service, a state's proceeding to enforce the Commission's rules with respect to the intrastate violation will yield factual findings regarding the interstate violation as well. The state's factual finding in such a case will be given great weight in the Commission's proceeding to determine whether the carrier violated the Commission's interstate verification procedures. This will help to deter slamming by expediting the resolution of slamming complaints on a nationwide basis. We conclude that state regulation of carrier changes in the intrastate market that is compatible with our rules, along with state enforcement of our rules regarding carrier changes in the intrastate market, will enable states to play a valuable and essential role in the partnership with the Commission to combat slamming and protect consumers.

E. Submitting and Executing Carriers

1. Definition of "Submitting" and "Executing" Carriers

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285 *See, e.g.*, ACTA Comments at 19; AT&T Comments at 37; RCN Comments at 3; Sprint Reply at 9; Winstar Comments at 9.

286 *See, e.g.*, ACTA Comments at 23; IXC Long Distance Reply at 7; SDN Comments at 2.

287 *See* 47 U.S.C. § 258(a).

90. In the *Further Notice and Order*, the Commission tentatively concluded that a submitting carrier is any carrier that requests that a consumer's telecommunications carrier be changed, and that an executing carrier is any carrier that effects such a request.[288] The Commission sought comment on these definitions, and on whether they were sufficiently broad in scope to hold accountable all carriers involved in carrier change transactions.[289]

91. We adopt a modification to our proposed definition of a submitting carrier in order to take into account the roles of underlying carriers and their resellers. Many commenters, including Bell Atlantic, Frontier, the North Carolina Commission, and Sprint, note that our proposed definitions did not take into account the role shifting that occurs when a facilities-based LEC or IXC sells service to a switchless reseller.[290] For example, the reseller that generates carrier changes for interexchange service generally submits the change requests to the facilities-based IXC from which it purchases service. The facilities-based IXC then submits the change requests to the executing LEC. These commenters generally support redefining a submitting carrier so that the reseller, rather than its underlying facilities-based carrier, would have the obligations of being the submitting carrier.[291] The rules we adopt build on suggestions made by WorldCom for defining a submitting carrier.[292] Under the rules we adopt, a submitting carrier will be generally any carrier that (1) requests on the behalf of a subscriber that the subscriber's telecommunications carrier be changed; and (2) seeks to provide retail services to the end user subscriber.[293] We note, however, that either the reseller or the facilities-based carrier may be treated as a submitting carrier if it is responsible for any unreasonable delays in the submission of carrier change requests or if it is responsible for submitting unauthorized carrier change requests, including fraudulent authorizations. If, for example, a reseller submits a carrier change request to its underlying carrier, and that underlying carrier changes that carrier change request so that the subscriber ends up being subject to an unauthorized carrier change, the underlying carrier would be liable as a submitting carrier for the unauthorized change. The underlying carrier would not be liable as a submitting carrier, however, if it innocently submitted to the executing carrier a change request that was not verified properly by its reseller.

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288 *Further Notice and Order*, 12 FCC Rcd at 10683.

289 *Id.*

290 *See, e.g.*, Bell Atlantic Comments at 8; Frontier Comments at 17; North Carolina Commission Comments at 4; and Sprint Comments at 26 n.20.

291 *See e.g.*, Frontier Comments at 19; IXC Long Distance Reply Comments 10; and Sprint Comments at 26 n.20.

292 *See* WorldCom Comments at 4.

293 *See* Appendix A, § 64.1100(e)(1).

92. We note that in situations in which a customer initiates or changes long distance service by contacting the LEC directly, verification of the customer's choice would not need to be verified by either the LEC or the chosen IXC. In this situation, neither the LEC nor the IXC is the submitting carrier as we have defined it. The LEC is not providing interexchange service to that subscriber. The IXC has not made any requests -- it has merely been chosen by the consumer. Furthermore, because the subscriber has personally requested the change from the executing carrier, the IXC is not requesting a change on the subscriber's behalf. If a LEC's actions in this situation resulted in the subscriber being assigned to a different interexchange carrier than the one originally chosen by the subscriber, however, then that LEC could be liable for violations of its duties as an executing carrier.

93. We adopt the definition proposed in the *Further Notice and Order* for an executing carrier, so that an executing carrier is generally any carrier that effects a request that a subscriber's telecommunications carrier be changed.[294] This rule will apply even where a reseller competitive local exchange company (CLEC) receives carrier changes and submits such changes to its underlying facilities-based LEC. Some commenters argue that, in such a case, the reseller CLEC should be considered the executing carrier rather than the facilities-based LEC.[295] BellSouth argues that both the CLEC and the facilities-based LEC should be considered executing carriers in this scenario.[296] We conclude that the executing carrier should be the carrier who has actual physical responsibility for making the change to the subscriber's service, rather than a carrier that is merely forwarding a carrier change request on behalf of a subscriber. For example, if a consumer who is subscribed to a reseller CLEC for local exchange service requests a change in interexchange carriers, the executing carrier is the facilities-based LEC that makes the software change at its switch, not the CLEC that receives the change order from the IXC and forwards that change order to the facilities-based LEC. For a change from a facilities-based local exchange carrier to a reseller CLEC, the executing carrier would be the facilities-based local exchange carrier who makes the change in its billing records so that the subscriber is billed by the CLEC rather than the facilities-based LEC. In a carrier change situation, the reseller CLEC may have little responsibility except to forward the change request to the facilities-based LEC that actually makes the change. Defining the executing carrier as the carrier that actually makes the change is therefore most appropriate. We note that, where a subscriber is changing to a facilities-based local exchange carrier, that facilities-based local exchange carrier will both "submit" the change, albeit to itself, and also execute that change. We also emphasize, however, that either the reseller or the facilities-based carrier may be treated as an executing carrier if it is

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294 *See* Appendix A, § 64.1100(e)(2).

295 *See, e.g.*, Bell Atlantic Comments at 9.

296 BellSouth Comments at 7.

responsible for any unreasonable delays in the execution of carrier changes or for the execution of unauthorized carrier changes, including fraudulent authorizations. If, for example, a reseller CLEC forwards to its facilities-based carrier a falsified request for a change in interexchange carriers, in order to benefit the reseller's affiliate, that reseller may be liable as an executing carrier and be subject to the same sanctions that would be imposed on any executing carrier that fails to comply with our rules.[297]

94. We also note that our definition of an executing carrier could also include an IXC in the current environment. When a facilities-based IXC resells service to a switchless reseller, the switchless reseller uses the same carrier identification code (CIC) as the facilities-based IXC. Subscribers of both the facilities-based IXC and the switchless reseller would therefore be on the network of the facilities-based IXC, with the same CIC. CICs are used by LECs to identify different IXCs so that LECs will know to which carrier they should route a subscriber's interexchange traffic.[298] Where a subscriber changes from a facilities-based IXC to a reseller of that facilities-based IXC's services, the reseller submits a carrier change order to the facilities-based IXC. That facilities-based IXC does not submit that change order to the subscriber's LEC because, as far as the LEC is concerned, the routing of calls for that subscriber has not changed due to the fact that the CIC remains the same (*i.e.*, the LEC will still send interexchange calls from that subscriber to the same facilities-based carrier). The facilities-based IXC uses the carrier change request to process the change in its own system, which enables the reseller to begin billing the subscriber. Therefore, in this very limited situation, the executing carrier is the facilities-based IXC, not the LEC. In fact, the facilities-based IXC would be the executing carrier for all carrier changes in which the subscriber remains on the facilities-based IXC's network, regardless of whether the subscriber has changed from a switchless reseller to the reseller's facilities-based IXC, from the facilities-based IXC to a switchless reseller of that IXC's service, or from a switchless reseller of the facilities-based IXC's service to another switchless reseller of that same IXC's service.

95. Based on BellSouth's recommendation,[299] we clarify that a billing agent has no liability under our verification rules if it is neither an executing or submitting carrier, as defined by our rules.

2. Application of Verification Rules to Submitting and Executing Carriers

96. In the *Further Notice and Order*, the Commission tentatively concluded that the

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297 *See infra* discussion on Application of Verification Rules to Submitting and Executing Carriers.

298 For a full discussion of CICs, *see infra* discussion in Further Notice of Proposed Rulemaking, Resellers and CICs.

299 BellSouth Comments at 14.

submitting carrier's compliance with our verification rules would facilitate timely and accurate execution of any carrier change, and that an executing carrier would not be required to duplicate the carrier change verification efforts of the submitting carrier.[300] The Commission sought comment on any specific additional or separate verification procedures that should apply to telecommunications carriers that "execute" carrier changes, and the possible effects of such procedures on competition and consumer protection.[301]

97. We conclude that executing carriers should not verify carrier changes prior to executing the change.[302] We agree with several commenters that requiring such verification would be expensive, unnecessary, and duplicative of the submitting carrier's verification.[303] Although executing carriers do not have verification obligations under our rules, they do have a responsibility to ensure that subscribers' carrier changes are executed as soon and as accurately as possible, using the most technologically efficient means available. Executing carriers are required to execute promptly and without any unreasonable delay[304] changes that have been verified by the submitting carrier.[305] In other words, executing carriers may be liable for failure to comply with our rules if their actions result in any unreasonable delay of execution of carrier changes or in unauthorized carrier changes.[306]

98. Some LECs believe that additional verification of carrier changes by executing carriers would further reduce the incidence of slamming.[307] These parties state that LEC

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300 *Further Notice and Order*, 12 FCC Rcd at 10683.

301 *Id.*

302 *See* Appendix A, § 64.1100(a)(2).

303 *See, e.g.*, Ameritech Comments at 13; BellSouth Comments at 8; MCI Comments at 6.

304 *See infra* discussion on Timeframe for Execution of Changes.

305 *See* Appendix A, § 64.1100(a)(2).

306 Sanctions imposed on executing carriers for violation of our rules may range, for example, from damages proved in state or Commission proceedings to forfeiture penalties imposed by the Commission pursuant to section 503(b) of the Act. *See, e.g.*, 47 U.S.C. §§ 208, 503(b).

307 We incorporate into this proceeding a request from several LECs for an advisory opinion on whether a LEC may, upon receipt of a carrier change order from an IXC, independently verify the carrier change request. *See Request for Advisory Opinion Concerning LEC Customer Notification Procedures Before Implementation of PIC-Change Orders* by Skyline Telephone Membership Corp., Yadkin Valley Telephone Membership Corp., and Bledsoe Telephone Cooperative, filed July 20, 1998 (LEC Advisory

verification has proved effective in avoiding unauthorized PIC changes which may be costly in terms of time devoted to resolution of consumer complaints and in a loss of consumer confidence in the LEC.[308] In contrast, several commenters state that an executing carrier could use verification as an opportunity to delay or deny carrier changes in order to gain a competitive advantage for itself or for affiliated carriers.[309] Although we agree that verification by executing carriers of carrier changes could help to deter slamming, we find that permitting executing carriers to verify independently carrier changes that have already been verified by submitting carriers could have anticompetitive effects. We have concerns that executing carriers would have both the incentive and ability to delay or deny carrier changes, using verification as an excuse, in order to benefit themselves or their affiliates. Furthermore, we find that an executing carrier that attempts to verify a carrier change request would be acting in violation of section 222(b), which states that a carrier that "receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose[.]"[310] The information contained in a submitting carrier's change request is proprietary information because it must submit that information to the executing carrier in order to obtain provisioning of service for a new subscriber. Therefore, pursuant to section 222(b), the executing carrier may only use such information to provide service to the submitting carrier, *i.e.*, changing the subscriber's carrier, and may not attempt to verify that subscriber's decision to change carriers.[311]

99. We also have concerns that an executing carrier's verification of an already verified carrier change could serve as a *de facto* preferred carrier freeze, even in situations in which the subscriber has not requested such a freeze.[312] Preferred carrier freezes require subscribers to contact their executing carriers to lift such freezes before any carrier changes may be made to their accounts. The verification of a carrier change request by an executing carrier is similar to a preferred carrier freeze because it would require the subscriber first to confirm with the submitting carrier that he or she wishes to make a carrier change, and then to contact the

Opinion Request).

308 *Id.*

309 *See, e.g.*, AT&T Comments at 2; CompTel Comments at 3; Illinois Commission Comments at 2; TRA Comments at 9. *See also, Ex Parte* Presentation by MCI, Oct. 16, 1998 (MCI Oct. 16, 1998 *Ex Parte* Presentation).

310 47 U.S.C. § 222(b).

311 *See also, infra* discussion on Marketing Use of Carrier Information.

312 *See infra* discussion on Preferred Carrier Freezes.

executing carrier to confirm that such a change was authorized. By requiring consumers to take affirmative action in order to change their carriers, preferred carrier freezes provide consumers with additional protection from slamming. But because preferred carrier freezes by their very nature impose additional burdens on subscribers, freezes should only be placed as a result of consumer choice. The preferred carrier freeze works to prevent slamming because it gives a consumer control over carrier changes. The imposition of an "unauthorized preferred carrier freeze" by an executing carrier would take away control from the consumer. We therefore find that, even where verification by an executing carrier would not result in undue delay or denial of a carrier change, such verification is prohibited.

100. Notwithstanding our prohibition on verification of carrier changes by executing carriers, we find that executing carriers may still provide a similar level of protection to their customers in ways that do not raise anticompetitive concerns. Executing carriers may make preferred carrier freezes available for subscribers who have concerns about slamming. In this way, the subscriber who has chosen to have a preferred carrier freeze placed on his or her account will be protected from unauthorized changes to the account. We emphasize that the imposition of a preferred carrier freeze must be authorized by the consumer to minimize any anticompetitive effects and to maintain flexibility for the consumer. Executing carriers also have a variety of methods to notify their subscribers that their carriers have changed. For example, as discussed in the *Truth-in-Billing NPRM*, carriers may choose to include a separate section in their subscriber bills to highlight any changes that have occurred on a subscriber's account, including changes to preferred carriers.[313]m from slamming.[314]

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submitting carrier needs service provisioning for a new subscriber. The rule we adopt ensures that the executing carrier remains in its role as a neutral administrator of carrier changes, and prevents the executing carrier from shifting into a competitive role against the submitting carrier using carrier proprietary information.

1. Third, the rule is not more extensive than is necessary to serve the governmental interest. The rule is narrowly tailored so that it only prohibits the marketing use of carrier proprietary information gained from the carrier change request. Accordingly, the rule would not prohibit a general marketing scheme that may coincidentally target a subscriber who has requested a carrier change because such activity would not entail the use of information gained solely by a carrier from a carrier change transaction.

2. Based on the above analysis, we conclude that prohibiting the use of carrier proprietary information gained from a carrier change request for marketing purposes, pursuant to section 222(b), does not impermissibly interfere with carriers' First Amendment rights. We have shown that the Commission's interest in promulgating this rule, to promote competition, is substantial because competition will give the American people access to new, better, and more affordable telecommunications services. We also have shown that the rule directly advances the interest of promoting competition by preventing the executing carrier from thwarting competition by using carrier proprietary information gained from the carrier change request to interfere with subscriber decisions. Finally, we have shown that the rule is not more extensive than necessary to serve our interest in promoting competition because the prohibition is limited only to marketing use of carrier proprietary information gained from the carrier change request.

F. Use of Preferred Carrier Freezes

1. Background

103. In the *Further Notice and Order*, the Commission sought comment on whether it should adopt rules to address preferred carrier freeze practices.[313][313] *Further Notice and Order*, 12 FCC Rcd at 10,687-89. A preferred carrier freeze (or freeze) prevents a change in a subscriber's preferred carrier

selection unless the subscriber gives the carrier from whom the freeze was requested his or her express written or oral consent. The Commission noted that, although neither the Act nor its rules and orders specifically address preferred carrier freeze practices,[313313] We noted also that the Common Carrier Bureau Enforcement Division has previously reviewed certain preferred carrier freeze practices and found them to be consistent with the Act and the Commission's rules and orders. *See, e.g.*, Staff Interpretive Ruling Regarding Preemptive Effect of Commission's Regulations Governing Changes of Consumers' Primary Interexchange Carriers and the Communications Act of 1934, As Amended, On Particular Enforcement Action Initiated by the California Public Utilities Commission, DA 96-1077, 11 FCC Rcd 20453 (July 3, 1996); *see also* Letter, Elliot Burg, Esq., Asst. Attorney General, State of Vermont, 11 FCC Rcd 1899 (1995). concerns about carrier freeze solicitations have been raised with the Commission.[313313] *See, e.g.*, Letter from Donald F. Evans, MCI Telecommunications Corporation to John Muleta, FCC (July 31, 1996). The Commission noted, moreover, that MCI filed a Petition for Rulemaking on March 18, 1997, requesting that the Commission institute a rulemaking to regulate the solicitation, by any carrier or its agent, of carrier freezes or other carrier restrictions on a consumer's ability to switch his or her choice of interexchange (interLATA or intraLATA toll) and local exchange carrier.[313313] MCI Petition for Rulemaking, RM-9085 (filed Mar. 18, 1997) (MCI Petition). AT&T has indicated that it "strongly supports" MCI's petition to establish regulations governing preferred carrier freezes. Letter from Mark C. Rosenblum, AT&T Corp. to Regina M. Keeney, FCC (Apr. 9, 1997). The Commission established a pleading cycle for comments regarding the MCI petition. *See* Public Notice, DA 97-942 (rel. May 5, 1997). Comments in response to that Public Notice are referred to as "Petition Comments" and "Petition Replies." The Commission determined that it was appropriate to consider MCI's petition in the *Further Notice and Order* and, therefore, incorporated MCI's petition and all responsive pleadings into the record of this proceeding.[313313] *Further Notice and Order*, 12 FCC Rcd at 10,687-88.

2. Overview and Jurisdiction

104. We adopt rules to clarify the appropriate use of preferred carrier freezes because we believe that, although preferred carrier freezes offer consumers an additional and beneficial level of protection against slamming, they also create the potential for unreasonable and anticompetitive behavior that might affect negatively efforts to foster competition in all markets. Thus, in adopting rules to govern the use of preferred carrier freeze mechanisms, we appropriately balance several factors, including consumer protection, the need to foster competition in all markets, and our desire to afford carriers flexibility in offering their customers innovative services such as preferred carrier freeze programs.[313313] *See, e.g.*, Ohio Commission Comments at 12. Moreover, in so doing we facilitate customer choice of preferred carrier selections and adopt and promote procedures that prevent fraud.

105. While we are confident that our carrier change verification rules, as modified in this *Order*, will provide considerable protection for consumers against unauthorized carrier changes, we recognize that many consumers wish to utilize preferred carrier freezes as an additional level of protection against slamming.[313313] *See, e.g.*, NYSDPS Comments at 8-9; Ameritech Petition Comments at 8 (noting that number of Ameritech Illinois customers utilizing freezes increased from 35,000 to 200,000 between 1993 and 1995); SNET Reply Comments at 4. As noted in the *Further Notice and Order*, a carrier freeze prevents a change in a subscriber's preferred carrier selection until the subscriber gives the carrier from whom the freeze was requested his or her written or oral consent.[313313] *See Further Notice and Order*, 12 FCC Rcd at 10,688. The record demonstrates that LECs increasingly have made available preferred carrier freezes to their customers as a means of preventing unauthorized conversion of carrier selections.[313313] *See, e.g.*, Bell Atlantic Comments at 4 ("Bell Atlantic began offering PC freezes in response to its subscriber's demands for protection from slamming."); SNET Comments at 6-7. It appears, based on the record, that particular PC freeze administration practices can vary widely between carriers (*e.g.*, some carriers require written consent to lift a freeze while others require oral consent to lift a freeze). *See, e.g.*, GTE Comments at 13 (stating that GTE requires customers to complete and return special form before freeze is lifted); Ameritech Comments at 21 (stating that Ameritech offers 24 hour telephone line for customers to lift freeze). The Commission, in the past, has supported the use of preferred carrier freezes as a means of ensuring that a subscriber's preferred carrier selection is not changed without his or her consent.[313313] *See, e.g.*, Federal Communications Commission, Common

Carrier Scorecard (Fall 1996); *Policy and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Report and Order, 10 FCC Rcd 9560, 9574, n.58 (1995) (*1995 Report and Order*). Indeed, the majority of commenters in this proceeding assert that the use of preferred carrier freezes can reduce slamming by giving customers greater control over their accounts.[313313] *See, e.g.*, NAAG Comments at 11; NCL Comments at 9; Texas Commission Comments at 4; Ameritech Comments at 21; GTE Reply Comments at 14; AT&T Comments at 18. Our experience, thus far, has demonstrated that preventing unauthorized carrier changes enhances competition by fostering consumer confidence that they control their choice of service providers. Thus, we believe that it is reasonable for carriers to offer, at their discretion, preferred carrier freeze mechanisms that will enable subscribers to gain greater control over their carrier selection.

106. In the *Further Notice and Order*, however, we stated that preferred carrier freezes may have the effect of limiting competition among carriers.[313313] *See Further Notice and Order*, 12 FCC Rcd at 10,688. We share commenters' concerns that in some instances preferred carrier freezes are being, or have the potential to be, implemented in an unreasonable or anticompetitive manner.[313313] *See, e.g.*, MCI Petition at 2-8; CompTel Comments at 8 ("In fact, the incumbent LEC's strategic use of PC-freezes belies any claim that they are using PC-freezes to protect consumers from slamming."); PaOCA at 7; RCN Reply Comments at 7-8. Indeed, we note that a number of state commissions have determined,[313313] *See, e.g.*, Michigan Public Service Commission, *Sprint Communications Company, L.P. v. Ameritech Michigan*, Case No. U-11038 (Aug. 1, 1996); Public Utilities Commission of Ohio, *Complaint of Sprint Communications Company, L.P. v. Ameritech Ohio*, Case No. 96-142-TP-CSS (Feb. 20, 1997); New Jersey Board of Public Utilities, *Investigation of IntraLATA Toll Competition for Telecommunications Services on a Presubscription Basis*, Docket No. TX94090388 (June 3, 1997). *Cf.* California Public Utilities Commission, *Alternative Regulatory Frameworks for Local Exchange Carriers*, Decision 97-04-083 (Apr. 23, 1997). *See also* North Carolina Commission Comments at 4; NAAG Comments at 11. and certain LECs concede,[313313]

See, e.g., Ameritech Reply Comments at 9; USTA Comments at 7 ("USTA agrees that PC freezes do have the ability to hinder competition if the Commission's rules permit improper use of them."). that unregulated preferred carrier freezes are susceptible to such abuses. By definition, preferred carrier freezes create an additional step (namely, that subscribers contact directly the LEC that administers the preferred carrier freeze program) that customers must take before they are able to obtain a change in their carrier selection.[313313] *See Further Notice and Order*, 12 FCC Rcd at 10,688. Where customers fail to take the additional step of lifting a preferred carrier freeze, their otherwise valid attempts to effectuate a change in carrier selection will be frustrated. Observing this process, some commenters argue that certain preferred carrier freeze programs are so onerous as to create an unreasonable hurdle for subscribers and submitting carriers seeking to process a carrier change.[313313] *See, e.g.*, Worldcom Petition Comments at 5; MCI Comments at 11; LCI Reply Comments at 8; *see also* NAAG Comments at 11. Other commenters, primarily interexchange carriers, suggest that LECs are using deceptive preferred carrier freeze solicitation practices to "lock up" consumers, without their understanding, as part of an effort to stifle competition in their markets.[313313] *See, e.g.*, Sprint Petition Comments at 7 (citing examples of Ameritech practices in Illinois and Michigan); TRA Comments at 23; *see also* Ohio Commission Comments at 10-12.

107. Particularly given the market structure changes contemplated in the 1996 Act,[313313]

See Joint Explanatory Statement (stating that the principal goal of the 1996 Act is to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition"). we are persuaded that incentives for unreasonable preferred carrier freeze practices exist. With the removal of legal and regulatory barriers to entry, carriers are now or soon will be able to enter each other's markets and provide various services in competition with one another.[313313] *See, e.g.*, 47 U.S.C. §§ 251-252, 271. Incumbent LECs have, or will have in the foreseeable future, authorization to compete in the market for interLATA services. Similarly, incumbent LECs are preparing to face or are facing competition in the local exchange and intraLATA toll markets. Given these changes in market structure, incumbent LECs may have incentives to market preferred carrier freezes aggressively to their customers and to use different standards for placing and removing freezes depending on the identity of the

subscriber's carrier.[313313] *See, e.g.*, MCI Comments at 18; Worldcom Comments at 9-10; Sprint Petition Comments at 5 ("In the past, most LECs did not actively promote PIC freezes . . . . "); TRA Comments at 18; *cf.* TOPC Reply Comments at 5. Despite these market changes, it appears that, at this time, facilities-based LECs -- most of which are incumbent LECs -- are uniquely situated to administer preferred carrier freeze programs. Thus, other carriers are dependent on the LECs to offer preferred carrier freeze services to their customers.

108. We conclude, contrary to the assertions of Bell Atlantic, that we have authority under section 258 to address concerns about anticompetitive preferred carrier freeze practices for intrastate, as well as interstate, services.[313313] Bell Atlantic and NYNEX Petition Comments at 1, n.1 ("The Commission has no jurisdiction to regulate PIC freezes or other LEC practices regarding intrastate services . . . ."). Congress, in section 258 of the Act, has granted this Commission authority to adopt verification rules applicable to both submission and execution of changes in a subscriber's selection of a provider of local exchange or telephone toll services.[313313] 47 U.S.C. § 258. *See supra* discussion on Application of the Verification Rules to the Local Market. *See also* Sprint Petition Reply Comments at 4. Preferred carrier freezes directly impact the verification procedures which Congress instructed the Commission to adopt because they require subscribers to take additional steps beyond those described in the Commission's verification rules to effectuate a carrier change. Moreover, where a preferred carrier freeze is in place, a submitting carrier that complies with our verification rules may find that its otherwise valid carrier change order is rejected by the LEC administering the freeze program. Since preferred carrier freeze mechanisms can essentially frustrate the Commission's statutorily authorized procedures for effectuating carrier changes, we conclude that the Commission has authority to set standards for the use of preferred carrier freeze mechanisms.

109. Based on this authority, we prescribe rules to ensure the fair and efficient use of preferred carrier freezes for intrastate and interstate services to protect customer choice and, correspondingly, to promote competition. Specifically, in the following sections, we adopt rules that apply, on a going-forward basis, to all carriers and that provide for the nondiscriminatory solicitation, implementation, and lifting of preferred carrier freezes.

3. Nondiscrimination and Application of Rules to All Local Exchange Carriers

110. We conclude, and codify in our rules implementing section 258 of the Act, that preferred carrier freezes should be implemented on a nondiscriminatory basis so that LECs do not use freezes as a tool to gain an unreasonable competitive advantage. Given that LECs are uniquely positioned to offer preferred carrier freezes, as described above, we believe that a nondiscrimination requirement is necessary to prevent unreasonable practices, such as denying freezes to the customers of their competitors. Accordingly, local exchange carriers must make available any preferred carrier freeze mechanism to all subscribers, under the same terms and conditions, regardless of the subscribers' carrier selection.[313313] *See*, Appendix A, § 64.1190(b). *See also, e.g.*, MCI Petition at 9; TRA Petition Comments at 8; CompTel Petition Comments at 2; CompTel Comments at 9; TOPC Reply Comments at 5; Citizens Petition Comments at 5. We note that a number of LECs, including Ameritech and GTE, indicate that they already offer preferred carrier freezes to customers on a nondiscriminatory basis.[313313] *See, e.g.*, Ameritech Reply Comments at 11; GTE Comments at 12 ("GTE treats all carriers, including affiliates, the same for PC-change freeze purposes."). Similarly, we state our expectation that LECs should not be able to impose discriminatory delays when lifting freezes.[313313] We concluded above that the nondiscrimination requirements of sections 202(a) and 251 prohibit executing carriers from imposing discriminatory delays on their competitors when executing preferred carrier changes. *See supra* discussion on Timeframe for Execution of Carrier Changes. We believe that sections 202(a) and 251 may also restrict incumbent LECs' ability to use preferred carrier freezes for anticompetitive conduct. Since the Commission has long recognized that incumbent LECs may have the incentive to discriminate in the provision of service to their competitors,[313313] *See, e.g., Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489, CC Docket No. 96-149 (rel. Dec. 24, 1996) ("*Non-Accounting Safeguards Order*"). we believe that articulating this nondiscrimination requirement will ensure that the same level of protection is available to all subscribers.

111. At the same time, we conclude that our rules for preferred carrier freezes should apply to all local exchange carriers. We reject those proposals to place additional requirements on incumbent LECs, to the exclusion of competitive LECs.[313313] *See, e.g.*, AT&T Petition Comments at 6; CompTel Petition Comments at 6. Where a competitive LEC offers a preferred carrier freeze program, that competitive LEC must comply with our preferred carrier freeze rules, as set out in this *Order*. This policy is appropriate because we expect that a competitive LEC may face the same incentives to discriminate in the provision of preferred carrier freeze service to the customers of its competitors. In addition, subscribers of competitive LECs have the same right to expect that preferred carrier freeze programs will be nondiscriminatory and not deceptive or misleading, as do subscribers of incumbent LECs.

4. Solicitation and Implementation of Preferred Carrier Freezes

112. We adopt minimum standards to govern the solicitation and implementation of preferred carrier freezes in order to deter anticompetitive application of freeze practices and to ensure that consumers are able to make more informed decisions on whether to utilize a freeze. We share concerns of some commenters that certain carriers may solicit preferred carrier freezes in a manner that is unreasonable under the Act.[313313] *See, e.g.,* AT&T Petition Comments at 4-5; Sprint Petition Comments at 7; TRA Comments at 23. The record indicates the potential for customer confusion. It appears that many consumers are unclear about whether preferred carrier freezes are being placed on their carrier selections and about which services or carriers are subject to these freezes.[313313] *See, e.g.,* MCI Petition at 4, n.3; NAAG Comments at 12. We find that the most effective way to ensure that preferred carrier freezes are used to protect consumers, rather than as a barrier to competition, is to ensure that subscribers fully understand the nature of the freeze, including how to remove a freeze if they chose to employ one. We thus conclude that, in order to be a just and reasonable practice, any solicitation and other carrier-provided information concerning a preferred carrier freeze program should be clear and not misleading.[313313] *See also* 47 U.S.C. § 201(b). Moreover, we adopt the tentative conclusion, as set forth in the *Further Notice and Order*, that any solicitation for preferred carrier freezes should provide certain basic explanatory information to subscribers about the nature of the preferred carrier freeze.[313313] *See Further Notice and Order*, 12 FCC Rcd at 10688. Our decision to adopt rules governing the solicitation of preferred carrier freezes is supported by the vast majority of commenters, including state commissions and a number of incumbent LECs.[313313] *See, e.g.,* NYSCPB Reply Comments at 9 ("Commission properly . . . proposed rules that would limit such promotional materials."); NAAG at 12; Ameritech Reply Comments at 10; CompTel Comments at 9.

113. We specifically decide that, at a minimum, carriers soliciting preferred carrier freezes must provide: 1) an explanation, in clear and neutral language, of what a preferred carrier freeze is and what services may be subject to a preferred carrier freeze; 2) a description of the specific procedures necessary to lift a preferred carrier freeze and an explanation that these steps are in addition to the Commission's regular verification rules for changing subscribers' carrier selections and that the subscriber will be unable to make a change in carrier selection unless he or she lifts the freeze; and 3) an explanation of any charges associated with the preferred carrier freeze service.[313313] *See* Appendix A, § 64.1190(d)(1). We decline, at this time, to mandate specific language to describe preferred carrier freezes because we believe that our rules will provide carriers with sufficient guidance to formulate scripts that inform customers about preferred carrier freezes in a neutral manner while preserving carrier flexibility in the message.[313313] *See* MCI Comments at 17 ("Commission should consider requiring the use of standard language . . ."); NYSCPB Reply Comments at 9; Excel Reply Comments at 4.

114. We also conclude that preferred carrier freeze procedures, including any solicitation, must clearly distinguish among telecommunications services subject to a freeze, *i.e.*, between local, intraLATA toll, interLATA toll, and international toll services.[313313] *See* Appendix A, § 64.1190(c). This rule will address concerns raised by commenters, including MCI and NAAG, that consumers may experience confusion about the differences between telecommunications services when employing freezes.[313313] MCI Comments at 14, n.15; NAAG Comments at 12. *See also* U S WEST Reply Comments at 24, n.74; TRA Comments at 25-26. It will also serve to prevent unscrupulous carriers from placing freezes on all of a subscriber's services when the subscriber only intended to authorize a freeze for a particular service or services.[313313] *See, e.g.,* Ameritech Petition Comments at 14; AT&T Petition Reply Comments at 7. We thus conclude that "account level" freezes are unacceptable and that, instead, carriers must explain clearly the difference in services and obtain separate authorization for each service for which a preferred carrier freeze is requested.[313313] *See* Appendix A, § 64.1190(c). We note that a broad range of commenters, including many incumbent LECs, agree that customers should have the ability to place individual freezes on their interLATA, intraLATA toll, and local services.[313313] *See, e.g.,* USTA Comments at 7; AT&T

3. Concerns with Certain Executing Carriers

a. Interference with the Execution Process

101. The Commission sought comment in the *Further Notice and Order* on whether ILECs should be subject to different requirements and prohibitions because they may have the incentive and the ability to delay or refuse to process carrier change orders in order to avoid losing local customers, or in order to favor an affiliated IXC.[315] We find that ILECs may very well have incentive to act anticompetitively, as would any carrier that executes changes for itself or an affiliate and for competing carriers. For example, a LEC that executes changes in local exchange service for CLECs might be tempted to delay the execution of such changes in order to retain its local exchange customers.

