

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)
)
 Policies and Rules Concerning) CC Docket No. 94-129
 Unauthorized Changes of Consumers')
 Long Distance Carriers)

**SECOND REPORT AND ORDER AND
 FURTHER NOTICE OF PROPOSED RULEMAKING**

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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 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

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 Red 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).

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).

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 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

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).

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*).

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 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 change²¹ requests made during consumer-initiated (in-bound) calls to carriers,²² rather than being applicable solely to outbound calls made by carriers to consumers; (2) extend our

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

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.

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*).

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 method²⁶ 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 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

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).

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.

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 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

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.

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.

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 changes and then to verify that authorization.³⁸ The current rules also require IXCs to verify all PIC changes using either a written LOA³⁹ 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 carrier⁴⁴ 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."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

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

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).

⁴⁵ 47 U.S.C. § 258(a).

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-slaming 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

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

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).

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

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 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

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.

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.

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 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

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").

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 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

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.

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).

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 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

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.

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.*

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 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

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).

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.

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, 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 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

⁸² *Id.*

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; NYSCP B 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.

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.

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 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

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).

⁹³ *Id.*

⁹⁴ See 47 U.S.C. §§ 201(b); 4(i).

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 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.

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).

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).

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 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 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

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

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).

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 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

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.

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.

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 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

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.

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).

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 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 the first 30 days after the

¹²¹ *Id.*

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.

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 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

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).

¹³⁴ See 47 U.S.C. § 208.

¹³⁵ See Appendix A, § 64.1170(a).

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 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

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.

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.

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 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

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.

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).

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 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 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

¹⁵² See Appendix A, § 64.1170(e).

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.

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

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 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

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.

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.

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 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

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.

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.

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 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, 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,

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.

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 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

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 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*.

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, 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

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.

¹⁸³ 47 C.F.R. § 64.1100(d)(8).

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 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

¹⁸⁴ NAAG Petition for Reconsideration at 16-17.

¹⁸⁵ 47 C.F.R. § 64.1150(f).

¹⁸⁶ *Further Notice and Order* at 10685.

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; 360^{II} Comments at 4.

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 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.

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

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

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.

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 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

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.

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.

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 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

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).

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

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 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, in making our decision regarding in-bound

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.

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).

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 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

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.

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*).

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 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

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.

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.

years.²³³ Previously, we required LOAs to be retained for one year²³⁴ 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 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 LOAs²³⁸ 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 verification²⁴² - 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

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.

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.

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 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 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 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

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

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*.

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

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 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

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 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.

exchange and telephone toll service.²⁵⁸ Accordingly, 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.²⁵⁹ 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.²⁶⁰ The Commission processed approximately 80 complaints regarding local service slamming in 1997 and 129 local service slamming complaints from January through October 1998.²⁶¹ We agree with the majority of commenters that the current rules, with the modifications adopted in this *Order*,²⁶² should be effective in preventing slamming in the local market.²⁶³

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.²⁶⁴ 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

²⁵⁸ 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.

²⁵⁹ 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.

²⁶⁰ 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.

²⁶¹ Common Carrier Bureau, Enforcement Division, Consumer Protection Branch Databases Tracking Consumer Complaints (Oct. 1998).

²⁶² See, *e.g.*, *infra* discussion on The Welcome Package (eliminating the welcome package as a verification method for carrier changes generated through telemarketing).

²⁶³ See, *e.g.*, AT&T Comments at 1; Bell Atlantic Comments at 10; NAAG Comments at 9.

²⁶⁴ 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*).

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.²⁶⁵ 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).²⁶⁶ 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.²⁶⁷ 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.²⁶⁸ 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.²⁶⁹ 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.²⁷⁰

²⁶⁵ See Ameritech Comments at 10; CBT Comments at 3-4.

²⁶⁶ 47 C.F.R. § 64.1150(e)(4).

²⁶⁷ See, *e.g.*, TRA Comments at 2; RCN Comments at 5.

²⁶⁸ 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.

²⁶⁹ See Ameritech Comments at 12.

²⁷⁰ 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.²⁷¹ 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 258.²⁷² 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.²⁷³

85. Based on the record, however, we create an exception for CMRS providers.²⁷⁴ 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.²⁷⁵ CMRS providers are not currently subject to equal access requirements.²⁷⁶ 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.²⁷⁷ 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

²⁷¹ *Id.*

²⁷² See Appendix A, §§ 64.1100, 64.1150, 64.1160.

²⁷³ See, e.g., BCI Comments at 9; PaOCA Comments at 4; USTA Comments at 2.

²⁷⁴ See Appendix A, § 64.1100(a)(3). See also, e.g., Air Touch Comments at 2; BellSouth Reply Comments at 7; 360^{II} Comments at 7.

²⁷⁵ See Appendix A, § 64.1100(a)(3).

²⁷⁶ 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).

²⁷⁷ 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.

new carrier.²⁷⁸ 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.²⁷⁹ 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.²⁸⁰ 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."²⁸¹ 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.²⁸² 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.²⁸³ The issue of federal preemption of slamming regulation by states has also been raised in other fora.²⁸⁴

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

²⁷⁸ Bell Atlantic Mobile Comments at 4; CTIA Reply Comments at 3-4.

²⁷⁹ 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).

²⁸⁰ *See* Appendix A, § 64.1100(a)(3).

²⁸¹ 47 U.S.C. § 258(a).

²⁸² *See, e.g.*, BellSouth Comments at 3; Working Assets Comments at 2.

²⁸³ AT&T Comments at 38; BellSouth Comments at 3; Excel Comments at 3.

²⁸⁴ *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).

substantial contact with consumers and are near to the slamming problem.²⁸⁵ 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.²⁸⁶ 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.²⁸⁷

89. 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.²⁸⁸ 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.²⁸⁹ 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.²⁹⁰ 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.²⁹¹ 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

²⁸⁵ Maryland Commission Comments at 3.

²⁸⁶ Oklahoma Commission Reply Comments at 3.

