Before the
Federal Communications Commission
Washington, D.C. 20554

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

THIRD ORDER ON RECONSIDERATION
AND SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: February 28, 2003 **Released: March 17, 2003**

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. In this Third Order on Reconsideration and Second Notice of Proposed Rulemaking (*Order*) in the above-captioned proceeding, we address certain issues raised in petitions for reconsideration of the Second Report and Order and Further Notice of Proposed Rulemaking (*Second Report and Order*),[1] the First Order on Reconsideration (*First Reconsideration Order*)[2] and the Third Report and Order and Second Order on Reconsideration (*Third Report and Order*)[3] implementing section 258 of the Communications Act of 1934 (Act), as amended by the Telecommunications Act of 1996 (1996 Act).[4] Section 258 prohibits any telecommunications carrier from submitting or executing an unauthorized

[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*, CC Docket No. 94-129, Second Report and Order and Further Notice of Proposed Rule Making, 14 FCC Rcd 1508 (1998) (*Second Report and Order), stayed in part*, *MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. May 18, 1999) (*Stay Order*), *motion to dissolve stay granted*, *MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. June 27, 2000) (*Order Lifting Stay*).

[2] *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, First Order on Reconsideration, 15 FCC Rcd 8158 (2000).

[3] *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, Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996 (2000) (*Third Report and Order*); Errata, DA 00-2163 (rel. Sept. 25, 2000); Erratum, DA 00-292 (rel. Oct. 4, 2000); *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,* CC Docket No. 94-129, Order, 16 FCC Rcd 4999 (2001).

[4] 47 U.S.C. § 258(a). Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

change in a subscriber's selection of a provider of telephone exchange service or telephone toll service.[5] This practice, known as "slamming," distorts the telecommunications market by enabling companies that engage in fraudulent activity to increase their customer and revenue bases at the expense of consumers and law-abiding companies.

2. In the *Second Report and Order*, *First Reconsideration Order,* and *Third Report and Order*, the Commission promulgated rules pursuant to section 258 of the Act to combat the practice of slamming.[6] In the *Second Report and Order*, the Commission sought to eliminate the profits associated with slamming by broadening the scope of its carrier change rules and adopting, among other things, more rigorous slamming liability and carrier change verification measures. When the Commission released the *Second Report and Order*, it recognized that additional revisions to the slamming rules could further improve the preferred carrier change process and prevent unauthorized changes. Thus, concurrent with the release of the *Second Report and Order*, the Commission issued a Further Notice of Proposed Rulemaking (*Further Notice*).[7] In the *Third Report and Order and Second Order on Reconsideration*, the Commission adopted a number of rules proposed in the *Further Notice,* and addressed most issues raised on reconsideration of the *Second Report and Order*.[8] In addition, in the *First Reconsideration Order*,[9] the Commission amended portions of the rules regarding liability for slamming that had been stayed by the D.C. Circuit Court.[10]

3. In this *Order*, we address petitions filed by a coalition of rural local exchange carriers (Rural LECs) and the National Telephone Cooperative Association (NTCA) seeking reconsideration of Commission rules prohibiting carriers that effect requests for subscriber carrier changes submitted by other carriers from "re-verifying" such requests before executing the requested changes.[11] We also address a petition filed by SBC Communications, Inc. (SBC) seeking clarification of our prohibition on the use of carrier change information for marketing purposes and of the application of our slamming rules to Responsible Organization (RespOrg) changes for 800 number service.[12] Additionally, we address a petition filed by AT&T seeking clarification regarding the application of the slamming rules to newly

[5] 47 U.S.C. § 258(a).

[6] 47 C.F.R. § 64.1100 *et seq*. Prior to the adoption of section 258 of the Act, the Commission had taken various steps to address the slamming problem; the adoption of section 258 expanded the Commission's authority in this area. *See*, *e.g.*, *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Report and Order, 10 FCC Rcd 9560 (1995), *stayed in part*, 11 FCC Rcd 856 (1995); *Policies and Rules Concerning Changing Long Distance Carrier*s, CC Docket No. 91-64, 7 FCC Rcd 1038 (1992), *reconsideration denied*, 8 FCC Rcd 3215 (1993); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 F.C.C.2d 911, 101 F.C.C.2d 935, *reconsideration denied*, 102 F.C.C.2d 503 (1985).

[7] *Second Report and Order,* 14 FCC Rcd at 1591-1609, ¶¶ 139-182.

[8] *Third Report and Order,* 15 FCC Rcd 15996 (2000).

[9] *First Order on Reconsideration*, 15 FCC 8158 (2000).

[10] Shortly after the release of the *First Order on Reconsideration*, the FCC filed a motion to dissolve the stay on the slamming liability rules that the D.C. Circuit had imposed in its *Stay Order*. Motion of the FCC to Dissolve the Stay, filed May 18, 2000 in *MCI WorldCom, Inc. v. FCC*, D.C. Cir. No. 99-1125. On June 27, 2000, the D.C. Circuit issued the *Order Lifting Stay*, which granted the Commission's unopposed motion and lifted the stay.

[11] *See Rural LECs*, Petition for Reconsideration, CC Docket No. 94-129, at 3-10 (filed March 18, 1999); *National Telephone Cooperative Association*, Petition for Reconsideration, CC Docket No. 94-129, at 4-18 (filed March 18, 1999).

[12] *SBC Communications, Inc.,* Petition for Reconsideration and for Clarification, CC Docket No. 94-129, at 13-14 (filed March 18, 1999).

installed lines, and petitions filed by Sprint and WorldCom seeking the elimination of certain carrier reporting requirements and modification of certain carrier liability rules. Finally, we address petitions for reconsideration of our *Third Report and Order* in which the Commission, among other things, modified its rules on the verification of carrier change requests, including third party verification (TPV) using a three-way conference call or a call through an automated verification system.[13]

4. This *Order* also contains a Further Notice of Proposed Rulemaking, in which we seek comment on rule modifications with respect to third party verifications.

II. RE-VERIFICATION OF CARRIER CHANGE REQUESTS BY EXECUTING CARRIERS

A. Background

5. In the *Second Report and Order*, the Commission set forth general distinctions between "submitting carriers" and "executing carriers" in the context of carrier change requests. A "submitting carrier" is defined as any telecommunications 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.[14] An example of a submitting carrier is an interexchange carrier (IXC) seeking to provide interexchange service to an end user. An "executing carrier" is defined as any telecommunications carrier that effects a request that a subscriber's telecommunications carrier be changed.[15] The Commission clarified that an executing carrier has actual physical responsibility for making the change to the subscriber's service, as opposed to merely forwarding a carrier change request on behalf of a subscriber.[16]

6. In the *Second Report and Order*, the Commission affirmed its tentative conclusion that submitting carriers should be responsible for verification of carrier change requests and, regardless of the solicitation method used, should employ one of three verification options (written letters of agency (LOAs), electronic authorization, or third party verification).[17] The Commission further concluded that an executing carrier may not "re-verify" the submitting carrier's initial verification of a change request.[18] The Commission agreed with parties that such re-verifications would be expensive, unnecessary, and duplicative. The Commission emphasized, however, that executing carriers must act to ensure that subscriber change requests are executed as quickly and as accurately as possible, without unreasonable delay and using the most technologically efficient means available.[19]

7. The Commission expressed concern in the *Second Report and Order* that executing carriers would have the incentive and ability to use the verification process as a means of delaying or denying carrier change requests in order to benefit themselves or their affiliates.[20] While the Commission agreed

[13] *Third Report and Order*, 15 FCC Rcd at ¶ 38.

[14] *See* 47 C.F.R. § 64.1100(a); *Second Report and Order,* 14 FCC Rcd at 1564-65, ¶ 92.

[15] *See* 47 C.F.R. § 64.1100(b); *Second Report and Order,* 14 FCC Rcd at 1565-66, ¶ 94.

[16] *Id.* The Commission also stated that, in the current environment, an IXC could also be an "executing carrier," *e.g.*, if a facilities-based IXC resells service to a switchless reseller. *See Second Report and Order,* 14 FCC Rcd at 1566, ¶ 95.

[17] *See Second Report and Order,* 14 FCC Rcd at 1567, ¶ 97. In a subsequent order, the Commission added a fourth verification option—the Internet LOA (*Third Report and Order*, 15 FCC Rcd 15996, at ¶¶ 6-21).

[18] *See Second Report and Order,* 14 FCC Rcd at 1567, ¶ 97; *see* 47 C.F.R. § 64.1120(a)(2).

[19] *Id.*

[20] *Id.* at ¶ 98.

with LEC commenters that allowing executing carriers to re-verify carrier change requests could help to deter slamming, it ultimately concluded that the anti-competitive effects of re-verification outweighed the potential benefits.[21] The Commission also noted that section 222(b) of the Act states that a carrier that "receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose."[22] The Commission found that information contained in a submitting carrier's change request is proprietary information such that that the executing carrier may only use that information to provide service to the submitting carriers (*i.e.*, changing the subscriber's carrier), and may not make additional use of that information for re-verification purposes.[23]

8. The Commission was also concerned that re-verification by executing carriers could function as a *de facto* preferred carrier "freeze," even in situations where a subscriber has not requested such a freeze.[24] In general, preferred carrier freezes require subscribers to contact their executing carriers to lift such freezes before any carrier changes can be effectuated. Executing carrier re-verification of a subscriber change request would also act as a "freeze" of a customer's preferred carrier by requiring the customer to communicate with the executing carrier before the requested change can be implemented.[25] As with unauthorized preferred carrier freezes, the Commission concluded that re-verification by executing carriers could serve to "take away control from the consumer" and constrain consumer choice.[26]

9. Notwithstanding its conclusion that executing carriers may not verify carrier change requests, the Commission emphasized that such carriers are free to provide protections to customers in ways that do not raise anti-competitive concerns.[27] For example, the Commission stated that executing carriers may make preferred carrier freeze options available to customers who choose to authorize such a freeze to protect themselves from slamming.[28] The Commission also noted that executing carriers have other means available to notify customers that their preferred carrier has changed, such as highlighting the change on the customer's bill.[29] Finally, the Commission stated that the concerns expressed by the executing carriers would likely lessen over time as the broader slamming safeguards contained in the *Second Report and Order* acted to decrease the incidence of slamming harms.[30]

B. Rural LEC and NTCA Petitions for Reconsideration

10. Rural LECs and NTCA ask the Commission to reconsider and reverse the prohibition on executing carrier re-verifications.[31] According to Rural LECs, because of their close relationships with

[21] *Id.* at ¶ 99.

[22] 47 U.S.C. § 222(b).

[23] *See Second Report and Order,* 14 FCC Rcd at 1567, ¶ 99.

[24] *Id.* at ¶¶ 99-101. 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 (*Second Report and Order*, 14 FCC Rcd at 1569, n. 348).

[25] *Id.*

[26] *See Second Report and Order,* 14 FCC Rcd at 1567, ¶ 100.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Rural LECs Petition*;* NTCA Petition.

their customers, small, rural LECs are "uniquely positioned to provide a line of defense" against slamming.[32] Rural LECs state that their own voluntary executing carrier verification efforts prevented slamming in the past, and they assert that executing carriers found that 40-50% of change requests were unauthorized.[33] NTCA agrees that, based on the number of potential slamming cases uncovered by executing carriers before the prohibition, it is clear that re-verification deters slamming.[34] Rural LECs assert that executing carrier verification serves as an additional safeguard against slamming and, contrary to the Commission's finding in the *Second Report and Order,* there is no assurance that under the Commission's modified rules slamming practices will abate, given the large financial incentives that remain.[35]

11. Rural LECs and NTCA further assert that executing carriers have a vested interest in verifying the accuracy of change requests because they are often customers' primary point of contact for phone service, and therefore risk damage to their business reputation and customer relations when slamming occurs, as well as being subject to the "costly and time-consuming" slamming enforcement process.[36] Rural LECs assert that they have not engaged in marketing when re-verifying change requests, and state that many rural LECs do not have long distance affiliates and would thus lack incentives to delay or deny carrier change requests.[37] Rural LECs argue that many submitting carriers, however, have incentives to use deceptive or misleading marketing practices in order to gain customers, and it is therefore inappropriate for such carriers to also be responsible for verification of change requests.[38] NTCA agrees that the Commission's concerns regarding potential anti-competitive use of verification by executing carriers are unfounded, and that in any case the benefits of allowing executing carriers to verify change request far outweigh any risk of anti-competitive behavior.[39] NTCA asserts that the Commission can allay any concerns it has about anti-competitive behavior by executing carriers by imposing, for example, time limits by which verification and execution must occur.[40] U S West states that, instead of a prohibition on LEC re-verifications, the Commission should at most regulate the "form, content and scope" of the re-verification contact.[41]

12. NTCA also states that, because an executing carrier could be liable for harms caused by inappropriate carrier changes, executing carriers assume great risk when relying on a submitting carrier's claim to be the "agent" of the end user.[42] NTCA asserts that the reasonableness of a LEC's belief in the apparent authority of the IXC will be difficult to establish given the high incidence of slamming.[43]

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[32] Rural LECs Petition at 2.

[33] *Id.* at 3-5; NTCA Petition at 13-15. *See also* Letter of the Montana Telecommunications Association to Magalie Roman Salas, Secretary, FCC, received April 22, 1999 (asserting that MTA companies were able to confirm through customer verification that as many as 80% of change orders "were the result of slamming").

[34] *See* NTCA Petition at 20-22.

[35] Rural LECs Petition at 10-11.

[36] *Id.* at 2-3, 9; NTCA Petition at 5-6.

[37] Rural LECs Petition at 6.

[38] Rural LECs report specific instances of fraudulent inducements and misstatements by LECs (Rural LECs Petition at 6-8).

[39] NTCA Petition at 17-18.

[40] *Id.* at 23.

[41] U S West Support/Opposition at 12.

[42] NTCA Petition at 13-14.