102. We agree with the ILECs, however, that the ability of an executing carrier to act anticompetitively by delaying execution of carrier changes is limited by several statutory provisions in the Act.[316] For example, section 251 requires incumbent LECs to provide facilities and services to requesting telecommunications carriers in a nondiscriminatory manner.[317] Any

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Petition Reply at 7; Puerto Rico Telephone Company Petition Reply at 4; LCI Reply Comments at 9. While some members of the public may still be unclear about the distinctions between different telecommunications services, particularly the difference between intraLATA toll and interLATA toll services, we expect that carriers can help customers to develop a better understanding of these services.

115. We decline those suggestions that we prohibit LECs from taking affirmative steps to make consumers aware of preferred carrier freezes because we believe that preferred carrier freezes are a useful tool in preventing slamming. Nor do we draw distinctions between "solicitation" and "educational materials" that some commenters urge us to adopt.[313313] *See, e.g.*, CBT Comments at 8. We instead believe that the standards adopted herein will provide sufficient guidance for consumers. At the same time, we decline the suggestions of those parties who would have us require LECs affirmatively to distribute literature describing their preferred carrier freeze programs.[313313] *See, e.g.*, TOPC Reply Comments at 5; OCC Reply Comments at 4; CBT Comments at 9. We note that some LECs do not affirmatively market their preferred carrier freeze programs. *See, e.g.*, SBC Comments at 8, 10. Should states wish to adopt such requirements, we believe that it is within their purvie

314 *See supra* discussion on Liability of Subscribers to Carriers.

315 *Further Notice and Order*, 12 FCC Rcd at 10684.

316 *See, e.g.*, Ameritech Comments at 16; Bell Atlantic Comments at 6.

317 *See* 47 U.S.C. § 251(c)(3), (c)(4); *see also* 47 U.S.C. § 271(c)(2)(B)(ii), (xiv); *see also Application of Ameritech Michigan Pursuant to section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543 (1997)

carrier that unreasonably fails to execute carrier changes for itself (or an affiliate) and for competing carriers within the same timeframe will be in violation of the specific nondiscrimination requirements of section 251 if it is a LEC, as well as in violation of section 201(b)'s prohibition against unjust and unreasonable practices, and section 202(a)'s prohibition against unjust and unreasonable discrimination.[318] Furthermore, any carrier that imposes unreasonable delays in executing carrier changes, both for itself and others, will be in violation of our verification procedures[319] or acting unreasonably in violation of section 201(b),[320] even if it is not acting in violation of a non-discrimination requirement. A party that believes that a carrier is delaying execution of carrier changes in violation of any of these statutory or regulatory provisions should file a complaint in the appropriate forum.[321] We would consider all the facts and circumstances presented in a section 208 complaint proceeding, for example, and take remedial action as appropriate.[322] In this way, we require carriers to provide parity in executing carrier changes for competitors and promptness in executing carrier changes generally.

b. Timeframe for Execution of Carrier Changes

103. Several commenters also support imposing specific deadlines for execution of carrier changes in order to prevent carriers from delaying execution.[323] For example, commenters suggest that carriers that execute carrier changes for themselves and for other carriers be required to implement changes within established deadlines ranging from three to seven days.[324] We decline at this time to adopt any such deadlines. We agree with many commenters that argue that mandating a specific deadline for execution of all carrier changes could be problematic because

(providing that Ameritech must "provision[ ] resale orders within the same average installation interval as that achieved by its retail operations").

318 *See* 47 U.S.C. §§ 251(c)(3), 251(c)(4), 201(b), 202(a).

319 *See* Appendix A, § 64.1100(a)(2).

320 47 U.S.C. § 201(b).

321 For example, a party may file a complaint with the appropriate state commission or with the Commission under section 208 of the Act. *See* 47 U.S.C. § 208.

322 *See* 47 U.S.C. § 208.

323 *See, e.g.*, North Carolina Commission Comments at 3-4; TRA Comments at 16.

324 *See, e.g.*, Excel Comments at 5 (suggesting that carrier changes be executed within seven days); Texas Commission Comments at 3 (suggesting that carrier changes be executed within three days).

there may be many legitimate reasons for a delay in the execution of a carrier change, such as a consumer request for a delay in implementation, or the administrative burden of processing a large number of change orders.[325] We also find that it would not be feasible to establish a specific deadline for execution of changes that would accommodate the needs of the wide variety of carriers in the marketplace, including smaller carriers. Some commenters propose that we also require a carrier that executes changes for itself and for other carriers to submit a report comparing the execution times for changes submitted by itself or its affiliates against changes submitted by competing carriers.[326] We decline to do so at this time because we conclude that the non-discrimination requirements of sections 202(a) and 251[327] already prohibit executing carriers from imposing discriminatory delays on their competitors.[328]

104. Although we decline to adopt specific execution timeframes for the reasons stated above, we believe that subscribers should be informed of how long it will take for a carrier change to become effective because they have the right to know when they will be able to use their new service. We strongly encourage a submitting carrier to inform subscribers of the expected timeframe for implementing the carrier change, if it is able to obtain such information from the executing carrier. Such information lets the subscriber know what to expect and allows the subscriber to plan his or her calling patterns accordingly. Such information also would give carriers and subscribers alike a standard by which to determine if a delay is unreasonable. Although we do not establish any specific standard for execution of changes in this proceeding, we may revisit this issue in a later proceeding. In the meantime, we expect carriers to fulfill subscriber requests as quickly as possible, using the most technologically efficient means available to implement changes to subscribers' telecommunications services. Noncompliance with this standard could be considered unreasonable delay.

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325 *See, e.g.*, Ameritech Reply Comments at 19; GTE Reply Comments at 19.

326 *See, e.g.*, CompTel Comments at 6; LCI Comments at 5; and NYSCPB Comments at 21.

327 *See* 47 U.S.C. §§ 251(c)(3), 251(c)(4), 202(a).

328 We note that the Commission is considering the issue of reporting requirements for certain ILEC activities in another proceeding. *See Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, Notice of Proposed Rulemaking, 13 FCC Rcd 12817 (1998); *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) (*Local Competition First Report and Order*), motion for stay denied, 11 FCC Rcd 11754 (1996), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *further recon. pending, appeal pending sub nom. Iowa Util. Bd. v. FCC and consolidated cases*, No. 96-3321 *et al.*, partial stay granted pending review, 109 F.3d 418 (8th Cir. 1996), order lifting stay in part (8th Cir. Nov. 1, 1996), *motion to vacate stay denied*, 117 S. Ct. 429 (1996).

c. Marketing Use of Carrier Change Information

105. In the *Further Notice and Order*, the Commission voiced concern that an incumbent LEC might attempt to engage in conduct that would blur the distinction between its role as a neutral executing carrier and its objectives as a marketplace competitor.[329] Specifically, the Commission stated that an example of this type of conduct could occur if an incumbent executing carrier sends a subscriber who has chosen a new carrier a promotional letter (winback letter) in an attempt to change the subscriber's decision to switch to another carrier.[330] We conclude that this is a valid concern and therefore find that an executing carrier may not use information gained from a carrier change request for any marketing purposes, including any attempts to change a subscriber's decision to switch to another carrier.[331] Many commenters support this decision.[332] As explained above, we find that carrier change information is carrier proprietary information[333] and, therefore, pursuant to section 222(b), the executing carrier is prohibited from using such information to attempt to change the subscriber's decision to switch to another carrier.[334] More specifically, section 222(b) states that "[a] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts."[335] The submitting carrier's change request is proprietary information because it must submit that information to the executing carrier in order to obtain provisioning of service for a new subscriber. In the *CPNI Order*, we stated that Congress' goal of promoting competition and preserving customer privacy would be furthered by protecting the competitively-sensitive information of other carriers from network providers that

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329 *Further Notice and Order*, 12 FCC Rcd at 10684.

330 *Id.*

331 *See* Appendix A, section 64.1100(a)(2).

332 *See, e.g.*, Ameritech Reply at 17-18; MCI Comments at 7-8; Texas Commission Comments at 3.

333 *See supra* discussion in Application of Verification Rules to Submitting and Executing Carriers (concluding that section 222(b) prohibits an executing carrier from using carrier change information to verify a subscriber's decision to change carriers after such change has been verified by the submitting carrier).

334 47 U.S.C. § 222(b). We note that, although section 222(b) prohibits the use of carrier change information for marketing purposes in this situation, the scope of section 222(b) is not limited to this particular application and may be construed broadly to cover a variety of situations.

335 *Id.*

gain access to such information through provision of wholesale service.[336] Similarly, in the situation of executing carriers and carrier change requests, section 222(b) works to prevent anticompetitive conduct on the part of the executing carrier by prohibiting marketing use of carrier proprietary information. The executing carrier otherwise would have no knowledge at that time of a consumer's decision to change carriers, were it not for the executing carrier's position as a provider of switched access services. Therefore, when an executing carrier receives a carrier change request, section 222(b) prohibits the executing carrier from using that information to market services to that consumer.

106. GTE and U S WEST contend that, because customer solicitations are protected by the First Amendment, the Commission should not prohibit executing carriers from winback solicitations as long as such solicitations are based on the executing carriers' own information, do not interfere with execution processing, and are not made in conjunction with notification to customers of carrier changes.[337] As stated above, we conclude that section 222(b) only prohibits an executing carrier from marketing using information from a carrier change request because the executing carrier is not using its own information, but rather the submitting carrier's proprietary information, which GTE and U S WEST agree is a reasonable limitation. Furthermore, section 222(b) does not prohibit all winback attempts, but only those that are based on carrier proprietary information. Finally, because our rule merely implements section 222(b), any possible First Amendment concerns would need to be addressed to the federal courts and Congress, not the Commission. Nonetheless, we conclude that section 222(b) and its application to this situation are entirely lawful and do not impermissibly infringe on carriers' First Amendment rights. It is true that the First Amendment protects commercial speech from unwarranted governmental intrusion.[338] The government may, however, regulate commercial speech that is not misleading or unlawful if: (1) the asserted governmental interest is substantial; (2) if the regulation directly advances the asserted governmental interest; and (3) if the regulation is not more extensive than is necessary to serve that interest.[339] In this case, we find that prohibiting executing carriers from

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336 *CPNI Order*, 13 FCC Rcd at 8201.

337 GTE Reply Comments at 13; U S WEST Comments at 21.

338 *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980) (*Central Hudson*).

339 *Central Hudson*, 447 U.S. at 566. The four-part analysis requires the following: first, a determination of whether the expression is protected by the First Amendment; second, a determination of whether such expression concerns lawful activity and is not misleading; third, a determination of whether the asserted governmental interest is substantial; fourth, a determination of whether the regulation directly advances the asserted government interest and whether it is not more extensive than is necessary to serve that interest. *Id.* We acknowledge that the first two parts of this test are satisfied because the commercial speech involved is both protected by the First Amendment and that the commercial speech involved does concern lawful activity and is not misleading.

using carrier proprietary information for marketing purposes in violation of section 222(b) does not impermissibly infringe upon First Amendment rights.

107. First, the Commission's interest in promulgating the rule is substantial. Section 222(b) is intended to advance competition and, as part of that goal, to protect consumer choices. The Supreme Court has recognized that eliminating restraints on competition is a "substantial" government interest.[340] Furthermore, the fact that the 1996 Act was enacted in order to open "all telecommunications markets to competition"[341] also demonstrates that the governmental interest in promoting competition is very substantial. In fulfilling the Congressional mandate to promote competition in all telecommunications markets, the Commission helps to ensure that the American public derives the full benefit of such competition by giving them the opportunity to choose new and better products and services at affordable rates, and by giving effect to such choices.

108. Second, the rule directly advances the governmental interest. The rule, governed by section 222(b), promotes competition and protects consumer choices by prohibiting executing carriers from using information gained solely from the carrier change transaction to thwart competition by using the carrier proprietary information of the submitting carrier to market the submitting carrier's subscribers. The rule places a limited prohibition on executing carriers because an executing carrier should be a neutral party without any interest in the choice of carriers made by a subscriber. Because of its position as a monopoly service provider, however, it may gain access through the carrier change process to a submitting carrier's proprietary information, *i.e.*, that the submitting carrier needs service provisioning for a new subscriber. The rule we adopt ensures that the executing carrier remains in its role as a neutral administrator of carrier changes, and prevents the executing carrier from shifting into a competitive role against the submitting carrier using carrier proprietary information.

109. Third, the rule is not more extensive than is necessary to serve the governmental interest. The rule is narrowly tailored so that it only prohibits the marketing use of carrier proprietary information gained from the carrier change request. Accordingly, the rule would not prohibit a general marketing scheme that may coincidentally target a subscriber who has requested a carrier change because such activity would not entail the use of information gained solely by a carrier from a carrier change transaction.

110. Based on the above analysis, we conclude that prohibiting the use of carrier

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340 *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("[T]he Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.").

341 *See* Joint Explanatory Statement at 1.

proprietary information gained from a carrier change request for marketing purposes, pursuant to section 222(b), does not impermissibly interfere with carriers' First Amendment rights. We have shown that the Commission's interest in promulgating this rule, to promote competition, is substantial because competition will give the American people access to new, better, and more affordable telecommunications services. We also have shown that the rule directly advances the interest of promoting competition by preventing the executing carrier from thwarting competition by using carrier proprietary information gained from the carrier change request to interfere with subscriber decisions. Finally, we have shown that the rule is not more extensive than necessary to serve our interest in promoting competition because the prohibition is limited only to marketing use of carrier proprietary information gained from the carrier change request.

F. Use of Preferred Carrier Freezes

1. Background

111. In the *Further Notice and Order*, the Commission sought comment on whether it should adopt rules to address preferred carrier freeze practices.[342] The Commission noted that, although neither the Act nor its rules and orders specifically address preferred carrier freeze practices,[343] concerns about carrier freeze solicitations have been raised with the Commission.[344] The Commission noted, moreover, that MCI filed a Petition for Rulemaking on March 18, 1997, requesting that the Commission institute a rulemaking to regulate the solicitation, by any carrier or its agent, of carrier freezes or other carrier restrictions on a consumer's ability to switch his or her choice of interexchange (interLATA or intraLATA toll) and local exchange carrier.[345] The

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342 *Further Notice and Order*, 12 FCC Rcd at 10,687-89. A preferred carrier freeze (or freeze) prevents a change in a subscriber's preferred carrier selection unless the subscriber gives the carrier from whom the freeze was requested his or her express written or oral consent.

343 We noted also that the Common Carrier Bureau Enforcement Division has previously reviewed certain preferred carrier freeze practices and found them to be consistent with the Act and the Commission's rules and orders. *See, e.g.*, Staff Interpretive Ruling Regarding Preemptive Effect of Commission's Regulations Governing Changes of Consumers' Primary Interexchange Carriers and the Communications Act of 1934, As Amended, On Particular Enforcement Action Initiated by the California Public Utilities Commission, DA 96-1077, 11 FCC Rcd 20453 (July 3, 1996); *see also* Letter, Elliot Burg, Esq., Asst. Attorney General, State of Vermont, 11 FCC Rcd 1899 (1995).

344 *See, e.g.*, Letter from Donald F. Evans, MCI Telecommunications Corporation to John Muleta, FCC (July 31, 1996).

345 MCI Petition for Rulemaking, RM-9085 (filed Mar. 18, 1997) (MCI Petition). AT&T has indicated that it "strongly supports" MCI's petition to establish regulations governing preferred carrier freezes. Letter from Mark C. Rosenblum, AT&T Corp. to Regina M. Keeney, FCC (Apr. 9, 1997). The Commission established a pleading cycle for comments regarding the MCI petition. *See* Public Notice, DA 97-942 (rel. May 5, 1997). Comments in response to that Public Notice are referred to as "Petition Comments" and

Commission determined that it was appropriate to consider MCI's petition in the *Further Notice and Order* and, therefore, incorporated MCI's petition and all responsive pleadings into the record of this proceeding.[346]

2. Overview and Jurisdiction

112. We adopt rules to clarify the appropriate use of preferred carrier freezes because we believe that, although preferred carrier freezes offer consumers an additional and beneficial level of protection against slamming, they also create the potential for unreasonable and anticompetitive behavior that might affect negatively efforts to foster competition in all markets. Thus, in adopting rules to govern the use of preferred carrier freeze mechanisms, we appropriately balance several factors, including consumer protection, the need to foster competition in all markets, and our desire to afford carriers flexibility in offering their customers innovative services such as preferred carrier freeze programs.[347] Moreover, in so doing we facilitate customer choice of preferred carrier selections and adopt and promote procedures that prevent fraud.

113. While we are confident that our carrier change verification rules, as modified in this *Order*, will provide considerable protection for consumers against unauthorized carrier changes, we recognize that many consumers wish to utilize preferred carrier freezes as an additional level of protection against slamming.[348] As noted in the *Further Notice and Order*, a carrier freeze prevents a change in a subscriber's preferred carrier selection until the subscriber gives the carrier from whom the freeze was requested his or her written or oral consent.[349] The record demonstrates that LECs increasingly have made available preferred carrier freezes to their customers as a means of preventing unauthorized conversion of carrier selections.[350] The

"Petition Replies."

346 *Further Notice and Order*, 12 FCC Rcd at 10,687-88.

347 *See, e.g.*, Ohio Commission Comments at 12.

348 *See, e.g.*, NYSDPS Comments at 8-9; Ameritech Petition Comments at 8 (noting that number of Ameritech Illinois customers utilizing freezes increased from 35,000 to 200,000 between 1993 and 1995); SNET Reply Comments at 4.

349 *See Further Notice and Order*, 12 FCC Rcd at 10,688.

350 *See, e.g.*, Bell Atlantic Comments at 4 ("Bell Atlantic began offering PC freezes in response to its subscriber's demands for protection from slamming."); SNET Comments at 6-7. It appears, based on the record, that particular PC freeze administration practices can vary widely between carriers (*e.g.*, some carriers require written consent to lift a freeze while others require oral consent to lift a freeze). *See, e.g.*, GTE Comments at 13 (stating that GTE requires customers to complete and return special form before

Commission, in the past, has supported the use of preferred carrier freezes as a means of ensuring that a subscriber's preferred carrier selection is not changed without his or her consent.[351] Indeed, the majority of commenters in this proceeding assert that the use of preferred carrier freezes can reduce slamming by giving customers greater control over their accounts.[352] Our experience, thus far, has demonstrated that preventing unauthorized carrier changes enhances competition by fostering consumer confidence that they control their choice of service providers. Thus, we believe that it is reasonable for carriers to offer, at their discretion, preferred carrier freeze mechanisms that will enable subscribers to gain greater control over their carrier selection.

114. In the *Further Notice and Order*, however, we stated that preferred carrier freezes may have the effect of limiting competition among carriers.[353] We share commenters' concerns that in some instances preferred carrier freezes are being, or have the potential to be, implemented in an unreasonable or anticompetitive manner.[354] Indeed, we note that a number of state commissions have determined,[355] and certain LECs concede,[356] that unregulated preferred carrier freezes are susceptible to such abuses. By definition, preferred carrier freezes create an

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freeze is lifted); Ameritech Comments at 21 (stating that Ameritech offers 24 hour telephone line for customers to lift freeze).

351 *See, e.g.*, Federal Communications Commission, Common Carrier Scorecard (Fall 1996); *Policy and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Report and Order, 10 FCC Rcd 9560, 9574, n.58 (1995) (*1995 Report and Order*).

352 *See, e.g.*, NAAG Comments at 11; NCL Comments at 9; Texas Commission Comments at 4; Ameritech Comments at 21; GTE Reply Comments at 14; AT&T Comments at 18.

353 *See Further Notice and Order*, 12 FCC Rcd at 10,688.

354 *See, e.g.*, MCI Petition at 2-8; CompTel Comments at 8 ("In fact, the incumbent LEC's strategic use of PC-freezes belies any claim that they are using PC-freezes to protect consumers from slamming."); PaOCA at 7; RCN Reply Comments at 7-8.

355 *See, e.g.*, Michigan Public Service Commission, *Sprint Communications Company, L.P. v. Ameritech Michigan*, Case No. U-11038 (Aug. 1, 1996); Public Utilities Commission of Ohio, *Complaint of Sprint Communications Company, L.P. v. Ameritech Ohio*, Case No. 96-142-TP-CSS (Feb. 20, 1997); New Jersey Board of Public Utilities, *Investigation of IntraLATA Toll Competition for Telecommunications Services on a Presubscription Basis*, Docket No. TX94090388 (June 3, 1997). *Cf.* California Public Utilities Commission, *Alternative Regulatory Frameworks for Local Exchange Carriers*, Decision 97-04-083 (Apr. 23, 1997). *See also* North Carolina Commission Comments at 4; NAAG Comments at 11.

356 *See, e.g.*, Ameritech Reply Comments at 9; USTA Comments at 7 ("USTA agrees that PC freezes do have the ability to hinder competition if the Commission's rules permit improper use of them.").

additional step (namely, that subscribers contact directly the LEC that administers the preferred carrier freeze program) that customers must take before they are able to obtain a change in their carrier selection.[357] Where customers fail to take the additional step of lifting a preferred carrier freeze, their otherwise valid attempts to effectuate a change in carrier selection will be frustrated. Observing this process, some commenters argue that certain preferred carrier freeze programs are so onerous as to create an unreasonable hurdle for subscribers and submitting carriers seeking to process a carrier change.[358] Other commenters, primarily interexchange carriers, suggest that LECs are using deceptive preferred carrier freeze solicitation practices to "lock up" consumers, without their understanding, as part of an effort to stifle competition in their markets.[359]

115. Particularly given the market structure changes contemplated in the 1996 Act,[360] we are persuaded that incentives for unreasonable preferred carrier freeze practices exist. With the removal of legal and regulatory barriers to entry, carriers are now or soon will be able to enter each other's markets and provide various services in competition with one another.[361] Incumbent LECs have, or will have in the foreseeable future, authorization to compete in the market for interLATA services. Similarly, incumbent LECs are preparing to face or are facing competition in the local exchange and intraLATA toll markets. Given these changes in market structure, incumbent LECs may have incentives to market preferred carrier freezes aggressively to their customers and to use different standards for placing and removing freezes depending on the identity of the subscriber's carrier.[362] Despite these market changes, it appears that, at this time, facilities-based LECs -- most of which are incumbent LECs -- are uniquely situated to administer preferred carrier freeze programs. Thus, other carriers are dependent on the LECs to offer preferred carrier freeze services to their customers.

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357 *See Further Notice and Order*, 12 FCC Rcd at 10,688.

358 *See, e.g.*, Worldcom Petition Comments at 5; MCI Comments at 11; LCI Reply Comments at 8; *see also* NAAG Comments at 11.

359 *See, e.g.*, Sprint Petition Comments at 7 (citing examples of Ameritech practices in Illinois and Michigan); TRA Comments at 23; *see also* Ohio Commission Comments at 10-12.

360 *See* Joint Explanatory Statement (stating that the principal goal of the 1996 Act is to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

361 *See, e.g.*, 47 U.S.C. §§ 251-252, 271.

362 *See, e.g.*, MCI Comments at 18; Worldcom Comments at 9-10; Sprint Petition Comments at 5 ("In the past, most LECs did not actively promote PIC freezes . . . . "); TRA Comments at 18; *cf.* TOPC Reply Comments at 5.

116. We conclude, contrary to the assertions of Bell Atlantic, that we have authority under section 258 to address concerns about anticompetitive preferred carrier freeze practices for intrastate, as well as interstate, services.[363] Congress, in section 258 of the Act, has granted this Commission authority to adopt verification rules applicable to both submission and execution of changes in a subscriber's selection of a provider of local exchange or telephone toll services.[364] Preferred carrier freezes directly impact the verification procedures which Congress instructed the Commission to adopt because they require subscribers to take additional steps beyond those described in the Commission's verification rules to effectuate a carrier change. Moreover, where a preferred carrier freeze is in place, a submitting carrier that complies with our verification rules may find that its otherwise valid carrier change order is rejected by the LEC administering the freeze program. Since preferred carrier freeze mechanisms can essentially frustrate the Commission's statutorily authorized procedures for effectuating carrier changes, we conclude that the Commission has authority to set standards for the use of preferred carrier freeze mechanisms.

117. Based on this authority, we prescribe rules to ensure the fair and efficient use of preferred carrier freezes for intrastate and interstate services to protect customer choice and, correspondingly, to promote competition. Specifically, in the following sections, we adopt rules that apply, on a going-forward basis, to all carriers and that provide for the nondiscriminatory solicitation, implementation, and lifting of preferred carrier freezes.

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363 Bell Atlantic and NYNEX Petition Comments at 1, n.1 ("The Commission has no jurisdiction to regulate PIC freezes or other LEC practices regarding intrastate services . . . .").

364 47 U.S.C. § 258. *See supra* discussion on Application of the Verification Rules to the Local Market. *See also* Sprint Petition Reply Comments at 4.

3. Nondiscrimination and Application of Rules to All Local Exchange Carriers

118. We conclude, and codify in our rules implementing section 258 of the Act, that preferred carrier freezes should be implemented on a nondiscriminatory basis so that LECs do not use freezes as a tool to gain an unreasonable competitive advantage. Given that LECs are uniquely positioned to offer preferred carrier freezes, as described above, we believe that a nondiscrimination requirement is necessary to prevent unreasonable practices, such as denying freezes to the customers of their competitors. Accordingly, local exchange carriers must make available any preferred carrier freeze mechanism to all subscribers, under the same terms and conditions, regardless of the subscribers' carrier selection.[365] We note that a number of LECs, including Ameritech and GTE, indicate that they already offer preferred carrier freezes to customers on a nondiscriminatory basis.[366] Similarly, we state our expectation that LECs should not be able to impose discriminatory delays when lifting freezes.[367] Since the Commission has long recognized that incumbent LECs may have the incentive to discriminate in the provision of service to their competitors,[368] we believe that articulating this nondiscrimination requirement will ensure that the same level of protection is available to all subscribers.

119. At the same time, we conclude that our rules for preferred carrier freezes should apply to all local exchange carriers. We reject those proposals to place additional requirements on incumbent LECs, to the exclusion of competitive LECs.[369] Where a competitive LEC offers a preferred carrier freeze program, that competitive LEC must comply with our preferred carrier freeze rules, as set out in this *Order*. This policy is appropriate because we expect that a

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365 *See*, Appendix A, § 64.1190(b). *See also, e.g.*, MCI Petition at 9; TRA Petition Comments at 8; CompTel Petition Comments at 2; CompTel Comments at 9; TOPC Reply Comments at 5; Citizens Petition Comments at 5.

366 *See, e.g.*, Ameritech Reply Comments at 11; GTE Comments at 12 ("GTE treats all carriers, including affiliates, the same for PC-change freeze purposes.").

367 We concluded above that the nondiscrimination requirements of sections 202(a) and 251 prohibit executing carriers from imposing discriminatory delays on their competitors when executing preferred carrier changes. *See supra* discussion on Timeframe for Execution of Carrier Changes. We believe that sections 202(a) and 251 may also restrict incumbent LECs' ability to use preferred carrier freezes for anticompetitive conduct.

368 *See, e.g., Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489, CC Docket No. 96-149 (rel. Dec. 24, 1996) ("*Non-Accounting Safeguards Order*").

369 *See, e.g.*, AT&T Petition Comments at 6; CompTel Petition Comments at 6.

competitive LEC may face the same incentives to discriminate in the provision of preferred carrier freeze service to the customers of its competitors. In addition, subscribers of competitive LECs have the same right to expect that preferred carrier freeze programs will be nondiscriminatory and not deceptive or misleading, as do subscribers of incumbent LECs.

4. Solicitation and Implementation of Preferred Carrier Freezes

120. We adopt minimum standards to govern the solicitation and implementation of preferred carrier freezes in order to deter anticompetitive application of freeze practices and to ensure that consumers are able to make more informed decisions on whether to utilize a freeze. We share concerns of some commenters that certain carriers may solicit preferred carrier freezes in a manner that is unreasonable under the Act.[370] The record indicates the potential for customer confusion. It appears that many consumers are unclear about whether preferred carrier freezes are being placed on their carrier selections and about which services or carriers are subject to these freezes.[371] We find that the most effective way to ensure that preferred carrier freezes are used to protect consumers, rather than as a barrier to competition, is to ensure that subscribers fully understand the nature of the freeze, including how to remove a freeze if they chose to employ one. We thus conclude that, in order to be a just and reasonable practice, any solicitation and other carrier-provided information concerning a preferred carrier freeze program should be clear and not misleading.[372] Moreover, we adopt the tentative conclusion, as set forth in the *Further Notice and Order*, that any solicitation for preferred carrier freezes should provide certain basic explanatory information to subscribers about the nature of the preferred carrier freeze.[373] Our decision to adopt rules governing the solicitation of preferred carrier freezes is supported by the vast majority of commenters, including state commissions and a number of incumbent LECs.[374]

121. We specifically decide that, at a minimum, carriers soliciting preferred carrier freezes must provide: 1) an explanation, in clear and neutral language, of what a preferred carrier freeze is and what services may be subject to a preferred carrier freeze; 2) a description of the specific procedures necessary to lift a preferred carrier freeze and an explanation that these steps

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370 *See, e.g.*, AT&T Petition Comments at 4-5; Sprint Petition Comments at 7; TRA Comments at 23.

371 *See, e.g.*, MCI Petition at 4, n.3; NAAG Comments at 12.

372 *See also* 47 U.S.C. § 201(b).

373 *See Further Notice and Order*, 12 FCC Rcd at 10688.

374 *See, e.g.*, NYSCPB Reply Comments at 9 ("Commission properly . . . proposed rules that would limit such promotional materials."); NAAG at 12; Ameritech Reply Comments at 10; CompTel Comments at 9.

are in addition to the Commission's regular verification rules for changing subscribers' carrier selections and that the subscriber will be unable to make a change in carrier selection unless he or she lifts the freeze; and 3) an explanation of any charges associated with the preferred carrier freeze service.[375] We decline, at this time, to mandate specific language to describe preferred carrier freezes because we believe that our rules will provide carriers with sufficient guidance to formulate scripts that inform customers about preferred carrier freezes in a neutral manner while preserving carrier flexibility in the message.[376]

122. We also conclude that preferred carrier freeze procedures, including any solicitation, must clearly distinguish among telecommunications services subject to a freeze, *i.e.*, between local, intraLATA toll, interLATA toll, and international toll services.[377] This rule will address concerns raised by commenters, including MCI and NAAG, that consumers may experience confusion about the differences between telecommunications services when employing freezes.[378] It will also serve to prevent unscrupulous carriers from placing freezes on all of a subscriber's services when the subscriber only intended to authorize a freeze for a particular service or services.[379] We thus conclude that "account level" freezes are unacceptable and that, instead, carriers must explain clearly the difference in services and obtain separate authorization for each service for which a preferred carrier freeze is requested.[380] We note that a broad range of commenters, including many incumbent LECs, agree that customers should have the ability to place individual freezes on their interLATA, intraLATA toll, and local services.[381] While some members of the public may still be unclear about the distinctions between different telecommunications services, particularly the difference between intraLATA toll and interLATA toll services, we expect that carriers can help customers to develop a better understanding of these services.

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375 *See* Appendix A, § 64.1190(d)(1).

376 *See* MCI Comments at 17 ("Commission should consider requiring the use of standard language . . ."); NYSCPB Reply Comments at 9; Excel Reply Comments at 4.

377 *See* Appendix A, § 64.1190(c).

378 MCI Comments at 14, n.15; NAAG Comments at 12. *See also* U S WEST Reply Comments at 24, n.74; TRA Comments at 25-26.

379 *See, e.g.*, Ameritech Petition Comments at 14; AT&T Petition Reply Comments at 7.

380 *See* Appendix A, § 64.1190(c).

381 *See, e.g.*, USTA Comments at 7; AT&T Petition Reply at 7; Puerto Rico Telephone Company Petition Reply at 4; LCI Reply Comments at 9.

123. We decline those suggestions that we prohibit LECs from taking affirmative steps to make consumers aware of preferred carrier freezes because we believe that preferred carrier freezes are a useful tool in preventing slamming. Nor do we draw distinctions between "solicitation" and "educational materials" that some commenters urge us to adopt.[382] We instead believe that the standards adopted herein will provide sufficient guidance for consumers. At the same time, we decline the suggestions of those parties who would have us require LECs affirmatively to distribute literature describing their preferred carrier freeze programs.[383] Should states wish to adopt such requirements, we believe that it is within their purview to do so.

124. We adopt our proposal to extend our carrier change verification procedures to preferred carrier freeze solicitations and note that this proposal was supported by a wide range of carriers, state commissions, and consumer organizations.[384] By requiring LECs that administer preferred carrier freeze programs to verify a subscriber's request to place a freeze, we expect to reduce customer confusion about preferred carrier freezes and to prevent fraud in their implementation. According to a number of commenters, customer confusion over preferred carrier freezes often results in valid carrier change orders being rejected by LECs.[385] In combination with our requirement that carriers obtain separate authorization for each telecommunications service subject to the freeze, these verification procedures will further ensure that subscribers understand which services will be subject to a preferred carrier freeze.[386] Requiring LECs that offer preferred carrier freezes to comply with the Commission's verification rules will also minimize the risk that unscrupulous carriers might attempt to impose preferred carrier freezes without the consent of subscribers.[387] We find such a practice to be unreasonable

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382 *See, e.g.*, CBT Comments at 8.

383 *See, e.g.*, TOPC Reply Comments at 5; OCC Reply Comments at 4; CBT Comments at 9. We note that some LECs do not affirmatively market their preferred carrier freeze programs. *See, e.g.*, SBC Comments at 8, 10.

384 *See* Appendix A, § 64.1190(d)(2). *See Further Notice and Order*, 12 FCC Rcd at 10,687-89. *See, e.g.*, Worldcom Comments at 9; Intermedia Comments at 6; BellSouth Comments at 4; Texas Commission Comments at 4; PaOCA Comments at 7.

385 *See, e.g.*, Sprint Petition Comments at 8 (rejection of the preferred carrier change order "may occur weeks after such customers have chosen to switch . . . "); CompTel Petition Comments at 4; MCI Comments at 14-15.