²⁸⁷ 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).

²⁸⁸ 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).

²⁸⁹ 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).

²⁹⁰ See, e.g., AT&T Comments at 36-37, n.51.

²⁹¹ See, e.g., ACTA Comments at 19; AT&T Comments at 37; RCN Comments at 3; Sprint Reply at 9; Winstar Comments at 9.

federal rules rather than with federal rules and multiple sets of state rules.²⁹² 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.

90. Section 258 expressly grants to the states authority to enforce the Commission's verification procedure rules with respect to intrastate services.²⁹³ 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

91. 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.²⁹⁴ 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.²⁹⁵

92. 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.²⁹⁶ 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

²⁹² See, e.g., ACTA Comments at 23; IXC Long Distance Reply at 7; SDN Comments at 2.

²⁹³ See 47 U.S.C. § 258(a).

²⁹⁴ *Further Notice and Order*, 12 FCC Rcd at 10683.

²⁹⁵ *Id.*

²⁹⁶ 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.

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.²⁹⁷ The rules we adopt build on suggestions made by WorldCom for defining a submitting carrier.²⁹⁸ 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.²⁹⁹ 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.

93. 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.

94. 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.³⁰⁰ 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.³⁰¹ BellSouth argues that both the CLEC and the facilities-based LEC should be considered executing carriers in this scenario.³⁰² 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

²⁹⁷ See e.g., Frontier Comments at 19; IXC Long Distance Reply Comments 10; and Sprint Comments at 26 n.20.

²⁹⁸ See WorldCom Comments at 4.

²⁹⁹ See Appendix A, § 64.1100(e)(1).

³⁰⁰ See Appendix A, § 64.1100(e)(2).

³⁰¹ See, e.g., Bell Atlantic Comments at 9.

³⁰² BellSouth Comments at 7.

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 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.³⁰³

95. 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.³⁰⁴ 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.

96. Based on BellSouth's recommendation,³⁰⁵ 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

97. In the *Further Notice and Order*, the Commission tentatively concluded that the 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.³⁰⁶ The Commission sought comment on any specific additional or separate verification procedures that should apply to telecommunications carriers that

³⁰³ See *infra* discussion on Application of Verification Rules to Submitting and Executing Carriers.

³⁰⁴ For a full discussion of CICs, see *infra* discussion in Further Notice of Proposed Rulemaking, Resellers and CICs.

³⁰⁵ BellSouth Comments at 14.

³⁰⁶ *Further Notice and Order*, 12 FCC Rcd at 10683.

"execute" carrier changes, and the possible effects of such procedures on competition and consumer protection.³⁰⁷

98. We conclude that executing carriers should not verify carrier changes prior to executing the change.³⁰⁸ We agree with several commenters that requiring such verification would be expensive, unnecessary, and duplicative of the submitting carrier's verification.³⁰⁹ 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 delay³¹⁰ changes that have been verified by the submitting carrier.³¹¹ 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.³¹²

99. Some LECs believe that additional verification of carrier changes by executing carriers would further reduce the incidence of slamming.³¹³ These parties state that LEC 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.³¹⁴ 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.³¹⁵ 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

³⁰⁷ *Id.*

³⁰⁸ *See* Appendix A, § 64.1100(a)(2).

³⁰⁹ *See, e.g.*, Ameritech Comments at 13; BellSouth Comments at 8; MCI Comments at 6.

³¹⁰ *See infra* discussion on Timeframe for Execution of Changes.

³¹¹ *See* Appendix A, § 64.1100(a)(2).

³¹² 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).

³¹³ 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 Opinion Request).

³¹⁴ *Id.*

³¹⁵ *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).

for purposes of providing any telecommunications service shall use such information only for such purpose[.]”³¹⁶ 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.³¹⁷

100. 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.³¹⁸ 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 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.

101. 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.³¹⁹ We note that most of the telephone bills issued by U S WEST highlight changes that have occurred to a subscriber's account, including changes in preferred carrier selections. Finally, we conclude that the LECs that want to verify carrier changes should experience less concern over slamming in the future because our new rules, especially the absolute remedy, should decrease consumer harm from slamming.³²⁰

³¹⁶ 47 U.S.C. § 222(b).

³¹⁷ See also, *infra* discussion on Marketing Use of Carrier Information.

³¹⁸ See *infra* discussion on Preferred Carrier Freezes.

³¹⁹ *Truth-in-Billing NPRM*, 13 FCC Rcd at 18186. NAAG proposes to require carriers to notify subscribers in their telephone bills of carrier changes. NAAG Comments at 16. We decline to adopt this proposal in this *Order* because it is more properly addressed in the Truth-in-Billing rulemaking proceeding.

³²⁰ See *supra* discussion on Liability of Subscribers to Carriers.

3. Concerns with Certain Executing Carriers

a. Interference with the Execution Process

102. 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.³²¹ 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.

103. 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.³²² For example, section 251 requires incumbent LECs to provide facilities and services to requesting telecommunications carriers in a nondiscriminatory manner.³²³ Any 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.³²⁴ Furthermore, any carrier that imposes unreasonable delays in executing carrier changes, both for itself and others, will be in violation of our verification procedures³²⁵ or acting unreasonably in violation of section 201(b),³²⁶ 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.³²⁷ We would consider all the facts and circumstances presented in a section 208 complaint proceeding, for example, and take remedial action as appropriate.³²⁸ 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

³²¹ *Further Notice and Order*, 12 FCC Rcd at 10684.

³²² *See, e.g.*, Ameritech Comments at 16; Bell Atlantic Comments at 6.

³²³ *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) (providing that Ameritech must "provision[] resale orders within the same average installation interval as that achieved by its retail operations").

³²⁴ *See* 47 U.S.C. §§ 251(c)(3), 251(c)(4), 201(b), 202(a).

³²⁵ *See* Appendix A, § 64.1100(a)(2).

³²⁶ 47 U.S.C. § 201(b).

³²⁷ 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.

³²⁸ *See* 47 U.S.C. § 208.