[43] *Id.*

Furthermore, NTCA states that, under the principles of agency law, an agent has no right or reason to require information to be withheld from the principal.[44] NTCA acknowledges that, under section 222(b) of the Act, an executing carrier may not disclose carrier change information to other IXCs or to any other party for competitive benefit.[45] However, NTCA argues that the executing carrier would be using the proprietary information to prevent anti-competitive practices, not to gain a competitive advantage.[46] NTCA also asserts that communications between an executing carrier and its own customers regarding carrier change verification information does not violate section 222(b) because the information is proprietary only as to the customers themselves. NTCA states that it is illogical to presume that Congress intended that a subscriber's own proprietary information not be divulged to him or her.[47]

13. Finally, Rural LECs and NTCA argue that, by restricting the ability of executing carriers to communicate with their customers, the Commission is unduly interfering with executing carriers' First Amendment rights. NTCA agrees that there is a substantial governmental interest in advancing competition and protecting consumer choice.[48] NTCA asserts, however, that the prohibition on executing carrier re-verification does not advance this interest and in any case is not the least restrictive rule that could have been adopted.[49] Rural LECs ask the Commission to consider this issue in the context of the U.S. Supreme Court's decision in *United States v. Playboy Entertainment Group.*[50] Specifically, Rural LECs argue that, as in the *Playboy* case, the Commission has restricted content-based speech without demonstrating that less restrictive means could not be used to accomplish the Commission's objectives.[51] Rural LECs also note that the Supreme Court let stand the Tenth Circuit's decision in *U S West v. FCC* that the Commission's customer proprietary network information (CPNI) rules improperly restricted speech.[52]

14. Several commenters oppose the petitions of Rural LECs and NTCA, stating that LECs have the incentive to try to delay carrier changes and/or market their own products to customers under the guise of verifying the intent to change carriers.[53] AT&T argues that petitioners have failed to demonstrate that protection of their purported "reputation interest" should take precedence over the specific interest of customers in the timely implementation of their orders, and the public interest in protection of a competitive telecommunications marketplace.[54] AT&T asserts that petitioners have in any case failed to provide any factual evidence that customers blame them for slamming.[55] WorldCom argues that the petitioners fail to explain why the new, Commission-approved verification processes will be insufficient

[44] NTCA Petition at 13-15.

[45] *Id.* at 9.

[46] *Id.* at 16-17.

[47] *Id.* at 12. *See also* Letter of Telecommunications Research & Action Center ("TRAC Letter") to Magalie Roman Salas, Secretary, FCC, dated September 28, 1999, at 2.

[48] NTCA Petition at 24.

[49] *Id.* at 24-25.

[50] Letter of David Cosson and Marci Greenstein, Counsel for Rural LECs, to Magalie Roman Salas, Secretary, FCC, dated June 27, 2000 (Rural LECs *ex parte*), (citing *United States v. Playboy Entertainment Group*), 529 U.S. 803 (2000) (*Playboy*).

[51] Rural LECs *ex parte* at 1-2.

[52] *Id.* at 2.

[53] *See, e.g.*, Qwest Comments at 14; Cable & Wireless Comments at 5-6.

[54] AT&T Comments at 11.

[55] *Id*.

to deter slamming.[56] Qwest states that the prohibition against re-verification by executing carriers will become even more important as Regional Bell Operating Companies ("RBOCs") are able to offer more services pursuant to section 271 of the Act.[57]

C. Discussion

15. We disagree with petitioners that our prohibition on executing carrier re-verification fails to withstand First Amendment analysis.[58] As an initial matter, the *Playboy* case cited by Rural LECs does not provide the proper framework for analysis of the speech at issue here. The ability of an executing carrier to verify its customer's change requests is by its nature commercial speech because it concerns the act of solicitation and consumer purchase of services provided by the consumer's carrier of choice.[59] In contrast, the speech at issue in *Playboy* was not commercial speech, was restricted solely on the basis of its content, and was therefore subject to a different level of protection under the First Amendment, *i.e*., the speech was subject to the strictest level of scrutiny. Thus, in *Playboy*, the Court found that the statutory provision at issue should be narrowly tailored to promote a compelling government interest and, if a less restrictive alternative would serve the Government's purpose, that alternative must be used."[60]

16. Commercial speech is subject to a lesser degree of First Amendment scrutiny than is used when examining non-commercial speech.[61] Specifically, as articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, commercial speech must be analyzed according to the following criteria: (1) whether the asserted governmental interest is substantial; (2) whether the regulation directly advances the governmental interest asserted; and (3) whether the regulation is not more extensive than necessary to serve that interest.[62]

17. With respect to the first prong of *Central Hudson*, we conclude that the governmental interest in preventing anti-competitive behavior and removing impediments to consumer choice, is substantial.

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[56] WorldCom Comments at 5-6.

[57] *Id*.

[58] The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I. Although the First Amendment on its face applies to legislation enacted by Congress, it is in practice much broader and encompasses, amongst other things, regulations promulgated by administrative agencies. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 192 (1991).

[59] *See U S West v. FCC,* 182 F.2d. at 1233, n.4 ("when the sole purpose of the intra-carrier speech based on CPNI is to facilitate the marketing of telecommunications services to individual customers, we find the speech integral to and inseparable from the ultimate commercial solicitation); *See also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.,* 425 U.S. 748, 760 (1976).

[60] *See Playboy,* 529 U.S. at 811 ("[T]he speech in question is defined by its content; and the statute which seeks to regulate it is content-based"). In *Playboy,* the Supreme Court also stated that the restriction at issue in that case "focuses only on the content of the speech and the direct impact that speech has on its listeners," and concluded that "[T]his is the essence of content-based regulation." *Id.* at 811, (citing *Boos v. Barry,* 485 U.S. 312, 321 (1988)). *See also Playboy*, 529 U.S. at 813 ("Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny . . . [I]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative").

[61] *See Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York,* 447 U.S. 557, 562 (1980).

[62] *Central Hudson,* 447 U.S. at 566. *See also Lorillard Tobacco Co. v. Reilly,* 121 S.Ct. 2404, 2421 (2001). In addition, under *Central Hudson*, if the speech in question concerns illegal activity or is misleading, the government may freely regulate the speech. In the instant proceeding, no commenter has suggested that the speech at issue is misleading or involves illegal activity.

Neither Rural LECs nor NTCA dispute this assertion; as noted above, NTCA in fact agrees that these interests are substantial. We also note that the Supreme Court has recognized that eliminating restraints on competition is a substantial government interest.[63] We remain concerned that, in today's dynamic telecommunications marketplace, re-verifications by executing carriers before executing carrier changes, in addition to the other verification safeguards required by our rules, are duplicative and create unnecessary burdens on customers seeking to make carrier change requests, and as such can impede consumer choice. As the Commission stated in the *Second Report and Order*, 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.[64]

18. As to the second prong of *Central Hudson*, we conclude that the decision to prohibit carriers from imposing an additional, duplicative procedure on consumers directly advances the substantial government interest in preventing anti-competitive practices by executing carriers. Those sections of the Act from which the Commission's slamming rules derive were enacted with the specific purpose of preventing anti-competitive practices that distort the telecommunications marketplace and unjustly harm consumers.[65] The Commission's verification procedures seek to prevent anti-competitive practices by all parties involved in the carrier change process, and promote competition and choice in telecommunications by ensuring that the ability to choose and change carriers is seamless and efficient. In general, there must be a "reasonable fit" between the regulation and the objective, and the fit "represents not necessarily the single best disposition but one whose scope is in proportion to the interest served."[66] NTCA suggests that the Commission could avoid anti-competitive delays by requiring executing carriers to verify and execute change requests within a certain period of time.[67] As we discussed in the *Second Report and Order*, mandating a specific deadline for such actions would be problematic due to the many legitimate reasons for delay, such as customer requests for delay or a large volume of change requests, and would likely fail to meet needs of the wide variety of carriers in the marketplace, small and large alike.[68] In any case, regardless of whether a time limit is in effect, customers should not be forced by executing carriers to provide affirmation, for yet a third time, of their decision to change preferred carriers. We note that, in general, carriers can communicate information freely to their customers during commercial transactions; we simply decline here to impose a duplicative and burdensome additional procedural step in the carrier change verification process.

19. In addition, such an alternative would not eliminate unnecessary burdens on consumers. As with unauthorized preferred carrier freezes, re-verification by its very nature imposes additional burdens on consumers and diminishes consumer choice. TRA asserts that, in the "rough and tumble" telecommunications marketplace, the costs to competition and consumer choice of allowing executing carriers to re-verify carrier change requests are "painfully obvious" and would be much higher than any potential benefits of allowing this practice.[69] TRA states that allowing carrier change information to be

[63] *See, e.g., Turner Broadcasting System v. FCC,* 512 U.S. 622, 663 (1994).

[64] *Second Report and Order,* 14 FCC Rcd at 1568, ¶ 99.

[65] *See, e.g*., 47 U.S.C. §§ 258, 201(b), 206-208; *See Second Report and Order,* 14 FCC Rcd at 1510-11, ¶ 1.

[66] *See Board of Trustees of the State University of New York v. Fox,* 492 U.S. 469, 480 (1989).

[67] NTCA Comments at 23.

[68] *Second Report and Order*, 14 FCC Rcd at 1571, ¶ 334.

[69] Telecommunications Resellers Association (TRA) Comments at 10-11.

used by executing carriers for re-verification would be analogous to authorizing GM to confirm each sale made by Ford before the sale can take place.[70]

20. We agree that it is difficult to imagine how a company that imposes a verification requirement on a consumer's purchase of a competitor's product reduces unnecessary delays and increases choice for consumers. We continue to believe that the Commission's prohibition on executing carrier verification advances and is proportionate to the goal of preventing anti-competitive behavior by executing carriers and protecting consumer choice. As the Commission stated in the *Second Report and Order*, even with this prohibition, executing carriers have other means of protecting their customers that will not interfere with competition or undermine consumer choice. For example, the Commission noted that executing carriers can offer a preferred carrier freeze option to customers who are concerned about slamming and authorize such a freeze, and can alert customers to carrier changes by highlighting carrier change information in customer billings.[71]

21. We also find that our rule satisfies the final prong of *Central Hudson*, *i.e.*, that it is not more extensive than necessary to serve the stated interest. While the Commission need not employ the least restrictive means, the means must be "narrowly tailored" to its desired objective.[72] Under this prong, we consider the "careful calculation" of costs and benefits associated with the burden on speech.[73] NTCA asserts that the Commission's decision to prohibit executing carrier verification does not reflect such a balancing. We disagree. In the *Second Report and Order*, the Commission acknowledged that executing carrier re-verification of carrier changes could in some instances help to deter slamming.[74] In addition, we note that NTCA and Rural LECs appear to claim that a benefit of such an approach would be to protect the business reputation of executing carriers who's customers assume they are responsible for slamming. The costs of such an approach were also set forth in the *Second Report and Order*.

22. Specifically, the Commission found that executing carrier re-verification could diminish consumer choice and impede competition, and would be expensive, unnecessary and duplicative of the submitting carriers' verification.[75] We also are unpersuaded by NTCA and Rural LECs' argument that executing carrier re-verification serves our interest in deterring slamming, and protecting consumer choice and competition, as well as our strengthened slamming rules. When asserting that executing carrier verification is necessary, NTCA and Rural LECs rely solely on the assertion that executing carrier verification revealed a high incidence of invalid change orders prior to the implementation of the Commission's current slamming safeguards.[76] Rural LECs and NTCA also provide no evidence that their customers blame them for slamming.

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[70] *Id*.

[71] *Second Report and Order,* 14 FCC Rcd at 1569, ¶ 101.

[72] *Florida Bar v. Went For It Inc*., 515 U.S. 618, 632 (1995).

[73] *U S West v. FCC*, 182 F.3d at 1238 (quoting *Cincinnati v. Discovery Network, Inc*., 507 U.S. 410, 417 (1993).

[74] *Second Report and Order* at ¶ 100.

[75] *Id*. at ¶¶ 97-101.

[76] As noted above, Rural LECs state that their own voluntary executing carrier verification efforts prevented slamming in the past, and that such efforts revealed that 40-50% of change requests were unauthorized (Rural LECs Petition at 3-5). We note that AT&T, Sprint, and TRA question this information, and assert that nearly half of the change orders reported to be invalid did not involve actual slamming (AT&T Comments at 10-11; TRA Comments at 11; Sprint comments at 4). Sprint posits that the high slamming rates reported by Petitioners may also reflect the use of marketing efforts by LECs during re-verifications (Sprint Comments at 5). WorldCom states that it has uncovered many instances in which ILECs have attempted to retain customers under the guise of verification (WorldCom Comments at 5). AT&T asserts that only one named member of the Rural LECs does not provide or

(continued....)

23. We have considered alternatives to the re-verification restriction, such as allowing re-verification by LECs without IXC affiliates, or allowing re-verification by LECs if the actual re-verification is conducted by an independent, third-party verifier. However, we note that these alternatives would still involve duplicative verifications for customers as discussed above. In addition, even if a LEC or its affiliate does not provide IXC service, the LEC remains a competitor to IXC service providers in the lucrative intraLATA toll market, and as such would have incentives to engage in anti-competitive behavior towards IXCs. Furthermore, such alternatives would create administrative difficulties. For example, if a customer was required to complete verifications at the behest of both the IXC and the LEC, and the verifications were somehow contradictory, it may not be clear as to which verification should be used to effect the carrier change or to make a determination in the context of a slamming dispute. While we do not agree with TRA that executing carrier verification is simply "a naked cost with no countervailing benefit," we also do not find that potential benefits of allowing executing carriers to verify sales by other companies to the executing carriers' customers outweigh the costs to consumer choice and competition. We note that our rules require executing carriers (that are informed by a subscriber of an unauthorized carrier change) to immediately notify both the authorized carrier and the alleged unauthorized carrier, and to refer the subscriber to the appropriate governmental forum for resolution of the complaint.[77] Under these circumstances, the LEC, at its discretion, may be able to assist the subscriber in receiving reimbursement or removal of the charges from the bill, particularly if the LEC acts as the billing and collections agent for the IXC in question.

