



Federal Communications Commission  
Washington, D.C. 20554

September 22, 1995

DA 95-2021

Elliot Burg, Esq.  
Assistant Attorney General  
State of Vermont  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001

RE: Vermont v. Oncor Communications, Inc., Civil File No. 89-162 (D. Vt.)

Dear Mr. Burg:

This is in response to your August 22, 1995 letter requesting a staff ruling concerning whether the Federal Communications Commission's ("FCC" or "Commission") regulations governing changes of consumers' long distance carriers preempt the State of Vermont's above-captioned suit against Oncor Communications, Inc. ("Oncor"). The state alleges that Oncor has engaged in unfair and deceptive practices in connection with marketing its operator-assisted long-distance service to Vermont consumers. For the reasons discussed below, and subject to the limitations noted, we conclude that the Commission has not preempted this state action.

Initially, we note that state law may be preempted by Congress through the proper exercise of its legislative powers, or by a federal agency acting pursuant to its congressionally delegated authority.<sup>1</sup> We understand your letter to seek a staff ruling regarding only the latter type of preemption.

As you may know, in its Allocation Order and subsequent Reconsideration Order and Waiver Order,<sup>2</sup> the Commission set forth rules and procedures for implementing equal access<sup>3</sup> and customer presubscription<sup>4</sup> to an interexchange carrier ("IXC").<sup>5</sup> The

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<sup>1</sup> City of New York v. FCC, 486 U.S. 57, 63-64 (1988).

<sup>2</sup> Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911 (1985) (Allocation Order), recon. denied, 102 FCC 2d 503 (1985) (Reconsideration Order); Investigation of Access and Divestiture Related Tariffs, Phase I, 101 FCC 2d 935 (1985) (Waiver Order).

<sup>3</sup> Equal access for interexchange carriers ("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) (Modification

Commission's original allocation plan required IXCs to have on file a letter of agency ("LOA") signed by the customer before submitting PIC change orders to the local exchange carrier ("LEC") on behalf of the customer.<sup>6</sup> After considering claims by certain IXCs that this requirement would stifle competition because consumers would not be inclined to execute the LOAs even though they agreed to change their PIC, the Commission later modified the requirement to allow IXCs to initiate PIC changes if they had "instituted steps to obtain signed LOAs."<sup>7</sup>

In 1992, the Commission again revised its rules because it continued to receive complaints about unauthorized PIC changes, a practice commonly known as "slamming."<sup>8</sup> Specifically, while recognizing the benefits of permitting a telephone-based industry to rely on telemarketing to solicit new business, the Commission required IXCs to institute one of the following four confirmation procedures before submitting PIC change orders generated by telemarketing: (1) obtain the consumer's written authorization; (2) obtain the consumer's electronic authorization by use of an 800 number; (3) have the consumer's oral authorization verified by an independent third party; or (4) send an information package, including a prepaid, returnable postcard, within three days of the consumer's request for a PIC change, and wait 14 days before submitting the consumer's order to the LEC. The latter is to ensure that the consumer has sufficient time to return the postcard denying, cancelling, or confirming the change order.<sup>9</sup> Hence, FCC rules and orders require that IXCs either obtain a signed LOA or complete one of the four above-listed telemarketing verification procedures

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of Final Judgment or "MFJ"). "Equal access allows end users to access facilities of a designated [IXC] by dialing '1' only." Allocation Order, 101 FCC 2d at 911.

<sup>4</sup> Presubscription is the process by which each customer selects one primary interexchange carrier ("PIC"), from among several available carriers, for the customer's phone line. Allocation Order, 101 FCC 2d at 911, 928. Thus, when a customer dials "1" only, the customer accesses the primary IXC's services. An end user can also use other IXCs by dialing a five-digit access codes. Id. at 911.

<sup>5</sup> Pursuant to the MFJ, the Bell Operating Companies (BOCs) were ordered to provide equal access to their customers by September 1986, where technically feasible. Id.

<sup>6</sup> An LOA is a document, signed by the customer, which states that the customer has selected a particular carrier as that customer's primary long distance carrier. Allocation Order, 101 FCC 2d at 929.

<sup>7</sup> Waiver Order, 101 FCC 2d at 942.

<sup>8</sup> Policies and Rules Concerning Long Distance Carriers, 7 FCC Rcd 1038, 1038-39, (1992), recon. denied, 8 FCC Rcd 3215 (1993) (PIC Change Order).

<sup>9</sup> See 47 C.F.R. § 64.1100; PIC Change Order, 7 FCC Rcd at 1045.

before submitting PIC change requests to LECs on behalf of consumers.

Because of its continued concern over unauthorized PIC changes, in June 1995 the Commission prescribed the general form and content of the LOA used to authorize a change in a customer's primary long distance carrier.<sup>10</sup> The Commission's revised rules prohibit the potentially deceptive or confusing practice of combining the LOA with promotional materials in the same document.<sup>11</sup> The rules also prescribe the minimum information required to be included in the LOA and require that the LOA be written in clear and unambiguous language.<sup>12</sup> Additionally, the rules prohibit all "negative option" LOAs<sup>13</sup> and require that LOAs and accompanying promotional materials contain complete translations if they employ more than one language.<sup>14</sup>

The Commission has thus taken substantial steps to protect consumers and legitimate competition from slamming by regulating carriers' PIC change practices. It has not, however, acted to displace complimentary state efforts. Indeed, in the LOA Order, the Commission expressly declined to preempt all state action in this area. Specifically, the Commission stated "that the record shows that state action regarding 'slamming' appears to be consistent with our own. Therefore, we decline at this time to preempt any state law regarding the unauthorized conversion of consumer's [sic] long distance service. We will consider specific preemption questions on a case-by-case basis."<sup>15</sup> Since you have presented such a question, we next consider Vermont's claims against Oncor.