104. Several commenters also support imposing specific deadlines for execution of carrier changes in order to prevent carriers from delaying execution.³²⁹ 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.³³⁰ 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 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.³³¹ 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.³³² We decline to do so at this time because we conclude that the non-discrimination requirements of sections 202(a) and 251³³³ already prohibit executing carriers from imposing discriminatory delays on their competitors.³³⁴

105. 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.

c. Marketing Use of Carrier Change Information

³²⁹ See, e.g., North Carolina Commission Comments at 3-4; TRA Comments at 16.

³³⁰ 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).

³³¹ See, e.g., Ameritech Reply Comments at 19; GTE Reply Comments at 19.

³³² See, e.g., CompTel Comments at 6; LCI Comments at 5; and NYSCP Comments at 21.

³³³ See 47 U.S.C. §§ 251(c)(3), 251(c)(4), 202(a).

³³⁴ 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).

106. 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.³³⁵ 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.³³⁶ 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.³³⁷ Many commenters support this decision.³³⁸ As explained above, we find that carrier change information is carrier proprietary information³³⁹ 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.³⁴⁰ 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."³⁴¹ 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 gain access to such information through provision of wholesale service.³⁴² 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.

107. 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

³³⁵ *Further Notice and Order*, 12 FCC Rcd at 10684.

³³⁶ *Id.*

³³⁷ *See* Appendix A, section 64.1100(a)(2).

³³⁸ *See, e.g.*, Ameritech Reply at 17-18; MCI Comments at 7-8; Texas Commission Comments at 3.

³³⁹ *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).

³⁴⁰ 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.

³⁴¹ *Id.*

³⁴² *CPNI Order*, 13 FCC Rcd at 8201.

changes.³⁴³ 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.³⁴⁴ 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.³⁴⁵ In this case, we find that prohibiting executing carriers from using carrier proprietary information for marketing purposes in violation of section 222(b) does not impermissibly infringe upon First Amendment rights.

108. 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.³⁴⁶ Furthermore, the fact that the 1996 Act was enacted in order to open "all telecommunications markets to competition"³⁴⁷ 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.

109. 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

³⁴³ GTE Reply Comments at 13; U S WEST Comments at 21.

³⁴⁴ *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980) (*Central Hudson*).

³⁴⁵ *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.

³⁴⁶ *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.").

³⁴⁷ *See* Joint Explanatory Statement at 1.

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.

110. 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.

111. 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

112. In the *Further Notice and Order*, the Commission sought comment on whether it should adopt rules to address preferred carrier freeze practices.³⁴⁸ The Commission noted that, although neither the Act nor its rules and orders specifically address preferred carrier freeze practices,³⁴⁹ concerns about carrier freeze solicitations have been raised with the Commission.³⁵⁰ 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

³⁴⁸ *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.

³⁴⁹ 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).

³⁵⁰ *See, e.g.*, Letter from Donald F. Evans, MCI Telecommunications Corporation to John Muleta, FCC (July 31, 1996).

interexchange (interLATA or intraLATA toll) and local exchange carrier.³⁵¹ 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.³⁵²

2. Overview and Jurisdiction

113. 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.³⁵³ Moreover, in so doing we facilitate customer choice of preferred carrier selections and adopt and promote procedures that prevent fraud.

114. 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.³⁵⁴ 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.³⁵⁵ 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.³⁵⁶ 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

³⁵¹ 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."

³⁵² *Further Notice and Order*, 12 FCC Rcd at 10,687-88.

³⁵³ See, e.g., Ohio Commission Comments at 12.

³⁵⁴ 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.

³⁵⁵ See *Further Notice and Order*, 12 FCC Rcd at 10,688.

³⁵⁶ 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).

changed without his or her consent.³⁵⁷ 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.³⁵⁸ 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.

115. In the *Further Notice and Order*, however, we stated that preferred carrier freezes may have the effect of limiting competition among carriers.³⁵⁹ 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.³⁶⁰ Indeed, we note that a number of state commissions have determined,³⁶¹ and certain LECs concede,³⁶² 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.³⁶³ 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.³⁶⁴ 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

³⁵⁷ 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).

³⁵⁸ 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.

³⁵⁹ See *Further Notice and Order*, 12 FCC Rcd at 10,688.

³⁶⁰ 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.

³⁶¹ 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.

³⁶² 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.").

³⁶³ See *Further Notice and Order*, 12 FCC Rcd at 10,688.

³⁶⁴ See, e.g., Worldcom Petition Comments at 5; MCI Comments at 11; LCI Reply Comments at 8; see also NAAG Comments at 11.

effort to stifle competition in their markets.³⁶⁵

116. Particularly given the market structure changes contemplated in the 1996 Act,³⁶⁶ 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.³⁶⁷ 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.³⁶⁸ 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.

117. 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.³⁶⁹ 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.³⁷⁰ 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.

118. 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

³⁶⁵ 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.

³⁶⁶ 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").

³⁶⁷ See, e.g., 47 U.S.C. §§ 251-252, 271.

³⁶⁸ 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.

³⁶⁹ 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").

³⁷⁰ 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.

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

119. 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.³⁷¹ 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.³⁷² Similarly, we state our expectation that LECs should not be able to impose discriminatory delays when lifting freezes.³⁷³ Since the Commission has long recognized that incumbent LECs may have the incentive to discriminate in the provision of service to their competitors,³⁷⁴ we believe that articulating this nondiscrimination requirement will ensure that the same level of protection is available to all subscribers.

120. 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.³⁷⁵ 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

121. 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

³⁷¹ 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.

³⁷² 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.").

³⁷³ 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.

³⁷⁴ 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*").

³⁷⁵ See, e.g., AT&T Petition Comments at 6; CompTel Petition Comments at 6.

concerns of some commenters that certain carriers may solicit preferred carrier freezes in a manner that is unreasonable under the Act.³⁷⁶ 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.³⁷⁷ 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.³⁷⁸ 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.³⁷⁹ 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.³⁸⁰

122. 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.³⁸¹ 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.³⁸²

123. 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.³⁸³ 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.³⁸⁴ It will also serve to

³⁷⁶ See, e.g., AT&T Petition Comments at 4-5; Sprint Petition Comments at 7; TRA Comments at 23.