24. With respect to the petitioners' other arguments, we disagree with NTCA that the prohibition on executing carrier re-verification exposes executing carriers to liability for slamming under general principals of agency law. The Commission's rules make clear that the responsibility to verify a customer's change request before submitting it to that customer's executing carrier rests upon the submitting carrier.[78] Consequently, any liability that flows from a submitting carrier's failure to verify a customer's change request will, under the Commission's rules, fall upon the submitting carrier.[79] Executing carriers are, of course, liable for any adverse actions that they may undertake during the

(...continued from previous page)
resell any type of long distance (AT&T Comments at 11). Sprint states that the information cited by Rural LECs appears to show that relatively few LECs without IXC affiliates incurred the added expense of re-verifying change requests, and that, in any case, rural LECs without an IXC affiliate might attempt to dissuade customers from changing IXCs; for example, a LEC might have a billing and collection agreement with the customer's current carrier but not with the carrier requesting the change (Sprint Comments at 3, nt. 1). Sprint notes that Rural LECs do not propose to use a third party verifier, and it is thus likely that the same LEC employees that conduct the verifications would also be responsible for marketing the LEC's services (Sprint Comments at 5). Rural LECs disagree that their petition indicates that relatively few LECs without IXC affiliates re-verify requests, as is alleged by Sprint (Rural LECs Reply at 4). Rural LECs state that the list of rural LECs that have in the past used verification was intended to be illustrative and not definitive, and note that NTCA reported that 40% of its members do not have IXC affiliates (*id*. at 5). Rural LECs also state that one of the cited companies used verification forms that were mailed and "not subject to human error, *i.e*., the kind of miscommunication or misinterpretation that Sprint alleges" (*id*.). Rural LECs assert that 67% of those subscribers nevertheless reported that their carrier change requests were invalid (*id*.).

[77] 47 C.F.R. § 64.1150(a),(b).

[78] 47 C.F.R. § 64.1120(a)(1)(ii).

[79] *See* 47 C.F.R. § 64.1140(a).

execution process, such as unnecessary or unreasonable delay in implementing a change request from a submitting carrier.[80]

25. Finally, we disagree with NTCA that the information contained in a carrier change request is not protected by section 222(b) of the Act. NTCA argues that the executing carrier would be using the proprietary information to *prevent* anti-competitive practices, and not to gain a competitive advantage in violation of section 222(b).[81] In contrast, Cable & Wireless and Sprint concur with the Commission's finding in the *Second Report and Order* that the use of carrier change information by executing carriers to re-verify orders is an impermissible use of proprietary information under section 222(b) of the Act.[82] As explained above, the Commission has legitimate concerns with regard to LEC use of carrier change information to impede consumer choice and hamper competition. In addition, the fact that an executing carrier may also use that information in a pro-competitive way (*i.e.,* to prevent slamming) does not diminish the fact that information contained in a carrier change request is by its very nature proprietary to the submitting carrier. Such information may only be used by the executing carrier to effectuate the provision of service by the submitting carrier to its customer.

26. Use of Carrier Change Information for Marketing Purposes. In a similar vein, SBC asks that the Commission clarify its position on the use of carrier change information for marketing purposes *after* the carrier change has been completed and the customer has been disconnected.[83] No commenter disputes that, under section 222(b) of the Act, carrier change information cannot be disclosed for competitive benefit.[84] NTCA agrees that "Congress intended by the express terms of section 222(b) to prevent carriers from using information obtained from another to be used for the carrier's own marketing efforts against the submitting carrier."[85] SBC, however, asks the Commission to clarify that executing carriers are not prohibited from contacting customers who have switched to competitors *after* the carrier change has been completed and the customer has been disconnected.[86] SBC argues that, because disconnect information is available to IXCs and CLECs concurrent with its availability to executing carriers, there should be no restrictions on the use of that information.[87] WorldCom asks the Commission to clarify that an executing carrier is prohibited from using information obtained from a carrier change request to "winback" the customer after carrier change completion and disconnection, even if the disconnect information reveals that a customer's service was disconnected as the result of a carrier change order.[88]

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[80] 47 C.F.R. § 64.1120(2). *See also* ¶¶ 82-91, *infra*, regarding executing carrier liability in instances where a customer contacts a LEC directly to request a carrier change.

[81] *See* NTCA Petition at 9, 16-17. *See also Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115, 96-149, 00- 257, FCC 02-214, (rel. July 25, 2002) (*CPNI Order*) at ¶¶ 131-133.

[82] Cable & Wireless Comments at 5.

[83] SBC Petition at 13-14.

[84] *See* NTCA Petition at 9, 16 ("NTCA has no quarrel with a conclusion that the statute proscribes the competitive marketing of the LEC's or any other carrier's service against the interests of the submitting carrier"). As explained above, NTCA contends that executing carrier re-verification of change requests utilizes carrier change information for pro-competitive, rather than anti-competitive, purposes.

[85] NTCA Petition at 16.

[86] SBC Petition at 13-14.

[87] *Id.* at 14.

[88] WorldCom Comments at 17-18.

27. We clarify that, to the extent that the retail arm of an executing carrier obtains carrier change information through its normal channels in a form available throughout the retail industry, and after the carrier change has been implemented (such as in disconnect reports), we do not prohibit the use of that information in executing carriers' winback efforts. This is consistent with our finding in the *Second Report and Order* that an executing carrier may rely on its own information regarding carrier changes in winback marketing efforts, so long as the information is not derived exclusively from its status as an executing carrier.[89] Under these circumstances, the potential for anti-competitive behavior by an executing carrier is curtailed because competitors have access to equivalent information for use in their own marketing and winback operations.

28. We emphasize that, when engaging in such marketing, an executing carrier may only use information that its retail operations obtain in the normal course of business. Executing carriers may not at any time in the carrier marketing process rely on specific information they obtained from submitting carriers due solely to their position as executing carriers. We reiterate our finding in the *Second Reconsideration Order* that carrier change request information transmitted to executing carriers in order to effectuate a carrier change cannot be used for any purpose other than to provide the service requested by the submitting carrier. We will continue to enforce these provisions, and will take appropriate action against those carriers found in violation. In addition, we note that our decision here is not intended to preclude individual State actions in this area that are consistent with our rules.

III. VERIFICATION OF CARRIER CHANGES

A. Independent Third Party Verification

29. Background. In the *Second Report and Order*, the Commission stated that a preferred carrier change order must be confirmed using written or electronically-signed letters of agency (LOAs), electronic authorization (a call to a toll-free number that records the caller's originating automatic number identification), independent third party verification, or "any State-enacted verification procedures applicable to intrastate preferred carrier change orders only."[90] In particular, the Commission modified its rules on independent third party verification to address concerns raised in conjunction with its use by strengthening the independence criteria under which third party verification entities operate.[91] The Commission noted, for example, that some carriers have used third party verification in a manner

[89] *Second Report and Order,* 14 FCC Rcd at 1573-74, ¶ 107. This is also consistent with our findings regarding winback in our Customer Proprietary Network Information ("CPNI") proceeding. *See Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115, 96-149, 00- 257, FCC 02-214, (rel. July 25, 2002) (*CPNI Order*)("[w]e reaffirm our existing rule that a carrier executing a change for another carrier is prohibited from using such information to attempt to change the subscriber's decision to switch to another carrier. However, because we recognize that a carrier's retail operations may, without using information obtained in violation of section 222(b), legitimately obtain notice that a customer plans to switch to another carrier or contact a defecting customer in the ordinary course of business, we decline to impose a presumption that all retention efforts are illegal, as requested by MCI WorldCom . . . we agree with BellSouth's argument that deeming any "winback or retention effort[s], including those based on information learned through the carrier's retail operations, . . . presumptively unlawful would deprive customers of . . . pro-consumer, pro-competitive benefits."). *CPNI Order* at ¶¶ 131-133.

[90] *Second Report and Order*, 14 FCC Rcd at 1508.

[91] *Id.* at ¶ 33.

calculated to confuse and mislead consumers.[92] The Commission thus set forth the criteria to be used when determining third party independence in order to better ensure that the third party verification process is truly separate from both the carrier and the carrier's sales representative.[93] Specifically, the Commission (1) stated that the third party verifier should not be owned, managed, controlled, or directed by the carrier, (2) found that the third party verifiers should not be given financial incentives to approve carrier changes, and (3) reiterated that the third party verifier must operate in a location physically separate from the carrier.[94] The Commission also recognized that additional revisions to the slamming rules could further improve the preferred carrier change process and prevent unauthorized changes. Thus, concurrent with the release of the *Second Report and Orde*r, the Commission issued a *Further Notice of Proposed Rulemaking* seeking comment on independent third party verification, as well as on various other proposals relating to slamming.[95]

30. In response to the comments received, in the *Third Report and Order* the Commission required that (1) the carrier or carrier's sales representative must drop off the call once the connection has been established between the subscriber and the third party verifier, (2) scripts for third party verification (TPV) should elicit, at a minimum, the identity of the subscriber, confirmation that the person on the call wants to make the change, the names of the carriers affected by the change, the telephone numbers to be switched, and the types of service involved, and the TPV must also be conducted in the same language that was used in the underlying sales transaction, (3) the entire TPV transaction must be recorded, and carriers must preserve and maintain these recordings for a minimum period of two years after obtaining such verification, and (4) automated systems that preserve the independence of the third party verification process may be used to verify carrier change requests.[96] The Commission created these requirements to enhance the independent nature of the third party method of verification and to ensure that the verification process ultimately involved only the consumer and the third party verifier. The Commission also stated, in the *Third Report and Order*, that a carrier's sales agent's role is concluded when a consumer is transferred to a third party verifier because the consumer's intent to change carriers should have been reached following a clear, non-misleading presentation by the carrier's sales agent.[97] The Commission found that the presence of a sales agent on the verification call could compromise the independent nature of the process by creating an opportunity for improper influence.[98]

31. VoiceLog, a third party verification services provider, has petitioned the Commission to reconsider the requirement that a carrier or carrier's sales representative drop off the call after initiating a three-way conference call or a call through an automated verification system.[99] VoiceLog states, among

[92] *Second Report and Order*, 14 FCC Rcd at 1552.

[93] *Id.*

[94] *Id.*.

[95] *Id.* at 1601-1603.

[96] *Third Report and Order*, 15 FCC Rcd at 21-24. Generally, an automated system operates in the following manner: after obtaining a carrier change request from a subscriber through telemarketing, the carrier's sales representative sets up a three-way call among the subscriber, the carrier, and the automated verification recording system. The automated system then plays recorded questions and records the subscriber's answers to those questions. *Id*. at 43, note 125.

[97] *Third Report and Order*, 15 FCC Rcd at ¶ 38.

[98] *Id.*

[99] *See* VoiceLog Petition for Reconsideration (VoiceLog Reconsideration Petition). VoiceLog also asks that the Commission stay the drop-off rule pending reconsideration. Inasmuch as we address VoiceLog's petition for reconsideration of the *Third Report and Order,* the petition for partial stay pending reconsideration is denied as moot. *See* VoiceLog Stay Petition.

other things, that many of the smaller carriers it serves do not have the "sophisticated central office equipment necessary to allow a sales representative to initiate a three-way conference call or call through an automated system and then drop off the line."[100]

32. Specifically, VoiceLog asserts that, when adopting the drop-off rule, the Commission failed to give full consideration to the rule's effect on consumers and, in particular, small carriers. VoiceLog states that smaller carriers often lack the economic or technical means to comply with the drop-off requirement, and, in some cases, are located in areas where they are unable to procure the services necessary to allow the party initiating the conference call to drop the call without terminating it.[101] VoiceLog conducted an Internet-based survey of members of the telecommunications industry in response to Commission staff requests for more detailed information about the impact of and costs of compliance with the drop-off rule.[102] Of the 58 respondents, 40% had 50 or fewer employees, while approximately 10% had over 1000 employees; 58% of respondents had $10 million or less in revenue, and 14% had more than $10 million. Forty-three percent said that they were unaware of the rule, 52% were not in compliance with the drop-off rule, and 33% currently do not have the technology required to comply with the drop-off rule.[103] With regard to compliance costs, 16% reported that they could not upgrade their technology to comply with the drop-off rule, 21% reported the costs to upgrade would exceed $10,000, 13% estimated the upgrade costs to exceed $50,000, and 10% estimated that the costs to comply with the rule would exceed $100,000.[104] Fifty percent of respondents stated that compliance with the rule would result in incremental costs of $1000 to $5000 per month or more. Forty-one percent of the respondents stated that they cannot monitor whether their sales representative has dropped off the line during the TPV and, according to VoiceLog, dropping off the line would require these carriers to put the line on hold, forcing the sales representative to periodically recheck the line to determine if the TPV is finished, an inefficient and costly process.[105]

33. When asked what reasons prevented the carriers from upgrading their technology to comply with the drop-off rule, 51% of respondents cited lack of capital, 46% cited a lack of technical information, and 11% stated either that the central office would not support a drop-off or that the technology was not available.[106]

34. Furthermore, VoiceLog and other commenters state that customers sometimes have questions that occur to them during the verification process.[107] VoiceLog asks that the Commission modify the drop-off requirement to allow a carrier or a carrier's representative initiating a three-way conference call or a call through an automated verification system to remain silently on the line, assist the subscriber in reaching a live person, assist in terminating the call, and provide neutral, objective information that

[100] VoiceLog Reconsideration Petition at 5. Several comments were filed in support of the VoiceLog petitions; *see* Comments of AT&T, BuyersOnline, Cox Communications, *Erbia*Network, Fionda, Hughes Telecom, IDS Telecom, John Ring Enterprises, Long Distance Post, PromiseVision, SaveTel Communications, SBA, Telephone Company of Central Florida, TCM Communications, Telecom New Zealand, and Velocity Networks of Kentucky.