386 We note that, where a subscriber seeks to place a freeze on more than one of his or her services, the separate authorization and verification may be received and conducted during the same telephone conversation or may be obtained in separate statements on the same written request for a freeze.

387 *See* AT&T Comments at 18 ("extending the verification rules to the freeze mechanism may help to curb

because it frustrates consumers' choice in carriers by making it more difficult for the consumer to switch carriers.

125. Our verification rules are designed to confirm a subscriber's wishes while imposing the minimum necessary burden on carriers. We agree with BellSouth that applying the Commission's verification rules to preferred carrier freezes will enable subscribers to obtain preferred carrier freeze protection with a minimum of effort.[388] By adopting the same verification procedures for both carrier changes and preferred carrier freezes, we expect that the process of implementing preferred carrier freezes will be less confusing for subscribers and administratively more efficient for carriers. We reject other commenter proposals, such as AT&T's proposal to require that LECs confirm preferred carrier freezes in writing.[389] We think that our verification rules will be adequate to ensure that subscribers' choices, whether for carrier changes or preferred carrier freezes, are honored.

5. Procedures for Lifting Preferred Carrier Freezes

126. We conclude that LECs offering preferred carrier freeze programs must make available reasonable procedures for lifting preferred carrier freezes. Based on the record before us, we are concerned that some procedures for lifting preferred carrier freezes may place an unreasonable burden on subscribers who wish to change their carrier selections.[390] In addition, and as noted above, we are concerned that consumers are not being fully informed about how freezes work, and therefore often fail to appreciate the significance of implementing a freeze at the time they make the choice. This concern is particularly acute in markets where competition has not yet fully developed so that consumers are aware of the choices they have or will have in the future. We conclude that adopting baseline standards for the lifting of preferred carrier freezes will appropriately balance the interests of Congress in opening markets to competition by protecting consumer choice, preventing anticompetitive practices, and providing consumers a potentially valuable tool to protect themselves from fraud. Thus, carriers must offer subscribers a simple, easily understandable, but secure, way of lifting preferred carrier freezes in a timely manner.[391]

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competitive abuse of that procedure . . ."); BellSouth Comments at 4 (rules will "provide some protection against unscrupulous carriers that attempt to limit competition by imposing PC freezes without the subscriber's authorization").

388 *See* BellSouth Comments at 4.

389 AT&T Comments at 19, n.23.

390 *See, e.g.*, MCI Comments at 15-17; CompTel Petition Comments at 2.

391 *See, e.g.*, IXC Long Distance Reply Comments at 5; Ameritech Reply Comments at 10; MCI Petition at 9.

127. With these concerns for promoting customer choice in mind, we conclude that a LEC administering a preferred carrier freeze program must accept the subscriber's written and signed authorization stating an intent to lift a preferred carrier freeze.[392] Such written authorization -- like the LOAs authorized for use in carrier changes and to place a preferred carrier freeze -- should state the subscriber's billing name and address and each telephone number to be affected. In addition, the written authorization should state the subscriber's intent to lift the preferred carrier freeze for the particular service in question. We think that this procedure is clearly consistent with the purpose of the preferred carrier freeze because it permits the subscriber to notify the LEC directly of her or his intention to lift a preferred carrier freeze.[393] By requiring LECs to accept such authorization, we ensure that subscribers will have a simple and reliable way of lifting preferred carrier freezes, and thus making a carrier change.

128. We similarly conclude that LECs offering preferred carrier freeze programs must accept oral authorization from the customer to remove a freeze and must permit submitting carriers to conduct a three-way conference call with the LEC and the subscriber in order to lift a freeze.[394] In this regard, we agree, for example, with the Texas Office of Public Utility Counsel that three-way calling is an effective means of having a preferred carrier freeze lifted during an initial conversation between a subscriber and a submitting carrier.[395] Specifically, three-way calling allows a submitting carrier to conduct a three-way conference call with the LEC administering the freeze program while the consumer is still on the line, *e.g.*, during the initial telemarketing session, so that the consumer can personally request that a particular freeze be lifted. We are not persuaded by certain LECs' claims that three-way calling is unduly burdensome or raises the risk of fraud.[396] We do not anticipate that the volume of subscribers seeking to lift their preferred carrier freezes will be overly burdensome for these carriers' customer support staff. Further, we expect that LECs administering preferred carrier freeze programs will be able to recover as part of the carrier change charge the cost of making such three-way calling available.[397] We also believe that three-way calling will effectively prevent

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392 *See* Appendix A, § 64.1190(e)(1).

393 *See, e.g.*, U S WEST Reply Comments at 25; USTA Reply Comments at 5; TNRA Comments at 3.

394 *See* Appendix A, § 64.1190(e)(2).

395 TOPC Reply Comments at 5. *See also* AT&T Petition Comments at 7; Telco Comments at 8-9; Ohio Commission Comments at 11; Worldcom Comments at 10.

396 *See, e.g.*, GTE Petition Comments at 5; Citizens Petition Reply at 5; Ameritech Petition Comments at 21.

397 Moreover, we can revisit these conclusions if further experience indicates that these rules become unduly burdensome.

fraud because a three-way call establishes direct contact between the LEC and the subscriber. We expect that the LEC administering the preferred carrier freeze program will have the opportunity to ask reasonable questions designed to determine the identity of the subscriber during an oral authorization, such as a three-way call, to lift a freeze.[398] Finally, the three-way call procedure merely lifts the preferred carrier freeze. In addition, a submitting carrier must follow the Commission's verification rules before submitting a carrier change. For example, an interexchange carrier wishing to submit a carrier change for a customer with a preferred carrier freeze would comply with our verification rules for carrier changes, perhaps by using third-party verification, and then, if necessary, could perform a three-way call with the LEC administering the preferred carrier freeze program to lift the freeze -- all before submitting its carrier change order to the executing carrier.

129. We decline to enumerate all acceptable procedures for lifting preferred carrier freezes. Rather, we encourage parties to develop new means of accurately confirming a subscriber's identity and intent to lift a preferred carrier freeze, in addition to offering written and oral authorization to lift preferred carrier freezes. Other methods should be secure, yet impose only the minimum burdens necessary on subscribers who wish to lift a preferred carrier freeze.[399] Thus, we do not adopt IXC Long Distance's proposal to require that LECs give customers a unique password or personal identification number.[400] While some LECs may find such a proposal useful, we need not mandate its use, given our decision to adopt the procedures for lifting preferred carrier freezes described above.

130. We agree with Ameritech and those commenters who suggest that the essence of the preferred carrier freeze is that a subscriber must specifically communicate his or her intent to request or lift a freeze.[401] Because our carrier change rules allow carriers to submit carrier change requests directly to the LECs, the limitation on lifting preferred carrier freezes gives the freeze mechanism its protective effect. We disagree with MCI that third-party verification of a carrier change alone should be sufficient to lift a preferred carrier freeze.[402] Were we to allow third-party verification of a carrier change to override a preferred carrier freeze, subscribers would gain no additional protection from the implementation of a preferred carrier freeze. Since we believe

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398 *See* AT&T Petition Reply at 5, n.8.

399 *See, e.g.*, Ameritech Comments at 20-21 (discussing development of 24 hour voice response unit).

400 IXC Long Distance Comments at 5.

401 Ameritech Reply Comments at 14. *See also* NYSCPB Reply Comments at 10; U S WEST Reply Comments at 25.

402 MCI Petition at 9. *See also* Midcom Petition Comments at 3; BCI Comments at 3.

that subscribers should have the choice to implement additional slamming protection in the form of preferred carrier freeze mechanisms, we do not adopt MCI's proposal.

131. We expect that, in three-way calls placed to lift a preferred carrier freeze, carriers administering freeze programs will ask those questions necessary to ascertain the identity of the caller and the caller's intention to lift her or his freeze, such as the caller's social security number or date of birth. Several commenters state that when subscribers contact certain LECs to lift their preferred carrier freezes, those LECs go further and attempt to retain customers by dissuading them from choosing another carrier as their preferred carrier selection.[403] Indeed, SNET states that there is no reason for incumbent LECs to treat the lifting of preferred carrier freezes "as ministerial and not as an opportunity to market the services of its affiliates."[404] We disagree with SNET and believe that, depending on the circumstances, such practices likely would violate our rule, discussed above, that carriers must offer and administer preferred carrier freezes on a nondiscriminatory basis. Indeed, we are aware of states that have made similar findings that a carrier that is asked to lift a freeze should not be permitted to attempt to change the subscriber's decision to change carriers.[405] In addition, such practices could also violate the "just and reasonable" provisions of section 201(b).[406] Much as in the context of executing carriers and carrier change requests, we think it is imperative to prevent anticompetitive conduct on the part of executing carriers and carriers that administer preferred carrier freeze programs.[407] Carriers that administer freeze programs otherwise would have no knowledge at that time of a consumer's decision to change carriers, were it not for the carrier's position as a provider of switched access services. Therefore, LECs that receive requests to lift a preferred carrier freeze must act in a neutral and nondiscriminatory manner. To the extent that carriers use the opportunity with the customer to advantage themselves competitively, for example, through overt marketing, such

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403 *See, e.g.*, CompTel Petition Comments at 4; Sprint Comments at 34; MCI Reply Comments at 10 (indicating that LECs engage in "win back" efforts even while participating in three-way calls). *But see* Bell Atlantic Reply Comments at 11, n.21.

404 SNET Petition Reply Comments at 7.

405 *See, e.g.*, Illinois Commerce Commission, *MCI Telecommunications Corp. et al. v. Illinois Bell Telephone Co.*, Order, Case Nos. 96-0075 and 96-0084 (rel. Apr. 3, 1996) ("[d]uring telephone calls for the purpose of changing the customer's intraMSA PIC to another carrier, Respondent should not attempt to retain the customer's account during the process"); Michigan Public Service Commission, *Sprint Communications Company, L.P. v. Ameritech Michigan*, Case No. U-11038 (Aug. 1, 1996) (concluding that "if a customer with [a preferred carrier freeze] calls to change providers, Ameritech Michigan shall not use that contact to try to persuade the customer not to change providers").

406 47 U.S.C. § 201(b).

407 *See supra* discussion on Marketing Use of Carrier Change Information.

conduct likely would be viewed as unreasonable under our rules.[408]

6. Information about Subscribers with Preferred Carrier Freezes

132. We do not require LECs administering preferred carrier freeze programs to make subscriber freeze information available to other carriers because we expect that, particularly in light of our new preferred carrier freeze solicitation requirements, more subscribers should know whether or not there is a preferred carrier freeze in place on their carrier selection.[409] Given our requirement that LECs make available a three-way calling mechanism to lift preferred carrier freezes, if a subscriber is uncertain about whether a preferred carrier freeze has been imposed, the submitting carrier may use the three-way calling mechanism to confirm the presence of a freeze. Thus, we expect that carriers will not typically need to rely on such information to determine whether a freeze is in place.[410] On the other hand, we see benefit to the consumer -- in terms of decreased confusion and inconvenience -- where carriers would be able to determine whether a freeze is in place before or during an initial contact with a consumer. As one alternative, we encourage LECs to consider whether preferred carrier freeze indicators might be a part of any operational support system that is made available to new providers of local telephone service.

7. When Subscribers Change LECs

133. Based on the record developed on this issue, we do not adopt the Commission's tentative conclusion that LECs would automatically establish existing preferred carrier freezes that were implemented with the prior LEC when a subscriber switches his or her provider of local service.[411] Rather, we conclude that when a subscriber switches LECs, he or she should request the new LEC to implement any desired preferred carrier freezes, even if the subscriber previously had placed a freeze with the original LEC. We are persuaded by the substantial number of LEC commenters asserting that it would be technically difficult or impossible to transfer information about existing preferred carrier freezes from the original LEC to the new

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408 *See* 47 U.S.C. §§ 201, 208.

409 *See* MCI Petition at 8-9; IXC Long Distance Reply Comments at 5. We note that at least one incumbent LEC makes this information available already. BellSouth Reply Comments at 7; *cf.* Ameritech Reply Comments at 11-12.

410 If we find that substantial impediments to the timely identification and lifting of preferred carrier freezes exists in the future, we can revisit this issue.

411 *Further Notice and Order*, 12 FCC Rcd at 10,689. *See also* OCC Comments at 3; Worldcom Comments at 10.

LEC.[412] It is our understanding that these difficulties are accentuated because each LEC has different procedures for managing preferred carrier freeze mechanisms. Moreover, because our rules will allow carriers to have different means for lifting freezes, it will be important for subscribers to be informed of the new LECs' procedures before deciding whether to renew a freeze. In the absence of such a requirement, we expect that LECs will develop procedures to ensure that new subscribers are able to implement any desired preferred carrier freezes at the time of subscription, thus avoiding potential confusion for subscribers.

8. Preferred Carrier Freezes of Local and IntraLATA Services

134. We decline the suggestion of a number of commenters that we prohibit incumbent LECs from soliciting or implementing preferred carrier freezes for local exchange or intraLATA services until competition develops in a LEC's service area.[413] In so doing, however, we recognize, as several commenters observe, that preferred carrier freezes can have a particularly adverse impact on the development of competition in markets soon to be or newly open to competition.[414] These commenters in essence argue that incumbent LECs seek to use preferred carrier freeze programs as a means to inhibit the ability or willingness of customers to switch to the services of new entrants. We share concerns about the use of preferred carrier freeze mechanisms for anticompetitive purposes. We concur with those commenters that assert that, where no or little competition exists, there is no real opportunity for slamming and the benefit to consumers from the availability of freezes is significantly reduced.[415] Aggressive preferred carrier freeze practices under such conditions appear unnecessary and raise the prospect of anticompetitive conduct.[416] We encourage parties to bring to our attention, or to the attention of the appropriate state commissions, instances where it appears that the intended effect of a carrier's freeze program is to shield that carrier's customers from any developing competition.

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412 *See, e.g.*, Ameritech Comments at 23; Bell Atlantic Comments at 5; MCI Comments at 17. *See also* Ohio Commission Comments at 12.

413 *See, e.g.*, MCI Petition Reply at 3; Intermedia Comments at 7; LCI Comments at 1; Telco Comments at 7; Excel Reply Comments at 2-3.

414 *See, e.g.*, NAAG Comments at 11; PaOCA Comments at 7; Sprint Comments at 34.

415 *See, e.g.*, MCI Comments at 13-14; Ohio Commission Comments at 11-12; *cf.* USTA Reply Comments at 7. *Cf.* BellSouth Comments at 12, n.25 (stating that it does not offer preferred carrier freezes for choice of local service providers whether the provider is BellSouth or a reseller CLEC).

416 *See, e.g.*, Ohio Commission Comments at 11-12; LCI Comments at 2-3; Intermedia Comments at 6; TRA Petition Comments at 2-4 (citing examples from MCI Petition).

135. Despite our concerns about the possible anticompetitive aspects of permitting preferred carrier freezes of local exchange and intraLATA toll services in markets where there is little competition for these services, we believe that it is not necessary for the Commission to adopt a nationwide moratorium. Indeed, we remain convinced of the value of preferred carrier freezes as an anti-slamming tool. We do not wish to limit consumer access to this consumer protection device because we believe that promoting consumer confidence is central to the purposes of section 258 of the Act. As with most of the other rules we adopt today, the uniform application of the preferred carrier freeze rules to all carriers and services should heighten consumers' understanding of their rights. We note the strong support of those consumer advocates that state that the Commission should not delay the implementation of preferred carrier freezes.[417] We also expect that our rules governing the solicitation and implementation of preferred carrier freezes, as adopted herein, will reduce customer confusion and thereby reduce the likelihood that LECs will be able to shield their customers from competition.

136. We make clear, however, that states may adopt moratoria on the imposition or solicitation of intrastate preferred carrier freezes if they deem such action appropriate to prevent incumbent LECs from engaging in anticompetitive conduct. We note that a number of states have imposed some form of moratorium on the implementation of preferred carrier freezes in their nascent markets for local exchange and intraLATA toll services.[418] We find that states -- based on their observation of the incidence of slamming in their regions and the development of competition in relevant markets, and their familiarity with those particular preferred carrier freeze mechanisms employed by LECs in their jurisdictions -- may conclude that the negative impact of such freezes on the development of competition in local and intraLATA toll markets may outweigh the benefit to consumers.

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417 *See, e.g.*, OCC Reply Comments at 6 ("Customers would thus not be able to protect themselves against slamming for one year under AT&T's proposal."); NYSDPS Comments at 8-9; NCL Comments at 8.

418 *See, e.g.*, New Jersey Board of Public Utilities, *Investigation of IntraLATA Toll Competition for Telecommunications Services on a Presubscription Basis*, Docket No. TX94090388 (June 3, 1997); California Public Utilities Commission, *Alternative Regulatory Frameworks for Local Exchange Carriers*, Decision 97-04-083 (Apr. 23, 1997); Tex. Admin. Code Title 16, § 23.103 (prohibiting freezes for intraLATA toll services until subscribers receive notice of equal access).

9. Limitation on Freeze Mechanisms for Resold Services

137. A number of commenters indicate that preferred carrier freeze mechanisms will not prevent all unauthorized carrier changes.[419] Specifically, and as described above, when a subscriber changes to a new carrier that has the same CIC as the original carrier -- such as a change from a facilities-based IXC to a reseller of that facilities-based IXC -- the execution of the change order is performed by the facilities-based IXC, not the subscriber's LEC.[420] Where such a change is made without the subscriber's authorization, it is referred to as a "soft slam." In a soft slam, the LEC does not make any changes in its system because it will continue to send interexchange calls from that subscriber to the same facilities-based IXC, using the same CIC. Since the soft-slam execution is not performed by the LEC and the LEC may not even be notified of the change, the LEC's preferred carrier freeze mechanism would not prevent such a change. We seek comment in the attached Further Notice of Proposed Rulemaking about issues concerning resellers and CICs, including alternative methods for preventing switchless resellers from circumventing a subscriber's preferred carrier freeze protection through soft slams.[421] We encourage commenters to address these issues in detail.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

138. The framework we have established in this *Order* is aimed at eliminating slamming by attacking the problem on several fronts, including keeping profits out of the pockets of slamming carriers, imposing more rigorous verification procedures, and broadening the scope of our rules to encompass all carriers. We seek additional comment on several issues that either were not raised sufficiently in the *Further Notice and Order* or that require additional comment for resolution. Specifically, we seek comment on (1) requiring unauthorized carriers to remit to authorized carriers certain amounts in addition to the amount paid by slammed subscribers; (2) requiring resellers to obtain their own carrier identification codes (CICs) to prevent confusion between resellers and their underlying facilities-based carriers; (3) modifying the independent third party verification method to ensure that this verification method will be effective in preventing slamming; (4) clarifying the verification requirements for carrier changes made using the Internet; (5) defining the term "subscriber" to determine which person or persons should be authorized to make changes in the selection of a carrier for a particular account; (6) requiring carriers to submit to the Commission reports on the number of slamming complaints received by such carriers to alert the Commission as soon as possible about carriers that practice slamming; (7) imposing a registration requirement to ensure that only qualified entities enter the

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419 *See, e.g.*, NYSDPS at 9.; Ameritech Petition Comments at 17; U S WEST Reply Comments at 11, n.28.

420 *See supra* discussion on Definition of "Submitting" and "Executing" Carriers.

421 *See infra* discussion in Further Notice of Proposed Rulemaking, Resellers and CICs.

telecommunications market; (8) implementing a third party administrator for execution of preferred carrier changes and preferred carrier freezes.

A. Recovery of Additional Amounts from Unauthorized Carriers

139. As explained above, because section 258 specifically mandates that the unauthorized carrier remit to the authorized carrier all amounts paid by the consumer, we conclude that Congress intended that the authorized carrier should be entitled to retain these payments, at least in the amount that the authorized carrier would have charged the subscriber absent the unauthorized change.[422] In light of this statutory restriction, we have established in this *Order* rules that treat differently subscribers who discover an unauthorized change before they pay their bills and those subscribers who do not discover that they have been slammed until after they have paid their bills. Conversely, the authorized carrier receives payment only if the subscriber first pays the slamming carrier. The rules we have adopted above reflect our efforts to balance the interests of consumers and carriers consistent with the provisions of the statute. We seek further comment, however, concerning possible mechanisms that would relieve the tension between compensating consumers and compensating authorized carriers, while maintaining a strong deterrent effect against slamming. We specifically seek comment on whether the proposals discussed below are within our jurisdiction and consistent with Congress' intent embodied in Section 258 of the Act.

140. Where a subscriber has paid charges to the unauthorized carrier, we propose that the authorized carrier collect from the unauthorized carrier double the amount of charges paid by the subscriber during the first 30 days after the unauthorized change.[423] This proposal would enable the authorized carrier to: (1) provide a complete refund or credit to a subscriber for charges paid after being slammed, so that the subscriber would, in effect, be absolved for the first 30 days of slamming charges;[424] and (2) retain an amount equal to the charges incurred by the subscriber after the unauthorized change, in accordance with the specific language of section 258(b). For example, if a subscriber who has been slammed has paid the slamming carrier $30.00 for charges incurred during the first 30 days after an unauthorized change, the slamming carrier must pay the authorized carrier $60.00. The authorized carrier then would give the subscriber a refund or credit of $30.00 and keep $30.00 for itself. If the subscriber has paid the unauthorized carrier for additional charges beyond the first 30 days after the unauthorized

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422 *See supra* discussion on Subscriber Refunds or Credits.

423 *See* Appendix B, § 64.1100(c). This proposal would not affect the obligation of slamming carriers to remit to authorized carriers billing and collection expenses and carrier change charges. *See* Appendix A, § 64.1170(a)(2), (b).

424 *See* Appendix B, § 64.1100(d)(1).

change, the authorized carrier would be entitled to collect and keep that amount from the unauthorized carrier.

141. Where the subscriber has not paid charges to the unauthorized carrier, we propose to permit the authorized carrier to collect from the unauthorized carrier the amount that would have been billed to the subscriber during the first 30 days after the unauthorized change. This proposal would enable the subscriber to be absolved of liability for the first 30 days after the unauthorized change, as provided by the rules we adopt in this *Order*, and at the same time provide for the authorized carrier to receive charges equal to the amount for which the subscriber was absolved. For example, if a subscriber who has been slammed would have paid the unauthorized carrier $30.00, but did not pay such charges, the unauthorized carrier must pay the authorized carrier $30.00. Alternatively, we seek comment on whether the authorized carrier's recovery under this proposal should equal the amount that the authorized carrier would have billed the subscriber during that 30-day time period absent the unauthorized change. The authorized carrier would then receive payments to which it would have been entitled if the unauthorized change had not occurred. Under either approach, the slamming carrier would be liable for charges to the authorized carrier regardless of whether the subscriber has paid the unauthorized carrier for such charges. We note that the rules adopted in this *Order* require that any charges imposed by the unauthorized carrier after the 30-day absolution period be paid by the subscriber to the authorized carrier at the authorized carrier's rates.[425]

142. We tentatively conclude that these proposals would appropriately impose additional penalties on slamming carriers. Moreover, by making the unauthorized carrier liable to the authorized carrier for these additional amounts, these proposals would provide further economic disincentive for carriers that engage in slamming and extra incentive for authorized carriers to pursue their claims against unauthorized carriers. The effect of the first proposal, furthermore, would be to absolve all subscribers of liability for charges incurred after being slammed while still giving authorized carriers incentive to pursue their claims against unauthorized carriers. Under the first proposal, even a subscriber who already has paid the unauthorized carrier would receive the benefit of being absolved of liability for slamming charges, thus compensating all consumers for the intrusion and inconvenience of being slammed.

143. We tentatively conclude that the Commission has the authority to permit these additional payments by slamming carriers, based on the language of section 258, which provides that "the remedies provided by this subsection are in addition to any other remedies available by law."[426] The Commission has additional authority under section 201(b) to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the]

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425 *See* Appendix A, § 64.1100(d)(3).

426 *Id.*

Act," as well as under section 4(i) to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions."[427] We tentatively conclude that permitting an authorized carrier to collect the above-described amounts from the unauthorized carrier would help to deter slamming by making slamming so unprofitable that carriers will cease practicing it. We seek comment on these tentative conclusions.

B. Resellers and CICs

144. The practice of reselling telecommunications service from facilities-based carriers to non-facilities based (switchless) carriers is a major development that has enabled many carriers to compete effectively in the long distance market. Reselling has given consumers a wider variety of services and carriers, as well as a reduction in the cost of telecommunications service. As competition develops further, however, so does the need to ensure that consumers are receiving accurate and sufficient information about the assortment of telecommunications services and carriers in order to avoid consumer confusion. Confusion over carriers and the services they provide can negate competition because confused consumers cannot make informed choices. Further misunderstandings may arise due to the use of carrier identification codes (CICs), which are used by LECs to identify different IXCs. Because CICs are issued by the North American Numbering Plan Administrator (NANPA) to facilities-based IXCs only, switchless resellers do not have their own CICs, but rather use the CICs of their underlying facilities-based carriers. The fact that resellers do not have their own CICs results in two slamming-related problems: (1) the "soft slam;" and (2) the misidentification of a reseller as the underlying carrier.

145. As described above, the "soft slam" occurs when a subscriber is changed, without authorization, to a carrier that uses the same CIC as his or her authorized carrier.[428] This can occur when a subscriber is changed from a switchless reseller to the reseller's facilities-based IXC, from the facilities-based IXC to a switchless reseller of that IXC's service, or from a switchless reseller of the facilities-based IXC's service to another switchless reseller of that same IXC's service. In all such cases, the subscriber's CIC remains the same even though the identity of the carrier has changed. As explained earlier, when a subscriber changes from a facilities-based IXC to a reseller of that facilities-based IXC's services, or in any situation in which a subscriber changes to another carrier that has the same CIC as the previous carrier, the execution of the change is performed by the facilities-based IXC, not the LEC.[429] It is the facilities-based

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427 47 U.S.C. §§ 201(b), 4(i).

428 *See supra* discussion on Limitation on Freeze Mechanisms for Resold Services.

429 *See supra* discussion on Definition of "Submitting" and "Executing" Carriers.

carrier that processes the carrier change in its system to enable the reseller to begin billing the subscriber. The LEC does not make any changes in its system because it will continue to send interexchange calls from that subscriber to the same facilities-based carrier, using the same CIC. In fact, the LEC may not even be notified of any changes.

146. The soft slam is therefore particularly problematic because it bypasses the LEC and enables a slamming reseller to bypass a subscriber's preferred carrier freeze protection.[430] Preferred carrier freeze protection, where the LEC will change a subscriber's carrier only after it receives express written or oral consent from that subscriber to lift the freeze, will not be triggered by a soft slam. This is because the LEC is not the executing carrier and may not even be aware of the unauthorized change. Further complications arise because the name of the facilities-based carrier may continue to appear on the subscriber's bill, giving the subscriber no indication that his or her preferred carrier has been changed.[431] If the slamming reseller's retail rates are higher than those of the carrier it replaced, however, the subscriber may become suspicious.

147. Another problem that results from resellers using the same CICs as their underlying facilities-based carriers is that of misidentification. For example, although a consumer is subscribed to a switchless reseller, the LEC will identify the subscriber's carrier as the facilities-based carrier because the LEC's records show that the reseller's CIC is the same as that of the facilities-based carrier. Subscribers also may experience difficulty in detecting when an unauthorized change has occurred. When a subscriber of a reseller receives the monthly bill for long distance services, the identity of the carrier on the portion of the subscriber's bill that lists the presubscribed carrier may not be the reseller, but the facilities-based carrier providing the underlying wholesale service. The identity of the reseller may, however, appear on a separate billing page under the reseller's name, or on an aggregator's billing page. Thus, if a reseller switches a subscriber to its network without first obtaining the subscriber's permission, the subscriber may only see the identity of the facilities-based carrier on the monthly telephone bill, and not the identity of the reseller that committed the slamming, unless the subscriber looks for the reseller's identity among the other pages of the telephone bill. Because the facilities-based carrier appears on the bill, subscribers who have been slammed by the unidentified reseller reasonably might assume that the facilities-based carrier is the culprit. Subscribers could then bring slamming complaints against the facilities-based carriers in numerous fora, when the real culprit is the unidentified reseller.

148. We seek comment on the issue of whether switchless resellers should be required to have their own CICs or some other identifier that would distinguish them from the underlying

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430 *See supra* discussion on Limitation of Freeze Mechanism for Resold Services.

431 *See, e.g.*, NYSDPS Comments at 9; Ameritech Comments at 17.

facilities-based carriers and allow the consumer to ensure that slamming has not occurred. We seek comment on three options: 1) require each reseller to obtain a CIC; 2) require the creation for each reseller of a "pseudo-CIC," that is, digits that would be appended to the underlying carrier's own CIC for identification of the reseller; or 3) require underlying facilities-based carriers to modify their systems to prevent unauthorized changes from occurring if a subscriber has a freeze on the account and to allow identification of resellers on the consumer's bill. We also seek comment on other benefits, unrelated to slamming, that may result from adoption of any of these options.

1. Background - Carrier Identification Codes

149. CICs are numeric codes that enable LECs providing interstate interexchange access services to identify the IXC that the originating caller wishes to use to transmit its interstate call.[432] LECs use the CICs to route traffic to the proper IXC and to bill for the interstate access service provided. CICs facilitate competition by enabling callers to use the services of telecommunications service providers both by presubscription and by dialing a carrier access code, or CAC, which incorporates that carrier's unique Feature Group D CIC.[433] Originally, CICs were unique three-digit codes (XXX), and CACs were five-digit codes incorporating the CIC (10XXX). Later, when demand forecasts exceeded the number of three-digit CICs, the Commission: (1) implemented CIC conservation measures in 1995 that stopped assigning three-digit CICs and started assigning four-digit CICs in a seven-digit CAC format (101XXXX),[434] and (2) approved a transition period that would allow subscribers to use either the original five-digit CACs required by the three-digit CICs, or the new seven-digit CACs (101XXXX) required by the four-digit CICs.[435] The transition period ended on July 1, 1998, and

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432 Most access providers are ILECs that provide access customers with circuits that interconnect to the ILEC's public switched telephone network. Commission rules require that "interstate access services should be made available on a non-discriminatory basis and, as far as possible, without distinction between end user and IC (interexchange carrier) customers." Petition of First Data Resources, Inc., Regarding the Availability of Feature Group B Access Service to End Users, *Memorandum Opinion and Order,* 1986 WL2911786 (rel. May 28, 1986) at para. 13. Typical access customers include interexchange carriers, wireless carriers, competitive access providers, and large corporate users.

433 Feature Group D access, or "equal access," is known in the industry as "One-plus" ("1+") dialing. This type of access allows calls to be routed directly to the caller's carrier of choice. Feature Group D access offers features, including presubscription, not generally available through other forms of access.

434 *See* Letter from Kathleen M.H. Wallman, Chief, Common Carrier Bureau, Federal Communications Commission to Ron Conners, Director of NANP Administration, dated March 17, 1995.

435 Administration of the North American Numbering Plan, Carrier Identification Codes (CICs), *Second Report and Order,* CC Docket No. 92-237, 12 FCC Rcd 8024 (1997).

all subscribers must now use the seven-digit CAC format.[436] After the Commission is satisfied that all of the Nation's carriers have complied with the requirement to end the transition period, we will consider making available for assignment to carriers the remainder of the approximately 10,000 CICs contained in the four-digit CIC format.

150. As noted above, CICs are also used to bill customers for the access and transport services provided by multiple carriers. Most calls between local access and transport areas (interLATA) involve at least two carriers: the LEC and the IXC. The LEC translates the digits dialed by the subscriber, who uses either the presubscribed carrier (1+) or a "dial-around" carrier,[437] using a CAC. The LEC knows which carrier the subscriber chose by either accessing the database to discover the identity of the carrier to which the subscriber is presubscribed, or by translating the CAC dialed by the subscriber. The LEC then routes the call to the IXC chosen by the subscriber. Carriers that share the transport of calls bill each other for the total minutes of use incurred on their respective networks, using CICs to identify the specific carriers that generated the calls. To obtain a CIC, however, NANPA requires carriers to first obtain Feature Group D access from the LECs that serve their customer bases.[438] The translation services provided by the LECs are bundled together with the Feature Group D access purchased by the IXC, and are not sold separately.[439] As a result, most CIC holders are facilities-based carriers because, unlike most resellers, they have a switch that needs to be connected with the LEC over a Feature Group D access facility.

151. Switchless resellers make a profit by buying the facilities-based carrier's service at a wholesale rate, and reselling it to subscribers at a retail rate. As noted above, resellers market the telephone services provided by facilities-based carriers, but do not possess their own unique CICs.

2. Jurisdiction

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436 Administration of the North American Numbering Plan, Carrier Identification Codes (CICs), *Order on Reconsideration, Order on Application for Review, and Second Further Notice of Proposed Rulemaking,* CC Docket No. 92-237, 12 FCC Rcd 17876 (1997). We note that 1+ dialing is not affected by transition from the three-digit CIC, five-digit CAC format to the four-digit CIC, seven-digit CAC format.

437 A consumer "dials around" a presubscribed carrier by dialing an access code prefix (*e.g.*, 10333 or 1-800-877-8000 to reach Sprint, or 1-800-CALL ATT to reach AT&T) in order to reach an IXC to which he or she is not presubscribed.

438 Carrier Identification Code (CIC) Assignment Guidelines 4, INC 95-0127-006, Industry Numbering Committee (November, 1997).

439 *See, e.g.*, The Bell Atlantic Telephone Companies, Tariff FCC No. 1 (June 30, 1998) and Bell South Telecommunications, Inc., Tariff FCC No. 1 (May 27, 1998).

152. We tentatively conclude that Commission regulations requiring resellers to be identified on their subscribers' monthly bills would be consistent with our authority under sections 201(b) and 4(i). The Commission has authority under section 201(b) to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the] Act," as well as under section 4(i) to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions."[440] Moreover, we tentatively conclude that the plain language of section 251(e)(1) gives the Commission authority to promulgate regulations of the type proposed below for changing the North American Numbering Plan (NANP). We also tentatively conclude that the Commission's authority to change the NANP includes changes to such documents as the CIC Assignment Guidelines as might be required by the Commission in this proceeding. We request comments on these tentative conclusions.