³⁷⁷ See, e.g., MCI Petition at 4, n.3; NAAG Comments at 12.

³⁷⁸ See also 47 U.S.C. § 201(b).

³⁷⁹ See *Further Notice and Order*, 12 FCC Rcd at 10688.

³⁸⁰ 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.

³⁸¹ See Appendix A, § 64.1190(d)(1).

³⁸² See MCI Comments at 17 ("Commission should consider requiring the use of standard language . . ."); NYSCPB Reply Comments at 9; Excel Reply Comments at 4.

³⁸³ See Appendix A, § 64.1190(c).

³⁸⁴ 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.

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.³⁸⁵ 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.³⁸⁶ 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.³⁸⁷ 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.

124. 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.³⁸⁸ 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.³⁸⁹ Should states wish to adopt such requirements, we believe that it is within their purview to do so.

125. 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.³⁹⁰ 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.³⁹¹ 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

³⁸⁵ See, e.g., Ameritech Petition Comments at 14; AT&T Petition Reply Comments at 7.

³⁸⁶ See Appendix A, § 64.1190(c).

³⁸⁷ 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.

³⁸⁸ See, e.g., CBT Comments at 8.

³⁸⁹ 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.

³⁹⁰ 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.

³⁹¹ 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.

a preferred carrier freeze.³⁹² 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.³⁹³ We find such a practice to be unreasonable because it frustrates consumers' choice in carriers by making it more difficult for the consumer to switch carriers.

126. 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.³⁹⁴ 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.³⁹⁵ 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

127. 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.³⁹⁶ 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.³⁹⁷

128. 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

³⁹² 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.

³⁹³ See AT&T Comments at 18 ("extending the verification rules to the freeze mechanism may help to curb 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").

³⁹⁴ See BellSouth Comments at 4.

³⁹⁵ AT&T Comments at 19, n.23.

³⁹⁶ See, e.g., MCI Comments at 15-17; CompTel Petition Comments at 2.

³⁹⁷ See, e.g., IXC Long Distance Reply Comments at 5; Ameritech Reply Comments at 10; MCI Petition at 9.

authorization stating an intent to lift a preferred carrier freeze.³⁹⁸ 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.³⁹⁹ 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.

129. 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.⁴⁰⁰ 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.⁴⁰¹ 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.⁴⁰² 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.⁴⁰³ We also believe that three-way calling will effectively prevent 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.⁴⁰⁴ 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.

³⁹⁸ See Appendix A, § 64.1190(e)(1).

³⁹⁹ See, *e.g.*, U S WEST Reply Comments at 25; USTA Reply Comments at 5; TNRA Comments at 3.

⁴⁰⁰ See Appendix A, § 64.1190(e)(2).

⁴⁰¹ 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.

⁴⁰² See, *e.g.*, GTE Petition Comments at 5; Citizens Petition Reply at 5; Ameritech Petition Comments at 21.

⁴⁰³ Moreover, we can revisit these conclusions if further experience indicates that these rules become unduly burdensome.

⁴⁰⁴ See AT&T Petition Reply at 5, n.8.

130. 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.⁴⁰⁵ Thus, we do not adopt IXC Long Distance's proposal to require that LECs give customers a unique password or personal identification number.⁴⁰⁶ 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.

131. 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.⁴⁰⁷ 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.⁴⁰⁸ 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 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.

132. 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.⁴⁰⁹ 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."⁴¹⁰ 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.⁴¹¹ In addition, such

⁴⁰⁵ See, e.g., Ameritech Comments at 20-21 (discussing development of 24 hour voice response unit).

⁴⁰⁶ IXC Long Distance Comments at 5.

⁴⁰⁷ Ameritech Reply Comments at 14. See also NYSCP B Reply Comments at 10; U S WEST Reply Comments at 25.

⁴⁰⁸ MCI Petition at 9. See also Midcom Petition Comments at 3; BCI Comments at 3.

⁴⁰⁹ 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.

⁴¹⁰ SNET Petition Reply Comments at 7.

⁴¹¹ 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*

practices could also violate the "just and reasonable" provisions of section 201(b).⁴¹² 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.⁴¹³ 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 conduct likely would be viewed as unreasonable under our rules.⁴¹⁴

6. Information about Subscribers with Preferred Carrier Freezes

133. 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.⁴¹⁵ 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.⁴¹⁶ 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

134. 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.⁴¹⁷ 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

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").

⁴¹² 47 U.S.C. § 201(b).

⁴¹³ *See supra* discussion on Marketing Use of Carrier Change Information.

⁴¹⁴ *See* 47 U.S.C. §§ 201, 208.

⁴¹⁵ *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.

⁴¹⁶ 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.

⁴¹⁷ *Further Notice and Order*, 12 FCC Rcd at 10,689. *See also* OCC Comments at 3; Worldcom Comments at 10.

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 LEC.⁴¹⁸ 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

135. 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.⁴¹⁹ 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.⁴²⁰ 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.⁴²¹ Aggressive preferred carrier freeze practices under such conditions appear unnecessary and raise the prospect of anticompetitive conduct.⁴²² 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.

136. 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

⁴¹⁸ See, e.g., Ameritech Comments at 23; Bell Atlantic Comments at 5; MCI Comments at 17. See also Ohio Commission Comments at 12.

⁴¹⁹ 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.

⁴²⁰ See, e.g., NAAG Comments at 11; PaOCA Comments at 7; Sprint Comments at 34.

⁴²¹ 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).

⁴²² 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).

implementation of preferred carrier freezes.⁴²³ 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.

137. 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.⁴²⁴ 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.