[101] VoiceLog states that it provides TPV services to approximately 200 carriers, the majority of which are smaller carriers. *See* VoiceLog Stay Petition.

[102] Impact of "Representative Drop Off" Rule, A Survey by VoiceLog, LLC (VoiceLog Survey).

[103] VoiceLog Survey at 2-4.

[104] *Id.* at 5.

[105] VoiceLog Reconsideration Petition at 5. *See* VoiceLog Survey at 4.

[106] VoiceLog Survey at 5.

[107] *See*, *e.g.*, AT&T Comments at 11.

responds directly to the subscriber's inquiry.[108] VoiceLog states that permitting a sales agent to stay on the line allows "a consumer who becomes confused to be able terminate the verification, obtain the needed clarification or information from the sales agent, and then initiate a new verification."[109] VoiceLog asserts that its proposal addresses concerns regarding potentially coercive behavior by the sales agent during the verification process, is practical to implement, and is easy to enforce.[110]

35. Discussion. We concluded in the *Third Report and Order* that the drop-off requirement would act as an important tool to better ensure that the third party verification process is truly separate from both the carrier and the carrier's sales representative.[111] In addition, we note that a third party verification does not necessarily need to employ a three-way call. Nevertheless, we recognize that dropping off a three-way call could potentially be infeasible for carriers in certain specific situations; for example, a carrier may not be able to comply with the drop-off rule because its sales force is located in an area with an exchange that does not employ the technology necessary to support a drop-off. Accordingly, we will exempt from the rule those carriers that certify to the Commission that their sales agents are unable to drop off the sales call after initiating a third party verification.[112] Such carriers will be exempt from the drop-off requirement for a period of two years from the date the certification is received by the Commission. Carriers that wish to extend their exemption from the rule must, at the end of the two year period (and every two years thereafter) re-certify to the Commission as to their continued inability to comply. For any carrier that certifies that it is unable to comply with the drop-off requirement, we emphasize that, in any case, the third party verification must be terminated if the sales agent of an exempted carrier responds to a consumer's inquiries after a verification attempt has begun. A new verification may be initiated only after the sales agent has finished responding to the customer.

36. This is consistent with the obligations of carriers who are subject to the drop-off rule in that any third party verification obtained before a sales representative has ceased providing information will not be considered valid. We also emphasize that, consistent with our rules for recordings of third party verifications, third party verification audio tapes provided by a carrier not subject to the "drop-off" rule (to the Commission or appropriate state agency in the course of an investigation of slamming) must include the entirety of the final verification communication, including both what the subscriber has said and what the subscriber has heard during the course of the final verification. As the Commission found in the *Third Report and Order*, strict liability "provides appropriate incentives for carriers to obtain authorization properly and to implement their verification procedures in a trustworthy manner."[113]

37. We believe that the above discussion fully addresses VoiceLog's concerns regarding the inability of certain carriers to comply with the drop-off rule. Inasmuch as VoiceLog also makes more general arguments with respect to the overall effect of the rule, and proposes more extensive modifications, we address these arguments below.

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[108] VoiceLog Reconsideration Petition at 9.

[109] Stay Petition at 5. In its Stay Petition, VoiceLog asks that a carrier's sales agent be allowed to remain on the line during the verification process, but states that verification would cease if the customer needed further assistance from the sales agent. In its Reconsideration Petition, VoiceLog asks that the Commission permit the sales agent to participate in the verification process by providing neutral assistance to the consumer if needed.

[110] VoiceLog Reconsideration Petition at 10.

[111] *Third Report and Order*, 15 FCC Rcd at ¶ 38.

[112] Such certification must include a signed affidavit testifying as to the carrier's inability to comply.

[113] *Third Report and Order*, 15 FCC Rcd at ¶ 51.

38. Alleged Drop-off Rule Deficiencies. VoiceLog argues that the rule imposes burdens on the verification process, impedes competition and will increase consumer confusion.[114] According to VoiceLog, the rule is overbroad because the presence of a sales agent during third party verification is not *per se* misleading or coercive; a sales agent that is allowed to remain silently on the line except to provide neutral, factual information would not have the opportunity to exert undue influence on the customer.[115] VoiceLog further asserts that consumers may be confused by automated verification systems or have additional questions regarding a carrier's service.[116] Thus, VoiceLog states, the drop-off rule imposes burdens on the verification process by causing unnecessary delays as a result of having to repeat the verification process, as opposed to allowing the sales representative to provide neutral, factual assistance during verification.[117] VoiceLog asserts that because these problems do not exist with LOAs, the drop off rule provides an incentive for carriers that can afford it to switch from third party verification to LOAs.[118]

39. AT&T asserts that it has been its experience that "verification end users request marketing-related information," and that the drop-off rule thereby forces the consumer to either forgo obtaining the information or terminate the verification call and place a new call to the carrier's telemarketing center in order to speak to the same carrier representative.[119] In addition, AT&T states that carriers that offer presubscribed service bundled with other services that do not require verification risk having the entire bundled order invalidated if the customer fails to complete the verification process.[120]

40. We are not persuaded that we need to modify our finding that a third party verification is valid only if it is commenced after a carrier's sales representative has finished providing information to the customer. We agree with ASCENT that there should be no reason for a sales agent to participate in the call after it has been transferred to an independent third party verifier; at this stage, the consumer will have manifestly exhibited a clear intent to effectuate a carrier change, and will have reached that conclusion following a non-misleading presentation by the sales representative.[121] If a consumer needs to obtain additional information, the third party verification must be terminated, and a new verification may commence only after the carrier's sales agent has finished responding to the consumer's inquiry. We emphasize that we do not forbid carriers' sales agents from speaking to a consumer after a verification attempt has commenced. Final verification, however, can only be validly obtained after sales agents have finished providing information.

41. We note that VoiceLog and AT&T assert that requiring a sales agent to be silent during verification achieves the desired result of avoiding undue influence by the agent without creating the problems they claim are associated with the drop-off rule.[122] AT&T states that "it is not apparent how the telemarketing personnel could exercise any such improper influence *unless they were to take a speaking role in the three way call*."[123] However, both parties also advocate that the sales agent *not* remain silent

[114] VoiceLog Reconsideration Petition at 4-9.

[115] *Id.* at 5.

[116] *Id*. at 7.

[117] *Id*.

[118] *Id*. at 8.

[119] AT&T Comments at 11-12.

[120] *Id.* at 13.

[121] Association of Communications Enterprises (ASCENT) Comments at 12.

[122] AT&T Comments at 10; VoiceLog Reconsideration Petition at 5.

[123] AT&T Comments at 10, note 22 (emphasis added).

so that the agent may provide information in response to consumer questions before verification is completed.[124] We disagree with AT&T that "marketing-related information" should be provided by the carrier's sales agent during verification.[125] As the Commission noted in the *Third Report and Order*, "[b]ecause the carrier's sales representative is usually compensated for sales completed, and not for sales attempts, the sales representative could not be considered an unbiased third party that lacks motivation to influence the outcome of the verification process."[126] It is difficult to imagine how any verification obtained before marketing has ceased can be considered representative of a consumer's final decision; such a practice would blur the line between marketing and verification to the extent that the concept of "independent verification" would be rendered virtually meaningless.

42. As noted above, VoiceLog asserts that the rule is impractical because many smaller carriers lack access to the technical means to comply with the requirement or cannot afford "expensive equipment upgrades."[127] We have addressed VoiceLog's concerns in this respect by creating an exemption for those carriers that certify that they are unable to comply with the rule. In addition, VoiceLog states that the rule is not competitively neutral with respect to other verification methods, such as LOAs.[128] VoiceLog asserts that because the burdens on the verification process associated with the drop off rule do not exist with LOAs, the rule provides an incentive for carriers that can afford it to switch from three-way calling and associated third party verification to LOAs obtained by face-to-face conversations.[129] VoiceLog states that smaller carriers, however, cannot afford these additional costs.[130] Again, we note that we now allow carriers to certify that they are unable to comply with the drop-off rule. In any case, we do not believe that the rule arbitrarily discriminates against three-way calling and associated third party verifications as opposed to LOAs obtained by sales agents face-to-face. We note that we have found that some carriers use misleading telemarketing to induce subscribers to change carriers by, for example, telling them that their long distance and local bills will be consolidated.[131] The third party verifiers then close the deal for the slamming carriers by assuring the consumers that they have merely authorized billing consolidation, rather than any carrier changes.[132] A subscriber may be more easily misled in the telemarketing situation than in a face-to-face meeting. In a face-to-face meeting, the subscriber is able to physically review the critical aspects of the calling plan and determine if any mistakes were made with regard to the ordered services.

43. Alleged Commission failure to consider the entire record when deciding on the drop-off rule. VoiceLog argues that "several commenters suggested that the Commission adopt a requirement similar to that which is proposed" by VoiceLog.[133] In adopting the drop-off rule, the Commission considered all proposals offered in the comments, including a proposal from the National Association of Attorneys General (NAAG), which suggested that the Commission take an even harder stance to ensure the independence of the third party verification, by not allowing a carrier to conduct a three-way call to

[124] AT&T Comments at 11-12; VoiceLog Petition at 4-5, 7-8.

[125] AT&T Comments at 11-12.

[126] *Third Report and Order* at ¶ 45.

[127] VoiceLog Reconsideration Petition at 5, 8.

[128] *Id*. at 6.

[129] *Id*. at 8.

[130] *Id*.

[131] *Third Report and Order*, 15 FCC Rcd at 19, note 102.

[132] *Third Report and Order*, 15 FCC Rcd at 19, note 102.

[133] VoiceLog Reconsideration Petition at 11.

connect the subscriber to the third party verifier.[134] The Commission also considered the comments of ASCENT who argued that the carrier's sales representatives role is concluded by the point at which the consumer is transferred to a third party verifier and there should be no reason for the carries sales representative to participate in a call after it has been transferred to an independent third party verifier.[135] These examples demonstrate that the record provided a reasonable basis for the Commission's initial decision. By allowing carriers to certify that they are unable to comply with the rule, the Commission will not force those carriers to choose between abandoning the use of the three-way call to link the subscriber with the automated TPV system or investing in infeasible upgrades.[136]

44. Alleged Commission Failure to Provide Opportunity for Notice and Comment on the Rule. VoiceLog contends that, in the Further Notice portion of the *Second Report and Order,* the Commission failed to provide notice of the possible adoption of a drop-off rule. In addition, VoiceLog states that the Commission also failed to solicit comment, in the Initial Regulatory Flexibility Analysis (IRFA), on the effect a drop-off rule would have on small businesses. Thus, according to VoiceLog, the Commission failed to comply with the Regulatory Flexibility Act (RFA) when it adopted the drop-off rule in the *Third Report and Order*.[137] The U.S. Small Business Association (SBA) agrees that the Commission adopted the drop-off requirement without raising the issue in an IRFA, or soliciting comment on compliance costs and significant alternatives. SBA adds that the *Third Report and Order's* Final Regulatory Flexibility Analysis (FRFA) did not analyze compliance costs of the drop-off rule or significant alternatives to lessen the regulatory impact on small businesses.[138] SBA asks the Commission to grant a partial stay of the drop-off rule, issue a supplemental IRFA that addresses the rule, and request comment on the effect of the rule on small businesses.[139]

45. We note that, in the Further Notice portion of the *Second Report and Order*, the Commission provided notice and the opportunity to comment on this aspect of third party verification. Specifically, the Commission asked whether, if a telemarketing carrier is present during the third party verification, such verification can be considered "independent" and asked whether "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."[140] The Commission also stated: "With some [automated third party verification] 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."[141] Therefore, while we did not mention the "drop-off rule" by that name, the Commission did seek comment on the fundamental aspects of the rule. In addition, in the IRFA, the Commission recognized that while it

[134] *Second Report and Order*, 14 FCC Rcd at 1601, ¶ 166.

[135] ASCENT Comments at 12.

[136] Those methods include written or electronically-signed LOA's, electronic authorization, other forms of independent third party verification, and any State-enacted verification procedures applicable to intrastate preferred carrier change orders. *See* 47 C.F.R. § 64.1120(c).

[137] U.S. Small Business Administration Ex Parte, filed May 3, 2001 (SBA Ex Parte).

[138] *See* SBA Ex Parte at 1.

[139] *Id.* at 1, 4.

[140] *Second Report and Order*, 14 FCC Rcd at 1601, ¶ 166.

[141] *Id.*.

did not propose "specific" rules for modification of the third party verification process, it sought comment generally on the form and content of the independent third party verification.[142] Furthermore, in the FRFA, the Commission recognized the drop-off requirement when summarizing projected compliance requirements.[143] Finally, we note that carriers (including small carrier entities) that certify that they are unable to comply, will not be subject to the rule. Thus, we believe that parties' regulatory flexibility concerns are addressed by the action we take here today. In addition, our action regarding the drop-off rule is discussed in the Supplemental Regulatory Flexibility Analysis herein.

46. First Amendment Concerns. Lastly, VoiceLog argues that the Commission's drop-off requirement is an unconstitutional abridgement of the First Amendment right of free speech under the *Central Hudson* test for permissible regulation of commercial speech.[144] As discussed in paragraph 16 *supra*, in *Central Hudson*, the Supreme Court articulated an analysis for determining whether a particular commercial speech regulation is constitutionally permissible.[145] While we are not convinced that VoiceLog's concerns raise a First Amendment issue, we nevertheless address VoiceLog's assertions below.