3. Option 1: Require Resellers to Obtain Individual CICs

153. As noted above, the NANPA currently requires resellers to first obtain Feature Group D access from a LEC before it will assign the reseller a CIC. If resellers were to obtain CICs without Feature Group D access, resellers would not need their own physical access to the public switched telephone network because that would be provided to them by facilities-based carriers. Instead, resellers would need "translation" access, or the ability of the LECs to route subscriber calls to the resellers even though the facilities used to route those calls were provided to the reseller by the facilities-based carrier. Under the auspices of the North American Numbering Council (NANC), the CIC Ad Hoc Working Group recommended to the NANC that the current Feature Group D access requirement be dropped:

> [a]ssignment of [Feature Group D] CICs without the need for the purchase of [Feature Group D] trunk (i.e., "translations access") could help alleviate some difficulties associated with resale. Specifically, translations access will facilitate the assignment of CICs to resellers, and thereby allow easier identification of these type service providers, enhancing the ability to resolve conflicts, including disputes which involve slamming.[441]

154. As our first option, we seek comment on requiring each reseller to obtain an individual CIC and on any changes to the NANP that would be required to make such a

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440 47 U.S.C. §§ 201(b), 4(i).

441 Report and Recommendation of the CIC Ad Hoc Working Group to the North American Numbering Council (NANC) Regarding the use and Assignment of Carrier Identification Codes (CICs), February 18, 1996 at 7.

requirement effective. First, we request comment on whether we should make the purchase of translations access by resellers mandatory in order to deter slamming. We note that if each reseller had a unique CIC, the preferred carrier freeze mechanism would be effective against soft slamming because every interexchange carrier change would involve a CIC change, and therefore trigger LEC preferred carrier freeze protection. We also ask commenting parties to address how effective this option would be in allowing consumers and carriers to detect slamming. Further, we seek comment on whether this option has advantages because it does not require facilities-based carriers to modify their existing billing and collection systems and will not cause a CIC shortage now that the Commission has ended the transition period to four-digit CICs. We request comment on the CIC Ad Hoc Working Group's recommendation to allow resellers to purchase translations access instead of Feature Group D trunk access. We note that section 251(e)(2) of the 1934 Act states: "[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[442]

155. We request further comment on this option's impact on the "competitively neutral" requirements of section 251(e)(2), in lieu of the fact that translations access is currently bundled together with Feature Group D trunk access. Specifically, should resellers pay the full Feature Group D trunk access rates for translations access in order to "level the playing field" with facilities-based carriers? How long of a transition period should we require? Should resellers be required to adhere to the same CIC Assignment Guidelines as facilities-based carriers? What will be the effect on CIC conservation if the Commission requires all resellers to obtain CICs? Commenting parties are encouraged to include empirical information with their comments.

4. Option 2: Require the Use of "Pseudo-CICs" for Resellers

156. The term "pseudo-CIC" refers to the creation of a coded suffix that follows a facilities-based carrier's CIC.[443] A facilities-based CIC would assign a three or four-digit suffix code to each reseller of the facilities-based carrier that could be used to identify a particular reseller on a consumer's bill. For example, the NANPA assigned AT&T the four-digit CIC 0288. Under the pseudo-CIC system, resellers of AT&T's services would be assigned suffixes to 0288 beginning with 0001, assuming the pseudo-CICs are four digits. Thus, reseller "A" would be assigned the pseudo-CIC "0288-0001."

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442 47 U.S.C. § 251(e)(2).

443 *See* Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, *Notice of Proposed Rulemaking*, 9 FCC Rcd 6885 (1994), BellSouth's Reply Comments at 2-4.

157. We seek comment on use of the pseudo-CIC to prevent switchless resellers from circumventing a subscriber's preferred carrier freeze protection through soft slams. As with Option 1, if each reseller had a unique CIC, the preferred carrier freeze mechanism would be more effective against slamming perpetrated by resellers because every interexchange carrier change would involve a CIC change, and therefore trigger any LEC-provided preferred carrier freeze protection mechanisms. We also request comment on the viability of the pseudo-CIC option as a method to identify particular resellers of a facilities-based carrier's services so that consumers can detect slamming if it occurs.

158. We request comment on recovering the cost of implementing the pseudo-CIC option, which would be borne primarily by ILECs and other carriers or entities that provide billing and collection services to resellers. We request further comment on the need to standardize pseudo-CIC assignments, particularly in cases where a reseller resells services from multiple facilities-based carriers. Should a single pseudo-CIC suffix be used by all facilities-based carriers to identify the same reseller, so that the 0001 suffix applies to reseller "A" regardless of the facilities-based carrier's CIC? Should the NANPA be required to administrate pseudo-CICs, to ensure uniformity? Finally, we request comment on the impact of pseudo-CIC implementation on section 251(e)(2)'s requirement for competitive neutrality, when determining the cost of its administration.

5. Option 3: Require Facilities-Based Carriers to Modify Their Systems

159. Facilities-based carriers maintain the network systems which enable them to execute carrier changes when a subscriber changes to a carrier whose CIC is the same as the previous carrier. They also maintain records of telephone service sales generated by each reseller, in order to bill resellers for the services consumed by the resellers' subscribers, or to pass that information to the entity providing the resellers with billing and collection services. We seek comment on imposing additional duties on facilities-based carriers to utilize their systems to help prevent soft slams and to help subscribers identify resellers on their bills.

160. We seek comment on requiring a facilities-based carrier to modify its system to enable it to execute preferred carrier freeze protection only for subscribers who are presubscribed to the services of either the facilities-based carrier or one of its switchless resellers. We propose that LECs be required to provide to each facilities-based IXC certain freeze information about subscribers of the facilities-based carrier or subscribers of any of the facilities-based carriers' resellers. This communication would contain information about which of those subscribers have preferred carrier freeze protection on their accounts, as well as information about which subscribers have lifted their freezes. Each facilities-based carrier then would have the information necessary to enable it to reject carrier change orders, in soft slam situations, for those subscribers who have preferred carrier freeze protection. The LEC would continue to be responsible for accepting subscriber requests for preferred carrier freeze protection, for maintaining such freeze protection for the subscriber against all other unauthorized changes, and

for lifting freezes upon receiving notification from subscribers. We seek comment on this proposal. We also seek comment on how frequently the facilities-based IXC would need to receive information from the LEC in order to prevent soft slams, as well as undue delays in legitimate carrier changes. We seek comment on the burden this proposal would impose on both facilities-based IXCs and LECs.

161. We also seek comment on whether facilities-based carriers should be required to modify their billing records to allow identification of resellers on the consumer's bill, whether such bill is issued from the reseller, the LEC, or a billing agent. We also seek comment on whether, if the subscriber's carrier has been changed but the CIC remains the same, such subscriber's bill should include information on how to contact the underlying facilities-based carrier if the subscriber believes that an unauthorized change has occurred. This would enable the subscriber to contact the facilities-based IXC, rather than the LEC. In this particular situation, the LEC has no ability to properly identify the carrier, nor any ability to change the subscriber back to the properly authorized carrier, because the subscriber's CIC has not changed. Only the facilities-based IXC has the ability to perform these functions. We seek comment on whether facilities-based carriers possess the information needed to distinguish resellers of their services on subscribers' monthly telephone bills. We ask for comment on the cost and effort associated with placing on consumers' bills information based on the reseller usage information already maintained by facilities-based carriers. Specifically, how expensive and difficult would it be for facilities-based carriers to modify their existing billing records to provide the means to identify on the subscribers' monthly bills the specific resellers responsible for the service? Finally, we request comment on the impact of this proposed option on section 251(e)(2)'s requirement for competitive neutrality, when determining the cost of its administration.

162. We also seek comment on any other proposals that would help to distinguish the identities of resellers from their facilities-based carriers, both for purposes of identification on subscriber bills and to prevent soft slams. We seek comment on additional CIC proposals, as well as on methods that would not involve CICs, if such proposals would attain both goals of properly identifying resellers and preventing switchless resellers from slamming subscribers.

6. Other Potential Benefits

163. We also seek comment on other benefits unrelated to slamming remedies that may result from the adoption of any of these options. For example, we ask commenters to describe how the enhanced identification of resellers may allow more efficient billing or routing of calls. In addition, we seek comment on whether such identification would promote competition by giving greater emphasis to the identity of resellers that provide service.

C. Independent Third Party Verification

164. As noted previously, the Commission has seen many instances of abuse

concerning our existing requirements for independent third party verification. We clarify above, for example, that the verifier must be truly independent of both the carrier and any telemarketing agent, that the third party verifier must not be compensated in a manner that creates incentives to engage in deceptive verification practices, and most importantly, that the third party verification must clearly and conspicuously confirm the previously obtained authorization. Several parties, however, have requested further guidance regarding independent third party verification.[444] Based on the number and breadth of comments we received asking for clarification of the independent third party verification option, we tentatively conclude that we should revise our rules for independent third party verification.

165. NAAG suggests in its comments that independent third party verification should be separated completely from the sales transaction, so that a carrier would not be permitted to conduct a three-way call to connect the subscriber to the third party verifier.[445] NAAG argues that a verification call initiated by the carrier is not truly independent because the subscriber would remain under the influence of the carrier's telemarketer during the verification.[446] We note, however, that using a three-way call is often the most efficient means by which to accomplish third party verification.[447] We seek comment on whether, if a telemarketing carrier is present during the third party verification, such verification can be considered "independent."

166. We seek comment on the use of automated third party verification systems, as opposed to "live" operator verifiers. Although different automated third party verification systems operate in various ways, such systems generally work as follows: after obtaining a carrier change request from a subscriber through telemarketing, the telemarketing carrier sets up a three-way call between the subscriber, the carrier, and the automated verification recording system. The recording system then plays recorded questions and records the subscriber's answers to those questions. Presumably the system would record both the questions asked by the system and the answers given by the subscriber. With some systems, the telemarketing carrier remains on the call during the verification, while in other systems the telemarketing carrier may hang up on the call after connecting the subscriber to the third party verifier. We seek comment on whether automated third party verification systems as described above would comply with our rules concerning independent third party verification, as well as with the intent behind our rules to produce evidence independent of the telemarketing carrier that a subscriber wishes to change his or her carrier. We also note that one commenter, VoiceLog, offers an additional system

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444 *See, e.g.*, NAAG Comments at 17; Quick Response Comments at 2.

445 NAAG Comments at 17.

446 *Id.*

447 *See also, e.g.*, ACTA Reply Comments at 29; MCI Reply Comments at 4, n.5.

called a "live-scripted" version.[448] In this "live-scripted" version, after the telemarketing carrier's representative sets up the three-way call between the subscriber, the carrier's representative, and the automated recording system, the system begins recording, at which point the carrier's representative asks scripted questions to confirm the necessary information about the subscriber's account and that the subscriber wishes to change his or her carrier.[449] We seek comment on whether such a "live-scripted" automated verification system would be at odds with our rules because it permits the carrier itself, who is not an independent party located in a separate physical location, to solicit the subscriber's confirmation. We also seek comment on the advantages and disadvantages of using automated third party verification and live operator third party verification. We note that some commenters argue that automated third party verification is more economical to use than live verifiers, and that automated systems provide recordings that, by recording the subscriber's tone of voice, may also indicate the subscriber's state of mind.[450] Other commenters maintain that live verifiers are more effective than automated verifiers because a live operator can answer questions asked by the subscriber, whereas an automated system may only be able to record "yes" or "no" answers.[451] We seek comment on these viewpoints and on any other advantages, disadvantages, or alternatives to using automated third party verification systems.

167. We seek comment on the content of the third party verification itself. For example, should the independent third party verifier be required or permitted to provide certain information in addition to confirming a subscriber's carrier change request? NAAG proposes that the Commission should define the format and content of the third party verification.[452] Quick Response states that its verifiers have carrier-provided information sheets with which to answer subscribers' questions during the verification process.[453] We also seek comment on whether independent third party verifiers should be permitted to dispense information on preferred carrier freeze procedures. Several commenters argue that requiring a third party verifier to provide additional information is unnecessary, time-consuming, and would put the third party verifier in the role of telemarketing for the carrier.[454] We seek comment on any

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448 VoiceLog Comments at 3.

449 *Id.*

450 *See, e.g.*, TPV Services Reply Comments at 7; VoiceLog Comments at 5.

451 *See* Quick Response Comments at 4-6.

452 NAAG Comments at 17.

453 Quick Response Comments at 5.

454 *See, e.g.*, ACTA Reply Comments at 28; TPV Reply Comments at 6.

benefits that might be gained from permitting or requiring third party verifiers to provide additional information. We also seek comment on whether such a requirement would compromise the independent nature of the verification, or on whether such a requirement is necessary. Finally, we seek comment on any other proposals that would improve the quality of the third party verification.

D. Carrier Changes Using the Internet

168. Many carriers have begun to utilize the Internet as a marketing tool to gain new subscribers. Consumers may log onto a carrier's website and file forms electronically to switch to that carrier's telecommunications service. We recognize that using the Internet is a quick and efficient method of signing up new subscribers and should be made widely available. Such availability, however, should be accompanied by measures to ensure that consumers are provided the same safeguards to prevent slamming as we have mandated for other forms of solicitation. It is the very ease with which a subscriber may change carriers using the Internet that also makes the Internet fertile ground for slamming. For example, we can envision scenarios in which a consumer who is "surfing" the Internet inadvertently signs up for a switch in long distance service, or is misled into signing up for a contest that actually results in a switch of telecommunications provider.

169. As stated in this *Order*, all carrier changes must be confirmed in accordance with one of the three verification methods in our rules: written LOA, electronic authorization, or independent third party verification.[455] It appears, however, that carriers have widely differing interpretations of the applicability of the Commission's verification rules to Internet carrier changes. For example, some carriers' websites state that the subscriber's carrier change request will be verified separately after the consumer sends, by electronic submission, the carrier change request. Other carriers' websites indicate that verification will occur only if the subscriber lives in certain specified states. Some carriers' websites do not offer electronic submission of any forms, stating that they cannot change any subscriber's service without that subscriber's signed written agreement. These websites offer the subscriber the choice of downloading a paper form or receiving the paper form in the mail, stating that the carrier will only change the subscriber's service after the subscriber submits a signed paper form.

170. We seek comment on whether a carrier change submitted over the Internet could be considered a valid LOA under our verification rules. When carriers obtain written LOAs from subscribers, such LOAs serve as both authorization to change a subscriber's carrier and verification of that subscriber's decision to change carriers. We seek comment on the extent to which current carrier change requests submitted over the Internet contain all the required elements of a valid LOA in accordance with our rules. We have particular concerns about how

[455] *See* Appendix A, § 64.1150.

an Internet sign-up system satisfies the signature requirement, which is one of the most important identification requirements of the written LOA.[456] The electronic forms that we have seen generally contain a section called the "electronic signature" that serves as a substitute for the consumer's written signature. Some electronic signatures consist of the consumer typing his or her name into the box. Other electronic signatures consist of the consumer submitting the form electronically to the carrier. We tentatively conclude that electronic signatures used in Internet submissions of carrier changes would not comply with the signature requirement for LOAs. We believe that the electronic signature fails to identify the "signer" as the actual individual whose name has been "signed" to the Internet form. We also believe that the electronic signature fails to identify the "signer" as an individual who is actually authorized to make telecommunications decisions. For example, there appear to be few safeguards to prevent someone from simply typing another person's name into the field for the electronic signature. There would be no telltale variations in handwriting to distinguish one electronic signature from another. We seek comment on these tentative conclusions, and seek comment generally on how carriers are dealing with the above-identified problems or how our rules should be modified to account for these differences.

171. We also seek comment on what additional information would provide sufficient consumer protection from an unscrupulous carrier. For example, some carriers will accept carrier changes using the Internet if subscribers submit their credit card numbers for billing purposes. We seek comment on whether obtaining a subscriber's credit card number would provide sufficient proof that a subscriber authorized a carrier change and that the submitting person is actually the subscriber. We seek comment on the extent to which a subscriber would be protected by the consumer protection aspects that accompany the use of credit cards. We also seek comment on whether carrier changes submitted over the Internet should require a subscriber to include certain personal information, such as social security number or mother's maiden name, to ensure that only the subscriber may change his or her own carrier. We seek comment on whether requiring the submission of these types of information would be sufficient to prevent slamming using the Internet, without jeopardizing the subscriber's privacy and other interests.

172. To the extent that a carrier change using the Internet is *not* a valid LOA, then at a minimum, a carrier using such a method of solicitation must verify in accordance with our rules. That is, the carrier must either obtain a valid written LOA, or confirm the sale with electronic authorization or independent third party verification. We seek comment on whether additional methods of verification might be particularly appropriate for use by carriers who solicit subscribers over the Internet.

173. We also have general concerns about the content of the solicitation using the Internet. For example, some IXC webpages state that in changing to that IXC's long distance

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[456] *See, e.g.*, 47 C.F.R. § 64.1150(b) (requiring that an LOA be signed and dated by the subscriber).

service, the consumer also agrees to change to the IXC's intraLATA toll service where applicable. These carriers do not give consumers the option of choosing only interLATA service by that carrier, but instead require the consumer to accept both interLATA and intraLATA toll service from that IXC. We tentatively conclude that such statements would be in violation of our rule that requires LOAs to contain separate statements regarding choices of interLATA and intraLATA toll service.[457] We seek comment on this tentative conclusion and on any other problems that may result from carrier use of the Internet to change subscribers' carriers.

174. Finally, we seek comment on other uses of the Internet in the carrier change context. For example, we seek comment on the extent to which subscribers may use the Internet to request or lift preferred carrier freezes. We have the same general above-mentioned concerns about whether this method would identify the submitting party as the actual subscriber whose service would be affected by the imposition or lifting of the preferred carrier freeze. We also seek comment on the verification procedures that should apply. Should subscribers requesting preferred carrier freezes over the Internet verify their requests in the same manner as requests given directly by telephone to a LEC? We state above that LECs should, at a minimum, provide subscribers with the option to lift freezes using either a written LOA or a three-way call, but that they may offer additional options. Could LECs provide a simple and secure method for subscribers to impose and lift their freezes using the Internet? We seek comment on any other uses of the Internet that would promote efficiency and convenience for both carriers and consumers in changing telecommunications carriers and other related activities.

E. Definition of "Subscriber"

175. Section 258 of the Act and our implementing rules require that the carrier obtain authorization from a subscriber before making a switch. Neither the Act nor our rules define the term "subscriber" for this purpose. We seek comment on how a subscriber should be defined, in light of our goals of consumer protection and promotion of competition. SBC suggests that the term "subscriber" should include "any person, firm, partnership, corporation, or lawful entity that is authorized to order telecommunications services supplied by a telecommunications services provider," so that carriers could obtain authorization from whomever at the business or residence is authorized to make the purchasing decision.[458] In the *1995 Report and Order*, we determined that the only individual qualified to authorize a change in carrier selection is the "telephone line subscriber," although we did not specifically define the term.[459] We believe that allowing the named party on the bill to designate additional persons in the household to make

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457 *See* 47 C.F.R. § 64.1150(e)(4).

458 SBC Comments at 6.

459 *See 1995 Report and Order*, 10 FCC Rcd at 9564, n.16.

telecommunications decisions could promote competition because carriers would be able to solicit more than one person in a household. We also believe that consumers would find such an arrangement convenient because it would allow more than one person to make telecommunications decisions, while still giving the named party control over which members of the household may make changes to telecommunications service. A spouse named on the bill could therefore designate the other spouse as being authorized to make decisions regarding telecommunications service, although their minor children would not be authorized to make such decisions.

176. On the other hand, we are concerned that adoption of such a proposal could lead to an increase in slamming. It is unclear, for example, how a marketing carrier would know if the person who has authorized a carrier change is in fact authorized to order telecommunications services. We are concerned that a slamming carrier could simply submit changes requested by unauthorized persons and claim that it thought that those persons were authorized. If the definition of a subscriber is limited to the party named on the bill, however, a carrier would know conclusively that it may only submit changes authorized by persons named on the bill. Furthermore, such a proposal presumably would require executing carriers to not only maintain lists of persons other than the named party who are authorized to make telecommunications decisions, but also to check each carrier change request against these lists to determine if the person who authorized the carrier change is also authorized to make decisions. We believe that this could be an unreasonable burden on the executing carrier.

177. We also seek comment on the current practices of carriers with regard to which members of a household are permitted to make changes to telecommunications service. Carriers who submit proposals should include an explanation of how their present systems operate and the advantages and disadvantages of their proposals, as opposed to their current procedures. We seek comment on this and other proposals to define the term "subscriber" in order to maximize consumer protection, provide consumer convenience, and promote competition in telecommunications services.

F. Submission of Reports by Carriers

178. We seek comment on whether we should require each carrier to submit to the Commission a report on the number of complaints of unauthorized changes in telecommunications providers that are submitted to the carrier by its subscribers.[460] This concept is based on a provision in the Senate's anti-slamming bill.[461] We believe that a reporting requirement could serve to alert the Commission as soon as possible about carriers that practice

[460] *See* Appendix B, § 64.1100(f).

[461] *See* S. 1618, 105th Cong., 2nd Sess. (1998).

slamming. Because most subscribers initially complain about slamming to their local exchange or long distance carriers, the Commission may not learn of a carrier's slamming practices until a subscriber has been unable to resolve the matter and then files a consumer complaint with the Commission. Early warning about slamming carriers will enable the Commission to take investigative action, where warranted, to stop slamming as soon as possible. We seek comment on the potential benefits of this reporting requirement and on whether such benefits outweigh the burdens on carriers. If the Commission were to adopt a reporting requirement, we seek comment on the frequency of filing such a report.

G. Registration Requirement

179. We seek comment on whether the Commission should impose a registration requirement on carriers who wish to provide interstate telecommunications service. Such a registration requirement could help to prevent entry into the telecommunications marketplace by entities that are either unqualified or that have the intent to commit fraud.[462] We propose that any telecommunications carrier that provides or seeks to provide interstate telecommunications service should register with the Commission.[463] We seek comment on the information that the registration should contain. We propose that the registration should contain, at a minimum, the carrier's business name(s); the names and addresses of all officers and principals; verification that such officers and principals have no prior history of committing fraud; and verification of the financial viability of the carrier. To the extent that the Commission already possesses some of this information, we seek comment on whether the Commission should consolidate the collection of the above-described information with other existing collection mechanisms, in order to lessen the burden on carriers.[464] We do not wish to impose any unnecessary barriers on entities seeking

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462 For example, we have experienced difficulty in tracking down certain switchless resellers. Because they resell the service of facilities-based carriers and do not require large amounts of capital, switchless resellers are extremely portable businesses. This portability enables unscrupulous entities to enter a market as resellers to commit fraud and disappear at the first sign of trouble, only to reappear in another state under a different business name. In conducting our investigations of slamming carriers, we often encounter this exact problem when attempting to serve process on entities that have deserted their business address locations.

463 *See* Appendix B, § 64.1195.

464 For example, section 1.47(h) of the Commission's rules requires common carriers to designate an agent in the District of Columbia for service of process. 47 C.F.R. § 1.47(h). Among other things, this designation includes the carrier's name, business address and telephone number. *Id.* Also, the Commission receives certain carrier information that is compiled from worksheets carriers use to calculate their contributions to fund interstate telecommunications relay service (TRS), federal universal service support mechanisms, the cost recovery mechanism for the North American Numbering Plan administration, and the cost recovery mechanism for the shared costs of long-term local number portability. The Commission has issued a Notice of Proposed Rulemaking proposing to simplify the Commission's filing requirements for these purposes. *1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements*

to enter the telecommunications market, but we believe that requiring carriers to register with the Commission will prevent entities with a history of fraud from offering telecommunications services. It also will provide the Commission with accurate information as to the identity of all entities that are providing telecommunications services, as well as provide a means of tracking and contacting these entities.[465] We tentatively propose that this registration requirement apply not just to new entrants but to all entities that offer telecommunications services. We also seek comment on the Commission's jurisdiction to require carriers to file a registration in order to provide interstate telecommunications service.

180. We tentatively conclude that the Commission should revoke or suspend, after appropriate notice and opportunity to respond, the operating authority of those carriers that fail to file a registration or that provide false or misleading information in their registration. Many states have authority to revoke carriers' operating licenses with regard to the provision of intrastate services. These states' revocation powers are limited to prohibiting carriers from operating within one state, which permits unscrupulous carriers to move to a different state to offer service. The revocation power proposed herein would enable the Commission to prevent an unscrupulous interstate interexchange carrier from operating nationwide. We seek comment on whether such penalty is appropriate in these situations, as well as in situations where the Commission finds that the provision of telecommunications service by a particular carrier would be contrary to the public interest.

181. We also tentatively conclude that a carrier has an affirmative duty to ascertain whether another carrier has filed a registration with the Commission prior to offering service to that carrier. For example, we believe that a facilities-based carrier should verify that a switchless reseller has registered with the Commission before agreeing to sell service to that entity. This would further check the ability of unscrupulous carriers to enter the marketplace. If we were to adopt this requirement, we would certainly facilitate the ability of a carrier to check the registration status of another carrier.[466] We seek comment on what penalty the Commission

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Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 98-233, CC Docket 98-171 (rel. Sept. 25, 1998).

465 This proposal would help to address slamming concerns raised by the General Accounting Office (GAO) in its Report on Telephone Slamming and Its Harmful Effects. General Accounting Office, Telecommunications, Telephone Slamming and Its Harmful Effects (1998) (GAO Report). In this report, the GAO stated that the Commission did not have any practice in place to "help ensure that applicants who become long-distance providers, or other common carriers, have satisfactory records of integrity and business ethics." GAO Report at 5.

466 For example, the Commission could publish a list, to be updated frequently, of carriers that have filed registrations.

should impose on carriers that fail to determine the registration status of other carriers before providing them with service. We believe that the penalty should not be as severe as the penalty to be imposed on carriers that fail to file valid registrations. We tentatively conclude that these penalties will protect consumers by ensuring that unqualified and unscrupulous carriers do not profit from the provision of telecommunications services. We seek comment on whether the consumer benefits of these proposals would outweigh the burden on carriers of filing registrations. We seek comment on these proposals and on other proposals that would prevent carriers that have a history of fraud or are otherwise unqualified from providing telecommunications services.

H. Third Party Administrator for Preferred Carrier Changes and Preferred Carrier Freezes

182. We seek further comment on the implementation by the industry of a comprehensive system in which an independent third party would administer carrier changes, verification, and preferred carrier freezes, as well as the dispute resolution functions mentioned above.[467] In the *Further Notice and Order* the Commission sought comment on the use of an independent third party to execute carrier changes neutrally in order to reduce carrier change disputes that might arise if ILECs continue to execute changes.[468] Many commenters responded in support of an independent third party administrator for carrier changes and even verification because such a party would have incentive to administer carrier changes in a neutral and accurate manner.[469] Although we agree that many of the commenters' contentions have merit, we conclude that the record before us is not fully developed to support the creation of a new and independent agent to handle execution functions at this time.[470] Therefore we seek further comment on the development and implementation of a third party administrator for these functions. We note that any industry-supported neutral party must administer carrier change functions in accordance with the Commission's rules and seek comment on how to ensure that

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467 *See supra* discussion on Third Party Administrator for Dispute Resolution.

468 *Further Notice and Order*, 12 FCC Rcd at 10644. Some carriers are concerned that as the competitive marketplace changes, LECs may have a conflict of interest between their role as LEC and their role as an affiliate of an interexchange competitor. *See, e.g.*, Letter from Bruce K. Cox, AT&T, to John Muleta, Federal Communications Commission (Sept. 27, 1996). AT&T suggests that "to avoid the inherent conflict of interest between competing carriers, serious consideration should be given to establishing procedures under which neutral third parties administer PIC protection." *Id.*

469 *See, e.g.*, CompTel Comments at 7; CWI Comments at 4; IXC Long Distance Reply Comments at 3; LCI Comments at 4; MCI Comments at 25; Sprint Comments at 19.

470 *See* WorldCom Comments at 16 (stating that the Commission should establish a separate rulemaking to address the issue of an independent third party administrator).

the industry's implementation of such a neutral third party for these functions would be consistent with the Commission's rules, policies, and practices.

183. An independent third party with broader responsibilities, such as administration of carrier changes, verification, and preferred carrier freezes, may be useful in addressing concerns raised by the commenters about potential anticompetitive practices in this area. Although we have concluded that the ability of the LECs to act anticompetitively while executing carrier changes is limited,[471] we find that the concept of an independent third party for administration of carrier changes and preferred carrier freezes is potentially viable. Most of the commenters who support such a system, however, are not specific about how such a system might work, nor do they offer concrete proposals for funding such an administrative scheme.[472] These comments fail to provide sufficient detail about the actual implementation and funding for a third party administrator system necessary for the Commission to mandate at this time. Furthermore, the commenters were unable to come to a consensus as to the actual duties of the independent third party administrator. Several carriers state that the third party administrator would need electronic interconnections with every carrier to be able to receive and process carrier changes and preferred carrier freezes.[473] On the other hand, TRA suggests that the third party administrator should only monitor compliance and document execution of carrier changes and preferred carrier freezes, but that it should not actually execute carrier changes and preferred carrier freezes.[474] We seek comment on concrete suggestions for the implementation of a third party administrator that are workable and cost-effective. Proposals for such third party administration should include specific and detailed information regarding the cost of setting up such a system.

IV. CONCLUSION

184. In this *Order*, we adopt rules to implement Section 258, which prohibits all telecommunications carriers from making changes to subscribers' preferred carrier selections except in accordance with our verification procedures. We adopt rules to remove the economic incentive to slam by generally absolving consumers of liability for slammed charges for 30 days after an unauthorized change, subject to a 90-day stay of such liability rules. We strengthen our verification rules by eliminating the welcome package as a verification option and by applying our rules to carrier changes resulting from consumer-initiated calls to carriers. We also broaden the application of our verification procedures to all telecommunications carriers, excluding

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471 *See supra* discussion on Concerns with Executing Carriers.

472 *See, e.g.*, LCI Comments at 4-5; Sprint Comments at 19.

473 *See, e.g.*, Bell Atlantic Reply Comments at 6; MCI Comments at 16.

474 TRA Reply Comments at 13.

CMRS carriers at this time,[475] in order to prevent slamming in all telecommunications markets, including local exchange, intraLATA, and interLATA services. Finally, we adopt rules to regulate the preferred carrier freeze process to ensure that it will protect consumers from slamming without preventing them from changing carriers when they wish to do so. We conclude that the rules we adopt in this *Order* will both safeguard consumer choice and promote competition in the local exchange, intraLATA, and interLATA telecommunications markets. In the Further Notice of Proposed Rulemaking portion of this *Order*, we seek comment on several proposals to further strengthen our slamming rules, including a proposal to require unauthorized carriers to remit to authorized carriers certain amounts in addition to the amount paid by slammed subscribers, as well as proposals for preventing the confusion and slamming that results from resellers using the same CICs as their facilities-based carriers.

VI. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

185. As required by the Regulatory Flexibility Act (RFA),[476] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Further Notice of Proposed Rule Making and Memorandum Opinion and Order on Reconsideration (*Further Notice and Order*) in Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carrier.[477]mment on

[475] *See supra* discussion on Application of the Verification Rules to All Telecommunications Carriers.

[476] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[477]

w sputes must pursue private settlement negotiations prior to filing a formal complaint with the Commission.[477477]
See 47 C.F.R. § 1.721(a)(8). As we stated in the IRFA of the *Further Notice and Order*, we believe that the adoption of such a dispute mechanism will lessen the economic impact of a dispute on small entities.

6. Federal Rules that May Overlap, Duplicate, or Conflict with the Proposed Rules

186. None.

C. Initial Paperwork Reduction Act of 1995 Analysis

187. The Further Notice of Proposed Rulemaking portion of this *Order* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in the Further Notice of Proposed Rulemaking portion of this *Order*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on the Further Notice of Proposed Rulemaking; OMB comments are due 60 days from date of publication of this *Order* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Final Paperwork Reduction Act of 1995 Analysis

188. The decision herein has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. 104-13, and the Office of Management and Budget (OMB) has approved some of its requirements in OMB No. 3060-0787. Some of the proposals have been modified or added, however, and therefore some of the information collection requirements in this item are contingent upon approval by the OMB.

E. Ex Parte Presentations

189. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[477477] *See Amendment of 47 C.F.R. 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, Report and Order, 12 FCC Rcd 7348, 7356-57, 27 (citing 47 C.F.R. 1.1204(b)(1)) (1997). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[477477] *See* 47 C.F.R. 1.1206(b)(2), as revised.

F. Petitions for Reconsideration

190. Parties must file any petitions for reconsideration of this *Order* within thirty days from publication in the Federal Register. Parties may file oppositions to the petitions for reconsideration pursuant to section 1.429(f) of the rules.[477477] *See* 47 C.F.R. § 1.429(f).

191. To file a petition for reconsideration in this proceeding, parties must file an original and ten copies of all petitions and oppositions. Petitions and oppositions should be sent to the Office of the Secretary, Federal Communications Commission, 445 12th St., S.W., TWA-204, Washington, D.C. 20554. If parties want each Commissioner to have a personal copy of their documents, an original plus fourteen copies must be filed. In addition, participants should submit two additional copies directly to the Common Carrier Bureau, Enforcement Division, Room 6008, 2025 M Street, N.W., Washington, D.C. 20554. The petitions and oppositions will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Copies of the petition and any subsequently filed documents in this matter may be obtained from International Transcription Services, 1231 20th Street N.W., Washington D.C. 20036, (202) 857-3800.