9. Limitation on Freeze Mechanisms for Resold Services

138. A number of commenters indicate that preferred carrier freeze mechanisms will not prevent all unauthorized carrier changes.⁴²⁵ 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.⁴²⁶ 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.⁴²⁷ We encourage commenters to address these issues in detail.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

139. 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.

⁴²³ 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.

⁴²⁴ 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).

⁴²⁵ See, e.g., NYSDPS at 9.; Ameritech Petition Comments at 17; U S WEST Reply Comments at 11, n.28.

⁴²⁶ See *supra* discussion on Definition of "Submitting" and "Executing" Carriers.

⁴²⁷ See *infra* discussion in Further Notice of Proposed Rulemaking, Resellers and CICs.

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 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

140. 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.⁴²⁸ 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.

141. 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.⁴²⁹ 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;⁴³⁰ 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 change, the authorized carrier would be entitled to collect and keep that amount from the unauthorized carrier.

⁴²⁸ See *supra* discussion on Subscriber Refunds or Credits.

⁴²⁹ 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).

⁴³⁰ See Appendix B, § 64.1100(d)(1).

142. 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.⁴³¹

143. 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.

144. 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."⁴³² 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] 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."⁴³³ 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

145. 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

⁴³¹ See Appendix A, § 64.1100(d)(3).

⁴³² *Id.*

⁴³³ 47 U.S.C. §§ 201(b), 4(i).

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.

146. 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.⁴³⁴ 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.⁴³⁵ It is the facilities-based 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.

147. 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.⁴³⁶ 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.⁴³⁷ If the slamming reseller's retail rates are higher than those of the carrier it replaced, however, the subscriber may become suspicious.

148. 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,

⁴³⁴ See *supra* discussion on Limitation on Freeze Mechanisms for Resold Services.

⁴³⁵ See *supra* discussion on Definition of "Submitting" and "Executing" Carriers.

⁴³⁶ See *supra* discussion on Limitation of Freeze Mechanism for Resold Services.

⁴³⁷ See, e.g., NYSDPS Comments at 9; Ameritech Comments at 17.

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.

149. 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 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

150. 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.⁴³⁸ 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.⁴³⁹ 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),⁴⁴⁰ 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

⁴³⁸ 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.

⁴³⁹ 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.

⁴⁴⁰ See Letter from Kathleen M.H. Wallman, Chief, Common Carrier Bureau, Federal Communications Commission to Ron Connors, Director of NANP Administration, dated March 17, 1995.

seven-digit CACs (101XXXX) required by the four-digit CICs.⁴⁴¹ The transition period ended on July 1, 1998, and all subscribers must now use the seven-digit CAC format.⁴⁴² 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.

151. 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,⁴⁴³ 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.⁴⁴⁴ 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.⁴⁴⁵ 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.

152. 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

153. 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

⁴⁴¹ 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).

⁴⁴² 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.

⁴⁴³ 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.

⁴⁴⁴ Carrier Identification Code (CIC) Assignment Guidelines 4, INC 95-0127-006, Industry Numbering Committee (November, 1997).

⁴⁴⁵ 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).

[the] Act, as may be necessary in the execution of its functions."⁴⁴⁶ 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

154. 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.⁴⁴⁷

155. 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 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."⁴⁴⁸

156. We request further comment on this option's impact on the "competitively neutral"

⁴⁴⁶ 47 U.S.C. §§ 201(b), 4(i).

⁴⁴⁷ 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.

⁴⁴⁸ 47 U.S.C. § 251(e)(2).

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

157. The term "pseudo-CIC" refers to the creation of a coded suffix that follows a facilities-based carrier's CIC.⁴⁴⁹ 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."

158. 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.

159. 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

160. 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.

161. 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

⁴⁴⁹ 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.

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.

162. 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.

163. 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

164. 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

165. 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.⁴⁵⁰ 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.

166. 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.⁴⁵¹ 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.⁴⁵² We note, however, that using a three-way call is often the most efficient means by which to accomplish third party verification.⁴⁵³ We seek comment on whether, if a telemarketing carrier is present during the third party verification, such verification can be considered "independent."

167. 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 called a "live-scripted" version.⁴⁵⁴ 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.⁴⁵⁵ 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

⁴⁵⁰ See, e.g., NAAG Comments at 17; Quick Response Comments at 2.

⁴⁵¹ NAAG Comments at 17.

⁴⁵² *Id.*

⁴⁵³ See also, e.g., ACTA Reply Comments at 29; MCI Reply Comments at 4, n.5.

⁴⁵⁴ VoiceLog Comments at 3.

⁴⁵⁵ *Id.*

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.⁴⁵⁶ 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.⁴⁵⁷ We seek comment on these viewpoints and on any other advantages, disadvantages, or alternatives to using automated third party verification systems.

168. 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.⁴⁵⁸ Quick Response states that its verifiers have carrier-provided information sheets with which to answer subscribers' questions during the verification process.⁴⁵⁹ 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.⁴⁶⁰ We seek comment on any 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

169. 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.

170. 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.⁴⁶¹ It appears, however, that carriers have widely differing interpretations of the

⁴⁵⁶ See, e.g., TPV Services Reply Comments at 7; VoiceLog Comments at 5.

⁴⁵⁷ See Quick Response Comments at 4-6.

⁴⁵⁸ NAAG Comments at 17.

⁴⁵⁹ Quick Response Comments at 5.

⁴⁶⁰ See, e.g., ACTA Reply Comments at 28; TPV Reply Comments at 6.

⁴⁶¹ See Appendix A, § 64.1150.

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.

171. 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 an Internet sign-up system satisfies the signature requirement, which is one of the most important identification requirements of the written LOA.⁴⁶² 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.

172. 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.

173. 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.

⁴⁶² See, e.g., 47 C.F.R. § 64.1150(b) (requiring that an LOA be signed and dated by the subscriber).

174. 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 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.⁴⁶³ 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.

175. 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"

176. 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.⁴⁶⁴ 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.⁴⁶⁵ We believe that allowing the named party on the bill to designate additional persons in the household to make 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.