47. VoiceLog argues that the drop-off requirement fails constitutional scrutiny under the *Central Hudson* analysis because the rule "halts all speech" in order to curtail some problematic speech.[146] VoiceLog states that carriers and marketers have an interest in conveying truthful information about their products to consumers and consumers have a corresponding interest in receiving truthful information.[147] VoiceLog further asserts that sales agent answers to consumer questions after verification has commenced, provided in a truthful and non-misleading manner, facilitate consumer choice and are protected by the First Amendment.[148] As noted above, we do not forbid carriers' sales agents from providing further information after a verification attempt has commenced. Final verification, however, can only be validly obtained after a sales agent has finished providing information. We thus disagree that the drop-off rule "halts all speech," as is argued by VoiceLog. Indeed, it does not halt any speech. We recognize that a customer whose sales agent has dropped off the call may get a different sales agent than the original agent when attempting to obtain further information after verification has commenced.[149] We do not believe that whatever small efficiency might be realized by a subscriber's speaking to the same sales agent in all cases outweighs the concerns regarding verifications made before marketing is completed. We emphasize that our rules strike a balance between our goals of protecting consumers and of promoting competition. We believe that the drop-off rule therefore is no more extensive than necessary to serve these goals. We also believe the drop-off rule directly advances the related goals of feasibility, practicality, and cost-effectiveness.

48. Consistent with our rules, any neutral, factual information that is provided by a third party verifier should not mirror the carrier's particular marketing pitch, nor should it market the carrier's

[142] *Second Report and Order* at ¶ 229, 14 FCC Rcd 1628.

[143] *Third Report and Order* at ¶ 112.

[144] VoiceLog Ex Parte at 3. *See also* VoiceLog joint letters with Capsule Communications, Clear World Communications, Plan B Communications, TransWorld Network, Corp., and AT&T Corp.

[145] *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. at 557 (1980) (*Central Hudson*). *See* discussion of Central Hudson in section II.C, *supra*.

[146] VoiceLog Ex Parte at 3.

[147] *Id.* (quoting *Lorillard Tobacco Co. v. Reilly*).

[148] *Id*.

[149] AT&T Comments at 11-12.

services or be an extension of the sales call. Instead, it should clearly verify the subscriber's decision to change carriers.[150] Commission rules also require the verification process (*i.e.*, everything the subscriber says and hears during the verification call) to be taped and preserved for a period of two years in order to ensure the availability of a complete and accurate record for investigation of any slamming complaint. If a carrier does not comply with the rule the verification is invalid. We will continue to review third party verification recordings when evaluating slamming complaints and will aggressively enforce our liability rules.

B. 60-Day Limit on the Effectiveness of an LOA

49. Background. In the *Third Report and Order*, the Commission found that a reasonable limitation on the amount of time an LOA should be considered valid is 60 days.[151] The Commission concluded that the 60-day limit applies to submitting carriers rather than executing carriers, because a submitting carrier is an actual party to the contractual agreement with the customer and, as such, is more capable of conforming its behavior to the obligation.[152]

50. Discussion. AT&T asks that the Commission modify its rule to exempt multi-line and/or multi-location business customers from the 60-day limit.[153] According to AT&T, large business customers typically execute LOAs authorizing their preferred carrier to pre-subscribe many or all of the customer's existing and newly added lines to the designated carrier.[154] However, many of these installations may occur months or even years after the LOA has been executed.[155] Thus, the 60-day limit on the effectiveness of LOAs will needlessly burden such subscribers and their carriers that must continually update those documents in order to maintain their validity.[156] AT&T also asks the Commission to clarify that a carrier change order submitted to an executing carrier within the 60-day effectiveness period should be considered timely, "notwithstanding the need for subsequent activities such as lifting a carrier freeze."[157] ASCENT, Sprint, and WorldCom agree with AT&T that application of the 60-day limit to businesses is inconvenient, wastes resources, and conveys no consumer protection benefits.[158]

51. SBC, however, sees no need to modify the 60-day period for LOAs. According to SBC, the rule only requires a carrier to *submit* a carrier change order within 60 days of the execution date of the LOA; the rule does not require the executing carrier to fully execute the change within 60 days.[159] In addition, SBC states that, if the Commission were to exempt large business customers from the rule, SBC would have to "make major modifications to its mechanized systems" in order to distinguish residential

[150] *Second Report and Order*, 14 FCC Rcd at 1553, ¶ 72.

[151] 47 U.S.C. § 64.1130(j).

[152] *Third Report and Order* at ¶ 80.

[153] AT&T Petition at 2-4.

[154] *Id*. at 3.

[155] *Id*.

[156] *Id*. at 4.

[157] AT&T Petition at note 4.

[158] ASCENT Comments at 5-6; Sprint Comments at 2; WorldCom Comments at 6-7.

[159] SBC Opposition at 1-3. While SBC is correct that the rule only applies to the submission of LOAs, we caution that our rules require executing carriers to effect "prompt execution, without any unreasonable delay, of changes that have been verified by a submitting carrier." *See* 47 C.F.R. § 64.1120.

and small business customer change orders from large "multi-line and/or multi-location business customers."[160] SBC suggests that, if the Commission were to act to modify the 60-day rule, it should do so uniformly for all customers.[161] AT&T replies that a carrier cannot submit a presubscription order to a LEC without knowing the telephone line numbers for the order, and that the carrier would not know these numbers if a large business customer does not establish a new location, or add new lines, until after the 60-day period.[162] AT&T also states that SBC fails to identify the costs of the modifications that SBC asserts will be necessary under the exemption AT&T proposes, or why major modifications are necessary given the current ability of LECs such as SBC to identify such customers for other purposes.[163]

52. We disagree with AT&T that carrier change orders submitted to an executing carrier within the 60-day effectiveness period should be considered timely, "notwithstanding the need for subsequent activities such as lifting a carrier freeze." When adopting the 60-day period (as opposed to a shorter period), the Commission recognized that while a preferred carrier freeze can be lifted "in as few as 24 or 48 hours," a subscriber may be "out of town or otherwise unable to be reached immediately."[164] The Commission found that a 60-day limitation "permits more flexibility under these and other circumstances."[165] Because it is clear that the Commission factored subsequent activities, such as lifting a carrier freeze, into its decision to adopt a 60-day limit, we decline to "clarify," as AT&T requests, that such activities effectively toll the 60-day period. We continue to believe that, a period of validity exceeding 60 days may cause confusion for customers regarding change requests they may have made but no longer remember.[166]

53. We recognize, however, that these concerns are likely not present in the case of multi-line and/or multi-location business customers that have entered into negotiated agreements with carriers to add presubscribed lines to their business locations during the course of a term agreement. We agree with AT&T that such a limitation would needlessly invalidate these negotiated LOAs and would not confer additional consumer protection benefits upon the parties. In addition, SBC has not adequately demonstrated why there is significant hardship associated with the identification of such customers.[167] Accordingly, upon reconsideration, we will no longer limit the effectiveness of such customers' LOAs to 60 days.

C. Identification of the Subscriber's Current Telecommunications Provider

54. Background. In the *Third Report and Order*, the Commission concluded that a script for third party verification should elicit, at a minimum, the identity of the subscriber; confirmation that the person on the call is authorized to make the carrier change; confirmation that the person on the call wants to make the change; the names of the carriers affected by the change; the telephone numbers to be

[160] *Id*. at 2-3.

[161] *Id*. at 3.

[162] AT&T Reply at 2-3.

[163] *Id*.

[164] *Third Report and Order* at ¶ 81.

[165] *Id*.

[166] *Id*.

[167] AT&T Reply at 2-3.

switched; and the types of service involved (*i.e.*, local, in-state toll, out-of-state toll, or international service).[168]

55. Discussion. AT&T asks the Commission to eliminate the requirement that independent third party verifications elicit from the customer the identity of the customer's current telecommunications provider.[169] AT&T states that the sole relevant consideration in executing a change order is identification of the carrier to whose service the change is being authorized, not the identity of the carrier being displaced.[170] AT&T asserts that requiring carriers to compile and provide the identity of the customer's current carrier is disruptive, superfluous and burdensome.[171] According to AT&T, many customers do not know or understand the identity of the carrier that provides their presubscribed telecommunications service and those that do might not be willing to provide such information to another carrier.[172] Therefore, this requirement would inevitably result in the provision by submitting carriers of inaccurate information to executing carriers.[173] AT&T also notes that the Commission does not require the inclusion of this information in LOAs.[174]

56. Qwest, Sprint, Verizon, and WorldCom agree with AT&T that the identity of the displaced carrier should not be a required element of an independent third party verification.[175] However, these commenters assert that such identification is not required by the Commission's rules.[176] Commenters note that the well established, long-standing rules for LOAs do not contain such a requirement, and that the Commission specified in the *Third Report and Order* that the content requirements it adopted "do not differ in substance from our rules regarding LOAs."[177] Accordingly, commenters state the "the names of the carriers affected by the change," should be read as referring to the executing and submitting carriers, and not to the displaced carrier.[178]

57. On reconsideration, we agree that it is unnecessary for a subscriber to identify in an independent third party verification the identity of the displaced carrier. Accordingly, we find that such identification need not be provided by the subscriber, either in LOAs or independent third party verifications. A customer may not in every instance be aware of the identity of his or her carrier, for example, as in the case of a customer's intraLATA toll carrier. AT&T also notes that customers who are served by a switchless reseller may often inaccurately believe that their carrier is the reseller's underlying facilities-based telecommunications provider.[179] We agree that the provision of this potentially inaccurate information could induce LECs to reject or unnecessarily delay execution of the change request based upon it.

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[168] *Third Report and Order* at ¶ 40.

[169] AT&T Petition at 4-7.

[170] *Id*. at 5.

[171] *Id*. at 5-6.

[172] *Id*.

[173] *Id*. at 6.

[174] *Id*.

[175] Qwest Comments at 3-4; Sprint Comments at 3-4; Verizon Comments at 2-3; WorldCom Comments at 3-6.

[176] *Id*.

[177] *Id*.

[178] *See, e.g.*, Verizon Comments at 3.

[179] AT&T Petition at note 6.

D. Effecting Freeze Lifts and Change Requests in the Same Three-Way Call

58. AT&T asks the Commission to require executing carriers to lift freezes and to process carrier change requests in the same three-way call.[180] AT&T notes that the Commission in the *Third Report and Order* acknowledged that lifting a preferred carrier freeze and switching the customer to the new preferred carrier in the same three-way transaction would be "an efficient means of effectuating a consumer's carrier change request," yet declined to require this of LECs.[181] According to AT&T, a LEC could have no legitimate basis for objecting to combining these transactions in a single call, as it would serve to reduce the time and cost of implementing customers' carrier changes.[182] Furthermore, requiring LECs to perform both transactions in the same call would improve the convenience of the three-way calling procedure for consumers.[183]

59. SBC states that the Commission's existing rules offer subscribers a "simple, understandable, but secure way of lifting preferred carrier freezes in a timely manner."[184] SBC and Verizon do not oppose *allowing* carriers to lift freezes and process carrier change orders in the same three-way call, but they do oppose *requiring* carriers to do so.[185] SBC asserts that requiring LECs to perform these transactions in the same call would force SBC to process all the requests manually, rather than use the mechanized systems in which SBC has invested millions of dollars.[186] As a result, SBC would need to hire more personnel and modify procedures manuals.[187] Verizon notes that manual processing would increase the risk of human error.[188] Verizon also states that, while carrier freezes are easily handled by automated systems (*e.g.*, "touch '1' to freeze, touch '2' to unfreeze"), this is not the case for carrier change requests involving any of dozens of possible carriers.[189] Thus, according to Verizon, the automated systems would have to be abandoned to accommodate AT&T's request.[190] Verizon also argues that AT&T has not set forth any arguments not already raised and resolved in the *Third Report and Order*, and has not shown that the current rule has caused problems for consumers.[191] In its reply, AT&T disputes the contention that its proposal would significantly increase any burdens associated with manual order processing. Specifically, AT&T states that, while LECs may have automated systems in place to lift carrier freezes or process carrier change orders from IXCs, LECs must also accept "carrier change orders submitted directly by end-users to the LECs" and three-way calls initiated by customers to lift a freeze.[192]

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[180] *Id*. at 7-9. *See also* MCI Comments at 8; ASCENT Comments at 9.

[181] *Id*. at 8.

[182] *Id*. at 8-9. *See also* ASCENT Comments at 9 ("[AT&T's suggested] procedure will not add appreciably to the burdens of any carrier").

[183] *Id*.

[184] SBC Opposition at 3-4.

[185] *Id*; *see also* Verizon Comments at 1-2.

[186] SBC Opposition at 3-4.

[187] *Id.*

[188] Verizon Comments at 1-2.

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] AT&T Reply at 6-7.

60. We agree that AT&T fails to raise any arguments that were not thoroughly considered in previous orders in this proceeding. In the *Second Report and Order*, the Commission declined to enumerate all acceptable procedures for lifting preferred carrier freezes. Rather, parties were encouraged to develop other methods of accurately confirming a subscriber's identity and intent to lift preferred carrier freezes, in addition to offering written and oral authorization.[193] In the *Third Report and Order*, the Commission stated that its rules "do not . . . prohibit LECs from requiring submitting carriers to use separate methods for lifting a preferred carrier freeze and submitting a carrier change request."[194] We are not persuaded by AT&T that, because a LEC in *some* cases handles preferred carrier change requests or carrier freeze lifts using manual processes, it is not therefore appreciably more burdensome to handle *every* such request in this manner, including when a carrier freeze request is accompanied by a carrier change order. We note that, in the *Third Report and Order*, when considering a request virtually identical to AT&T's, the Commission specified that a carrier concerned about delays it believes are attributable to a LEC refusing to accept a properly verified carrier change order (during the same three-way call initiated for the purpose of lifting a freeze) may file a complaint in the appropriate forum.