192. Petitions for reconsideration must comply with section 1.429 and all other applicable sections of the Commission's rules.[477477] *See* 47 C.F.R. § 1.429. We require, however, that a summary be included with all comments, although a summary that does not exceed three pages will not count toward the page limits. The summary may be paginated separately from the rest of the pleading (*e.g.*, as "i, ii"). *id.* Petitions also must clearly identify the specific portion of this *Order* for which relief is sought. If a portion of a party's arguments does not fall under a particular topic listed in the outline of this *Order*, such arguments should be included in a clearly labelled section at the beginning or end of the filing.

G. Comment Filing Procedures

193. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before 30 days from publication in the Federal Register, and reply comments on or before 45 days from publication in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[477477] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

194. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address." A sample form and directions will be sent in reply.

195. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this pro

the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[478]

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

186. Section 258 of the Act makes it unlawful for any telecommunications carrier "to submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe."[479] Accordingly, the Commission adopts in this *Order* rules that: (1) apply the Commission's verification rules to local telecommunications service and to telecommunications carriers that submit carrier changes;[480] (2) eliminate the welcome package as a verification option;[481] (3) apply the Commission's verification rules to sales generated from in-bound telemarketing;[482] (4) require carriers to maintain and preserve verification records for two years;[483] (5) absolve subscribers of liability for slammed charges for a period of time, provided that subscribers do not pay any charges to their unauthorized carriers;[484] (6) require an unauthorized carrier to remit to the authorized carrier an amount equal to all charges that may have been paid by a subscriber from the time the slam occurred, any charge required to return the subscriber to his or her authorized carrier, and expenses of billing and collection;[485] (7) where a subscriber has paid slamming charges to an unauthorized carrier and the authorized carrier has recovered such amount from the unauthorized carrier, require the authorized carrier to provide a refund or credit to a subscriber for any payments made in excess of the authorized carrier's rates;[486] (8) require an authorized carrier to restore premiums to any subscribers who have paid

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478 *See* 5 U.S.C. § 604.

479 47 U.S.C. § 258.

480 *See supra* discussion on Application of the Verification Rules to the Local Market; Application of the Verification Rules to All Telecommunications Carriers.

481 *See supra* discussion on the Welcome Package.

482 *See supra* discussion on Application of the Verification Rules to In-Bound Telemarketing.

483 *See supra* discussion on Other Verification Mechanisms

484 *See supra* discussion on Liability of Subscribers to Carriers.

485 *See supra* discussion on Reimbursement Procedures.

486 *See supra* discussion on Subscriber Refunds or Credits.

slamming charges to their unauthorized carriers;[487] (9) prescribe procedures for solicitation and implementation of carriers freezes.[488] The Commission stays the effect of the liability rules for 90 days to enable carriers to implement a voluntary dispute resolution mechanism to be administered by an independent third party. The objectives of the rules adopted in this *Order* are to implement the provisions of section 258 and provide further safeguards to protect consumers from unauthorized switching of their telecommunications service providers, as well as to encourage full and fair competition among telecommunications carriers in the marketplace.

2. Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA

187. In the IRFA, the Commission found that the rules it proposed to adopt in this proceeding may have a significant impact on a substantial number of small businesses as defined by 5 U.S.C. § 601(3).[489] Specifically, under the Act and proposed rules, small entities that violate the Commission's carrier change verification rules by slamming subscribers shall be liable to the subscriber's properly authorized carrier for all charges paid by the slammed consumer.[490] Furthermore, the Commission sought comment on whether the welcome package described in section 64.1100(d) should be eliminated, on the costs and benefits associated with in-bound verification procedures, as well as on consumer-to-carrier, carrier-to-carrier, and carrier-to-consumer liability.[491] The IRFA solicited comment on the number of small businesses that would be affected by the proposed regulations and on alternatives to the proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding.[492]

188. America's Carriers Telecommunications Association (ACTA) has submitted comments directly in response to the IRFA.[493] ACTA, which is a non-profit trade association

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487 *See supra* discussion Restoration of Premiums.

488 *See supra* discussion on Preferred Carrier Freezes.

489 *Further Notice and Order*, 12 FCC Rcd at 10,708.

490 *Id.*

491 *Id.* at 10,708-09.

492 *Id.* at 10,715.

493 *See* ACTA Comments Regarding IRFA (ACTA IRFA Comments).

comprised of mostly small business entities,[494] states that the Commission violated the RFA in its IRFA by not addressing sufficiently the "impact of the vague and standardless environment surrounding enforcement of the anti-slamming campaign on small carriers."[495] ACTA asserts that because the proposed rules define slamming to include unintentional acts, small carriers will suffer disproportionately.[496] ACTA states that the only proposal the Commission made to minimize the impact of its proposed rules on small carriers was the proposal to require private settlement negotiations regarding the transfer of charges arising due to section 258 liability.[497] ACTA states that this proposal is inadequate because liability for inadvertent slams should not be imposed in the first place.[498] ACTA submits that imposing liability for inadvertent slams will allow dishonest customers to claim falsely that they were slammed in order to avoid payment for legitimate services.[499] Even when a complaint is not prosecuted to a formal decision, ACTA states, handling allegations of slamming are expensive and time-consuming for small carriers.[500] ACTA also claims that the Commission is prejudiced against small carriers[501] and that this attitude is reflected in unbalanced proposals that will allow large carriers and the Commission to subject small carriers to misdirected enforcement efforts and monetary losses and fines, as well as skew competition.[502] ACTA also objects to the following as being harmful to small carriers: (1) elimination of the welcome package because it is an economical verification method for small carriers;[503] (2) imposing the same verification procedures for in-bound and out-bound calls

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494 ACTA IRFA Comments at 1.

495 *Id.* at 3.

496 *Id.* at 9.

497 *Id.* at 3. We note that this particular proposal will be dealt with in a subsequent order. *See supra* para. 3.

498 *Id.*

499 *Id.* at 9.

500 *Id.*

501 ACTA claims, for example, that the Commission skewed its statistics in the *Common Carrier Scorecard* to make it appear as though the majority of slamming complaints may be due to the marketing practices of smaller companies. *Id.* at 5.

502 *Id.* at 10.

503 ACTA Comments at 24.

because that would overburden small carriers;[504] (3) non-preemption of state regulation because small carriers would have difficulty in meeting the requirements of different states.[505]

189. We disagree with ACTA's contention that we did not conduct a sufficient IRFA because we ignored the "impact of the vague and standardless" anti-slamming environment created by the inclusion of inadvertent acts as slamming violations. We do not believe that imposing liability for all intentional and unintentional unauthorized changes is vague. In fact, we believe that it is so clear as to eliminate any doubts as to the circumstances that would constitute a slam. The bright-line standard that we adopt in this *Order* should help all carriers, including small carriers, to avoid making unauthorized changes to a subscriber's selection of telecommunications provider. We also disagree with ACTA's contention that defining slamming to include accidental slams would disproportionately affect small carriers. Section 258 prohibits slamming by any telecommunications carrier and does not distinguish between intentional and inadvertent conduct.[506] Regardless of its size, no carrier has the right to commit unlawful acts. We believe that holding carriers liable for intentional and inadvertent unauthorized changes to subscribers' preferred carriers will reduce the overall incidence of slamming. First, we believe that the rights of the consumer and the authorized carrier to remedies for slamming should not be affected by whether the slam was an intentional or accidental act. Regardless of the intent, or lack thereof, behind the slam, they have suffered injury. Second, we agree with those commenters who assert that imposing liability for all slamming occurrences will make all carriers more vigilant in preventing unauthorized carrier changes, whether such changes are inadvertent or intentional.[507]

190. We disagree with ACTA's allegation that the Commission is biased against small carriers and that this bias is evident in the rules we proposed in the *Further Notice and Order*, such as elimination of the welcome package and application of the verification rules to in-bound calls. The rules we adopt require all carriers, regardless of size, to take precautions to guard against the harm to consumers that is caused by slamming. While the rules we adopt may impose some costs on all carriers, these are necessary costs. We cannot lower the costs for carriers in order to promote competition at the expense of the consumer. A consumer can only take advantage of the benefits of competition if his or her choice of carriers can be guaranteed. Finally, regarding the preemption of state law, we decline to exercise our preemption authority at this time because the commenters have failed to establish a record upon which a specific

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504 *Id.* at 26.

505 ACTA IRFA Comments at 9.

506 47 U.S.C. § 258.

507 *See, e.g.*, BellSouth Reply Comments at 3.

preemption finding could be made. The record in this proceeding does not contain any analysis of which particular state laws would be inconsistent with our verification rules or would obstruct federal objectives.

3. Description and Estimates of the Number of Small Entities to Which the Rules Adopted in the *Order* in CC Docket No. 94-129 Will Apply

191. 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 adopted rules.[508] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[509] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[510] 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).[511]

192. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS).[512] According to data in the most recent report, there are 3,459 interstate carriers.[513] These carriers include,

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508 5 U.S.C. § 603(b)(3).

509 *Id.* at § 601(6).

510 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

511 Small Business Act, 15 U.S.C. § 632 (1996).

512 FCC, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997) (*Telecommunications Industry Revenue*). We believe that the TRS Fund Worksheet Data is the most reliable source of information for our purposes because carriers file the TRS worksheets yearly and are instructed to select the single category of type of service provision that best describes them. Other sources of carrier data, such as the tariffs on file with the Common Carrier Bureau, may not reflect the same figures as the TRS Fund Worksheet Data, because such sources are not updated annually.

513 *Id.*

inter alia, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers.

193. 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.[514] Below, we discuss the total estimated number of telephone companies falling within the two categories and the number of 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.

194. Although some affected incumbent local exchange carriers (ILECs) may have 1,500 or fewer employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they are either dominant in their field of operations or are not independently owned and operated, and therefore by definition not "small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small ILECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small ILECs within this analysis and use the term "small ILECs" to refer to any ILECs that arguably might be defined by the SBA as "small business concerns."[515]

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514 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).

515 *See* 13 CFR § 121.201, SIC code 4813. Since the time of the Commission's 1996 decision, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996), 61 FR 45476 (August 29, 1996), the Commission has consistently addressed in its regulatory flexibility analyses the impact of its rules on such ILECs.

195. **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.[516] 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, personal communications services providers, covered specialized mobile radio providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small ILECs because they are not "independently owned and operated."[517] 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 proposed rules, if adopted.

196. **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.[518] According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.[519] 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 proposed rules, if adopted.

197. **Local Exchange Carriers.** Neither the Commission nor the SBA has developed a definition for small providers of local exchange services (LECs). The closest

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516 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*).

517 *See generally* 15 U.S.C. § 632(a)(1).

518 *1992 Census, supra*, at Firm Size 1-123.

519 13 CFR § 121.201, SIC code 4813.

applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[520] According to the most recent *Telecommunications Industry Revenue* data, 1,371 carriers reported that they were engaged in the provision of local exchange services.[521] 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 1,371 providers of local exchange service are small entities or small ILECs that may be affected by the proposed rules, if adopted.

198. **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.[522] According to the most recent *Telecommunications Industry Revenue* data, 143 carriers reported that they were engaged in the provision of interexchange services.[523] 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 143 small entity IXCs that may be affected by the proposed rules, if adopted..

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520 *Id.*

521 *Telecommunications Industry Revenue*, Figure 2.

522 13 CFR § 121.201, SIC code 4813.

523 *Telecommunications Industry Revenue*, Figure 2.

199. **Competitive Access Providers.** Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services providers (CAPs). The closest applicable definition under the SBA rules is for telephone communications companies other than except radiotelephone (wireless) companies.[524] According to the most recent *Telecommunications Industry Revenue* data, 109 carriers reported that they were engaged in the provision of competitive access services.[525] 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 109 small entity CAPs that may be affected by the proposed rules, if adopted.

200. **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.[526] According to the most recent *Telecommunications Industry Revenue* data, 339 reported that they were engaged in the resale of telephone service.[527] 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 339 small entity resellers that may be affected by the proposed rules, if adopted.

201. **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.[528] According to the Bureau of the Census, only twelve radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.[529]

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524 13 CFR § 121.201, SIC code 4813.

525 *Telecommunications Industry Revenue*, Figure 2.

526 13 CFR § 121.201, SIC code 4813.

527 *Telecommunications Industry Revenue*, Figure 2.

528 13 C.F.R. § 121.201, SIC code 4812.

529 *1992 Census, Series UC92-S-1*, at Table 5, SIC code 4812.

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 1,758 cellular licenses; however, a cellular licensee may own several licenses. In addition, according to the most recent *Telecommunications Industry Revenue* data, 804 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.[530] 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 804 small cellular service carriers that may be affected by the proposed rules, if adopted.

4. Summary of Projected Reporting, Recordkeeping and other Compliance Requirements

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

203. *Verification rules.* The Commission's verification rules shall apply to all carriers, excluding for the present time CMRS carriers, that submit or execute carrier changes on behalf of a subscriber. This rule implements the mandate of section 258 that the Commission's verification rules apply to all carriers who submit or execute changes in a subscriber's selection of a provider of telephone service.[531] We believe that application of the verification rules to all carriers is the best way to prevent slamming from occurring in the first instance.

204. *Elimination of the welcome package.* Carriers may not use the welcome package as a verification method. Although smaller carriers may have utilized the welcome package as an economical way to verify telemarketing sales,[532] we conclude that the welcome package has been a significant source of slamming. We conclude that unscrupulous carriers could use the welcome package as a negative-option LOA if carriers send it to consumers from whom they have not obtained consent, or if the oral consent obtained was based on false or misleading telemarketing efforts. Because of our responsibility to safeguard consumer choices, we cannot continue to allow carriers to use this method of verification.

205. *Verification of in-bound telemarketing sales.* Carriers must comply with our

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530 *Telecommunications Industry Revenue*, Figure 2.

531 *See* 47 U.S.C. § 258.

532 *See, e.g.*, ACTA Comments at 25; TRA Comments at 11.

verification rules for all calls that result in carrier changes that are submitted on behalf of subscribers, whether those calls are consumer-initiated or carrier-initiated. Consumers who call carriers are vulnerable to being slammed and deserve the same level of protection as consumers who receive calls from carriers. Excluding in-bound calls from our verification requirements would open a loophole for slammers. Through this loophole, unscrupulous carriers could slam not only consumers who call in for reasons other than to change carriers, but also consumers who do not call in at all. Consumers slammed in this way would have difficulty proving that they had never called in because there would be no record of any alleged transaction. We note, furthermore, that TRA states that the verification rules should apply to in-bound calls in order to balance the verification burden between small and large carriers.[533] TRA explains that because the large carriers can launch massive campaigns to encourage customers to call, exempting them from verification would give large carriers an advantage over small carriers, who generally must initiate calls to consumers and then verify any sales made through such calls.[534]

206. *Independent Third Party Verification.* The Commission adopts criteria to determine the independent status of a third party verifier. This will provide carriers and independent third party verification companies with guidelines for determining independence.

207. *Verification Records.* Carriers must maintain and preserve verification records for a period of two years. Any person desiring to file a complaint with the Commission alleging a violation of the Act must do so within two years of the alleged violation.[535] A two-year retention period will enable carriers to produce documentation to support their claims regarding an alleged unauthorized change.

208. *Liability rules.* The Commission's rules permit a slammed subscriber to be absolved of liability for slamming charges for 30 days after the unauthorized change. Charges from a slammed carrier on any subsequent bills shall be paid to the authorized carrier at the authorized carrier's rates. If a subscriber pays the unauthorized carrier, however, the unauthorized carrier shall remit an amount equal to all charges paid by the subscriber from the time the slam occurred, any charge required to return the subscriber to his or her authorized carrier, and billing and collection expenses. Upon receipt of such amount, the authorized carrier shall provide a refund or credit to the subscriber for any amounts the subscriber paid in excess of the authorized carrier's rates. The authorized carrier shall keep the remaining amount. The authorized carrier must also restore premiums to any subscribers that have paid slamming charges to their unauthorized carriers. Such rules are necessary to eliminate the economic

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533 TRA Comments at 10-11.

534 *Id.*

535 *See* 47 U.S.C. § 415.

incentive to slam and to compensate consumers for the fraud that has been perpetrated upon them. The effect of these liability rules is stayed for 90 days, however, to enable carriers to implement an carrier-supported independent dispute resolution mechanism.

209. *Third Party Administrator for Dispute Resolution.* The effective date of the Commission's liability rules is delayed until 90 days after publication in the *Federal Register* to enable carriers to develop and implement an alternative carrier dispute resolution mechanism involving an independent administrator. If carriers successfully implement such a plan, the Commission will entertain carriers' requests for waiver of the administrative requirements of our liability rules where such carriers voluntarily agree to use the independent administrator. An independent administrator could enable consumers to resolve a slamming incident by dealing with one entity, while carriers would benefit from having a neutral party execute the procedural requirements of the liability rules.

210. *Preferred Carrier Freeze Procedures.* The Commission's rules require carriers who offer preferred carrier freeze protection to follow certain procedures. Preferred carrier freeze solicitations must make clear the different services that may be frozen and ensure the subscriber understands how to lift a freeze. Carriers must verify subscriber requests for preferred carrier freezes. Subscribers must be able to lift their freezes using, at a minimum, three-way calling and written authorization. These requirements are necessary to provide consumers with protection against slamming and to prevent anticompetitive conduct.

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

211. *Verification rules.* Some carriers state that the Commission's rules should not burden the entire industry but rather target the unscrupulous carriers, so as to avoid imposing unnecessary costs on smaller competitors.[536] Ameritech, SBC, and U S WEST propose systems that would impose fines or more stringent verification requirements on carriers with a history of slamming, as determined by the LEC or otherwise.[537] We decline to adopt such proposals

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536 *See, e.g.*, TRA Comments at 2; U S WEST Reply Comments at 5.

537 *See* Ameritech Comments at 12; SBC Comments at 4-5; U S WEST Comments at 20. For example, under SBC's "3 strikes and you're out" approach, Strike 1 would occur if a carrier's disputed change orders exceeded 2% of its service orders in one month. The carrier would be placed on probation. Strike 2 would occur if the dispute level continued to exceed 2% of its service orders in one month at the end of the probation period. That carrier would then be subjected to a fine of at least $5,000 per slamming occurrence. Strike 3 would occur if the dispute level continued to exceed 2% of its service orders in one month. The carrier would then be subject to $10,000 fines, as well as possible suspension of carrier-change privileges. SBC Comments at 5.

because they would impose more stringent verification requirements on carriers only after such carriers have slammed significant numbers of consumers. Application of our rules will help to prevent carriers from slamming consumers in the first place. Furthermore, we find such proposals to be problematic because they could permit LECs to target certain carriers for "punishment." Considering the fact that LECs will no longer be neutral parties in the carrier change process, we conclude that it would not be prudent to provide LECs with incentive to act anti-competitively. We note that Ameritech did state that punishment could be imposed using a more neutral source of numbers of carrier change disputes, such as the Common Carrier Scorecard, which shows the number of disputed carrier changes for carriers.[538] We share TRA's concern, however, about imposing disparate treatment before a carrier has the opportunity to prove that it did not slam a consumer.[539]

212. *Elimination of the welcome package.* Several commenters propose modifications to the welcome package, rather than elimination of it entirely, because the welcome package is an inexpensive verification option that is suitable for use by smaller carriers. For example, the Oklahoma Commission and WorldCom suggest that the welcome package contain a positive-option postcard, so that a carrier change would not be considered verified until the customer signed and returned the postcard.[540] AT&T, however, opposes the concept of a positive-option postcard because it argues that it would transform the welcome package into a signed LOA requirement, which is difficult to obtain from consumers.[541] We decline to adopt this proposal because such modification would not increase the utility of the welcome package for carriers. Although we feel that requiring a positive-option postcard requirement would minimize one of the fraudulent aspects of the welcome package, we agree with AT&T that such a requirement merely transforms the welcome package into a written LOA requirement, which is already a verification option under our rules.[542] ACTA states that carriers could prove that consumers received a welcome package by using certified mail, or by maintaining mailing manifests.[543] We decline to adopt these proposals. Although they may help to prove that a customer received a welcome package, they will not prevent carriers from sending welcome packages to consumers

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538 *See* Ameritech Comments at 12.

539 *See* TRA Reply Comments at 9-11.

540 *See, e.g.*, Oklahoma Commission Reply Comments at 4; WorldCom Comments at 7.

541 AT&T Reply Comments at 4.

542 *See* 47 C.F.R. § 64.1150.

543 ACTA Comments at 26.

with whom they have never spoken or from whom they have not obtained consent. We conclude that it is better to eliminate the welcome package entirely, rather than attempt to "fix" it with modifications that fail to provide adequate protection against fraud or curtail its usefulness.

213. *Verification of in-bound telemarketing.* Several commenters propose that less burdensome verification procedures apply to in-bound telemarketing. ACTA and RCN, for example, suggest that the telemarketer be permitted to confirm the order verbally, just as a mail order telemarketer would.[544] BellSouth, GTE, IXC Long Distance, and TOPC propose to allow carriers to make inexpensive audio recordings of inbound calls.[545] We decline to adopt these proposals because we feel that they offer little protection to a consumer against an unscrupulous carrier. In previous orders, we have rejected in-house verification procedures as providing carriers with too much incentive and opportunity to commit fraud.[546] Because we conclude that consumers deserve the same protection from in-bound call slamming as they do from out-bound call slamming, we cannot permit carriers to use less secure procedures to verify sales generated from in-bound calls. Furthermore, our rules provide a carrier with sufficient flexibility to choose a verification method that is appropriate for that carrier. Finally, as noted above, TRA believes that exempting in-bound calls from verification favors large carriers over small carriers because it is the large carriers that are able to launch massive campaigns to encourage customers to call and avoid verification costs.[547]

214. *Independent Third Party Verification.* Several commenters submitted proposals for determining the independence of a third party verifier.[548] These commenters support the criteria that the Commission has adopted in this *Order*. We find that the adoption of these criteria will benefit all carriers, including small carriers, because it provides certainty and guidance in choosing an appropriate independent third party verifier. The rules also provide guidance for small entities that are independent third party verifiers.

215. *Verification Records.* Several commenters, including NAAG and NYSDPS, support a requirement that carriers retain verification records for a certain period of time.[549]

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544 *Id.* at 27; RCN Comments at 5.

545 *See, e.g.*, BellSouth Comments at 11; GTE Comments at 10-11; IXC Long Distance Comments at 3; TOPC Reply Comments at 4.

546 *See PIC Verification Order*, 7 FCC Rcd at 1041.

547 *Id.*

548 *See, e.g.*, MCI Comments at 21; TPV Services Comments at 7.

549 *See, e.g.*, NAAG Comments at 8; NYSDPS Comments at 5.

NAAG suggested that carriers retain records for three years,[550] while NYSDPS suggested a period of nine months.[551] We choose a retention period of two years because any person desiring to file a complaint with the Commission alleging a violation of the Act must do so within two years of the alleged violation.[552] Although this rule may place a burden on smaller carriers to retain their records, they will benefit from this requirement because it will enable them to produce documentation to support their claims regarding an alleged unauthorized change.

216. *Liability rules.* Although some carriers state that liability for slamming should not be imposed on carriers who inadvertently slam subscribers,[553] we conclude that the rights of the consumer and the authorized carrier to remedies for slamming should not be affected by whether the unauthorized change was an intentional or accidental act. Regardless of the intent, or lack thereof, behind the unauthorized change, they have suffered injury. We also conclude that holding carriers liable for all slamming occurrences will make all carriers more vigilant in preventing unauthorized carrier changes, whether such changes are inadvertent or intentional. To address concerns that smaller carriers may suffer from the imposition of our liability rules, we note that a carrier accused of slamming has the opportunity to provide evidence of verification, in order to prove that it did not slam a subscriber, before having to remit any revenues to an authorized carrier.

217. Additionally, several carriers object to absolving subscribers of liability because they argue that authorized carriers should not be deprived of revenue.[554] Although our rules do absolve subscribers of liability for slammed charges for a limited period of time, if a subscriber does pay the unauthorized carrier, the authorized carrier is entitled to demand, and keep, all charges paid by the subscriber to the unauthorized carrier. While authorized carriers, including smaller carriers, may be deprived of some revenue because many subscribers will not pay for charges incurred after being slammed, all carriers will ultimately receive greater benefits from the overall decrease in slamming that will result from our rules. Any other liability rule would still enable slamming carriers to keep their profits and would not give consumers the same incentive to police their telephone bills carefully and quickly. Furthermore, because the authorized carrier has not incurred any costs for providing service, the authorized carrier would receive a windfall if it were to receive, in every instance, the revenues for charges imposed by an

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550 NAAG Comments at 8.

551 NYSDPS Comments at 5.

552 *See* 47 U.S.C. § 415.

553 ACTA IRFA Comments at 9.

554 *See, e.g.*, ACTA Comments at 35; TRA Comments at 14.

221. As required by the Regulatory Flexibility Act (RFA),[558] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Second Report and Order and Further Notice of Proposed Rulemaking (*Order*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Order* provided below in the Comment Filing Procedures section. The Commission will send a copy of the *Order*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[559] In addition, the *Order* and IRFA (or summaries thereof) will be published in the Federal Register.[560]

1. Need for, and Objectives, of Proposed Rules

222. The Commission, in its efforts to protect consumers from unauthorized switching of preferred carriers, and to implement provisions of the Telecommunications Act of 1996 pertaining to illegal changes in subscriber carrier selections, is issuing this *Order* containing a Further Notice of Proposed Rulemaking. The Commission seeks comment on: (1) requiring unauthorized carriers to remit to authorized carriers certain amounts in addition to the amount paid by slammed subscribers; (2) how to modify and clarify the independent third party verification method in the Commission's rules[561] in order to ensure that this verification method will be effective in preventing slamming; (3) proposals for verifying carrier changes made by subscribers using the Internet; (4) how the term "subscriber" should be defined, in order to determine which person or persons should be authorized to make changes in the selection of a carrier; (5) requiring carriers to submit to the Commission reports on the number of slamming complaints received by such carriers, in order to alert the Commission as soon as possible about carriers that practice slamming; (6) imposing a registration requirement to ensure that only qualified entities enter the telecommunications market; and (7) whether resellers should be assigned their own carrier identification codes (CICs) to prevent confusion between resellers and their underlying facilities-based carriers.

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558 *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

559 *See* 5 U.S.C. § 603(a).

560 *See id.*

561 *See* 47 C.F.R. § 64.1100(c).

223. Under the Act and the proposed rules, a small entity that violates the Commission's carrier change verification rules may be liable to an authorized carrier for double the amount of charges paid to the slamming entity by a slammed subscriber or for the amount for which the slammed subscriber was absolved. Small entities may be affected by the proposals for modifying the independent third party verification process; verifying carrier changes made on the Internet; adopting a definition of "subscriber;" requiring carriers to submit to the Commission a report on the number of slamming complaints received by them; imposing a registration requirement; and modifications of the CIC process.

2. Legal Basis

224. This *Order* containing a Further Notice of Proposed Rulemaking is adopted pursuant to sections 1, 4(i), 4(j), 201-205, 258, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 258, 303(r).

3. Description and Estimates of the Number of Small Entities to Which Rules Will Apply

225. In the associated FRFA, *supra*, we have provided a detailed description of small entities.[562] Those entities include wireline carriers, local exchange carriers, small incumbent local exchange carriers, interexchange carriers, competitive access providers, resellers, and wireless carriers. We hereby incorporate those detailed descriptions by reference.

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

226. *Liability.* The proposed rules would require permit authorized carriers to recover from unauthorized carriers double the amount of charges paid by slammed subscribers, or the amount for which the subscriber was absolved.[563] This would enable authorized carriers to provide a refund or credit to slammed subscribers while keeping the amount they would have received in the absence of an unauthorized change. This could affect small entities that engage in slamming.

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562 *See* discussion in Final Regulatory Flexibility Analysis, Description and Estimates of the Number of Small Entities to Which the Rules Adopted in CC Docket No. 94-129 Will Apply.

563 *See supra* discussion in Further Notice of Proposed Rulemaking; Double Recovery of Charges Paid by Slammed Subscribers.

227. *Resellers and CICs.* The Commission proposes to require switchless resellers to obtain their own carrier identification codes (CICs), to obtain pseudo-CICs, or to have the facilities-based reseller modify its billing systems. These proposals are intended to address the confusion that occurs because switchless resellers have the same carrier identification code (CIC) as their underlying facilities-based carriers. When a subscriber is slammed, the unauthorized change may not appear on the subscriber's bill if the slamming carrier is a reseller using the CIC of its facilities-based carrier. Furthermore, subscribers who have preferred carrier freeze protection on their accounts may still be slammed because the freeze protection is not triggered when the slamming carrier is a reseller using the CIC of its facilities-based carrier. These proposals would probably impose additional costs on switchless resellers, most of whom are small entities.

228. *Independent Third Party Verification.* Although specific rules are not proposed to modify the independent third party verification process, which could be used by small carriers, the Commission seeks comment on the definition of an independent third party verifier and on the content of the independent third party verification. This was in response to many commenters who indicated a need for further guidance on independent third party verification.

229. *Internet Carrier Changes.* Although specific rules are not proposed, the Commission seeks comment on the extent to which the electronically-submitted Internet form could be considered a valid LOA in accordance with the verification procedures. The Commission also seeks comment on other procedures that might be appropriate to verify Internet carrier changes. This is in response to the need for standards among the widely varying Internet solicitation and verification practices being utilized by carriers, including small entities.

230. *Definition of "Subscriber."* Although no specific proposals were made, the Commission seeks comment on how the term "subscriber" should be defined, which may affect the marketing practices of small entities. A set definition would prevent carrier changes by persons who are not authorized to change carriers in a household.

231. *Carrier Reports.* The proposed rules would also require each carrier to submit to the Commission a report on the number of slamming complaints that are submitted to that carrier by subscribers. Small carriers would not be exempt from filing this report. This would enable the Commission to learn about slamming entities as quickly as possible.

232. *Registration Requirement.* This rule proposes to require all interstate carriers to register with the Commission. The Commission seeks comment on requiring the registration to contain the carrier's business name(s); the names and addresses of all officers and principals; verification that such officers and principals have no prior history of committing fraud; and

verification of the financial viability of the carrier. The Commission also proposes to revoke or suspend the operating authority of any carriers who fail to register or who provide false or misleading information in their registration. This would apply to all carriers, including small entities. The proposals are designed to prevent entry into the telecommunications marketplace by entities that are either unqualified or have the intent to commit fraud.

233. *Third Party Administrator for Preferred Carrier Changes and Preferred Carrier Freezes.* Although specific rules are not proposed, the Commission seeks comment on the implementation of a comprehensive system in which an independent third party would administer carrier changes, preferred carrier freezes, and verification. Several commenters support the use of an independent administrator, but failed to provide sufficient detail on the scope of its functions, how such a system would work, and how it would be funded.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

234. *Liability Proposal.* Given that slamming is becoming an increasingly prevalent practice, we believe that our liability proposal is necessary to discourage carriers from slamming consumers. Permitting authorized carriers to recover the additional amounts proposed will make slamming unprofitable for carriers. If the carrier provides proof that it did not violate the Commission's rules, then it is not required to pay any penalty. All carriers, including small carriers, will benefit by the reduction in slamming that will result from the implementation of our proposals.

235. *Carrier Reports.* In order to reduce the burden on carriers, we seek comment on requiring the report to be filed only when complaints reach a threshold level, rather than requiring the report to be filed on a regular basis. Filing the report only when complaints reach a threshold level could permit carriers to file a more limited amount of information only when necessary to stop a pattern or practice of slamming. We believe that the resulting investigations into slamming will reduce slamming and be beneficial to all carriers, including those carriers that are small entities.

236. *Registration Requirement.* The registration requirement proposal is not overly burdensome. The registration does not require carriers to obtain difficult information, unless such carriers have previously been involved in fraudulent activities. This requirement should only burden carriers who have a history of fraud, in order to keep them from offering telecommunications services. As such, the proposal is narrowly tailored to impose only minimal burdens on other carriers.

237. *Resellers and CICs.* The Commission offers several options to resolve the

problems with identification between switchless resellers and their facilities-based carriers. They range in expense and burden on carriers, so small carriers will have the opportunity to endorse the option that best suits their needs.

238. We invite parties commenting on this regulatory analysis to provide information as to the number of small businesses that would be affected by our proposed regulations and identify alternatives that would reduce the burden on these entities while still ensuring that consumers' telecommunications carrier selections are not changed without their authorization. Furthermore, in the event of a dispute between carriers under our liability provisions, the carriers involved in such disputes must pursue private settlement negotiations prior to filing a formal complaint with the Commission.[564] As we stated in the IRFA of the *Further Notice and Order*, we believe that the adoption of such a dispute mechanism will lessen the economic impact of a dispute on small entities.

6. Federal Rules that May Overlap, Duplicate, or Conflict with the Proposed Rules

239. None.

C. Initial Paperwork Reduction Act of 1995 Analysis

240. The Further Notice of Proposed Rulemaking portion of this *Order* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in the Further Notice of Proposed Rulemaking portion of this *Order*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on the Further Notice of Proposed Rulemaking; OMB comments are due 60 days from date of publication of this *Order* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Final Paperwork Reduction Act of 1995 Analysis

[564] *See* 47 C.F.R. § 1.721(a)(8).

241. The decision herein has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. 104-13, and the Office of Management and Budget (OMB) has approved some of its requirements in OMB No. 3060-0787. Some of the proposals have been modified or added, however, and therefore some of the information collection requirements in this item are contingent upon approval by the OMB.

E. Ex Parte Presentations

242. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[565] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[566]

F. Petitions for Reconsideration

243. Parties must file any petitions for reconsideration of this *Order* within thirty days from publication in the Federal Register. Parties may file oppositions to the petitions for reconsideration pursuant to section 1.429(f) of the rules.[567]

244. To file a petition for reconsideration in this proceeding, parties must file an original and ten copies of all petitions and oppositions. Petitions and oppositions should be sent to the Office of the Secretary, Federal Communications Commission, 445 12th St., S.W., TWA-204, Washington, D.C. 20554. If parties want each Commissioner to have a personal copy of their documents, an original plus fourteen copies must be filed. In addition, participants should submit two additional copies directly to the Common Carrier Bureau, Enforcement Division, Room 6008, 2025 M Street, N.W., Washington, D.C. 20554. The petitions and oppositions will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Copies of the petition and any subsequently filed documents in this matter may be

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565 *See Amendment of 47 C.F.R. 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, Report and Order, 12 FCC Rcd 7348, 7356-57, 27 (citing 47 C.F.R. 1.1204(b)(1)) (1997).