⁴⁶³ See 47 C.F.R. § 64.1150(e)(4).

⁴⁶⁴ SBC Comments at 6.

⁴⁶⁵ See *1995 Report and Order*, 10 FCC Rcd at 9564, n.16.

177. 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.

178. 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

179. 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.⁴⁶⁶ This concept is based on a provision in the Senate's anti-slamming bill.⁴⁶⁷ We believe that a reporting requirement could serve to alert the Commission as soon as possible about carriers that practice 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

180. 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.⁴⁶⁸ We propose that any telecommunications

⁴⁶⁶ See Appendix B, § 64.1100(f).

⁴⁶⁷ See S. 1618, 105th Cong., 2nd Sess. (1998).

⁴⁶⁸ 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

carrier that provides or seeks to provide interstate telecommunications service should register with the Commission.⁴⁶⁹ 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.⁴⁷⁰ We do not wish to impose any unnecessary barriers on entities seeking 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.⁴⁷¹ 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.

181. 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.

182. 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

locations.

⁴⁶⁹ See Appendix B, § 64.1195.

⁴⁷⁰ 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 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).

⁴⁷¹ 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.

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.⁴⁷² We seek comment on what penalty the Commission 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

183. 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.⁴⁷³ 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.⁴⁷⁴ 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.⁴⁷⁵ 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.⁴⁷⁶ 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 the industry's implementation of such a neutral third party for these functions would be consistent with the Commission's rules, policies, and practices.

184. An independent third party with broader responsibilities, such as administration of

⁴⁷² For example, the Commission could publish a list, to be updated frequently, of carriers that have filed registrations.

⁴⁷³ See *supra* discussion on Third Party Administrator for Dispute Resolution.

⁴⁷⁴ *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.*

⁴⁷⁵ 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.

⁴⁷⁶ See WorldCom Comments at 16 (stating that the Commission should establish a separate rulemaking to address the issue of an independent third party administrator).

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,⁴⁷⁷ 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.⁴⁷⁸ 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.⁴⁷⁹ 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.⁴⁸⁰ 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

185. 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 CMRS carriers at this time,⁴⁸¹ 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

⁴⁷⁷ See *supra* discussion on Concerns with Executing Carriers.

⁴⁷⁸ See, e.g., LCI Comments at 4-5; Sprint Comments at 19.

⁴⁷⁹ See, e.g., Bell Atlantic Reply Comments at 6; MCI Comments at 16.

⁴⁸⁰ TRA Reply Comments at 13.

⁴⁸¹ See *supra* discussion on Application of the Verification Rules to All Telecommunications Carriers.

A. Final Regulatory Flexibility Analysis

186. As required by the Regulatory Flexibility Act (RFA),⁴⁸² 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.⁴⁸³ The Commission sought written public comment on the proposals in the *Further Notice and Order*, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.⁴⁸⁴

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

187. 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."⁴⁸⁵ 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;⁴⁸⁶ (2) eliminate the welcome package as a verification option;⁴⁸⁷ (3) apply the Commission's verification rules to sales generated from in-bound telemarketing;⁴⁸⁸ (4) require carriers to maintain and preserve verification records for two years;⁴⁸⁹ (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;⁴⁹⁰ (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;⁴⁹¹ (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

⁴⁸² 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).

⁴⁸³ *Further Notice and Order*, 12 FCC Rcd 10,674 (1997).

⁴⁸⁴ See 5 U.S.C. § 604.

⁴⁸⁵ 47 U.S.C. § 258.

⁴⁸⁶ See *supra* discussion on Application of the Verification Rules to the Local Market; Application of the Verification Rules to All Telecommunications Carriers.

⁴⁸⁷ See *supra* discussion on the Welcome Package.

⁴⁸⁸ See *supra* discussion on Application of the Verification Rules to In-Bound Telemarketing.

⁴⁸⁹ See *supra* discussion on Other Verification Mechanisms

⁴⁹⁰ See *supra* discussion on Liability of Subscribers to Carriers.

⁴⁹¹ See *supra* discussion on Reimbursement Procedures.

carrier's rates;⁴⁹² (8) require an authorized carrier to restore premiums to any subscribers who have paid slamming charges to their unauthorized carriers;⁴⁹³ (9) prescribe procedures for solicitation and implementation of carriers freezes.⁴⁹⁴ 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

188. 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).⁴⁹⁵ 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.⁴⁹⁶ 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.⁴⁹⁷ 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.⁴⁹⁸

189. America's Carriers Telecommunications Association (ACTA) has submitted comments directly in response to the IRFA.⁴⁹⁹ ACTA, which is a non-profit trade association comprised of mostly small business entities,⁵⁰⁰ 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."⁵⁰¹ ACTA asserts that because the proposed rules define slamming to include unintentional acts, small carriers will suffer disproportionately.⁵⁰² ACTA

⁴⁹² See *supra* discussion on Subscriber Refunds or Credits.

⁴⁹³ See *supra* discussion Restoration of Premiums.

⁴⁹⁴ See *supra* discussion on Preferred Carrier Freezes.

⁴⁹⁵ *Further Notice and Order*, 12 FCC Rcd at 10,708.

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.* at 10,708-09.

⁴⁹⁸ *Id.* at 10,715.

⁴⁹⁹ See ACTA Comments Regarding IRFA (ACTA IRFA Comments).

⁵⁰⁰ ACTA IRFA Comments at 1.

⁵⁰¹ *Id.* at 3.

⁵⁰² *Id.* at 9.

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.⁵⁰³ ACTA states that this proposal is inadequate because liability for inadvertent slams should not be imposed in the first place.⁵⁰⁴ 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.⁵⁰⁵ 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.⁵⁰⁶ ACTA also claims that the Commission is prejudiced against small carriers⁵⁰⁷ 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.⁵⁰⁸ 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,⁵⁰⁹ (2) imposing the same verification procedures for in-bound and out-bound calls because that would overburden small carriers,⁵¹⁰ (3) non-preemption of state regulation because small carriers would have difficulty in meeting the requirements of different states.⁵¹¹

190. 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.⁵¹² 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

⁵⁰³ *Id.* at 3. We note that this particular proposal will be dealt with in a subsequent order. *See supra* para. 3.