E. Registration Requirement

61. In the *Third Report and Order*, the Commission adopted a requirement that all new and existing common carriers providing interexchange telecommunications service must register with the Commission.[195] The Commission further concluded that "facilities-based carriers shall have an affirmative duty to ascertain whether a potential carrier-customer (*i.e*., a reseller) has filed a registration with the Commission *prior to* providing that carrier-customer with service."[196] In situations where a facilities-based carrier was already providing a reseller with service, the Commission directed the reseller to notify its underlying facilities-based carrier that it had submitted the registration information to the Commission, within a week of having done so.[197] The Commission noted that a facilities-based carrier would not be responsible for the accuracy of the registration provided to the Commission by its potential carrier-customer, nor would such a carrier, relying in good faith on the absence of such registration, be liable under section 251 of the Act for withholding service from the unregistered entity.[198] The Commission held that it might, however, after giving appropriate notice and opportunity to respond, impose a fine on carriers that failed to determine the registration status of other carriers before providing them with service.[199]

62. WorldCom asks that Commission to clarify that underlying carriers are not under a duty to take any action with regard to carrier-resellers if: (1) the underlying carrier "does not receive a notification of registration from an existing carrier-customer," and/or (2) the underlying carrier's "existing carrier-customer does not appear on the list maintained by the Commission."[200] WorldCom states that the Commission in the *Third Report and Order* appears to distinguish "new" carrier-reseller relationships from "existing" ones, and that this is the best policy outcome. Specifically, requiring underlying carriers to police relationships that existed prior to the requirement would, according to

[193] *Second Report and Order,* 14 FCC Rcd at 1564, ¶ 130.

[194] *Third Report and Order* at ¶ 74

[195] *Id.* at ¶ 62.

[196] *Id*. at ¶ 65 (emphasis in original).

[197] *Id.*

[198] *Id*. at ¶ 66.

[199] *Id.*

[200] WorldCom Petition at 9-10.

WorldCom, expose the parties to risks that were not contemplated during negotiations leading to the creation of the reseller arrangement, and would raise the carrier's cost to serve the entire reseller base.[201]

63. ASCENT agrees that the Commission's requirements apply only on a forward-looking basis, and not to existing carrier-customers.[202] ASCENT asserts that nothing in the *Third Report and Order* "suggests that an underlying carrier, which by industry practice will have already ascertained that its carrier-customer is authorized to provide interstate, interexchange service pursuant to Section 214 before entering into a contractual relationship with that carrier, is in any way authorized to abrogate such contractual relationship in reliance on the registration requirement recently established in the *Third Report and Order*."[203] ASCENT suggests that any Commission clarification specify that an underlying carrier has no authority to act to deny service under existing service arrangements if it does not receive registration notification from existing carrier-customers.[204]

64. We believe that the *Third Report and Order* is sufficiently clear with respect to the registration requirements, and we decline to provide the clarification sought by WorldCom and ASCENT. Never did the Commission indicate that it intended to "grandfather" resellers that provided service prior to adoption and effective date of the *Third Report and Order* with respect to our registration requirement. To the contrary, the Commission found that "all new *and existing* common carriers providing interexchange telecommunications service must register with the Commission."[205] As noted above, the Commission specified that, in situations where a facilities-based carrier was already providing a reseller with service when the registration requirement took effect, the reseller was obligated to notify its underlying facilities-based carrier that it had submitted the registration information to the Commission, within a week of having done so.[206] The Commission further stated that, once the facilities-based carrier had determined the registration status of its potential carrier-customer, the facilities-based carrier was not responsible for monitoring the registration status of that customer on an ongoing basis, although a prudent carrier might choose to do so.[207]

65. As noted in the *Third Report and Order*, a facilities-based carrier will not be responsible for the accuracy of the registration information, nor will such a carrier, relying in good faith on the absence of such registration, be liable under section 251 of the Act for withholding service from the unregistered entity.[208] The Commission may, however, after giving appropriate notice and opportunity to respond, impose a fine on carriers that fail to determine the registration status of carrier customers.[209] The obligation of a reseller to register with the Commission, as well as the corresponding duties of the underlying carrier with respect to the reseller, should not differ depending on whether the reseller provided service prior to the adoption and effective date of the of the *Third Report and Order*. As the Commission noted, the registration requirement and related rules are intended to deter facilities-based

[201] *Id*.

[202] ASCENT Comments at 10-11.

[203] *Id*.

[204] *Id*.

[205] *Third Report and Order* at ¶ 62 (emphasis added).

[206] *Id.*

[207] *Id*.

[208] *Id*.

[209] *Id*. at ¶ 66.

carriers from providing service to resellers that have not registered with the Commission, which will, in turn, make it more difficult for unscrupulous resellers to stay in business.[210]

IV. LIABILITY FOR UNAUTHORIZED CARRIER CHANGES

66. Customer referral to unauthorized carrier. In its petition, WorldCom asserts that the Commission should require carriers contacted by a subscriber alleging slamming to inform the subscriber that he or she should contact and seek resolution from the alleged unauthorized carrier, in addition to informing the subscriber of their right to file a complaint if necessary and of their right to absolution.[211] Under the rules adopted in the *First Reconsideration Order*, a carrier that is contacted by a consumer alleging slamming "shall direct each unsatisfied subscriber to the proper state commission (or the FCC) for resolution of the slamming problem and inform such unsatisfied subscriber of all the relevant filing requirements."[212] The Commission noted that the carrier must inform the subscriber that, if all charges for the first 30 days of service are removed from the subscriber's bill, the subscriber must file a complaint with the relevant agency or be subject to re-billing.[213] In addition, an executing carrier that is informed of an alleged slam by a subscriber must immediately notify both the authorized and alleged unauthorized carrier of the incident, including the identity of each carrier involved.[214]

67. WorldCom states that many consumers suspecting a slam will contact either the carrier that they consider to be their authorized carrier or their LEC.[215] WorldCom asserts, however, that there is no incentive for these carriers to refer the consumer to the alleged unauthorized carrier for resolution.[216] WorldCom acknowledges that the Commission's rules require the LEC to notify the alleged unauthorized carrier of a subscriber's allegation, but it states that there is no specified deadline for this notification.[217] Thus, according to WorldCom, the alleged unauthorized carrier may not be aware of a slamming allegation prior to the filing of a complaint.[218] WorldCom asserts that a requirement of subscriber referral to the alleged unauthorized carrier would make customers better apprised of their alternatives and thus more able to obtain relief without engaging in administrative litigation.[219] In addition, WorldCom contends, state agencies and the Commission could avoid needless adjudication.[220] WorldCom asserts that the alleged unauthorized carrier is in the best position, relative to executing and authorized carriers, to satisfy the customer by providing an explanation for the establishment of the account, providing full remedies, blocking future traffic, and advising the customer to contact his or her carrier of choice to establish an account.[221] USTA notes that a disgruntled customer might view a referral to the alleged

[210] *Id*.

[211] WorldCom Petition at 6. *See also* AT&T Comments at 9-10.

[212] *First Reconsideration Order* at ¶ 34.

[213] *Id*. at ¶ 32.

[214] *Id*. at ¶ 35.

[215] WorldCom Petition at 5.

[216] *Id*. at 5-6.

[217] *Id*.

[218] *Id*.

[219] *Id*. at 6-7.

[220] *Id*.

[221] *Id*.

unauthorized carrier as "tantamount to telling Little Red Riding Hood to go to grandmother's house to be greeted and eaten by the big, bad wolf," and that customers may feel animosity towards a carrier that makes such a referral.[222] Verizon disagrees that the alleged unauthorized carrier is in the best position to satisfy the consumer given that it is the one carrier that cannot actually return the consumer to the authorized carrier.[223] USTA states that the approach suggested by WorldCom could create an opportunity for the alleged unauthorized carrier to market its product, notwithstanding prior abusive conduct by that carrier.[224]

68. We currently require carriers contacted by a subscriber alleging slamming to inform the subscriber of their right to file a complaint with the appropriate governmental agency.[225] On reconsideration, we will also require carriers to inform the subscriber that he or she may contact and seek resolution from the alleged unauthorized carrier and, in addition, may contact the authorized carrier. Such contact will, amongst other things, give the subscriber the opportunity to inform the alleged unauthorized carrier that he or she will not be paying the disputed charges, and to inform the authorized carrier that the subscriber would like to receive its service. We agree with WorldCom that such a requirement may aid consumers seeking an immediate resolution to their situation. We believe that subscribers should be informed of all of their options by the carrier they choose to contact initially. Subscribers that choose to contact the alleged unauthorized carrier, but are not satisfied by the response of that carrier, will have been informed of their right to file a complaint in the appropriate forum, and will presumably exercise that option.

69. Removal of charges from subscriber bills when a subscriber has not yet paid the charges. WorldCom also asks the Commission to reconsider its rule requiring alleged unauthorized carriers to remove all charges assessed for the first 30 days of services from a subscriber's bill upon the subscriber's allegation that he or she was slammed.[226] WorldCom states that such a requirement violates due process because it deprives the carrier of a property right prior to a hearing, and is not justified on policy grounds as it creates incentives for consumer fraud.[227] WorldCom asserts that the Commission's rule should be modified to require the filing of a complaint with the appropriate agency as a precondition to removal of the charges assessed during the first 30 days.[228] According to WorldCom, such a modification will provide consumers with the incentive to act quickly to file a complaint, thus facilitating prompt resolution, and will protect carriers from "unscrupulous consumers who have no intention of filing a complaint with an agency but realize that due to the inability of carriers to ascertain if a consumer filed a complaint they may escape rebilling."[229]

[222] USTA Opposition at 5.

[223] Verizon also disputes the contention of WorldCom that a LEC will not be able to provide the subscriber with a full 30-day credit (*see* below regarding removal of charges from a subscriber's bill for the first 30 days of alleged unauthorized service) because a LEC might not have information about the entire 30 days of service. Verizon states that WorldCom is "simply wrong" and that "the LEC takes 30 days of charges off of a subscriber's bill, even if it takes an additional billing cycle for the credits to appear on the customer's bill." Verizon Opposition at 5.

[224] USTA Opposition at 5-6.

[225] See 47 C.F.R. § 64.1150(b).

[226] WorldCom Petition at 14-16.

[227] *Id*.

[228] *Id*.

[229] *Id*.

70. We decline to modify our rule requiring removal by the unauthorized carrier of all charges assessed for the first 30 days of service upon a subscriber's allegation that he or she was slammed.[230] We agree with Verizon that charges should not remain on a subscriber's bill even after the subscriber has complained to a carrier of slamming, and we note that the Commission's rules already provide incentives for prompt filing of complaints by subscribers with the appropriate agency.[231] In the *First Reconsideration Order*, the Commission found that absolution minimizes slamming carriers' physical control over slamming revenues, and that this was especially important given the Commission's experiences with slamming carriers that went out of business or declared bankruptcy after enforcement agencies detected their illegal activities.[232] The Commission found that its absolution rule would also encourage consumers to scrutinize their bills immediately and carefully, thereby engaging the public in slamming detection.[233] In addition, the Commission stated that the rule would encourage carriers to verify all changes properly in order to protect themselves against any improper allegations of slamming.[234]

71. The Commission also found that its rule requiring the removal of charges should be accompanied by a rule to encourage prompt filing of a complaint with the appropriate agency.[235] Accordingly, the Commission specified that any carrier informed by a subscriber of a slam must convey to the subscriber that, if all charges for the first 30 days of service are being removed from such subscriber's bill, pending resolution of the slamming complaint, the subscriber must file the complaint with the state commission (or the FCC) within 30 days of notifying the carrier of the alleged slam, or be subject to re-billing.[236] In addition, the Commission stated that a carrier informed by a subscriber of a slam must convey to the subscriber relevant filing information, including information relating to the 30-day timeframe.[237] Thus, we believe that subscribers are sufficiently motivated to promptly file complaints with the appropriate agency, and that WorldCom's concerns regarding unreasonable delays have been adequately addressed.

72. Based on our experience in administering the slamming liability rules, we also believe that the danger of "unscrupulous" customers acting in the manner that WorldCom suggests (*i.e.*, never intending to actually file a complaint in order to escape rebilling because they are aware of "the inability of carriers to ascertain if a consumer filed a complaint") is remote at best. WorldCom also appears to ignore the fact that our rules require that, "upon receipt" of a slamming complaint, the appropriate agency

[230] For a further explanation of the procedures that apply when a subscriber has not paid charges to the allegedly unauthorized carrier, *see* the *First Reconsideration Order* at ¶¶ 38-40. According to our rules, the authorized carrier has the option of billing the subscriber for calls made after the first 30 days after the slam at the rates the subscriber would have paid the authorized carrier absent the slam. *Id*. The Commission, in the *First Reconsideration Order*, stated that, rather that actually re-rating the service provided by the authorized carrier, the authorized carrier may bill the subscriber for 50% of the rate the unauthorized carrier would have charged. However, an authorized carrier must perform actual re-rating if the subscriber so requests. *Id*.

[231] Verizon notes that a LEC contacted by a subscriber who alleges slamming will typically credit the subscriber immediately and recourse the billed amount to the carrier. Verizon states that WorldCom's proposal seeks to "put some of the money back into slamming" in that WorldCom would rather have a LEC finance the unauthorized carrier's business until such time as a slam has been proven. Verizon Opposition at 5-6.

[232] *First Reconsideration Order* at ¶ 10.

[233] *Id*.

[234] *Id.*

[235] *Id.* at ¶ 32.

[236] 47 C.F.R. § 54.1160(c).