566 *See* 47 C.F.R. 1.1206(b)(2), as revised.

567 *See* 47 C.F.R. § 1.429(f).

obtained from International Transcription Services, 1231 20th Street N.W., Washington D.C. 20036, (202) 857-3800.

245. Petitions for reconsideration must comply with section 1.429 and all other applicable sections of the Commission's rules.[568] Petitions also must clearly identify the specific portion of this *Order* for which relief is sought. If a portion of a party's arguments does not fall under a particular topic listed in the outline of this *Order*, such arguments should be included in a clearly labelled section at the beginning or end of the filing.

G. Comment Filing Procedures

246. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before 30 days from publication in the Federal Register, and reply comments on or before 45 days from publication in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[569]

247. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address." A sample form and directions will be sent in reply.

248. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th St., S.W., TWA-325, Washington,

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568 *See* 47 C.F.R. § 1.429. We require, however, that a summary be included with all comments, although a summary that does not exceed three pages will not count toward the page limits. The summary may be paginated separately from the rest of the pleading (*e.g.*, as "i, ii"). *id.*

569 *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

D.C. 20554.

249. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Kimberly Parker, Federal Communications Commission, Common Carrier Bureau, 2025 M Street, N.W., Sixth Floor, Washington, DC 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, proceeding (including the lead docket number in this case, CC Docket No. 94-129); type of pleading (comment or reply comment); date of submission; and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20037.

250. Written comments by the public on the proposed and/or modified information collections are due 30 days after publication of this Notice in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, 445 12th St., S.W., Room A1836, Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

VI. ORDERING CLAUSES

251. Accordingly, IT IS ORDERED that pursuant to sections 1, 4, 201-205, and 258, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, and 258, the policies, rules, and requirements set forth herein ARE ADOPTED.

252. IT IS FURTHER ORDERED that 47 C.F.R. Part 64 IS AMENDED as set forth in Appendix A, effective 70 days after publication of the text thereof in the Federal Register, except that the following rules set forth in Appendix A will not become effective until 90 days after publication of the text in the Federal Register: sections 64.1100(c), 64.1100(d), 64.1170, and 64.1180.

253. IT IS FURTHER ORDERED that the stay of the application of the Commission's verification rules to in-bound calls imposed in *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Order, 11 FCC Rcd 856 (1995) is lifted.

254. IT IS FURTHER ORDERED that pursuant to section 1.429(d) of the Commission's rules, 47 C.F.R. § 1.429(d), U S WEST's Petition for Reconsideration is dismissed as being untimely filed.

255. IT IS FURTHER ORDERED that a FURTHER NOTICE OF PROPOSED RULEMAKING IS ISSUED.

256. IT IS FURTHER ORDERED that the Chief of the Common Carrier Bureau is delegated authority to require the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding.

257. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Order*, including the Final Regulatory Flexibility Analysis and the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

258. The *Order* IS ADOPTED, and the requirements contained herein will become effective 70 days after publication of a summary in the Federal Register, except that the following rules in Appendix A will become effective 90 days after publication of the summary in the Federal Register: sections 64.1100(c), 64.1100(d), 64.1170, and 64.1180. The collections of information contained within is contingent upon approval by OMB.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

RULES AMENDED

Part 64 of the Commission's Rules and Regulations, Chapter 1 of Title 47 of the Code of Federal Regulations, is amended as follows:

1. The title of Part 64, Subpart K, is amended to read as follows:

Subpart K - Changes in Preferred Telecommunications Service Providers

2. Part 64, Subpart K, is further amended by redesignating section 64.1100 as section 64.1150, and modifying new section 64.1150 to read as follows:

§64.1150 Verification of Orders for Telecommunications Service

No telecommunications carrier shall submit a preferred carrier change order unless and until the order has first been confirmed in accordance with one of the following procedures:

(a) The telecommunications carrier has obtained the subscriber's written authorization in a form that meets the requirements of section 64.1160; or

(b) The telecommunications carrier has obtained the subscriber's electronic authorization to submit the preferred carrier change order. Such authorization must be placed from the telephone number(s) on which the preferred carrier is to be changed and must confirm the information required in paragraph (a) of this section. Telecommunications carriers electing to confirm sales electronically shall establish one or more toll-free telephone numbers exclusively for that purpose. Calls to the number(s) will connect a subscriber to a voice response unit, or similar mechanism that records the required information regarding the preferred carrier change, including automatically recording the originating automatic numbering identification; or

(c) An appropriately qualified independent third party has obtained the subscriber's oral authorization to submit the preferred carrier change order that confirms and includes appropriate verification data (e.g., the subscriber's date of birth or social security number). The independent third party must (1) not be owned, managed, controlled, or directed by the carrier or the carrier's marketing agent; (2) must not have any financial incentive to confirm preferred carrier change orders for the carrier or the carrier's marketing agent; and (3) must operate in a location physically separate from the carrier or

the carrier's marketing agent. The content of the verification must include clear and conspicuous confirmation that the subscriber has authorized a preferred carrier change; or

(d) Any State-enacted verification procedures applicable to intrastate preferred carrier change orders only.

3. Part 64, Subpart K, is further amended by redesignating section 64.1150 as section 64.1160, and modifying new section 64.1160 to read as follows:

§64.1160 Letter of Agency Form and Content

(a) A telecommunications carrier may use a letter of agency to obtain written authorization and/or verification of a subscriber's request to change his or her preferred carrier selection. A letter of agency that does not conform with this section is invalid for purposes of this subpart.

(b) The letter of agency shall be a separate document (or an easily separable document) containing only the authorizing language described in paragraph (e) of this section having the sole purpose of authorizing a telecommunications carrier to initiate a preferred carrier change. The letter of agency must be signed and dated by the subscriber to the telephone line(s) requesting the preferred carrier change.

(c) The letter of agency shall not be combined on the same document with inducements of any kind.

(d) Notwithstanding paragraphs (b) and (c) of this section, the letter of agency may be combined with checks that contain only the required letter of agency language as prescribed in paragraph (e) of this section and the necessary information to make the check a negotiable instrument. The letter of agency check shall not contain any promotional language or material. The letter of agency check shall contain in easily readable, bold-face type on the front of the check, a notice that the subscriber is authorizing a preferred carrier change by signing the check. The letter of agency language shall be placed near the signature line on the back of the check.

(e) At a minimum, the letter of agency must be printed with a type of sufficient size and readable type to be clearly legible and must contain clear and unambiguous language that confirms:

(1) The subscriber's billing name and address and each telephone number to be covered by the preferred carrier change order;

(2) The decision to change the preferred carrier from the current telecommunications carrier to the soliciting telecommunications carrier;

(3) That the subscriber designates [name of submitting carrier] to act as the subscriber's agent for the preferred carrier change;

(4) That the subscriber understands that only one telecommunications carrier may be designated as the subscriber's interstate or interLATA preferred interexchange carrier for any one telephone number. To the extent that a jurisdiction allows the selection of additional preferred carriers (*e.g.*, local exchange, intraLATA/intrastate toll, interLATA/interstate toll, or international interexchange) the letter of agency must contain separate statements regarding those choices, although a separate letter of agency for each choice is not necessary; and

(5) That the subscriber understands that any preferred carrier selection the subscriber chooses may involve a charge to the subscriber for changing the subscriber's preferred carrier.

(f) Any carrier designated in a letter of agency as a preferred carrier must be the carrier directly setting the rates for the subscriber.

(g) Letters of agency shall not suggest or require that a subscriber take some action in order to retain the subscriber's current telecommunications carrier.

(h) If any portion of a letter of agency is translated into another language then all portions of the letter of agency must be translated into that language. Every letter of agency must be translated into the same language as any promotional materials, oral descriptions or instructions provided with the letter of agency.

4. Part 64, Subpart K, is further amended by adding new sections 64.1100, 64.1170, 64.1180, and 64.1190 to read as follows:

§ 64.1100 Changes in Subscriber Carrier Selections

(a) No telecommunications carrier shall submit or execute a change on the behalf of a subscriber in the subscriber's selection of a provider of telecommunications service except in accordance with the procedures prescribed in this Subpart. Nothing in this section shall preclude any State commission from enforcing these procedures with respect to intrastate services.

(1) No submitting carrier shall submit a change on the behalf of a subscriber in the subscriber's selection of a provider of telecommunications service prior to obtaining: (A) authorization from the subscriber, and (B) verification of that authorization in accordance with the procedures prescribed in section 64.1150. For a submitting carrier, compliance with the verification procedures prescribed in this Subpart shall be defined as compliance with subsections (a) and (b) of this section, as well with section 64.1150. The submitting carrier shall maintain and preserve records of verification of subscriber authorization for a minimum period of two years after obtaining such verification.

(2) An executing carrier shall not verify the submission of a change in a subscriber's selection of a provider of telecommunications service received from a submitting carrier. For an executing carrier, compliance with the procedures prescribed in this Subpart shall be defined as prompt execution, without any unreasonable delay, of changes that have been verified by a submitting carrier.

(3) Commercial mobile radio services (CMRS) providers shall be excluded from the verification requirements of this Subpart as long as they are not required to provide equal access to common carriers for the provision of telephone toll services, in accordance with 47 U.S.C. § 332(c)(8).

(b) Where a telecommunications carrier is selling more than one type of telecommunications service *(e.g.*, local exchange, intraLATA/intrastate toll, interLATA/interstate toll, and international toll) that carrier must obtain separate authorization from the subscriber for each service sold, although the authorizations may be made within the same solicitation. Each authorization must be verified separately from any other authorizations obtained in the same solicitation. Each authorization must be verified in accordance with the verification procedures prescribed in this Subpart.

(c) Carrier Liability for Charges. Any submitting telecommunications carrier that fails to comply with the procedures prescribed in this Subpart shall be liable to the subscriber's properly authorized carrier in an amount equal to all charges paid to the submitting telecommunications carrier by such subscriber after such violation, as well as for additional amounts as prescribed in section 64.1170 of this Subpart. The remedies provided in this Subpart are in addition to any other remedies available by law.

(d) Subscriber Liability for Charges. Any subscriber whose selection of telecommunications service provider is changed without authorization verified in accordance with the procedures set forth in this Subpart is absolved of liability for charges imposed by the unauthorized carrier for service provided during the first 30 days

after the unauthorized change. Upon being informed by a subscriber that an unauthorized change has occurred, the authorized carrier, the unauthorized carrier, or the executing carrier shall inform the subscriber of this 30-day absolution period. The subscriber shall be absolved of liability for this 30-day period only if the subscriber has not already paid charges to the unauthorized carrier.

(1) Any charges imposed by the unauthorized carrier on the subscriber after this 30-day period shall be paid by the subscriber to the authorized carrier at the rates the subscriber was paying to the authorized carrier at the time of the unauthorized change. Upon the subscriber's return to the authorized carrier, the subscriber shall forward to the authorized carrier a copy of any bill that contains charges imposed by the unauthorized carrier after the 30-day period of absolution. After the authorized carrier has re-rated the charges to reflect its own rates, the subscriber shall be liable for paying such re-rated charges to the authorized carrier.

(2) If the subscriber has already paid charges to the unauthorized carrier, and the authorized carrier recovers such charges as provided in paragraph (c), the authorized carrier shall refund or credit to the subscriber any charges recovered from the unauthorized carrier in excess of what the subscriber would have paid for the same service had the unauthorized change not occurred, in accordance with the procedures set forth in section 64.1170 of this Subpart.

(3) If the subscriber has been absolved of liability as prescribed by this subsection, the unauthorized carrier shall also be liable to the subscriber for any charge required to return the subscriber to his or her properly authorized carrier, if applicable.
(e) Definitions. For the purposes of this Subpart, the following definitions are applicable:

(1) Submitting carrier: a submitting carrier is generally any telecommunications carrier that: (A) requests on the behalf of a subscriber that the subscriber's telecommunications carrier be changed, and (B) seeks to provide retail services to the end user subscriber. A carrier may be treated as a submitting carrier, however, if it is responsible for any unreasonable delays in the submission of carrier change requests or for the submission of unauthorized carrier change requests, including fraudulent authorizations.

(2) Executing carrier: an executing carrier is generally any telecommunications carrier that effects a request that a subscriber's telecommunications carrier be changed. A carrier may be treated as an executing carrier, however, if it is responsible for any unreasonable delays in the execution of carrier changes or for the execution of

unauthorized carrier changes, including fraudulent authorizations.

(3) Authorized carrier: an authorized carrier is generally any telecommunications carrier that submits a change, on behalf of a subscriber, in the subscriber's selection of a provider of telecommunications service with the subscriber's authorization verified in accordance with the procedures specified in this Subpart.

(4) Unauthorized carrier: an unauthorized carrier is generally any telecommunications carrier that submits a change, on behalf of a subscriber, in the subscriber'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 Subpart.

(5) Unauthorized change: an unauthorized change is a change in a subscriber's selection of a provider of telecommunications service that was made without authorization verified in accordance with the verification procedures specified in this Subpart.

§ 64.1170 Reimbursement Procedures

(a) The procedures in this section shall apply only after a subscriber has determined that an unauthorized change has occurred, as defined by section 64.1100(e)(5) of this Subpart, and the subscriber has paid charges to an allegedly unauthorized carrier. Upon receiving notification from the subscriber or a carrier that a subscriber has been subjected to an unauthorized change and that the subscriber has paid charges to an allegedly unauthorized carrier, the properly authorized carrier must, within 30 days, request from the allegedly unauthorized carrier proof of verification of the subscriber's authorization to change carriers. Within ten days of receiving such request, the allegedly unauthorized carrier shall forward to the authorized carrier either:

(1) Proof of verification of the subscriber's authorization to change carriers; or
(2) The following:

(A) An amount equal to all charges paid by the subscriber to the unauthorized carrier; and

(B) An amount equal to any charge required to return the subscriber to his or her properly authorized carrier, if applicable;

(C) Copies of any telephone bill(s) issued from the unauthorized carrier to

the subscriber.

(b) If an authorized carrier incurs any billing and collection expenses in collecting charges from the unauthorized carrier, the unauthorized carrier shall reimburse the authorized carrier for reasonable expenses.

(c) Where a subscriber notifies the unauthorized carrier, rather than the authorized carrier, of an unauthorized subscriber carrier selection change, the unauthorized carrier must immediately notify the authorized carrier.

(d) Subscriber Refunds or Credits. Upon receipt from the unauthorized carrier of the amount described in paragraph (a)(2)(A), the authorized carrier shall provide a refund or credit to the subscriber of all charges paid in excess of what the authorized carrier would have charged the subscriber absent the unauthorized change. If the authorized carrier has not received from the unauthorized carrier an amount equal to charges paid by the subscriber to the unauthorized carrier, the authorized carrier is not required to provide any refund or credit. The authorized carrier must, within 60 days after it receives notification of the unauthorized change, inform the subscriber if it has failed to collect any charges from the unauthorized carrier and inform the subscriber of his or her right to pursue a claim against the unauthorized carrier for a refund of all charges paid to the unauthorized carrier.

(e) Restoration of Premium Programs. Where possible, the properly authorized carrier must reinstate the subscriber in any premium program in which that subscriber was enrolled prior to the unauthorized change, if that subscriber's participation in the premium program was terminated because of the unauthorized change. If the subscriber has paid charges to the unauthorized carrier, the properly authorized carrier shall also provide or restore to the subscriber any premiums to which the subscriber would have been entitled had the unauthorized change not occurred. The authorized carrier must comply with the requirements of this subsection regardless of whether it is able to recover from the unauthorized carrier any charges that were paid by the subscriber.

§ 64.1180 Investigation Procedures

(a) The procedures in this section shall apply only after a subscriber has determined that an unauthorized change has occurred and such subscriber has not paid for charges imposed by the unauthorized carrier for the first 30 days after the unauthorized change, in accordance with section 64.1100(d) of this Subpart.

(b) The unauthorized carrier shall remove from the subscriber's bill all charges that were incurred for service provided during the first 30 days after the unauthorized change occurred.

(c) The unauthorized carrier may, within 30 days of the subscriber's return to the authorized carrier, submit to the authorized carrier a claim that the subscriber was not subjected to an unauthorized change, along with a request for the amount of charges for which the consumer was credited pursuant to paragraph (b) and proof that the change to the subscriber's selection of telecommunications carrier was made with authorization verified in accordance with the verification procedures specified in this Subpart.

(d) The authorized carrier shall conduct a reasonable and neutral investigation of the claim, including, where appropriate, contacting the subscriber and the carrier making the claim.

(e) Within 60 days after receipt of the claim and the proof of verification, the authorized carrier shall issue a decision on the claim to the subscriber and the carrier making the claim.

(1) If the authorized carrier decides that the subscriber was not subjected to an unauthorized change, the authorized carrier shall place on the subscriber's bill a charge equal to the amount of charges for which the subscriber was previously credited pursuant to paragraph (b). Upon receiving this amount, the authorized carrier shall forward this amount to the carrier making the claim.

(2) If the authorized carrier decides that the subscriber was subjected to an unauthorized change, the subscriber shall not be required to pay the charges for which he or she was previously absolved.

§ 64.1190 Preferred Carrier Freezes

(a) A preferred carrier freeze (or freeze) prevents a change in a subscriber's preferred carrier selection unless the subscriber gives the carrier from whom the freeze was

requested his or her express consent. All local exchange carriers who offer preferred carrier freezes must comply with the provisions of this section.

(b) All local exchange carriers who offer preferred carrier freezes shall offer freezes on a nondiscriminatory basis to all subscribers, regardless of the subscriber's carrier selections.

(c) Preferred carrier freeze procedures, including any solicitation, must clearly distinguish among telecommunications services (*e.g.*, local exchange, intraLATA/intrastate toll, interLATA/interstate toll, and international toll) subject to a preferred carrier freeze. The carrier offering the freeze must obtain separate authorization for each service for which a preferred carrier freeze is requested.

(d) Solicitation and imposition of preferred carrier freezes.

(1) All carrier-provided solicitation and other materials regarding preferred carrier freezes must include:

(A) An explanation, in clear and neutral language, of what a preferred carrier freeze is and what services may be subject to a freeze;

(B) A description of the specific procedures necessary to lift a preferred carrier freeze; an explanation that these steps are in addition to the Commission's verification rules in sections 64.1150 and 64.1160 for changing a subscriber's preferred carrier selections; and an explanation that the subscriber will be unable to make a change in carrier selection unless he or she lifts the freeze; and

(C) An explanation of any charges associated with the preferred carrier freeze.

(2) No local exchange carrier shall implement a preferred carrier freeze unless the subscriber's request to impose a freeze has first been confirmed in accordance with one of the following procedures:

(A) The local exchange carrier has obtained the subscriber's written and signed authorization in a form that meets the requirements of section 64.1190(d)(3); or

(B) The local exchange carrier has obtained the subscriber's electronic authorization, placed from the telephone number(s) on which the preferred carrier freeze is to be imposed, to impose a preferred carrier freeze. The electronic authorization should confirm appropriate verification data (*e.g.*, the subscriber's date of birth or social security number) and the information required in section

64.1190(d)(3)(B)(i)-(iv). Telecommunications carriers electing to confirm preferred carrier freeze orders electronically shall establish one or more toll-free telephone numbers exclusively for that purpose. Calls to the number(s) will connect a subscriber to a voice response unit, or similar mechanism that records the required information regarding the preferred carrier freeze request, including automatically recording the originating automatic numbering identification; or

(C) An appropriately qualified independent third party has obtained the subscriber's oral authorization to submit the preferred carrier freeze and confirmed the appropriate verification data (*e.g.*, the subscriber's date of birth or social security number) and the information required in section 64.1190(d)(3)(B)(i)-(iv). The independent third party must (1) not be owned, managed, or directly controlled by the carrier or the carrier's marketing agent; (2) must not have any financial incentive to confirm preferred carrier freeze requests for the carrier or the carrier's marketing agent; and (3) must operate in a location physically separate from the carrier or the carrier's marketing agent. The content of the verification must include clear and conspicuous confirmation that the subscriber has authorized a preferred carrier freeze.

(3) Written authorization to impose a preferred carrier freeze. A local exchange carrier may accept a subscriber's written and signed authorization to impose a freeze on his or her preferred carrier selection. Written authorization that does not conform with this section is invalid and may not be used to impose a preferred carrier freeze.

(A) The written authorization shall comply with section 64.1160(b), (c), and (h) of the Commission's rules concerning the form and content for letters of agency.

(B) At a minimum, the written authorization must be printed with a readable type of sufficient size to be clearly legible and must contain clear and unambiguous language that confirms:

(i) The subscriber's billing name and address and the telephone number(s) to be covered by the preferred carrier freeze;

(ii) The decision to place a preferred carrier freeze on the telephone number(s) and particular service(s). To the extent that a jurisdiction allows the imposition of preferred carrier freezes on additional preferred carrier selections (*e.g.*, for local exchange, intraLATA/intrastate toll, interLATA/interstate toll service, and international toll), the authorization must contain separate statements regarding the particular selections to be

frozen;

(iii) That the subscriber understands that she or he will be unable to make a change in carrier selection unless she or he lifts the preferred carrier freeze; and

(iv) That the subscriber understands that any preferred carrier freeze may involve a charge to the subscriber.

(e) Procedures for lifting preferred carrier freezes. All local exchange carriers who offer preferred carrier freezes must, at a minimum, offer subscribers the following procedures for lifting a preferred carrier freeze:

(1) A local exchange carrier administering a preferred carrier freeze must accept a subscriber's written and signed authorization stating her or his intent to lift a preferred carrier freeze; and

(2) A local exchange carrier administering a preferred carrier freeze must accept a subscriber's oral authorization stating her or his intent to lift a preferred carrier freeze and must offer a mechanism that allows a submitting carrier to conduct a three-way conference call with the carrier administering the freeze and the subscriber in order to lift a freeze. When engaged in oral authorization to lift a preferred carrier freeze, the carrier administering the freeze shall confirm appropriate verification data (*e.g.*, the subscriber's date of birth or social security number) and the subscriber's intent to lift the particular freeze.

APPENDIX B

PROPOSED RULE CHANGES

Part 64 of the Commission's Rules and Regulations, Chapter 1 of Title 47 of the Code of Federal Regulations, is proposed to be amended as follows:

1. Part 64, Subpart K, is proposed to be amended by modifying section 64.1100(c), (d), and adding subsection (f) to read as follows:

§ 64.1100 Changes in Subscriber Carrier Selections

. . . .

(c) Carrier Liability for Charges. Any submitting telecommunications carrier that fails to comply with the verification procedures prescribed in this Subpart shall be liable to the subscriber's properly authorized carrier for amounts as prescribed in section 64.1170 of this Subpart, as well as for:

(1) If the subscriber has paid charges to the unauthorized carrier, an amount equal to double the charges paid by such subscriber to the submitting carrier for charges incurred during the first 30 days after the unauthorized change, as well as an amount equal to all subsequent charges paid by the subscriber; or

(2) If the subscriber has not paid charges to the unauthorized carrier, an amount equal to what the unauthorized carrier would have charged the subscriber for charges incurred during the first 30 days after the unauthorized change.

The remedies provided in this Subpart are in addition to any other remedies available by law.

. . . .

(d) (2) If the subscriber has already paid charges to the unauthorized carrier, the subscriber shall receive a refund or credit of all charges paid to such carrier, in accordance with the procedures set forth in section 64.1170 of this Subpart. The liability provisions of this subsection shall not apply if the subscriber's authorized carrier does not receive from the unauthorized carrier the amount described in section 64.1170(a)(2)(A) or the amount described in section 64.1170(d)(1)(B).

2. Part 64, Subpart K, is further proposed to be amended by modifying section 64.1170 to read as follows:

§ 64.1170 Reimbursement Procedures

(a) The procedures in this section shall apply only after a subscriber has determined that an unauthorized change has occurred, as defined by section 64.1100(e)(5) of this Subpart. Upon receiving notification from the subscriber or a carrier that a subscriber has been subjected to an unauthorized change, the properly authorized carrier must, within 30 days, request from the allegedly unauthorized carrier proof of verification of the subscriber's authorization to change carriers. Within ten days of receiving such request, the allegedly unauthorized carrier shall forward to the authorized carrier either:

. . . .

(2) The following:

(A) If the subscriber has paid charges to the unauthorized carrier, an amount equal to double the charges paid by the subscriber to the unauthorized carrier for charges incurred during the first 30 days after the unauthorized change and an amount equal to all subsequent charges paid by the subscriber. If the subscriber has not paid charges to the unauthorized carrier, an amount equal to the charges that the unauthorized carrier billed or would have billed to the subscriber for charges incurred during the first 30 days after the unauthorized change; and

. . . .

(d) Compensation for the Subscriber.

(1) Within ten days of receipt of the amount described in subsection (a)(2)(A) above, the authorized carrier shall provide a complete refund or credit to the subscriber of all charges paid by the subscriber to the unauthorized carrier. If the authorized carrier does not receive the amount described in subsection (a)(2)(A), then the authorized carrier is not required to provide a complete refund or credit to the subscriber. The authorized carrier must, within 60 days after it receives notification of the unauthorized change, inform the subscriber if it has failed to collect any charges from the unauthorized carrier and inform the subscriber of his or her right to pursue a claim against the unauthorized carrier for a refund of all charges paid to the unauthorized carrier.

3. Part 64, Subpart K, is further proposed to be amended by adding section 64.1195 to read as follows:

§ 64.1195 Registration Requirement

(a) Applicability. A telecommunications carrier shall not begin to provide interstate telecommunications service unless it has filed a registration with the Commission in accordance with subsection (b) and had such registration approved by the Commission.

(1) Any telecommunications carrier already providing service on the effective date of these rules shall comply with the registration requirements of subsection (b) within 90 days of the effective date of these rules. The provision of service shall not be affected by the filing of the registration.

(b) Contents of registration. The registration shall contain the following information:

(1) the carrier's business address;

(2) the names and addresses of all officers and other principals;

(3) a statement of the carrier's financial viability;

(4) a verification that the carrier, its officers, and other principals have no prior history of committing fraud on the public.

(c) Approval or Rejection of Registration. Any registration shall be deemed approved by the Commission 30 days after filing unless the Commission issues an order rejecting or suspending such registration. The Commission may reject or suspend such registration for any of the reasons identified in subsection (d) of this section.

(d) Revocation or Suspension of Operating Authority. After notice and opportunity to respond, the Commission may revoke or suspend the authorization of any telecommunications carrier to provide service upon any of the following grounds:

(1) the carrier fails to file the registration in accordance with subsection (a) of this section; or

(2) the carrier provides materially false or incomplete information in the course of the registration required by subsection (a) of this section ; or

(3) the carrier, or any predecessor in interest, or any of its officers or other principals has failed to pay a forfeiture imposed for violations of section 258.

APPENDIX C

PARTIES FILING COMMENTS TO THE *FURTHER NOTICE AND ORDER* RESPONSIVE PLEADINGS CC DOCKET NO. 94-129

Air Touch Communications (Air Touch)
America's Carriers Telecommunications Association (ACTA)
Ameritech
AT&T
Bell Atlantic
Bell Atlantic Mobile, Inc. (Bell Atlantic Mobile)
BellSouth Corp. (BellSouth)
Billing Information Concepts Corp. (BIC)
Brittan Communications International Corp. (BCI)
Cable and Wireless, Inc. (CWI)
Cincinnati Bell Telephone (CBT)
Citizens Communications (Citizens)
Competitive Telecommunication Association (CompTel)
Direct Marketing Association (DMA)
Excel Communications, Inc. (Excel)
Florida Legal Services (FLS)
Florida Public Service Commission (Florida Commission)
Frontier Corp. (Frontier)
GTE Service Corp. (GTE)
Illinois Commerce Commission (Illinois Commission)
Intermedia Communications (Intermedia)
IXC Long Distance, Inc. (IXC Long Distance)
LCI International Telecom Corp. (LCI)
Maryland Public Service Commission (Maryland Commission)
MCI Telecommunications Corp. (MCI)
Montana Public Service Commission (Montana Commission)
National Association of Attorneys General (NAAG)
National Consumers League (NCL)
New York State Consumer Protection Board (NYSCPB)
New York State Department of Public Service (NYSDPS)
Office of the People's Counsel (for the District of Columbia) (OPC)
Ohio Consumers' Counsel (OCC)
Pennsylvania Office of Consumer Advocate (PaOCA)
People of the State of California and the Public Utilities Commission of the State of

California (California Commission)
Public Staff - North Carolina Utilities Commission (North Carolina Commission)
Public Utilities Commission of Ohio (Ohio Commission)
Public Utilities Commission for Texas (Texas Commission)
Quick Response
RCN Corp. Telecom Services, Inc. (RCN)
SDN Users Association, Inc. (SDN)
Southern New England Telephone Company (SNET)
SouthWestern Bell Telephone Company, Pacific Bell, & Nevada Bell (SBC)
Sprint Corp. (Sprint)
Telecommunications Resellers Association (TRA)
Tennessee Regulatory Authority (TNRA)
Texas Office of Public Utilities (TOPC)
360O Communications Company (360O)
Time Warner Communication Holdings Incorporated (TW Comm.)
TPV Services, Inc. (TPV)
United States Telephone Association (USTA)
U S WEST, Inc. (U S WEST)
Vermont Public Service Board (VTPSB)
Virginia State Corp. Commission Staff (Virginia Commission)
VoiceLog LLC (VoiceLog)
Winstar Communications (Winstar)
Working Assets
WorldCom, Inc. (WorldCom)

PARTIES FILING REPLY COMMENTS TO *FURTHER NOTICE AND ORDER* RESPONSIVE PLEADINGS CC DOCKET NO. 94-129

America's Carriers Telecommunications Association (ACTA)
Ameritech
AT&T
Bell Atlantic
BellSouth Corp. (BellSouth)
Cable and Wireless, Inc. (CWI)
Cellular Telecommunication Industry Association (CTIA)
Citizens Communications (Citizens)
Direct Marketing Association (DMA)
Excel Communications, Inc. (Excel)

GTE Service Corp. (GTE)
IXC Long Distance, Inc. (IXC Long Distance)
LCI International Telecom Corp. (LCI)
MCI Telecommunications Corp. (MCI)
New York State Consumer Protection Board (NYSCPB)
Ohio Consumers' Counsel (OCC)
Oklahoma Corp. Commission (Oklahoma Commission)
People of the State of California and the Public Utilities Commission of the State of California (California Commission)
RCN Corp. Telecom Services, Inc. (RCN)
Southern New England Telephone Company (SNET)
Sprint Corp. (Sprint)
Telecommunications Resellers Association (TRA)
Telco Communication Group (Telco)
Texas Office of Public Utility Counsel (TOPC)
TPV Services, Inc. (TPV)
United States Telephone Association (USTA)
U S WEST, Inc. (U S WEST)
VoiceLog LLC (VoiceLog)
WorldCom, Inc. (WorldCom)

PARTIES FILING COMMENTS TO MCI PETITION FOR RULEMAKING CCB/CPD FILE NO. 97-19

ALLTEL Telephone Services Corporation (ALLTEL)
Ameritech
Association for Local Telephone Service (ALTS)
AT&T
Bell Atlantic and NYNEX
BellSouth Telecommunications, Inc. (BellSouth)
Citizens Communications (Citizens)
Competitive Telecommunications Association (CompTel)
Cox Communications, Inc. (Cox)
GTE Service Corporation (GTE)
MIDCOM Communications, Inc. (MIDCOM)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell (SBC)
Sprint Communications Company, L.P. (Sprint)
Telecommunications Resellers Association (TRA)
United States Telephone Association (USTA)

Worldcom, Inc. (Worldcom)

PARTIES FILING REPLY COMMENTS TO MCI PETITION FOR RULEMAKING CCB/CPD FILE NO. 97-19

Ameritech
AT&T
BellSouth Telecommunications, Inc. (BellSouth)
Citizens Communications (Citizens)
GTE Service Corporation (GTE)
MCI Telecommunications Corporation (MCI)
Puerto Rico Telephone Company (PRTC)
Southern New England Telephone Company (SNET)
Sprint Communications Company, L.P. (Sprint)
Telecommunications Resellers Association (TRA)
U S WEST, Inc. (U S WEST)

December 17, 1998

Separate Statement
of
Commissioner Susan Ness

Re: Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, CC Docket No. 94-129

This Commission receives more complaints about slamming than any other telephone-related complaint, and despite past efforts by this Commission and state commissions the number of complaints is still rising. With this Order and Further Notice of Proposed Rulemaking, we take strong measures both to empower consumers and to punish carriers that engage in slamming practices.

Slammers are nothing if not bold. Victims of slamming cut across socio-economic lines and political parties, and include CEOs, grandmothers, and members of my own staff. I know how outraged consumers are when they are slammed. They feel violated. I have received innumerable e-mails expressing consumers' frustration, and I am certain my colleagues have had the same experience. Three times in the past several years, I have testified on slamming at field hearings before Senate committees, and I have heard the outrage loud and clear from legislators and their constituents.

There is no doubt that we must take additional steps to act swiftly and punish wrongful carriers severely.

The rules we adopt today are about empowering the victim -- the consumer -- and preventing slamming carriers from ever receiving payment for their wrongful actions. Once a payment enters the hands of a wrongful carrier, there is always the chance that the wrongful carrier will disappear or file for bankruptcy, as we have now learned from experience. "Absolution" -- permitting the customer not to pay for service received from a slamming carrier -- should make it less likely that carriers will engage in slamming in the first place.