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.* at 9.

⁵⁰⁶ *Id.*

⁵⁰⁷ 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.

⁵⁰⁸ *Id.* at 10.

⁵⁰⁹ ACTA Comments at 24.

⁵¹⁰ *Id.* at 26.

⁵¹¹ ACTA IRFA Comments at 9.

⁵¹² 47 U.S.C. § 258.

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.⁵¹³

191. 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 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

192. 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.⁵¹⁴ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁵¹⁵ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁵¹⁶ 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).⁵¹⁷

193. 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).⁵¹⁸ According to data in the most

⁵¹³ See, e.g., BellSouth Reply Comments at 3.

⁵¹⁴ 5 U.S.C. § 603(b)(3).

⁵¹⁵ *Id.* at § 601(6).

⁵¹⁶ 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).

⁵¹⁷ Small Business Act, 15 U.S.C. § 632 (1996).

⁵¹⁸ 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

recent report, there are 3,459 interstate carriers.⁵¹⁹ These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers.

194. 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.⁵²⁰ 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.

195. 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."⁵²¹

196. **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.⁵²² 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."⁵²³ 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.

sources are not updated annually.

⁵¹⁹ *Id.*

⁵²⁰ 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).

⁵²¹ *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.

⁵²² 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*).

⁵²³ *See generally* 15 U.S.C. § 632(a)(1).

197. **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 1992.⁵²⁴ 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.⁵²⁵ 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.

198. **Local Exchange Carriers.** Neither the Commission nor the SBA has developed a definition for small providers of local exchange services (LECs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.⁵²⁶ According to the most recent *Telecommunications Industry Revenue* data, 1,371 carriers reported that they were engaged in the provision of local exchange services.⁵²⁷ 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.

199. **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.⁵²⁸ According to the most recent *Telecommunications Industry Revenue* data, 143 carriers reported that they were engaged in the provision of interexchange services.⁵²⁹ 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..

⁵²⁴ 1992 Census, *supra*, at Firm Size 1-123.

⁵²⁵ 13 CFR § 121.201, SIC code 4813.

⁵²⁶ *Id.*

⁵²⁷ *Telecommunications Industry Revenue*, Figure 2.

⁵²⁸ 13 CFR § 121.201, SIC code 4813.

⁵²⁹ *Telecommunications Industry Revenue*, Figure 2.

200. **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.⁵³⁰ According to the most recent *Telecommunications Industry Revenue* data, 109 carriers reported that they were engaged in the provision of competitive access services.⁵³¹ 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.

201. **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.⁵³² According to the most recent *Telecommunications Industry Revenue* data, 339 reported that they were engaged in the resale of telephone service.⁵³³ 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.

202. **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.⁵³⁴ 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.⁵³⁵ 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.⁵³⁶ 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

⁵³⁰ 13 CFR § 121.201, SIC code 4813.

⁵³¹ *Telecommunications Industry Revenue*, Figure 2.

⁵³² 13 CFR § 121.201, SIC code 4813.

⁵³³ *Telecommunications Industry Revenue*, Figure 2.

⁵³⁴ 13 C.F.R. § 121.201, SIC code 4812.

⁵³⁵ *1992 Census, Series UC92-S-1*, at Table 5, SIC code 4812.

⁵³⁶ *Telecommunications Industry Revenue*, Figure 2.

may be affected by the proposed rules, if adopted.

4. Summary of Projected Reporting, Recordkeeping and other Compliance Requirements

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

204. *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.⁵³⁷ We believe that application of the verification rules to all carriers is the best way to prevent slamming from occurring in the first instance.

205. *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,⁵³⁸ 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.

206. *Verification of in-bound telemarketing sales.* Carriers must comply with our 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.⁵³⁹ 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.⁵⁴⁰

207. *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.

⁵³⁷ See 47 U.S.C. § 258.

⁵³⁸ See, e.g., ACTA Comments at 25; TRA Comments at 11.

⁵³⁹ TRA Comments at 10-11.

⁵⁴⁰ *Id.*

208. *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.⁵⁴¹ A two-year retention period will enable carriers to produce documentation to support their claims regarding an alleged unauthorized change.

209. *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 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.

210. *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.

211. *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

212. *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.⁵⁴² 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

⁵⁴¹ See 47 U.S.C. § 415.

⁵⁴² See, e.g., TRA Comments at 2; U S WEST Reply Comments at 5.

LEC or otherwise.⁵⁴³ We decline to adopt such proposals 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.⁵⁴⁴ 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.⁵⁴⁵

213. *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.⁵⁴⁶ 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.⁵⁴⁷ 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.⁵⁴⁸ ACTA states that carriers could prove that consumers received a welcome package by using certified mail, or by maintaining mailing manifests.⁵⁴⁹ 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 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.

⁵⁴³ 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.

⁵⁴⁴ See Ameritech Comments at 12.

⁵⁴⁵ See TRA Reply Comments at 9-11.

⁵⁴⁶ See, e.g., Oklahoma Commission Reply Comments at 4; WorldCom Comments at 7.

⁵⁴⁷ AT&T Reply Comments at 4.

⁵⁴⁸ See 47 C.F.R. § 64.1150.

⁵⁴⁹ ACTA Comments at 26.

214. *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.⁵⁵⁰ BellSouth, GTE, IXC Long Distance, and TOPC propose to allow carriers to make inexpensive audio recordings of inbound calls.⁵⁵¹ 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.⁵⁵² 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.⁵⁵³

215. *Independent Third Party Verification.* Several commenters submitted proposals for determining the independence of a third party verifier.⁵⁵⁴ 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.

216. *Verification Records.* Several commenters, including NAAG and NYSDPS, support a requirement that carriers retain verification records for a certain period of time.⁵⁵⁵ NAAG suggested that carriers retain records for three years,⁵⁵⁶ while NYSDPS suggested a period of nine months.⁵⁵⁷ 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.⁵⁵⁸ 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.