[237] *Id*. at note 88.

must "notify the alleged unauthorized carrier of the slamming complaint and ensure that the carrier removes immediately all unpaid charges from the subscriber's bill, if it has not done so already."[238] We note that, in cases in which the consumer has chosen not to contact the alleged unauthorized carrier prior to filing a complaint with the appropriate agency, the removal of charges may not in fact occur until after the complaint has been filed, as WorldCom prefers. Finally, although WorldCom suggests that our rule granting preliminary relief poses a due process concern, WorldCom's proposed modification would also allow for removal of charges "prior to an investigation or hearing." We therefore believe WorldCom's actual concern lies with the issue of incentive for consumer fraud, which we address above.[239]

73. Amounts owed by unauthorized carriers when the subscriber has paid the unauthorized carrier. Section 258 mandates that the unauthorized carrier "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."[240] In addition, the legislative history specifically directed that the Commission's rules implementing section 258 "should also provide that consumers be made whole."[241] Accordingly, in the *First Reconsideration Order*, the Commission established a remedy that both allows the authorized carrier to retain an amount equal to "all charges paid by the subscriber" to the unauthorized carrier, and also insures that subscribers are "made whole" by reimbursing them the amount they paid in excess of what they would have paid their preferred carrier absent the slam (or a proxy for such amount).[242] The Commission stated that, once a carrier has been found guilty of slamming, the unauthorized carrier shall be required to disgorge to the authorized carrier an amount adequate to satisfy both of these obligations.[243] The Commission found that an approximate proxy for this amount is 150% of the amounts collected by the unauthorized carrier from the subscriber following a slam.[244] Upon receipt of the money, the authorized carrier is required to remit one third (*i.e.*, 50% of what the subscriber paid to the unauthorized carrier) to the injured subscriber.[245]

74. WorldCom asks that the Commission reconsider its requirement that unauthorized carriers pay the subscriber's authorized carrier 150% of all charges paid by such subscriber.[246] WorldCom states that the Commission misconstrued the plain language of the statute "by interpreting the phrase '*liable* to the [authorized] carrier' for all payments received, to mean that the authorized carrier is allowed to *retain* an amount equal to payments received."[247] WorldCom states that Congress intended to make the customer whole by mandating that the unauthorized carrier be liable in an amount equal to all charges

[238] *First Reconsideration Order* at ¶ 36; 47 U.S.C. § 64.1150(c).

[239] WorldCom Petition at 14.

[240] 47 U.S.C. § 258.

[241] *First Reconsideration Order* at ¶ 17.

[242] *Id.*

[243] *Id*. The Conference Report regarding section 258 provides that "[t]he conferees adopt the House provision as a new section 258 of the Communications Act. It is the understanding of the conferees that in addition to requiring that the carrier violating the Commission's procedures must reimburse the original carrier for foregone revenues, the Commission's rules should also provide that consumers are made whole." Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. at 136 (1996) (Joint Explanatory Statement).

[244] *First Reconsideration Order* at ¶ 17.

[245] *Id*.

[246] WorldCom Petition at 11-13.

[247] *Id*. at 11-13..

paid.[248] WorldCom asserts that the Commission places undue reliance on the fact that section 258 provides for remedy "in addition to any other remedies available at law," and that this provision was not intended to allow the Commission to set liability at an amount greater than "all charges paid by [the] subscriber."[249]

75. We decline to modify our finding that unauthorized carriers must pay the subscriber's authorized carrier 150% of all charges paid by such subscriber and, upon receipt of the money, that the authorized carrier is required to remit one third (*i.e.*, 50% of what the subscriber paid to the unauthorized carrier) to the injured subscriber.[250] WorldCom argues that the phrase "other remedies available by law" means that an authorized carrier may pursue a different claim in state or federal court or before the Commission, and does not mean that the Commission, when implementing section 258, can set liability at an amount greater than that established by the provision itself.[251] In the *First Reconsideration Order*, the Commission stated that section 258 specifically allows for both the remedy to the authorized carrier of all amounts collected from the subscriber, and "other remedies available by law."[252] The Commission noted that one such remedy is the ability of consumers to bring a claim to the Commission or in federal court, or where allowed under state law to the state commissions, for damages due to slamming.[253] WorldCom, however, fails to explain in its petition why the "other remedies available by law" outlined by the Commission in the *First Reconsideration Order* should exclude complaints made pursuant to any portion of the Act.

76. Specifically, the Commission stated that, pursuant to sections 206-208 of the Act, a consumer bringing a complaint is entitled to actual and consequential damages following a finding of a slam.[254] The Commission noted that, prior to the *Second Report and Order*, Commission orders compensated slammed consumers by requiring slamming carriers, pursuant to sections 201(b) and 208 of the Act, to refund to the subscriber any amounts paid to the slamming carrier in excess of what he would have paid his preferred carrier absent the slam.[255] The Commission found that its modified liability requirements thus satisfied the congressional mandate of making consumers "whole," by retaining the availability of other existing remedies to ensure that subscribers pay no more for service than they would have but for being slammed.[256] As the Commission stated in the *First Reconsideration Order*, the requirement that the slamming carrier disgorge 150% of the amount paid to it by the subscriber relies on our section 258 authority only with respect to that provision's express permission for the Commission to use "any other remedies available by law."[257]

77. WorldCom also points to the Commission's statement in the *First Reconsideration Order* that the 150% disgorgement would act as an incentive for authorized carriers to act on slamming complaints; however, WorldCom asserts that the Commission failed to explain why reimbursement for lost revenue

[248] *Id.*

[249] *Id*. 47 U.S.C. § 258(b).

[250] *First Reconsideration Order* ¶ 17.

[251] WorldCom Petition at 12.

[252] *First Reconsideration Order* ¶ 19

[253] *Id*.

[254] *Id*.; 47 U.S.C. §§ 206-208.

[255] *Id*.

[256] *Id*.

[257] *Id*.; 47 U.S.C. § 258.

fails to provide the same incentives.[258] We agree with AT&T that WorldCom ignores that the 50% increment to which WorldCom objects is required to be turned over to the subscriber.[259] Thus, according to AT&T, the sums do not accrue to the authorized carrier, which must in fact absorb the administrative costs of remitting those amounts to the consumer, and for which the authorized carrier receives no compensation.[260]

78. We continue to believe that the 150% proxy approach utilized by our current liability rules most fully satisfies the dual congressional mandate of section 258. The 150% proxy compensates the subscriber while satisfying the requirement of liability of the unauthorized carrier to the authorized carrier for all amounts collected from the subscriber. In the First *Reconsideration Order*, we noted that several carriers, including WorldCom, supported a proxy refund of 50% to the subscriber as fully compensating the consumer while sparing carriers the difficult and expensive process of actual re-rating.[261]

79. Finally, we disagree with WorldCom that, because it is possible that under our rules an authorized carrier could ultimately receive more revenue if the consumer pays for unauthorized service than if he or she does not, authorized carriers may fail to inform subscribers of their right not to pay charges incurred after the first 30 days of being slammed.[262] As noted above, however, the Commission specified that *any* carrier informed by a subscriber of a slam must convey to the subscriber what actions he or she must take, with respect to the removal of unpaid charges for the first 30 days of service from the bill, in order to avoid rebilling.[263]

80. WorldCom also asks the Commission to clarify that charges for which a subscriber is reimbursed or credited prior to the filing of a complaint constitute "unpaid" charges for purposes of the Commission's liability rules.[264] WorldCom notes that the Commission's rules do not prevent unauthorized carriers from providing a customer credits or reimbursement prior to the customer filing a complaint.[265] WorldCom states that under such circumstances, a customer will be in control of the funds as if he or she had never paid, and the refunded or credited charges should thus be considered "unpaid" when calculating liability under the Commission's slamming rules.[266] In the alternative, WorldCom asks that the Commission at a minimum clarify that credits or reimbursements made to the consumer are to be

[258] WorldCom Petition at 13.

[259] AT&T Comments at note 13.

[260] *Id*. AT&T asserts that this procedure can, if anything, more accurately be viewed as unfair to the authorized carrier, and not the unauthorized carrier as is asserted by WorldCom.

[261] *First Reconsideration Order* ¶ 21. If the subscriber is failed to be made whole by the 50% proxy, the subscriber may ask the authorized carrier to re-rate the unauthorized carrier's charges based on the rates of the authorized carrier and, on behalf of the subscriber, seek an additional refund from the unauthorized carrier, to the extent that the re-rated amount exceeds the 50% of all charges paid by the subscriber to the unauthorized carrier. *First Reconsideration Order* ¶ 52.

[262] WorldCom Petition at 13. According to our rules, if a subscriber has not already paid the unauthorized carrier, the unauthorized carrier must remove all charges assessed for the first 30 days of services from a subscriber's bill upon the subscriber's allegation that he or she was slammed. If the subscriber has paid the unauthorized carrier, then our reimbursement rules (as described in ¶¶ 72-77, *supra*) apply.

[263] 47 C.F.R. § 54.1160(c). Specifically, the subscriber must file the complaint with the state commission (or the FCC) within 30 days of notifying the carrier of the alleged slam, or be subject to re-billing.

[264] *Id*. at 10-11.

[265] *Id.*

[266] *Id.*

deducted from the amount owed by a carrier found guilty of a slam.[267] WorldCom asserts that carriers will be discouraged from attempting to resolve disputes directly with the subscriber if they believe that such attempts could result in double payment.[268]

81. We decline to find that credited charges made to the consumer before a complaint has been filed should be considered "unpaid" when calculating liability under the Commission's slamming rules, or that the credits or reimbursements should be deducted from the amount owed by a carrier found guilty of a slam. As SBC asserts, the fact that a carrier has chosen to attempt to appease a customer does not alter its statutory liability, as described above, to the authorized carrier.[269] Furthermore, we disagree with WorldCom that this requirement discourages carriers from attempting to resolve disputes directly with subscribers. We believe that the desire to avoid an agency determination of slamming creates a powerful incentive to satisfy the customer so that the customer will be unlikely to file a complaint in the first instance. We note that, in our experience with administration of slamming complaints, complaints are very rarely filed by consumers who were previously credited or reimbursed by the unauthorized carrier. Thus, it would appear that customers who have been satisfied in such a manner do not generally file slamming complaints and, accordingly, that carriers would have great incentives to avoid, in this way, the filing of a complaint.

82. Unauthorized carrier changes resulting from LEC actions. In their Petitions, Sprint and WorldCom note that subscribers sometimes request carrier changes by communicating directly with LECs.[270] Sprint and WorldCom ask that the Commission reconsider its "apparent decision" to classify as an IXC slam any unauthorized carrier change that occurred as a result of a LEC mistakenly executing a carrier change and informing an IXC that it had gained a customer.[271] Sprint asserts that the IXC cannot be considered an unauthorized carrier in this scenario because it has not submitted the change and is under no obligation to verify these "LEC installs."[272] Sprint and WorldCom express concern that an IXC could nonetheless be found liable for slamming if accused under these circumstances because it would be unable to produce valid proof of verification of the carrier change as is required by the Commission's rules.[273]

83. 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."[274] AT&T asserts that section 258 and the Commission's implementing regulations therefore cannot be construed to impose liability upon an IXC when it has not "submitted" a carrier change.[275] AT&T states that an IXC that becomes a carrier through a LEC install likewise fails to satisfy the Commission's definition of an "unauthorized carrier," and does not incur liability under the Commission's rules that apply to carriers

[267] *Id.*

[268] *Id.*

[269] SBC Opposition at 3. AT&T notes that, if the Commission were to grant WorldCom's request, it should not impair the right of the authorized carrier to an amount at least equal to all sums paid by the consumer, as provided for in section 258 and implementing rules. AT&T Comments at 8.

[270] Sprint Petition at 1; WorldCom Petition at 8.

[271] Sprint Petition at 1-5; WorldCom Petition at 8-10.

[272] Sprint Reply at 3.

[273] Sprint Petition at 1-5; WorldCom Petition at 8-10.

[274] 47 U.S.C. § 258 (b).

[275] AT&T Comments at 3-5.

that "submit" a carrier change."[276] AT&T states that Sprint's petition is thus superfluous in that it appears to assume that such liability can be imposed without any revision to the *First Reconsideration Order*.[277] Sprint asserts that it makes little sense as a policy matter to hold IXCs liable for the mistakes of LECs, and that it is necessary to provide incentives for LECs to minimize such mistakes.[278] Sprint and WorldCom state that penalizing a carrier that made no mistake does not provide such incentives and is especially inappropriate considering that LECs and IXCs are competitors in the intraLATA and, increasingly, interLATA, markets.[279]

84. Sprint asks that the Commission allow an alleged unauthorized carrier to produce records that show a subscriber was added to its customer base due to instructions it received from a LEC and, "in the absence of convincing evidence by the LEC or subscriber to the contrary, the relevant agency should exonerate the unauthorized carrier and instead require the LEC to provide restitution to the subscriber and authorized carrier as specified in the Rules as well as pay the previously accused but now exonerated carrier for all charges and fees incurred by the subscriber when such subscriber was erroneously assigned to [the] IXC by the LEC but not paid by such subscriber."[280]

85. As Sprint and USTA note, the Commission has recognized that an executing carrier may be responsible for an unauthorized carrier change.[281] In the *First Reconsideration Order*, the Commission stated that "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."[282] The Commission also stated that, in situations in which a customer initiates or changes long distance service by contacting the LEC directly, "if a LEC's actions result in the subscriber being assigned to a different interexchange carrier than the one originally chosen by the subscriber . . . [the] LEC could be liable for violations of its duties as an executing carrier."[283] The Commission specified that sanctions imposed on executing carriers for violations "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."[284] USTA states that, because the Commission has already provided for executing carrier liability, Sprint's petition should be rejected.[285]

86. We agree with Sprint that it would be unfair to hold IXCs liable for slamming pursuant to section 258 when the unauthorized carrier change was the result of a LEC's action. Sprint notes that determinations of slamming by IXCs under these circumstances can create incentives for LECs to act in ways that contravene the goals of section 258 and can damage the business reputation of an "innocent"

[276] *Id*. at 4. *See* 47 C.F.R. § 64.1100 (d) ("The term 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 part."); 47 C.F.R. § 64.1120 (a)&(c). *See also* Excel Telecommunications, Inc. ("Excel") Reply at 1-2.

[277] AT&T Comments at 3-5.

[278] Sprint Petition at 2-3.