The state filed its complaint in Chittenden Superior Court, State of Vermont (Docket No. 738-95CnC), and Oncor thereafter removed the case to the United States District Court for the District of Vermont, in which it is now pending. In the "Amended Consumer Fraud Complaint" filed in the state court proceeding, dated July 10, 1995 and attached to your letter to the Commission, the state has alleged that Oncor and its agent New England

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<sup>10</sup> Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, FCC 95-225 (June 14, 1995), recon. pending, (LOA Order).

<sup>11</sup> See LOA Order, FCC 95-225 at para. 27. Checks that serve as an LOA are excepted from the "separate or severable" requirement so long as the check contains certain information clearly indicating that endorsement of the check authorizes a PIC change and otherwise complies with the Commission's LOA requirements. Id. at para. 25.

<sup>12</sup> Id. at para. 10.

<sup>13</sup> Id. at para. 11. "Negative option" LOAs require consumers to take some action to avoid having their long distance telephone service changed.

<sup>14</sup> Id. at para. 40.

<sup>15</sup> Id. at para. 43.

Payphone, Inc. have switched pay telephone owners' PIC to Oncor long-distance service without adequate authorization from those pay telephone owners. The complaint alleges that in some instances, the defendants have not obtained any authorization from consumers whose telephone lines have been converted to Oncor service. In other instances, the complaint states, the defendants have utilized "commission checks" to solicit new Oncor customers; on the reverse side of the checks, above the endorsement line, is a statement purporting to serve as the payees' authorization to change the PIC for their telephone to Oncor. According to the complaint, however, this disclosure or purported authorization is inadequate "given its tiny size and its obscurity in the promotional mailing." Count I of the complaint alleges that these acts and practices are deceptive in violation of the Vermont Consumer Fraud Act, 9 V.S.A § 2451 et seq. Count II alleges that the defendants' alleged conduct is also unfair in violation of the Consumer Fraud Act because it violates FCC "guidelines" and is "otherwise unfair."

Our interpretation of our own agency regulations leads us to conclude that Vermont's claims do not conflict with our rules. First, there is nothing in the express language of the Consumer Fraud Act that contradicts Commission regulations. It is not specifically directed at the practices governed by Commission's PIC change rules, but instead prohibits unfair and deceptive practices generally. Second, the claims Vermont has raised are not inconsistent with Commission requirements. The state has alleged that the defendants switched consumers' long-distance carriers without proper authorization. As described above, the FCC's rules prohibit the same conduct. Therefore, the state's action appears to advance rather than frustrate Commission objectives.

Moreover, the possibility that a state may seek to impose more stringent requirements to afford greater protection to consumers does not automatically render such requirements impermissibly inconsistent with the Commission's rules as long as it remains possible for a carrier to comply with both the state and federal standards. For example, Vermont claims that the disclosure on the back of Oncor's "commission check" is too small and obscure to effectively inform consumers of the consequences of endorsing the check. In the LOA Order, the Commission stated that LOAs must be "written in clear and unambiguous language" and "printed with type of sufficient size and readable type to be clearly legible to the consumer."<sup>16</sup> Yet the Commission determined not to dictate the precise language IXCs must use, acknowledging "that differing state requirements and differences in the target market for individual promotional campaigns indicate that IXCs may be better able to tailor the specific language."<sup>17</sup> Hence, the Commission retained flexibility in its rules in part to enable IXCs to comply with its rules as well as additional standards in recognition of a state's potential interest in providing different or greater protection for its residents.

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<sup>16</sup> Id. at paras. 2, 12.

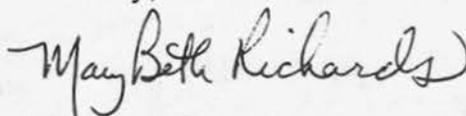
<sup>17</sup> Id. at para. 10.

In sum, the Commission has not preempted all state action challenging carriers' PIC change practices, and, after careful review, we find nothing in the state's "Amended Consumer Fraud Complaint" that actually and impermissibly conflicts with Commission rules. Accordingly, we conclude that preemption by the Commission of the suit filed by the State of Vermont against Oncor Communications, Inc. would not be warranted.

This is a staff ruling issued pursuant to Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291. Applications for review must be filed within 30 days of public notice of this action. 47 C.F.R. § 1.115.

I hope this information is helpful and thank you for your interest in this matter. Please let us know whenever we can be of further assistance.

Sincerely,

A handwritten signature in cursive script that reads "Mary Beth Richards". The signature is written in dark ink and is positioned above the typed name.

Mary Beth Richards  
Deputy Chief, Common Carrier Bureau