I share the concern that unlimited absolution might lead to false claims of slamming. But we have followed the lead of Congress in limiting absolution to a period of 30 days. I also would have entertained establishing a dollar cap on the amount of absolution, so as to dissuade those who might be tempted to abuse the process. To those who object to any rule providing an

absolution remedy, I ask: why penalize all consumers for fear that some might game the system? Should such abuse arise, the Commission can always modify this rule. For now, our primary focus is on deterring injury to consumers, and providing a meaningful remedy when it occurs.

Of course, it is not just the consumer but the rightful carrier that is injured by slamming. During this interim period, before we can adopt even stronger anti-slamming rules proposed in the Further Notice, we are faced with a difficult decision: when no payment has been made, we can give priority to compensating the authorized carrier or to compensating the consumer. I choose the consumer.

It is the consumer whose choice has been taken away; it is the consumer who has been troubled and inconvenienced; it is the consumer upon whom we rely to notice the problem and to register the complaint. I am confident that we will adopt further measures to ensure that authorized carriers are also compensated, and that slammers are doubly penalized. But in the interim our first concern must be the consumer. Limited absolution is a form of compensation, not a windfall.

In addition to harming the consumer and the authorized carrier, slamming also threatens competition. The centerpiece of competition is consumer choice. If consumers choose a carrier and their selection is changed against their will, then consumers are not reaping the benefits of competition. We are committed to making competition a success. So, in addition to adopting pro-consumer rules, we are also increasing our enforcement efforts and instituting new procedures that will make it quicker and easier for consumers to file and resolve slamming complaints.

Congress has sent us a clear message: stop carriers from slamming. In turn, we are sending slammers a clear message: we have zero tolerance for such practices.

Separate Statement of
Commissioner Gloria Tristani

Re: 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.

I enthusiastically support the rules adopted today by the Commission to combat slamming. The problem of slamming has become rampant, and it is the FCC's job to stop it. I believe our new anti-slamming rules are a major victory for millions of consumers. I expect that these new rules, in concert with our aggressive enforcement actions against slammers, will drastically reduce the frequency of slamming.

The highlight of the Commission's new rules is that a customer who is slammed need not pay the slammer. This is good public policy for two reasons. First, allowing consumers to withhold payment from the slammer helps takes the profit out of slamming. That should substantially reduce the frequency of slamming. Second, allowing a slammed customer to withhold payment compensates the slamming victim for the trouble and aggravation of having been slammed. Anyone who has experienced the frustration and inconvenience of being slammed knows that some compensation is appropriate.

For this new approach to work, however, consumers must read their telephone bills carefully. When a customer receives a bill and notices that his or her preselected carrier has been changed without consent, the customer should immediately call the carrier they had previously selected and get switched back to that carrier. At that point, the customer likely has accumulated charges from the slammer for one month, or part of a month. Our new rules say that the customer need not pay those charges.

If, however, the customer does not realize that his or her preselected carrier has been changed and ends up paying the slammer, the customer is still relieved of payment to the slammer for the first month of service once the slam is discovered. After the one-month period, the customer's payments to the slammer can be recovered by the customer's authorized carrier. The authorized carrier must refund to the customer any amount paid by the customer that exceeds what that customer would have been charged under the authorized carrier's rates. Thus, to take fullest advantage of the Commission's new slamming rules, consumers need to uncover slams the first time the slamming carrier's name appears on the bill.

This new approach to preventing slamming relies on the customer realizing that he or she has been slammed. Because telephone bills today are not always clear, it is possible for the customer not to be aware of a change in presubscribed carriers. To deal with misleading or unclear billing information, the FCC recently proposed requiring carriers to organize their bills more clearly. I expect the Commission will take up consideration of those rules shortly. Adoption of those rules would greatly facilitate discovery of an unauthorized change in presubscribed carriers, thereby ensuring that the customer does not pay the slamming carrier.

Thus, with the adoption of the customer absolution policy, the imposition of two more significant fines against slammers and crammers, and the simplification of complaint filings, it should be clear that this Commission is serious about bringing slamming and cramming to an end.

December 17, 1998

STATEMENT OF COMMISSIONER MICHAEL K. POWELL, CONCURRING IN PART AND DISSENTING IN PART

Re: Second Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers (CC Docket No. 94-129).

I write separately to explain the bases upon which I partially dissent from and partially concur in this action.

As an initial matter, I wish to express my firm support for the Commission taking steps, pursuant to section 258 of the 1996 Act, to establish policies and rules designed to combat unauthorized changes of consumers' long distance carriers ("slamming"). The Act mandates that we turn the ship of federal telecommunications regulation smartly in the direction of competitive markets and away from the traditional central planning model. It is critical to the functioning of competitive markets that consumers make effective choices in the marketplace, as these choices tell self-interested firms what to sell, how much and where. Slamming robs consumers of choices they have made, and thus I am more than pleased to support its prevention and vigorous prosecution.

I have some nagging concerns, however, about the manner in which this action combats slamming, which I describe briefly here. I agree that an important way to combat slamming is to prevent carriers from reaping the financial benefits of slamming. Further, I generally support making slamming carriers pay for what they have done, to the extent we have authority to require such remedies.

But I am concerned that some of the steps taken in this item may not adequately compensate authorized carriers, which are no more responsible for a particular incident of slamming than the slammed subscriber. There are two dimensions to my concerns in this regard.

First, I must respectfully and reluctantly dissent from the narrow part of this action that requires authorized carriers to forward to the subscriber charges the subscriber has paid to the slamming carrier (which the authorized carrier then collects from the slammer) to the extent those monies exceed the amount the subscriber would normally have paid the authorized carrier. While I agree that it is a worthy end for us to do what we can to restore slammed subscribers to

their original positions, I feel strongly that the means for achieving this end must comport, as always, with the express language of the Act. Section 258(b) could not be more clear that a slamming carrier is liable to the authorized carrier for the *entire* amount the slammed subscriber has paid to the slammer:

> Any telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber 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 . . .[570]

The statute provides for no exception to this all-inclusive language regarding charges paid to the subscriber, and I respectfully reject the suggestion that we can trump the express language of section 258(b) by relying on tidbits from the legislative history, comments detailing the parties' preferences or inferences regarding what Congress must have meant in enacting the provision in the context of existing Commission rules.

I also reject the suggestion that simple adherence to the statutory language would lead to an anomalous policy result. For example, allowing the authorized carrier to keep all of the money it collects from slamming carriers would tend to maximize the incentive authorized carriers have to collect from slammers. Moreover, in light of the public outcry against slamming, it seems likely that many authorized carriers would have freely chosen to refund charges in excess of what the subscriber normally would have paid, just to keep their subscribers happy and retain them in an increasingly competitive market. By mandating this remedy, we have overstepped our legal authority and precluded potential market-based remedies that could have achieved the same purpose.

Given these objections, I would have preferred to make use of other express language in section 258(b), which provides that "[t]he remedies provided by this subsection are in addition to any other remedies available by law."[571] In particular, I would have preferred to consider alternative legal means by which the slammed subscriber could collect an amount equal to the "excess" it paid from the *slamming carrier,* provided that such means did not undermine the statutory remedy available to the authorized carrier. If such means could not be implemented in this action I would have been open to considering them in the next phase of this proceeding, in which we will consider additional financial penalties for slamming carriers.

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570 47 U.S.C. § 258(b) (emphasis added).

571 47 U.S.C. § 258(b).

Second, I am concerned that our rules do not provide for compensation to the authorized carrier (either from the slamming carrier or the subscriber) when the subscriber does not pay the slammer. I worry that this shortcoming does not afford the authorized carrier the benefit of the bargain it struck with the subscriber.

Authorized carriers generally have a relationship of indefinite duration with their subscribers, according to which the authorized carrier expects to profit from doing business with that subscriber. The authorized carrier relies on that expectation in crafting its pricing policies and otherwise running its business, at least until the subscriber acts to sever his relationship with the authorized carrier. Without further information on the record, I am not prepared to say that authorized carriers are not harmed when this expectation is not satisfied.[572] I also would point out that this potential harm would tend to disfavor smaller authorized carriers who are now entering the market to bring consumers the benefits of additional competition. By declining to compensate authorized carrier for this potential harm, I believe our rules fall short of keeping the authorized carrier whole.

In contrast, our rules are more favorable to slammed subscribers. I agree that subscribers may suffer harms and incur costs as a result of being slammed, and I would support penalizing slammers in a way that forces them to compensate subscribers for such harms and costs. But the fact generally remains that a slammed subscriber expected to be able to *make* calls, expected to *pay* for those calls and actually *made* the calls. The primary difference is that the slamming carrier, rather than the authorized carrier, actually served the subscriber -- a fact which will generally go unnoticed until the subscriber sees a new carrier on his bill. Thus, in many cases, the subscriber will pretty much receive the benefit of his bargain, albeit based on the performance of a substitute carrier.

While in principle, I do not object to our rules compensating slammed subscribers, I do wish we were doing more in this action to compensate authorized carriers. This view is consistent with the plain language of the section 258, which appears to provide a remedy for the authorized carrier. Indeed, as I have said, section 258 specifically allows the authorized carrier to collect *all*

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572 Conversely, I reject the notion that authorized carriers would obtain a windfall if the subscriber paid them for service actually provided by the slamming carrier. The authorized carrier made capacity on its network available for the subscriber's use in reliance on the expectation that the subscriber would use that network and pay for such use. Thus, payment to the authorized carrier would merely afford the authorized carrier with the benefit of the bargain it struck with the subscriber. In any event, the plain language of section 258 clearly contemplates authorized carriers obtaining money paid by the subscriber (to the slammer) even though another carrier has provided service.

monies paid by the subscriber to the slammer, without reference to whether or not the amount paid to the slammer is greater than the amount the authorized carrier would normally receive from the subscriber. Thus, under the statute, the authorized carrier could, in some cases, receive *more* than it would have received had the slam not occurred.

In light of these concerns, I would have preferred to defer considering rules to free slammed subscribers from paying either the slamming or authorized carrier until the next phase of this proceeding, in which we will consider additional financial penalties for slamming carriers. By imposing these additional penalties on slammers, I believe we could more adequately compensate authorized carriers without necessarily reducing compensation to slammed subscribers. I do, however, take some comfort in knowing that (1) a solution that would provide more compensation to authorized carriers (based on harsher penalties to slammers) can still be implemented after reviewing the submissions responding to this action; and (2) authorized carriers that feel they have not been adequately compensated under our rules may have additional remedies available in state or federal fora.[573] These considerations mitigate my concerns sufficiently that I feel comfortable concurring in the remainder of this action.

Having expressed these concerns, I look forward to working with my colleagues in the next phase of this proceeding to ensure that all of the innocent parties associated with slamming violations -- both subscribers and authorized carriers -- have full opportunity to be compensated for such violations. My colleagues and, in particular, our dedicated Common Carrier Bureau staff are to be commended for their tireless work in addressing this important consumer protection issue.

[573] For example, it is my understanding that authorized carriers may be able to sue slamming carriers for lost profits before the Commission pursuant to Title II of the Act or before state authorities. Other possible remedies based on state law might include actions alleging tortious interference with contracts, interference with business relationships, and punitive damages (for willful slamming violations), or contract violations (*e.g.*, where the slamming carrier is a reseller that can be said to have violated a contract with the authorized carrier).

December 17, 1998

DISSENTING STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Second Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers (CC Docket No. 94-129).

The unauthorized change of a customer's long distance carrier ("slamming") is a growing concern for consumers and this agency, and I congratulate the Commission on taking steps to reduce it. I appreciate that we must take action to combat slamming, but we cannot and should not do so in a manner that conflicts with the safeguards and incentives established in the Act. With that in mind, I write separately to explain why I must dissent from the regulations outlined in today's Order.

Before I begin, let me note that everyone here at the Commission shares the same goal -- significantly reducing and eventually eliminating slamming. I express my firm support for the Commission, pursuant to section 258 of the 1996 Act, to enact rules and regulations designed to eliminate these unauthorized changes. I have serious reservations, however, about the method of achieving these goals that the Commission adopts in this Order. Specifically, I believe that the consumer absolution scheme created here will lessen the incentives of the party most able to take appropriate action to combat slamming -- i.e. the authorized carrier -- and may also inadvertently lead to an increase in fraudulent claims of slamming.

First, I am concerned that the absolution of consumer liability proposed here is not found in the statute and even conflicts with the statutory goals. Section 258 seems to anticipate that it would be the authorized carrier who would have the greatest incentive to police against slamming, as that carrier would be entitled to recover the charges paid to the slamming carrier.[574] The rules adopted today, however, do not provide for any compensation to the authorized carrier when the subscriber does not pay the slamming carrier. In this manner, the adoption of consumer absolution may act to discourage the authorized carrier from policing these practices because frequently there will be no payments by the consumer to the slamming carrier available for them to collect.

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[574] 47 USCA Section 258.

I agree with Commissioner Powell that we should be -- and indeed the statute envisioned -- doing more to compensate the authorized carriers. These carriers are also harmed by slamming, as they lose the compensation that would have been due to them had one of their customers not been taken away in an unauthorized manner. Indeed, the authorized carrier may suffer a greater harm. The subscriber was still able to make telephone calls using the service of the slamming carrier. The authorized carrier, however, will be unable to recoup the payments that should have been made by their customer.

In addition, at least in one regard, the Commission's rules directly conflict with the statute. Section 258 states that the authorized carrier should be entitled to "an amount equal to all charges paid by such subscriber after such violation."[575] The Order, however, requires that authorized carriers, once obtaining monies paid by the subscriber to the slammer, must refund any excess of what the subscriber would normally have paid. Such a requirement is not what the statute requires and is especially troubling in concert with the consumer absolution provisions.

At bottom, the statute seemed to ensure that the authorized carrier would be made at least whole, maximizing their incentive to collect from slammers. By absolving consumer liability for the first 30 days and requiring the authorized carriers to refund any excess that they do collect from a slamming carrier, the Commission is eviscerating the incentives that Congress provided to the authorized carries.

Finally, I fear that the consumer absolution mechanism adopted today may add further complications by encouraging false claims of slamming. While I appreciate the expedited industry-driven process for evaluating slamming claims, informing customers that they may have 30 days of free service with the mere allegation of a slam will only encourage fraudulent claims of slamming. Moreover, it will necessitate increased costs to be borne by all consumers for either adjudicating those claims or providing free service to those claiming to be slammed. I cannot endorse such an outcome.

There are countless markets in the United States that work well for both consumers and businesses alike. The vast majority of these markets work on a common-law basis, without the striking level of government intervention found in this item. The Commission's decision today presents the extraordinary situation in which consumers recognize that a service has a price, willingly purchase that service, are satisfied with the service itself, and yet the federal government interferes to instruct the consumer not to pay for that service. Indeed, I can think of

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[575] 47 USCA Section 258.

no other industry in which a federal agency has decreed such an outcome by rule.

This form of supposedly free service is not cost-less. These costs are borne by legitimate carriers in the telephone industry. The long distance industry is extremely competitive and, according to one of the basic principles of economics, additional costs in a competitive industry are always reflected in higher prices. And these higher prices will be paid by all telephone consumers. That is an outcome that I see in conflict with the Telecommunications Act of 1996.

Excerpts from Selected FCC Orders

1st Bell South Louisiana

12. On November 24, 1997, the Louisiana Commission submitted its comments to this Commission concerning BellSouth's Louisiana application. In its comments, the Louisiana Commission reiterated its view that BellSouth should be granted interLATA authority, because it has satisfied the requirements of section 271. We note that, although the Louisiana Commission has addressed every checklist item, it has not included an analysis of the state of local competition in Louisiana, as the Commission has encouraged state commissions to perform.

29. The record does not support BellSouth's claim that the low flow-through rates are caused primarily by new entrants making mistakes on the orders they submit. BellSouth made the same argument in its South Carolina application. We rejected this claim in the BellSouth South Carolina Order because the record there did not support these claims. Specifically, we could not determine how many of the errors assigned by BellSouth to the actions of competing carriers resulted from BellSouth's failure to provide information, such as business rules, concerning how BellSouth's internal systems process orders. Given the lack of evidence presented by BellSouth, we find no reason to alter our prior conclusion that BellSouth has not met its burden of establishing that it is providing nondiscriminatory access, because it has failed to demonstrate that competing carriers are to blame for the high order rejection rates. In reaching this decision, we are not suggesting that BellSouth is responsible if the quality of work performed by the competing carrier's workforce is, indeed, inferior. BellSouth, however, has failed to provide us with such information and, therefore, it has failed to substantiate its claim that competing carriers are to blame for the low order flow-through rate.

2nd Bell South Louisiana

VI. CHECKLIST COMPLIANCE

49. We next consider whether BellSouth has fully satisfied the competitive checklist in section 271(c)(2)(B). In the sections below, we provide a detailed analysis of BellSouth's application with respect to each checklist item.

50. As discussed above, we recognize that BellSouth has made considerable progress in many areas to comply with the checklist requirements. We urge BellSouth to continue this work. There are important areas, however, where BellSouth fails to satisfy the requirements stated in the Commission's previous section 271 orders, including the BellSouth South Carolina Order. Each of our findings that BellSouth has not satisfied an individual item of the competitive checklist constitutes independent grounds for denying this application.

A. Analytical Framework

51. The analytical framework we use to assess the application is consistent with the approach established in the Commission's previous orders. As a general matter, we re-emphasize the Commission's conclusion in the Ameritech Michigan Order that the BOC applicant retains at all times the ultimate burden of proof that its application satisfies all of the requirements of section 271, even if no party comments on a particular checklist item.[1]

52. With respect to each checklist item, we first determine whether BellSouth has made a prima facie case that it meets the requirements of the particular checklist item.[2] A BOC must plead, with appropriate supporting evidence, facts which, if true, are sufficient to establish that the requirements of section 271 have been met.[3] Once the applicant has made such a showing, opponents must produce evidence and arguments to show that the application does not satisfy the requirements of section 271 or risk a ruling in the BOC's favor.[4] Because the Commission must accord substantial weight to the Department of Justice's evaluation of a section 271 application, if the Department of Justice concludes that a BOC has not satisfied the requirements of sections 271 and 272, the BOC must submit more convincing evidence than that proffered by the Department of Justice in order to satisfy its burden of proof.[5] We note that we will look to the state to resolve factual disputes wherever possible.[6] When resolving factual disputes, we use the "preponderance of the evidence" standard.[7]

53. We stress that, as an initial matter, we base our determination of whether a BOC has satisfied a checklist item on the BOC's evidence supporting its prima facie case, and not on the absence of comments opposing the BOC's showing on a particular issue. Where a BOC provides sufficient evidence to establish a prima facie case, however,

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[1] *Ameritech Michigan*, 12 FCC Rcd at 20568.

[2] *Id.*

[3] *Id.* at 20569. As the Commission has stated previously, a BOC's section 271 application must be complete on the day it is filed, and therefore, in assessing whether BellSouth has made a *prima facie* case, we limit our analysis to factual evidence proffered by BellSouth on the date of its application and evidence in its replies that is directly responsive to arguments raised by parties commenting on its application. *Id.* at 20570-75. *But see infra* paras. 367-68 (denial of AT&T Motion to Strike).

[4] *Id.* at 20569.

[5] *Id.*

[6] With respect to the present application, however, the state of Louisiana did not engage in a fact finding investigation.

[7] *Ameritech Michigan Order*, 12 FCC Rcd at 20568.

commenters opposing the application must provide evidence of their own to shift the burden of production back to the BOC.

54. To make a prima facie case that it is meeting the requirements of a particular checklist item under Track A, a BOC must demonstrate that it is providing access or interconnection pursuant to the terms of that checklist item.[8] The Commission has previously concluded that, to establish that it is "providing" a checklist item, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish the item upon request pursuant to a state-approved interconnection agreement or agreements that set forth prices and other terms and conditions for each checklist item, and that it is currently furnishing, or is ready to furnish, the checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality.[9]

55. As indicated above, BellSouth bases its application on the presence of a Track A competitor. In our assessment of each checklist item, therefore, we first examine whether BellSouth identifies an interconnection agreement with a competing provider of telephone exchange service described in section 271(c)(1)(A) under which it has a legal obligation to furnish that checklist item. BellSouth states that it is legally obligated to provide all 14 checklist items through both its state-approved interconnection agreements and its SGAT.[10]

56. We next consider, in our examination of each checklist item, whether BellSouth has provided sufficient evidence to demonstrate that it is furnishing, or ready to furnish, each checklist item as a practical matter. The evidence necessary to demonstrate compliance will vary depending on the individual checklist item. In certain circumstances, the BOC's assertion in its brief, supported by testimony from an officer of the company will suffice, whereas in other cases, we examine actual commercial usage and relevant performance data.[11] In situations where no actual commercial usage exists, we consider any carrier-to-carrier testing, independent third-party testing, and internal testing.[12] In situations where BellSouth provides access to a particular checklist item through a region-wide process, such as its OSS, we will consider both region-wide and

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[8] 47 U.S.C. § 271(c)(2)(B).

[9] *Ameritech Michigan Order*, 12 FCC Rcd at 20601-02.

[10] *See* BellSouth Application at 32.

[11] We stress that a BOC submitting factual evidence in support of its application bears the burden of ensuring that the significance of the evidence is readily apparent. *Ameritech Michigan*, 12 FCC Rcd at 20577. We further note that promises of future performance have no probative value in demonstrating present compliance with the requirements of section 271. *Id.* at 20573-74.

[12] *Id.* at 20618.

state specific evidence in our evaluation of that checklist item.[13] Although there is often more than one type of evidence that an applicant can use to meet its burden of proof, we hope that this order will assist future applicants by identifying particular types of evidence we find persuasive in assessing whether the BOC has complied with the checklist.

57. When considering commenters' filings in opposition to the BOC's application, we look for evidence that the BOC's policies, procedures, or capabilities preclude it from satisfying the requirements of the checklist item. Mere unsupported allegations in opposition will not suffice. Although anecdotal evidence may be indicative of systemic failures, isolated incidents may not be sufficient for a commenter to overcome a BOC's prima facie case. Moreover, a BOC may overcome such evidence by providing, inter alia, objective performance data demonstrating that it satisfies the statutory nondiscrimination requirement. We will also look favorably on BOC measures designed to correct problems promptly and to prevent similar problems in the future. While we will not hold the BOCs to a standard of perfection, we require that the BOCs establish methods to respond effectively to problems as they occur and to prevent similar failures in the future.

58. In this order, we conclude that BellSouth satisfies six checklist items and one subsection of a seventh checklist item. We conclude that BellSouth may incorporate by reference its showing on these checklist items in any future application for section 271 approval in Louisiana. BellSouth must, however, certify in the application that its actions and performance at the time are consistent with the showing upon which we base our determination that the statutory requirements for these checklist items have been met.[14] We expect that commenters will direct their arguments to any new information that BellSouth fails to satisfy these checklist items.

59. We emphasize that the evidentiary standards governing our review of section 271 applications are intended to balance our need for reliable evidence against our recognition that no finder of fact can expect proof to an absolute certainty. While we

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[13] *See BellSouth South Carolina Order*, 13 FCC Rcd at 593.

[14] Our conclusion that BellSouth may incorporate by reference its previous showing applies only to checklist items that we conclude BellSouth fully satisfies. For purposes of this determination, BellSouth may treat Section 271 (c)(2)(B)(vii), which has three subsections, as three individual checklist items. Accordingly, in any future application in Louisiana, BellSouth may incorporate by reference its showing in this proceeding for checklist item (vii)(I) 911 and E911 services. BellSouth may also incorporate by reference its showing in this proceeding for the following checklist items: (iii) poles, ducts, conduits, and rights of way; (viii) white pages directory listings for competing LECs' customers; (ix) telephone numbers for assignment to other carrier's customers; (x) databases and associated signaling necessary for call routing and completion; (xii) services or information necessary to allow a requesting carrier to implement local dialing parity; and (xiii) reciprocal compensation arrangements. BellSouth, however, must file a complete showing for every other checklist item.

continue to demand that BOCs demonstrate as thoroughly as possible that they satisfy each checklist item, the public interest and other statutory requirements, we reiterate that BOCs need only prove each element by a preponderance of the evidence, which generally means the "greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it."[15] Moreover, we emphasize that we are more concerned with the quality of information presented in an application than the quantity of information that is filed. While this and prior orders identify certain types of information we would find helpful in our review of section 271 applications, we reiterate that we remain open to approving an application based on other types of evidence if a BOC can persuade us that such evidence demonstrates nondiscriminatory treatment and other aspects of the statutory requirements. In addition, we underscore that we remain committed to working with the industry to clarify further the guidance we have given regarding how the BOCs may obtain section 271 approval. It is our firm belief that, by helping the industry understand what the BOCs must do to satisfy section 271, we will achieve most efficiently Congress' goal of simultaneously opening the BOCs' local exchange markets to competition while promoting long distance competition through BOC entry into that market.

References to Reasonably Foreseeable Demand

116. In any future application, we would find persuasive evidence showing that the flow-through rates for competing carriers' orders for resale services at reasonably foreseeable demand levels will be substantially the same as the flow-through rates for BellSouth's retail orders.[16] In the absence of such evidence, BellSouth has the burden of showing why its ordering systems for competing carriers nonetheless meet the nondiscriminatory standard, i.e., that its systems provide competing carriers with access to OSS functions that is on par with that which the BOC provides its own retail operations.[17]

139. In addition, we conclude that BellSouth has not adequately supported its claim that its EDI interface has sufficient capacity to meet reasonably foreseeable demand.[18] In support of that claim, BellSouth states that the EDI interface has

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[15] *Ameritech Michigan Order*, 12 FCC Rcd at 20568-69.

[16] *See* KMC Comments at 15.

[17] *Ameritech Michigan Order*, 12 FCC Rcd at 20567-70; *see* Department of Justice Evaluation at 35 (contending that "where the reported data has such numerous indications of deficient performance, BellSouth does not carry its burden by simply producing data and asserting that it shows adequate performance: BellSouth needs to discuss the results and, where apparent discrepancies exist, explain them"); ALTS Comments at 16; KMC Comments at 15.

[18] BellSouth Stacy Aff. at 99.

undergone internal testing, which incorporated recommendations by IBM,[19] and carrier to carrier testing.[20] BellSouth also states that it did not perform any internal testing of the EXACT interface because of the existence of actual commercial usage by interexchange carriers. It is unclear to what extent BellSouth's internal testing and carrier-to-carrier testing of EDI was for ordering resale services versus UNEs.[21]

144. We expect that, in any future application, BellSouth will demonstrate that the ordering process it offers to competitive LECs meets the nondiscriminatory requirement. In particular, BellSouth should provide evidence that it offers ordering functionality for UNEs, including complex directory listings, split accounts, and number portability, that provides an efficient competitor a meaningful opportunity to compete based on reasonably foreseeable demand.

192. Provisioning of Unbundled Local Loops. BellSouth fails to make a prima facie case that it provides unbundled loops in a nondiscriminatory manner. In particular, BellSouth fails to demonstrate that it provides access for the provisioning and ordering of unbundled local loops sufficient to allow an efficient competitor a meaningful opportunity to compete.[22] Furthermore, BellSouth fails to demonstrate that it can provide loop cutovers based on reasonably foreseeable demand in a timely and reliable fashion.[23]

225. Furthermore, BellSouth must ensure that orders containing a code indicating the desired routing of calls are efficiently processed. AT&T contends that BellSouth's insistence on adding routing information to customer orders causes AT&T's orders to require manual intervention.[24] We have repeatedly recognized that manual

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[19] *Id.* at 99-100. IBM reported in May 1997, "The test approach is in the construction phase. With the anticipated refinements, it appears adequate. The data gathering, data points, and report layouts are in the design phase and appear acceptable. Given the schedule constraints, alternative tools are not recommended at this time."

[20] *Id.* at 102.

[21] *See* BellSouth Stacy Aff., Ex. WNS-33. BellSouth conducted end-to-end testing with MCI from September 9, 1997 to December, 11, 1997, for error-free purchase orders or local service, mechanized firm order completion notices, and mechanized completion notices. It is unclear from this document whether the test included resale orders, UNE orders, or whether the test was successful.

[22] *BellSouth South Carolina Order*, 13 FCC Rcd at 594.

[23] *See Ameritech Michigan Order*, 12 FCC Rcd at 20601-20602, 20618.

[24] AT&T Hamman Aff. at para. 35. Initially BellSouth informed AT&T to include the correct line class code in the remarks section of the Local Service Request (LSR). This caused the orders, otherwise capable of mechanical processing, to fall out for manual processing. BellSouth then informed AT&T to use a "feature" field on the LSR. That practice also caused the orders to drop out for manual processing. According to AT&T, at the time this application was filed, BellSouth still had not informed AT&T how to

intervention results in less efficient processing.[25] In future applications, we expect Bellsouth to demonstrate that, if it requires specific information for selective routing that results in manual intervention in the processing of such orders, BellSouth will be able to process such orders in a timely manner and in volumes reflecting reasonably foreseeable demand. Of course, the easiest way for BellSouth to make this demonstration is to ensure that orders that include selective routing information do not require manual intervention.

1st Michigan-Ameritech

30. Under section 271(d)(2)(B), the Commission "shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c)."[26] In requiring the Commission to consult with the states, Congress afforded the states an opportunity to present their views regarding the opening of the BOCs' local networks to competition. In order to fulfill this role as effectively as possible, state commissions must conduct proceedings to develop a comprehensive factual record concerning BOC compliance with the requirements of section 271 and the status of local competition in advance of the filing of section 271 applications. We believe that the state commissions' knowledge of local conditions and experience in resolving factual disputes affords them a unique ability to develop a comprehensive, factual record regarding the opening of the BOCs' local networks to competition. The state commission's development of such a record in advance of a BOC's application is all the more important in light of the strict, 90-day deadline for Commission review of section 271 applications. Most state commissions, recognizing the importance of their role in the section 271 process, have initiated proceedings to develop a comprehensive record on these issues.[27] Others,

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place orders for customized routing in a manner that would permit the order to be mechanically processed. AT&T Hamman Comments at para. 35.

[25] *See First BellSouth Louisiana Order*, 13 FCC Rcd at 6261-62; *Ameritech Michigan Order*, 12 FCC Rcd at 20648.

[26] 47 U.S.C. § 271(d)(2)(B). Subsection (c) states that a Bell operating company meets the requirements of paragraph (c)(1) if it has, for each state for which authorization is sought: (A) entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service to residential and business subscribers; or (B) a statement of the terms and conditions that the company generally offers to provide such access and interconnection, which has been approved or permitted to take effect effect by the State commission under section 252(f). *Id.* § 271(c)(1). Subsection (c) further states that a Bell operating company meets the requirements of paragraph (c)(2) if, within the state for which authorization is sought, the "[a]ccess or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of [the competitive checklist]." *Id.* § 271(c)(2).

[27] *See State Regulators Call for Prompt InterLATA Reviews*, Telecommunications Reports, Feb. 17, 1997, at 7 (reporting that three state utility commissioners had urged other state utility commissioners to be

however, have not yet initiated such proceedings, or have undertaken only a cursory review of BOC compliance with section 271. We note that the Act does not prescribe any standard for Commission consideration of a state commission's verification under section 271(d)(2)(B). The Commission, therefore, has discretion in each section 271 proceeding to determine what deference the Commission should accord to the state commission's verification in light of the nature and extent of state proceedings to develop a complete record concerning the applicant's compliance with section 271 and the status of local competition. We will consider carefully state determinations of fact that are supported by a detailed and extensive record, and believe the development of such a record to be of great importance to our review of section 271 applications. We emphasize, however, that it is our role to determine whether the factual record supports a conclusion that particular requirements of section 271 have been met.

34. We note, however, that the Michigan Commission's consultation did not include an analysis of the state of local competition in Michigan. This information is not germane to the competitive checklist, which is the one subject on which the Commission is required to consult with the state commissions. But this information will be valuable to our assessment of the public interest, and it is information which the state commissions are well-situated to gather and evaluate. Accordingly, in future applications, we suggest that the relevant state commission develop, and submit to the Commission, a record concerning the state of local competition as part of its consultation. In particular, state commissions should, if possible, submit information concerning the identity and number of competing providers of local exchange service, as well as the number, type, and geographic location of customers served by such competing providers. We recognize that carriers may view much of this information as proprietary and that different states have different procedures for obtaining and handling such information. Nevertheless, we encourage states to develop and submit to the Commission as much information as possible, consistent with state procedural requirements.

39. These BOCs fail, however, to quote completely the relevant Joint Explanatory Statement language. The quoted passage goes on specifically to state that, "[i]n making an evaluation, the Attorney General may use . . . (3) any other standard the Attorney General deems appropriate."[28] This passage does not limit such other standard to an antitrust standard. Thus, read in its entirety, the legislative history cited by these BOCs does not support their position that the Department of Justice's evaluation must be

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prepared promptly to review BOC compliance with the requirements of section 271 so that the state utility commissions could fulfill the "crucial role assigned to [them]" by the 1996 Act, and comply with the Commission's schedule for reviewing section 271 applications) (citing Letter of Kenneth McClure, Missouri Public Service Commissioner; Cheryl L. Parrino, Chairman of the Wisconsin Public Service Commission; and Joan H. Smith, Oregon Public Utilities Commissioner, to various state public utilities commissioners (Jan. 24, 1997)).