217. *Liability rules.* Although some carriers state that liability for slamming should not be

⁵⁵⁰ *Id.* at 27; RCN Comments at 5.

⁵⁵¹ *See, e.g.*, BellSouth Comments at 11; GTE Comments at 10-11; IXC Long Distance Comments at 3; TOPC Reply Comments at 4.

⁵⁵² *See PIC Verification Order*, 7 FCC Rcd at 1041.

⁵⁵³ *Id.*

⁵⁵⁴ *See, e.g.*, MCI Comments at 21; TPV Services Comments at 7.

⁵⁵⁵ *See, e.g.*, NAAG Comments at 8; NYSDPS Comments at 5.

⁵⁵⁶ NAAG Comments at 8.

⁵⁵⁷ NYSDPS Comments at 5.

⁵⁵⁸ *See* 47 U.S.C. § 415.

imposed on carriers who inadvertently slam subscribers,⁵⁵⁹ 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.

218. Additionally, several carriers object to absolving subscribers of liability because they argue that authorized carriers should not be deprived of revenue.⁵⁶⁰ 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 unauthorized carrier. We also note that we are delaying the effective date of these liability rules for 90 days to enable carriers to implement an alternative mechanism to resolve slamming disputes.

219. *Third Party Administrator for Dispute Resolution.* This provision will benefit smaller carriers by providing them with an alternative means of compliance with our liability rules. Carriers are given a choice of complying with our liability rules in whole by administering the requirements themselves, or of complying by using an independent third party to administer the requirements.

220. *Preferred Carrier Freeze Procedures.* Some carriers, including smaller carriers, object to allowing preferred carrier freezes of local exchange and intraLATA services prior to the advent of competition for those services.⁵⁶¹ We agree that preferred carrier freezes have the potential to lock out competition in a monopoly market, but we find that consumers should not be deprived of this valuable protection on a nation-wide basis. Accordingly, states are free to impose restrictions on the use of preferred carrier freezes for local exchange and intraLATA toll services if they determine that such steps are necessary in light of the availability of local competition in a particular market. Furthermore, we impose certain requirements that will prevent carriers from using preferred carrier freezes in an anticompetitive manner, such as easy procedures to lift freezes. In this way, the existence of preferred carrier freeze programs will not impede carriers wishing to compete in local services, especially smaller carriers.

221. The Commission will send a copy of the *Order*, including this FRFA, in a report to be

⁵⁵⁹ ACTA IRFA Comments at 9.

⁵⁶⁰ See, e.g., ACTA Comments at 35; TRA Comments at 14.

⁵⁶¹ See, e.g., CompTel Comments at 8; TRS Petition Comments at 2.

sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.⁵⁶² In addition, the Commission will send a copy of the *Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.⁵⁶³

B. Initial Regulatory Flexibility Analysis

222. As required by the Regulatory Flexibility Act (RFA),⁵⁶⁴ 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.⁵⁶⁵ In addition, the *Order* and IRFA (or summaries thereof) will be published in the Federal Register.⁵⁶⁶

1. Need for, and Objectives, of Proposed Rules

223. 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 rules⁵⁶⁷ 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.

224. 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

⁵⁶² See 5 U.S.C. § 801(a)(1)(A)

⁵⁶³ See 5 U.S.C. § 604(b).

⁵⁶⁴ 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).

⁵⁶⁵ See 5 U.S.C. § 603(a).

⁵⁶⁶ See *id.*

⁵⁶⁷ See 47 C.F.R. § 64.1100(c).

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

225. 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

226. In the associated FRFA, *supra*, we have provided a detailed description of small entities.⁵⁶⁸ 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

227. *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.⁵⁶⁹ 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.

228. *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.

229. *Independent Third Party Verification.* Although specific rules are not proposed to

⁵⁶⁸ 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.

⁵⁶⁹ See *supra* discussion in Further Notice of Proposed Rulemaking; Double Recovery of Charges Paid by Slammed Subscribers.

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.

230. *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.

231. *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.

232. *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.

233. *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.

234. *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

235. *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.

236. *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.

237. *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.

238. *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.

239. 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.⁵⁷⁰ 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

240. None.

C. Initial Paperwork Reduction Act of 1995 Analysis

241. 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

⁵⁷⁰ See 47 C.F.R. § 1.721(a)(8).

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

242. 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

243. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.⁵⁷¹ 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.⁵⁷²

F. Petitions for Reconsideration

244. 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.⁵⁷³

245. 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.

246. Petitions for reconsideration must comply with section 1.429 and all other applicable

⁵⁷¹ 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).

⁵⁷² See 47 C.F.R. 1.1206(b)(2), as revised.

⁵⁷³ See 47 C.F.R. § 1.429(f).

sections of the Commission's rules.⁵⁷⁴ 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

247. 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.⁵⁷⁵

248. 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.

249. 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, D.C. 20554.

250. 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.

⁵⁷⁴ 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.*

⁵⁷⁵ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

251. 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

252. 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.

253. 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.

254. 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.

255. 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.

256. IT IS FURTHER ORDERED that a FURTHER NOTICE OF PROPOSED RULEMAKING IS ISSUED.

257. 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.

258. 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.

259. 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)
360th Communications Company (360th)
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 take 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

finer 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 . . .⁵⁷⁶

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."⁵⁷⁷ 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.

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.⁵⁷⁸ I also would point out that this potential harm would tend to

⁵⁷⁶ 47 U.S.C. § 258(b) (emphasis added).

⁵⁷⁷ 47 U.S.C. § 258(b).

⁵⁷⁸ 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

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* 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.⁵⁷⁹ 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.

provided service.

⁵⁷⁹ 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.⁵⁸⁰ 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.

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

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47 USCA Section 258.

subscriber after such violation.⁵⁸¹ 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 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.

⁵⁸¹ 47 USCA Section 258.