[28] *See* Joint Explanatory Statement at 149.

limited solely to the competitive effects of BOC entry on the interLATA market, or even to antitrust-related matters. It is a fundamental canon of statutory construction that the legislative history of a statute cannot undermine the plain meaning of a statute unless it clearly and unequivocally expresses a legislative intent contrary to that language.[29] Because we find the legislative history does not clearly and unequivocally manifest an intent by Congress to limit the Commission's reliance on the Attorney General's evaluation to the competitive effects of BOC interLATA entry on long distance competition, contrary to the plain language of section 271, we reject these BOCs' interpretation of section 271(d).[30]

Footnote [10] 47 U.S.C. § 271(d)(1). For purposes of this proceeding, we adopt the definition of the term "in-region state" that is contained in 47 U.S.C. § 271(i)(1). We note that section 271(j) provides that a BOC's in-region services include 800 service, private line service, or their equivalents that terminate in an in-region state of that BOC and that allow the called party to determine the interLATA carrier, even if such services originate out-of-region. *Id.* § 271(j). The 1996 Act defines "interLATA services" as "telecommunications between a point located in a local access and transport area and a point located outside such area." *Id.* § 153(21). Under the 1996 Act, a "local access and transport area" (LATA) is "a contiguous geographic area (A) established before the date of enactment of the [1996 Act] by a [BOC] such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area,

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[29] *Burlington No. R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but '[i]n the absence of a "clearly expressed legislative intention to the contrary," the language of the statute itself "must ordinarily be regarded as conclusive."'") (citations omitted); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987).

[30] The remarks of individual members of Congress during floor debates, such as those relied on by these BOCs to support their contention that the Commission's reliance on the Department of Justice is narrowly circumscribed, are entitled to less weight than other types of legislative history. *See Allen v. Attorney General of State of Maine*, 80 F.3d 569, 575 (1st Cir. 1996) ("As a general matter, courts must be chary of overvaluing isolated comments by individual solons.") (citations omitted); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 537 (7th Cir. 1991); *In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988) ("To the extent that legislative history may be considered, it is the official committee reports that provide the authoritative expression of legislative intent. . . . Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted for the bill.") (citations omitted). Thus, we generally do not rely on floor statements of individual members of Congress to ascertain the meaning of an ambiguous statutory provision. In any event, in this case, we note that floor statements by other legislators support a conclusion contrary to that posited by these BOCs. *See, e.g.*, 142 Cong. Rec. S698 (daily ed. Feb. 1, 1996) (Statement of Sen. Kerrey) ("In conjunction with [its] evaluation, the Attorney General may submit any comments and supporting materials under any standard she believes appropriate. Through its work in investigating the telecommunications industry and enforcing the MFJ, DOJ has important knowledge, evidence, and experience that will be of critical importance in evaluating proposed long-distance entry -- which, as I indicated earlier, requires an FCC finding that such entry is in the public interest, and that a facilities-based competitor is present. On both of these issues, the DOJ's expertise in telecommunications and competitive issues generally should be of great value to the FCC.").

or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a [BOC] after such date of enactment and approved by the Commission." *Id.* § 153(25). LATAs were created as part of the Modification of Final Judgement's (MFJ's) "plan of reorganization." *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983). Pursuant to the MFJ, "all [BOC] territory in the continental United States [was] divided into LATAs, generally centering upon a city or other identifiable community of interest." *United States v. Western Elec. Co.*, 569 F. Supp. 990, 993-94 (D.D.C. 1983).

44. In the first instance, therefore, a BOC must present a *prima facie* case in its application that all of the requirements of section 271 have been satisfied.[31] Once the applicant has made such a showing, opponents of the BOC's entry must, as a practical matter, produce evidence and arguments necessary to show that the application does not satisfy the requirements of section 271 or risk a ruling in the BOC's favor.[32] We emphasize, however, that the BOC applicant retains at all times the ultimate burden of proof that its application satisfies section 271.

References to Reasonably Foreseeable Demand

110. We agree with Ameritech that "provide" is commonly understood to mean both "furnish" and "make available."[33] Therefore, we must look to the statutory context in which the term is used to determine its precise meaning in this instance. For the reasons discussed below, we conclude that a BOC "provides" a checklist item if it actually furnishes the item at rates and on terms and conditions that comply with the Act or, where no competitor is actually using the item, if the BOC makes the checklist item

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[31] Thus, a BOC must plead, with appropriate supporting evidence, facts which, if true, are sufficient to establish that the requirements of section 271 have been met. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22070.

[32] *See, e.g., Hale v. Dep't of Transp., FAA*, 772 F.2d 882, 885 (Fed. Cir. 1985) ("Proving a prima facie case compels the conclusion sought to be proven unless evidence sufficient to rebut the conclusion is produced."). *See also Non-Accounting Safeguards Order*, 11 FCC Rcd at 22072. We believe that shifting the burden of production once a BOC has presented a *prima facie* case that its application satisfies section 271 is appropriate, because parties opposing a BOC's application have the greatest incentive to produce, and generally have access to, information that would rebut the BOC's case. In addition, absent such a shift in the burden of production, a BOC applicant would be in the untenable position of having to prove a negative (that is, of coming up with, and rebutting, arguments why its application might not satisfy the requirements of section 271). We emphasize, again, that, although the burden of *production* on a particular issue may shift to the opponents of BOC entry, the ultimate burden of *persuasion* never shifts from the BOC to the opponents of BOC entry.

[33] For instance, *The American Heritage College Dictionary* defines "provide" alternately as "[t]o furnish; supply" and "[t]o make available; afford." *The American Heritage College Dictionary* at 1102 (3d ed. 1993).

available as both a legal and a practical matter.[34] Like the Department of Justice, we emphasize that the mere fact that a BOC has "offered" to provide checklist items will not suffice for a BOC petitioning for entry under Track A to establish checklist compliance.[35] To be "providing" a checklist item, a BOC must have a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item.[36] Moreover, the petitioning BOC must demonstrate that it is presently ready to furnish each checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality.[37] For instance, the BOC may present operational evidence to demonstrate that the operations support systems functions the BOC provides to competing carriers will be able to handle reasonably foreseeable demand volumes for individual checklist items. As discussed below, such evidence may include carrier-to-carrier testing, independent third-party testing, and internal testing of operations suppport systems functions, where there is no actual commercial usage of a checklist item.[38]

138. Under the second part of the inquiry, the Commission will examine operational evidence to determine whether the OSS functions provided by the BOC to competing carriers are actually handling current demand and will be able to handle reasonably foreseeable demand volumes. We agree with the Department of Justice that the most probative evidence that OSS functions are operationally ready is actual

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[34] *See* Department of Justice SBC Oklahoma Evaluation at 23.

[35] *See id.*; *see also* Brooks Fiber Comments at 3-4.

[36] *See* Department of Justice SBC Oklahoma Evaluation at 23; *see also* Brooks Fiber Comments at 2. We note that we are not at this time determining whether the agreements must contain prices adopted in permanent cost proceedings, as opposed to interim prices, in order to establish checklist compliance. The Department of Justice expressed concern that, at the time Ameritech filed its application, the prices in Michigan were for the most part still interim and had not been finally determined to be cost-based. *See* Department of Justice Evaluation at 41-43. Numerous parties also raised this issue, urging the Commission not to rely on interim prices to establish checklist compliance. *See, e.g.*, ALTS Comments at 20-21; ALTS Reply Comments at 13-14; Brooks Fiber Comments at 10; CompTel Comments at 14-16; KMC Comments at 4-9; MCI Comments at 23-25; NCTA Reply Comments at 12-13; Sprint Reply Comments at 4; TRA Comments at 36. We need not resolve this issue in the context of the Ameritech application, because the Michigan PSC has approved final prices for Michigan, as stated above. *See supra* note 152. We note that a number of other states have issued orders adopting a cost methodology for permanent prices, and we expect additional states to issue similar decisions shortly.

[37] *See* Department of Justice SBC Oklahoma Evaluation at 23; *see also* Brooks Fiber Comments at 12; TRA Comments at 21 (stating that checklist items should be ubiquitously available in sufficient capacity with sufficient operational support).

[38] *See infra* para. 0.

commercial usage.[39] Carrier-to-carrier testing, independent third-party testing, and internal testing also can provide valuable evidence pertaining to operational readiness, but are less reliable indicators of actual performance than commercial usage.[40] We recognize that, although a BOC has a duty to provide items on the checklist to competing carriers, this duty does not include the duty to ensure that competing carriers are currently using each and every OSS function.[41] As long as the BOC can demonstrate that the reason competing carriers are not currently using a particular OSS function is because of the competing carriers' business decisions, rather than the lack of the practical availability of the necessary OSS functions, the Commission may consider carrier-to-carrier testing, independent third-party testing, and internal testing, without commercial usage, as evidence of commercial readiness.

161. As discussed above, we find that commercial usage is the most probative type of empirical evidence when considering whether a BOC has met its burden of demonstrating compliance with this checklist item.[42] Absent data on commercial usage, we will examine carefully the results of carrier-to-carrier testing.[43] With regard to Ameritech's OSS functions for the ordering, provisioning and billing of combinations of network elements, we note that carrier-to-carrier testing began after the submission of Ameritech's application and even now has not yet been completed. Evidence in the record clearly indicates that a number of competing carriers, prior to the filing of Ameritech's application, sought to develop and test the necessary OSS functions to order, provision, and bill combinations of network elements.[44] Under such circumstances, we are unwilling to make a decision, based only on evidence relating to internal testing, regarding the readiness of Ameritech's OSS functions to support the provision of combinations of network elements. Given the demand by competing carriers to purchase combinations of network elements, we would expect to examine evidence other than mere internal testing results in any future section 271 application. We would expect Ameritech to demonstrate, at a minimum, that both individual and combinations of network elements can be ordered, provisioned, and billed in an efficient, accurate, and

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[39] *See* Department of Justice SBC Oklahoma Evaluation at 29-30.

[40] With regard to third-party evaluation, see *infra* Section VI.C.7.

[41] *See* discussion of the meaning of "provide" *supra* Section VI.A.

[42] *See supra* para. 0.

[43] *Id.*

[44] *See, e.g.*, AT&T Comments, Vol. III.E, Bryant Aff. at 17-28; MCI Comments, Exh. G, Sanborn Aff. at 13-14; Letter from Linda Oliver, Counsel for LCI International Telecom Corp., to William F. Caton, Acting Secretary, Federal Communications Commission (July 28, 1997).

timely manner, and that its operations support systems supporting such functions are designed to accommodate both current demand and projected demand of competing carriers.[45]

199. We conclude that Ameritech's OSS functions for ordering and provisioning must be able to handle reasonable fluctuations in service orders by competing carriers as well as reasonably foreseeable general increases in ordering volumes. This is especially true when a short-term surge in orders does not result in the total number of orders exceeding or even approaching Ameritech's stated capacity. We find that Ameritech's inability to handle adequately AT&T's increase in order volume indicates that Ameritech has not demonstrated that its systems are capable of handling the order volumes and fluctuations reasonably expected in a competitive marketplace.[46] Our concern is heightened by the fact that Ameritech handles OSS functions on a region-wide basis from a single location. As more competing carriers enter the local markets in each state in Ameritech's region, we expect order volumes to continue to be relatively volatile. In any future application, we would expect to see data indicating that Ameritech has processed in a timely fashion orders falling within the range of its stated capacity.

1st Bell South South Carolina

27. Finally, we are mindful of the fact that the South Carolina Commission has found that BellSouth does comply with the competitive checklist and, as noted, believes that BellSouth's entry into the long distance market in that state is in the public interest. We must respectfully disagree. In giving substantial weight to the Department of Justice's evaluation, as required by Congress, that BellSouth's market is not open to competition, and in conducting our statutorily required independent assessment, we reach a different conclusion. We must also respectfully disagree with the South Carolina Commission's contention that we should not consider any new issues or facts that were not presented in the state commission proceeding.[47] Because it is the Commission's statutory duty to determine whether the requirements of section 271 have been satisfied, the Commission is not limited to considering only the issues and facts that were presented

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[45] *See supra* Section VI.C.3.

[46] We note that Ameritech represents in its reply that, as order volumes increased in June, it received 9,100 orders during the week of June 2nd, nearly 10,500 orders during the week of June 9th, and almost 23,500 orders during the week of June 23rd. In addition, Ameritech asserts that, on June 26th, it processed over 7,300 orders in a single day. *See* Ameritech Reply Comments at 6, and Vol. 5R.7, Gates and Thomas Reply Aff. at 12-13. As discussed above, we give no weight to new evidence that pertains to events occurring after comments were filed, and we only consider evidence that pertains to events occurring between the date an application is filed and the date comments are filed when such evidence is directly responsive to arguments or evidence presented in comments. *See supra* Section IV.B.1.

[47] South Carolina Commission Comments at 4; South Carolina Commission Reply Comments at 2, 10, 12.

in the state commission proceeding.[48] We find no basis in the statute to justify our refusal to consider all information that is pertinent to our evaluation of an application. On the other hand, we emphasize that parties should make every effort to present their views to the state commission in the first instance, where such views can be adequately addressed by other interested parties and subjected to cross-examination.

78. As explained below, this conclusion is consistent with the standard set forth in the Ameritech Michigan Order for checklist items that have not been requested. In the Ameritech Michigan Order, the Commission addressed the meaning of "providing access and interconnection" pursuant to the competitive checklist as required under sections 271(c)(2)(A) and 271(d)(3)(A)(i) (i.e., for Track A). Under these provisions, the BOC must show that it "is providing access and interconnection" and that it "has fully implemented the competitive checklist."[49] The Commission concluded that "a BOC 'provides' a checklist item if it actually furnishes the item at rates and on terms and conditions that comply with the Act."[50] Alternatively, the Commission concluded that, where no competitor is actually using the item, the BOC must show that it makes the checklist item available "as both a legal and practical matter."[51] To be "providing" a checklist item, "a BOC must have a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item."[52] In addition, the BOC must demonstrate that it is "presently ready to furnish each checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality."[53] Evidence of actual commercial usage of a checklist item is most probative, but a BOC may also submit evidence such as carrier-to-carrier testing, independent third party testing, and internal testing to demonstrate its ability to provide a checklist item.[54]

109. The evidence in the record in fact suggests that the significant number of order rejections cannot be attributed solely to new entrants. We note that every competing carrier attempting to use BellSouth's EDI interface is experiencing high order

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[48] A number of commenters agree that the Commission must make its own independent findings and can use evidence outside that presented in the state commission section 271 proceeding. *See, e.g.*, ACSI Comments at 10 n.35; ALTS Reply Comments at 4-8; CFA Reply Comments at 5-7, 41; Sprint Comments at 4-5; WorldCom Reply Comments at 16-17.

[49] 47 U.S.C. §§ 271(c)(2)(A), 271(d)(3)(A)(i).

[50] *Ameritech Michigan Order* at para. 110.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

error rates.[55] Indeed, if we assume that BellSouth's analysis of the order rejection rate is correct, it shows that competing carriers' error rates actually increased from July to August.[56] Moreover, BellSouth appears to acknowledge that some of the errors are attributable to its systems. It asserts that actions it took to correct nine categories of "internally caused error conditions" were responsible for the reduction of the order rejection rate from July to August.[57]

110. Even if we were to assume that the high error rates were caused primarily by competing carriers' mistakes, we still could not conclude that BellSouth has met its burden of demonstrating that it is providing nondiscriminatory access. Because BellSouth has not provided information explaining the causes of order errors, as discussed above, we cannot make a judgment regarding how many of the errors assigned by BellSouth to the actions of competing carriers result from BellSouth's failure to provide information, such as business rules, concerning how BellSouth's internal systems process orders. As discussed in the Ameritech Michigan Order, business rules refer to the protocols that a BOC uses to ensure uniformity in the format of orders.[58] Commenters contend that errors are caused because carriers were not properly informed of BellSouth's business rules.[59] The Department of Justice concurs and asserts that BellSouth is not "adequately assisting competing carriers to understand how to implement and use all of

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[55] Public Ex. WNS-41; *see* MCI King Decl. at para. 135.

[56] Public Ex. WNS-41. BellSouth provides data on the number of order errors measured against the total number of orders supported by mechanized processing. As discussed above, BellSouth also asserts that a certain percentage of those errors are due to errors by competing carriers. Based on the number of errors that BellSouth has assigned to competing carriers, we calculate that the percentage of errors committed by competing carriers, measured as a percentage of the total orders actually sent by competing carriers, increased from 30 percent in July to 51 percent in August. *Id.*

For both July and August, BellSouth has provided the Commission with the number of orders eligible for mechanized order processing (*i.e.*, order flow through), the number of orders that actually did flow through its ordering systems, and the number of orders that BellSouth asserts would have flowed through its systems if there were no "CLEC caused input errors." *See id.* Although BellSouth has provided aggregate data for carriers using both the EDI and LENS interfaces for ordering, as discussed above, we look only to the data for those carriers using the EDI interface. *See supra* note 306. Based on these numbers, we calculated the number of orders that BellSouth claims contained "CLEC caused input errors." Our final calculation, for each month, was to divide the number of competing carriers' orders containing "CLEC caused input errors" by the total number of competing carriers' orders eligible for order flow through. Therefore, in July, 1997, for the total number of orders sent by competing carriers, BellSouth claims that competing carriers caused errors for 30 percent of the total, and in August, 1997, BellSouth claims that competing carriers caused errors for 51 percent of the total.

[57] BellSouth Stacy OSS Aff. at para. 112.

[58] These protocols define valid relationships in the creation and processing of orders, as well as other interactions involved in the BOC's provision of OSS functions. *Ameritech Michigan Order* at para. 137 n.335.

[59] *See e.g.*, WorldCom Comments at 7; AT&T Comments at 29-30.

the OSS functions available to them."[60] Both the Department of Justice and competing carriers specifically cite BellSouth's failure to provide sufficient information concerning BellSouth's "internal editing and data formatting requirements" necessary for competing carriers' orders to be successfully processed through both BellSouth's interface and its internal systems.[61]

111. It is, of course, critical that BellSouth provide to competing carriers BellSouth's business rules concerning how its internal systems and databases process an order submitted via the EDI interface so that competing carriers can take affirmative steps to reduce potential errors. The Commission previously has concluded that BOCs have an affirmative obligation to provide such information and support to competing carriers "with all of the information necessary to format and process their electronic requests so that these requests flow through the interfaces, the transmission links,[62] and into the legacy systems as quickly and efficiently as possible."[63] Such information must include all internal business rules, and ordering codes used by a BOC that competing carriers need to place orders through the system efficiently.[64] We find that the evidence reasonably supports a conclusion that some of the competing carriers' errors were caused by BellSouth's failure to provide business rules and other pertinent information.

144. BellSouth contends that it implemented mechanized order processing for the four types of unbundled network elements described above on October 6, 1997.[65] Although we commend BellSouth for taking steps to improve the efficiency of its systems, we note that implementation of mechanized processing of orders for these unbundled network elements was instituted after the date BellSouth filed its application.[66] We expect that, in any future application, BellSouth will provide a

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[60] Department of Justice Evaluation, App. A at A-25 to A-26.

[61] *Id.*, App. A at A-26; AT&T Bradbury Aff. at paras. 140-70, 208.

[62] Transmission links refer to those intermediate systems a BOC has deployed to translate or process orders received via an interface, such as BellSouth's EDI interface, to a format that can be understood and processed by the BOC's internal legacy systems. *See Ameritech Michigan Order* at paras. 134-35. As discussed above, BellSouth employs the LEO and LESOG systems, and its LCSC personnel to process orders to a format that its legacy systems, beginning with its SOCS system, can understand and process to completion.

[63] *Id.* at para. 137.

[64] *Id.* Ordering codes include such information as universal service ordering codes (USOCs) and field identifiers (FIDs). *Id.* at para. 137 n.336.

[65] BellSouth Stacy OSS Aff. at para. 58; BellSouth Stacy OSS Reply Aff. at para. 51. BellSouth asserts that manual processing was sufficient for the low volume of unbundled network element orders placed by competing carriers up to early October. BellSouth Reply Comments at 45.

[66] Consistent with the Commission's decision in the *Ameritech Michigan Order*, we must analyze BellSouth's operations support system at the time of the application. Given the statutory time constraints, we

detailed explanation of the actions it has undertaken, as of the date of filing, to transition to an automated process, and will demonstrate that it is able to process orders for and provision unbundled network elements in a timely and accurate manner at both current and projected levels of demand from competing carriers.[67]

146. BellSouth states that, although it will generally deliver unbundled network elements to a new entrant's collocation space, it will continue to offer certain elements in combination, because, as BellSouth notes, some of these elements technically cannot be separated.[68] BellSouth, however, submits no evidence of its ability to provide OSS functions that support the ordering and provisioning of these combinations of network elements. Indeed, BellSouth states in its affidavits that:

> The changes BellSouth would have to make to our electronic interfaces to accommodate [unbundled network element (UNE)] combinations would include modifying them to accept a new UNE order type, and substantial inventory and billing changes, which would be required to allow the systems to provision UNE combinations as resale (since they replicate resale services), but inventory and bill them as UNEs.[69]

BellSouth further indicates that it has not yet undertaken development of OSS that could process orders for combinations of network elements.[70] In addition, we are troubled by allegations in the record with respect to BellSouth's ability to coordinate orders for separate unbundled network elements so that a carrier may combine them.[71] We expect that, in future applications, BellSouth will submit evidence to demonstrate that both individual network elements and those elements that BellSouth offers in combination can be ordered and provisioned in an efficient, accurate, and timely manner, and that its operations support systems are

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do not consider post-filing measures. *See Ameritech Michigan Order* at paras. 152-53.

[67] *See id.* at para. 161.

[68] *See infra* para. 191; *see also* BellSouth Reply Comments, App. A, Tab 9, Reply Affidavit of Alphonso J. Varner (BellSouth Varner Reply Aff.) at para. 21 (listing unbundled network elements that BellSouth will provide in combination).

[69] BellSouth Stacy OSS Aff. at para. 60.

[70] *Id.*

[71] A number of carriers contend that BellSouth has not adequately coordinated the cutover of loops with competing carriers, and, as a result, customers have had their service disrupted for significant periods of time. ACSI Comments at 31-32 & App. A, Tab 1, Affidavit of James C. Falvey (ACSI Falvey Aff.) at para. 32; ALTS Comments at 24-25; Sprint Closz Aff. at paras. 65-74; WorldCom Comments at 8; WorldCom Ball Decl. at para. 18. When a competing carrier orders a loop and unbundled local switching, the new entrant and BellSouth would need to coordinate these orders and the cutover of the loop so that the new entrant's customer does not lose service for a long period of time.

> designed to accommodate both current and projected demand for unbundled network elements and combinations of unbundled network elements.[72]

We have burden of coming forth with evidence even as to errors made by CLECs. We must show it is CLEC's messing up

[72] As discussed below, although the Commission's rules do not require BellSouth to offer combinations of unbundled network elements, BellSouth states that it offers certain network elements in combination. *See infra* para. 191; *see also* BellSouth Varner Reply Aff. at para. 21 (listing unbundled network elements that BellSouth will provide in combination).

111. Moreover, BellSouth does not respond in this application to certain flow-through issues raised in previous orders.[73] BellSouth again presents aggregate flow-through data for both EDI and LENS orders, even though, as in previous applications, BellSouth relies only on its EDI interface to demonstrate that it provides nondiscriminatory access to ordering and provisioning.[74] On reply, however, BellSouth provides disaggregated flow-through data for LENS and EDI. Although interested parties did not have an opportunity to comment, it appears that this data may not represent a sound comparison of competing carriers' flow-through relative to BellSouth's retail flow-through.[75] In the *BellSouth South Carolina Order*, we "urge[d] BellSouth . . . in future applications, to sufficiently disaggregate its data to permit analysis of the performance of those interfaces upon which it is expressly relying on in its application."[76] In addition, BellSouth adjusts its flow-through data upward to account for competing carriers' errors based on its own analysis of the error type and party at fault but provides no evidentiary support for its conclusion.[77] BellSouth provides further data on carrier errors on reply. Given the complexity of this data and the fact that interested parties have not had an opportunity to address it, we exercise our discretion to accord the information minimal weight.[78] We do not hold a BOC accountable for flow-through problems that are attributable to competing carriers' errors.[79] In the *BellSouth South Carolina Order*, however, we rejected BellSouth's assertion that competing carriers' errors are the cause of its low EDI flow-through rates because BellSouth "d[id] not provide credible evidence or explanation" to support its assertion.[80] In this application, BellSouth again fails to provide supporting data or documentation to substantiate its conclusions until the reply

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[73] *See* Department of Justice Evaluation at 27 n.51; CompTel Comments at 7-9; e.spire Comments at 29; ALTS Reply at 4.

[74] *See* AT&T Comments at 42; BellSouth Stacy Perf. Meas. Aff., Ex. WNS-3 (Report: Percent Flow Through Service Requests (Detail)).

[75] For example, BellSouth adjusts its calculation of flow-through for competing carriers by excluding: (1) complex orders; and (2) competing carriers' errors without sufficient timely explanation. BellSouth Stacy OSS Reply Aff. at paras. 62-64; BellSouth Stacy Perf. Meas. Reply Aff. at para. 21, Exs. WNSPM Reply - 5a, -5b.

[76] *BellSouth South Carolina Order*, 13 FCC Rcd at 595-96 n.306; *see* Department of Justice Evaluation at 31.

[77] BellSouth Stacy OSS Aff. at para. 121; *see* AT&T Comments at 43; AT&T Bradbury Aff. at paras. 245-48; MCI Comments at 48-49; MCI Green Aff. at paras. 158-59.

[78] BellSouth Stacy Perf. Meas. Reply Aff., Exs. WNSPM Reply - 5a, -5b.

[79] *See BellSouth South Carolina Order*, 13 FCC Rcd at 603; *First BellSouth Louisiana Order*, 13 FCC Rcd at 6263-64.

[80] *BellSouth South Carolina Order*, 13 FCC Rcd at 603; *First BellSouth Louisiana Order*, 13 FCC Rcd at 6263-64.

round, despite our directions in the *BellSouth South Carolina Order* that BellSouth provide such information.[81] Moreover, the data previously filed in this proceeding show that all carriers using the EDI interface are experiencing low flow-through rates.[82] As in previous orders, we are unable to accept BellSouth's claims regarding competing carriers' errors in the absence of persuasive evidence to support such claims.[83]

112. BellSouth's own data indicate that in a significant number of cases, the failure of orders to flow through BellSouth's order processing systems cannot be attributed solely to the errors of competing carriers.[84] Even if we accept BellSouth's analysis of competing carriers' errors, the data show that a significant number of EDI orders drop out for manual processing due to other reasons.[85] We describe the flow-through data for one competing carrier, identified as "Carrier No. 9," to illustrate.[86] BellSouth's flow-through data for May 1998 show that it received 622 EDI orders from competing carrier No. 9, 18 of which were automatically rejected.[87] These 18 automatically rejected orders are excluded from the flow-through calculation.[88] Of the remaining 604 orders that BellSouth determined are "valid orders," 170 orders flowed through BellSouth's systems and, according to BellSouth, 67 orders dropped out for manual processing due to competing carriers' errors. In other words, 367 of 604 valid orders dropped out for manual processing for reasons other than the competing carrier's errors, producing a BellSouth-calculated flow-through rate of 31.6 percent.[89] As noted

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[81] *BellSouth South Carolina Order*, 13 FCC Rcd at 599-600; *First BellSouth Louisiana Order*, 13 FCC Rcd at 6263-64; *see* AT&T Comments at 43; AT&T Bradbury Aff. at paras. 245-48; CompTel Comments at 8; e.spire Comments at 30; KMC Comments at 15; MCI Comments at 48-49; MCI Green Aff. at paras. 158-59; *see also* Sprint Closz Aff. at paras. 47-48 (arguing that order errors "may not be entirely due to human error," but may instead reflect BellSouth legacy system edits "which have not been properly documented or communicated to [competing carriers]").

[82] BellSouth Stacy Perf. Meas. Aff., Ex. WNS-3 (Report: Percent Flow Through Service Requests (Detail)).

[83] *BellSouth South Carolina Order*, 13 FCC Rcd at 599-600; *First BellSouth Louisiana Order*, 13 FCC Rcd at 6263-64.

[84] *See* AT&T Comments at 43; AT&T Bradbury Aff. at para. 247; MCI Comments at 48-49.

[85] *See* AT&T Comments at 42-43; e.spire Comments at 30.

[86] For confidentiality purposes, BellSouth's filing does not identify carriers by name. *See* BellSouth Stacy Perf. Meas. Aff., Ex. WNS-3 (Report: Percent Flow-Through Service Requests (Detail)).

[87] *See* BellSouth Stacy Perf. Meas. Aff., Ex. WNS-3 (Report: Percent Flow-Through Service Requests (Detail)).

[88] See note . *supra*.

[89] *See* BellSouth Stacy Perf. Meas. Aff., Ex. WNS-3 (Report: Percent Flow-Through Service Requests (Detail)). BellSouth calculates this figure of 31.6 percent by adjusting for competing carriers'

above, the flow-through rates when BellSouth representatives place an order for their own retail operations are 96 percent for residential services and 82 percent for business services. BellSouth itself attributes the significantly lower flow-through rates for competing carriers to causes other than the competitors' errors.[90] The reasons for manual processing could include BellSouth-caused errors or a decision by BellSouth not to provide electronic processing for a particular order type.[91] In any event, these 367 manually processed orders are a substantial factor in the low EDI flow-through rate experienced by this particular carrier, and by BellSouth's own analysis, the manual processing of these orders is not attributable to errors by the competing carrier.

113. BellSouth has failed to correct other deficiencies previously identified as factors contributing to BellSouth's low flow-through rates. As in prior orders, we are unable to determine how many of the errors that BellSouth ascribes to competing carriers result from BellSouth's underlying failure to provide adequate information, such as business rules, concerning how BellSouth's internal systems process orders.[92] We are unable to make such a judgment because, as noted above and in prior orders, BellSouth provides no evidence supporting its claims regarding the causes of order errors.[93]

114. In prior orders, we concluded that BellSouth's practice of returning order error notices to competing carriers manually, rather than electronically via the EDI interface, is not equivalent access because manual processes generally are "less timely and more prone to errors."[94] Among other things, manual processes tend to lead to

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errors, as determined by BellSouth. *See* BellSouth Application at 26. Our own calculation yields a flow-through rate of 28 percent for carrier No. 9 in May 1998 because, as noted in para. 0 *supra*, we do not accept BellSouth's analysis of competing carriers' errors.

[90] *See* BellSouth Stacy Perf. Meas. Aff., Ex. WNS-3 (Report: Percent Flow-Through Service Requests (Detail)).

[91] *See* Second BellSouth Louisiana Application, App., Tab. 12, Affidavit of William N. Stacy (BellSouth Stacy Perf. Meas. Reply Aff.) at para. 21, Ex. WNSPM Reply - 4c (Report: Percent Flow Through Service Requests (Detail)).

[92] *BellSouth South Carolina Order*, 13 FCC Rcd at 601; *First BellSouth Louisiana Order*, 13 FCC Rcd at 6263-64; *see also* AT&T Comments at 38-39; AT&T Bradbury Aff. at paras. 67-69. The Department of Justice contends that BellSouth still lacks fully documented business rules for ordering processes. Department of Justice Evaluation at 27 n.51; *see, e.g.*, AT&T Comments at 35-39; AT&T Bradbury Aff. at paras. 67-70.

[93] *See supra* para. 0; *see also* AT&T Comments at 38-39, 43; AT&T Bradbury Aff. at paras. 67-69, 246.

[94] *BellSouth South Carolina Order*, 13 FCC Rcd at 605; *First BellSouth Louisiana Order*, 13 FCC Rcd at 6262-63; *see Ameritech Michigan Order*, 12 FCC Rcd at 20616-18 ("For those functions that the BOC itself accesses electronically, the BOC must provide equivalent electronic access for competing carriers").

additional errors, and to lower BellSouth's flow-through rates.[95] In its application, BellSouth states that it has developed a mechanism to provide competing carriers with electronic error notification via EDI or LENS, which includes a standard set of over 300 error messages.[96] As discussed below, however, BellSouth's own data indicate that more than 80 percent of BellSouth's rejection notices still require manual re-keying.[97] This does not constitute equivalent access.

115. We also found previously that the lack of integration between BellSouth's interfaces for pre-ordering and ordering functions contributed to BellSouth's low flow-through rates.[98] As discussed in the *BellSouth South Carolina Order*, "[t]his lack of integration requires new entrants manually to re-enter data obtained from the pre-ordering interface into the ordering interface, a process that reasonably can be expected to contribute to errors committed by new entrants."[99] We note that the order flow-through rates for competing carriers using the LENS interface, which provides integrated pre-ordering and ordering functions, generally are higher than EDI flow-through rates,[100] although BellSouth relies exclusively on EDI to show compliance with the requirements of this checklist item. As we conclude above, BellSouth still fails to provide access to integrated pre-ordering and ordering interfaces.[101]

116. In any future application, we would find persuasive evidence showing that the flow-through rates for competing carriers' orders for resale services at reasonably foreseeable demand levels will be substantially the same as the flow-through rates for BellSouth's retail orders.[102] In the absence of such evidence, BellSouth has the burden of showing why its ordering systems for competing carriers nonetheless meet the nondiscriminatory standard, *i.e.*, that its systems provide competing carriers with access

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[95] *See BellSouth South Carolina Order*, 13 FCC Rcd at 605; *see First BellSouth Louisiana Order*, 13 FCC Rcd at 6266-67.

[96] BellSouth Stacy OSS Aff. at paras. 125, 127, Ex. WNS-45;

[97] See *infra* paras.118-119.

[98] *BellSouth South Carolina Order*, 13 FCC Rcd at 602.

[99] *BellSouth South Carolina Order*, 13 FCC Rcd at 602; *accord First BellSouth Louisiana Order*, 13 FCC Rcd at 6275-76, 6277.

[100] *See* BellSouth Stacy Perf. Meas. Aff., Ex. WNS-3 (Report: Percent Flow Through Service Requests (Detail)).

[101] See paras. 96-102 *supra*.

[102] *See* KMC Comments at 15.

to OSS functions that is on par with that which the BOC provides its own retail operations.[103]

[103] *Ameritech Michigan Order*, 12 FCC Rcd at 20567-70; *see* Department of Justice Evaluation at 35 (contending that "where the reported data has such numerous indications of deficient performance, BellSouth does not carry its burden by simply producing data and asserting that it shows adequate performance: BellSouth needs to discuss the results and, where apparent discrepancies exist, explain them"); ALTS Comments at 16; KMC Comments at 15.