[279] *Id*. at 3. *See also* WorldCom Petition at 9; AT&T Comments at 7.

[280] Sprint Petition at 5. *See also* Excel Reply at 1-4.

[281] Sprint Petition at 2; USTA Opposition at 2-4.

[282] *First Reconsideration Order* at ¶ 98.

[283] *Id*. at ¶ 93.

[284] *Id*. at note 312; *See, e.g*., 47 U.S.C. §§ 208, 503(b).

[285] USTA Opposition at 3-4.

IXC.[286] Verizon disagrees that LECs should be subject to the penalties invoked by section 258, asserting that this section authorizes liability only to a carrier that violates the verification procedures and "collects charges."[287]

87. As an initial matter, we note that our authority to regulate in this area flows not only from section 258 of the Act, but also from other portions of the Act which preceded the adoption of section 258, and upon which many of our slamming rules are also based. For example, sections 201(b) and sections 206-208 allow for customer relief in addition to the carrier remedy of section 258.[288] As a result, the fact that a LEC may not "collect charges" as a result of an unauthorized carrier change does not limit the Commission's authority to provide for consumer remedies. We recognize that there are situations in which a LEC assigns a consumer to a non-affiliated IXC without authorization.[289] In this instance, three "innocent" parties can potentially suffer damage. The "unauthorized" carrier will have provided services for which it may not receive compensation from the subscriber, the subscriber will have been subject to the rates of a carrier whose services it did not authorize, and the authorized carrier will have been deprived of the revenues it would have collected from the subscriber but for the LEC's actions. Verizon states that, if it has mistakenly assigned a subscriber to an unauthorized carrier, it offers to switch the complaining subscriber to the desired carrier at no charge and refunds the charges, either by crediting the subscriber's bill or issuing the subscriber a check.[290] We agree that, when a LEC has assigned a subscriber to a non-affiliated carrier without authorization, and where the subscriber has paid the non-affiliated carrier the charges for the billed service, the LEC shall reimburse the subscriber for all charges paid by the subscriber to the unauthorized carrier and shall switch the subscriber to the desired carrier at no cost to the subscriber. When the subscriber has not paid the unauthorized carrier, the LEC shall switch the subscriber to the desired carrier at no cost to the subscriber, and shall also secure the removal of the unauthorized charges from the subscriber's bill. Under no circumstances will the subscriber be held liable for the unauthorized charges. Authorized or unauthorized carriers may seek further remedies for lost profits or other damages against the LEC as an executing carrier that has effectuated an unauthorized carrier change, as is detailed in paragraph 84, above.

88. We note, however, that situations may arise in which a LEC that has a long distance affiliate adds, without authorization, a customer to its long distance affiliate's customer base, thus favoring its long distance affiliate. In order to deter such actions, we believe that a LEC should be held responsible for unauthorized carrier changes that favor its long distance affiliate, in the same manner that an IXC

[286] Sprint Petition at 2-4.

[287] "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." 47 U.S.C. § 258(b).

[288] In the *First Reconsideration Ord*er, the Commission noted that sections 206-208 of the Act provide for actual and consequential damages for consumers upon the finding of a slam (*First Reconsideration Order*, 15 FCC Rcd 8158, at ¶ 19). Prior to the adoption of section 258 of the Act, the Commission had taken various steps to address the slamming problem; the adoption of section 258 expanded the Commission's authority in this area. For example, the Commission required slamming carriers, pursuant to sections 201(b) and 208 of the Act, to refund to the subscriber any amounts paid to the slamming carrier in excess of what he or she would have paid the preferred carrier absent the slam (*Id*.). *See also* statement of Commissioner Michael K. Powell ("[i]n light of consumers' right to sue for damages in provisions outside of section 258, as well as the 'other remedies' language of section 258 itself . . . we can provide relief to consumers over and above the authorized carrier remedy in section 258(b))." (*Id*., Statement of Michael K. Powell).

[289] *See* ¶¶ 68-71, *supra*.

[290] Verizon Opposition at 3-4.

would be held responsible if it submitted an unauthorized change itself. Thus, when a LEC makes an unauthorized carrier change that favors its affiliate, and when the customer has paid the charges, the LEC must pay to the authorized carrier 150% of the amounts collected from the subscriber, just as an IXC would under similar circumstances.[291] If the consumer has not paid the charges, then our absolution rule would apply.[292] Our responsibility to provide remedies for consumers who experience unauthorized carrier changes is equally compelling when a customer experiences an unauthorized change as the result of a LEC's actions.

89. We note that our holding applies to any carrier acting as an executing carrier. In many cases, the executing carrier in question will be a LEC; however, an IXC may also act as an executing carrier, *e.g.*, when a facilities-based IXC resells service to a switchless reseller and that reseller submits a subscriber's carrier change request to the underlying IXC.[293]

90. In addition, we note that, in the *Second Report and Order*, when finding that verification rules should apply to "in-bound" as well as "out-bound" calls, the Commission reiterated 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."[294] According to the Commission, "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."[295] In the *Second Report and Order*, the Commission found that consumers that initiate calls to carriers are just as vulnerable to slamming as consumers that are contacted by carriers, especially as carriers begin combining services to market to consumers, such as intraLATA and interLATA toll services.[296] However, the Commission at that time declined to require verification of long distance carrier changes "in situations in which a customer initiates or changes long distance service by contacting a LEC directly."[297] The Commission stated that, under those circumstances, the LEC is not acting as a "submitting" carrier in that "the LEC is not providing interexchange service to [the] subscriber."[298]

91. As noted by Sprint and WorldCom above, since the adoption of the *Second Report and Order*, however, many LECs have become (or plan to become) long distance service providers. Given the large numbers of customers that are now or may soon be served by LECs that also provide interexchange services, we find it necessary to modify our decision to exclude from our verification rules those in-bound calls that are initiated by a customer by directly contacting the LEC. The Commission has previously recognized that LECs that compete with other carriers for local and long distance services may not be neutral third parties in implementing carrier changes.[299] Due to the changes in the competitive landscape that have come to fruition since the adoption of the *Second Report and Order*, and based on our experiences therewith, we now find it necessary, as with other in-bound carrier change calls, to require verification of carrier change requests that occur when a customer initiates a call to a LEC. We find that

[291] 47 U.S.C. § 64.1170.

[292] 47 U.S.C. § 64.1160.

[293] *Second Report and Order,* 14 FCC Rcd at 1566, ¶ 95.

[294] *Id.* at 1547.

[295] *Id*. at 1548.

[296] *Id*. at 1549.

[297] *Id*. at 1565.

[298] *Id*.

[299] *Id.* at 1518.

such verification is necessary to deter slamming and as such furthers the goals of section 258. We emphasize however, that we retain our prohibition on executing carrier "re-verification," *e.g.*, a LEC may not require an additional verification by the subscriber after a carrier submits a carrier change to a LEC (as opposed to a customer seeking a carrier change by calling a LEC directly to request the change). Under such circumstances, the submitting carrier and the customer will have already completed the verification procedures required under our rules, and any LEC-mandated customer re-verification would be redundant and create unnecessary impediments to carrier changes.

V. OTHER ISSUES

92. Toll-Free Service Accounts. SBC also seeks clarification that the carrier change verification requirements set forth in the *Second Report and Order* do not apply to verifications of Responsible Organization ("RespOrg") changes for toll-free service accounts.[300] A RespOrg is the entity that a consumer seeking to acquire a toll-free number must contact. RespOrgs obtain toll-free numbers from the Service Management System (SMS/800) database[301] and manage the record for the numbers, including billing and routing information as well as information about subscribers' IXCs. RespOrgs are the only entities that may gain access to the SMS/800 database.[302] A subscriber may port its toll-free number from one RespOrg to another RespOrg by either 1) contacting its current RespOrg and authorizing the change, or 2) having the new RespOrg ask the SMS/800 administrator to port the number by submitting a written subscriber authorization.[303]

93. SBC states that a RespOrg should be allowed to continue to follow the "industry practice" of comparing a signature on a written LOA with the authorized signature on the account it has on file and, if the signatures do not match, contacting the subscriber to verify the change request.[304] WorldCom disagrees, stating that LEC verification of all services, including toll-free number services, is clearly prohibited under the Commission's rules, and that the written LOAs employed by SBC are not necessary in order to effect RespOrg changes so long as the change request is acceptable under the rules.[305] WorldCom states that SBC offers no explanation for its proposed exemption other than SBC's history of verifying RespOrg changes.[306] SBC later filed a letter asserting that, while the industry practice at the time it filed its Petition was to verify the customer's decision to change RespOrgs, the "Industry Guidelines for Toll Free Number Administration" now "prohibits RespOrg change verification prior to working the change order," and that SBC follows the current guidelines.[307]

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[300] SBC Petition at 13.

[301] The SMS/800 database is the single, centralized database into which all customer records and routing instructions for 800 numbers are located. *See Provision of Access for 800 Service*, Order, 8 FCC Rcd 1844, 1845 (Com. Car. Bur. 1993)(*NASC Change Order*).

[302] *See Provision of Access for 800 Service*, Order, 8 FCC Rcd 1844, 1845 (Com. Car. Bur. 1993)(*NASC Change Order*).

[303] *Id*.

[304] SBC Petition at 13. See also SBC *Ex Parte* submitted Nov. 10, 1999; Opposition of SBC to AT&T Application of Review of *Provision of Access for 800 Service*, CC Docket No. 86-10, Order, 8 FCC Rcd 1844 (Com. Car. Bur. 1993)("NASC Change Order"); Provision of Access for 800 Service, CC Docket No. 86-10, Order on Reconsideration, 14 FCC Rcd 4347 (Com. Car. Bur. 1999)("Order on Reconsideration").

[305] WorldCom Comments at 21.

[306] *Id*.

[307] SBC *Ex Parte* at 1.

94. We note that, in the *NASC Change Order*, the Common Carrier Bureau stated that a RespOrg change request submitted to the SMS/800 administrator must include "proper written authorization."[308] In a subsequent Order on Reconsideration (*NASC Reconsideration*), the Common Carrier Bureau clarified that it "did not intend [in the *NASC Change Order*] to allow [preferred carrier] change procedures to be used for RespOrg changes: we intended that all RespOrg change authorizations be in writing."[309] AT&T filed an Application for Review of the *NASC Reconsideration*, contending that the *NASC Change Order* did not preclude the use of carrier change procedures to verify RespOrg changes submitted to the SMS/800 administrator, including third party verification, and that the Common Carrier Bureau had failed to provide a sufficient explanation for a finding to the contrary in the *NASC Reconsideration*, *i.e*. that only written LOAs satisfy the requirement of "proper written authorization."[310] SBC filed an Opposition to AT&T's Application for Review, stating again that it must be able to continue the practice of comparing signatures it has on file to signatures on written LOAs in order to determine which subscribers to contact to make sure slamming does not occur.[311] Without the signature comparison process, according to SBC, the RespOrg would have to contact the customer on every 800 number change.[312]

95. In a subsequent *Clarification Order*, the Common Carrier Bureau stated that, by requiring "proper written authorization," it did not intend to preclude the current SMS/800 administrator practice of accepting LOAs for RespOrg change requests that contain a subscriber's personal identification number in lieu of the subscriber's signature.[313] AT&T then withdrew its Application for Review, stating that its concerns had been addressed in the *Clarification Order*.[314] Inasmuch as SBC is seeking a requirement that all RespOrg change requests include LOAs with customer signatures, we note that the *Clarification Order* disallows such a result. In general, it would not appear that an entity, when providing RespOrg service, is functioning as an "executing" or "submitting" carrier as contemplated by our carrier change rules.[315]

96. New Lines and New Installations. AT&T asks the Commission to clarify, or in the alternative reconsider and hold, that the slamming rules apply to customers' initial carrier selections for newly installed lines.[316] AT&T asserts that, while nothing in the *Second Report and Order* suggests that such customers be excluded from slamming protections, the Commission should state more clearly that the slamming rules apply to a subscriber's selection of preferred carriers, either as an initial carrier selection or as a change from an existing choice.[317] AT&T notes that millions of new subscriber lines are

[308] *Provision of Access for 800 Service*, CC Docket No. 86-10, Order, 8 FCC Rcd 1844 (Com. Car. Bur. 1993)(*NASC Change Order*);

[309] *Id*; *Provision of Access for 800 Service*, CC Docket No. 86-10, Order on Reconsideration, 14 FCC Rcd 4347 (Com. Car. Bur. 1999)(*Order on Reconsideration*).

[310] *See* "Application for Review" of AT&T of the *Order on Reconsideration*. Concurrent with its Application for Review, AT&T also filed a "Petition for Stay Pending Review" of the *Order on Reconsideration*. SBC filed an Opposition in response to the AT&T Application and Petition (SBC Opposition).

[311] SBC Opposition at 1-2.

[312] *Id*. at 2.

[313] *Clarification Order*, 14 FCC Rcd at 19,571.

[314] *See* Letter submitted by AT&T March 15, 2000 in CC Docket No. 86-10; Public Notice, DA 00-642*, AT&T Corp. Withdrawal of Application for Review*.

[315] Any further concerns regarding RespOrg issues should be raised in the context of our toll-free number proceedings.

[316] AT&T Petition at 23-25. *See also* Motion of AT&T Corp. for Expedited Decision at 1-7 ("AT&T Motion").

[317] AT&T Petition at 23-24.

installed annually as businesses and residences expand or change locations.[318] According to AT&T, excluding newly installed lines from application of our slamming rules would deny many customers valuable consumer protections and would harm competition.[319] In AT&T's subsequent Motion for Expedited Decision, AT&T states that, since the adoption of the *Second Report and Order*, many incumbent LECs have begun to offer long distance service, and that "incumbent LECs do not apply the anti-slamming protections to at least 20 percent of all customers for whom the incumbent LECs submit orders selecting their long distance affiliate."[320] AT&T asserts that, once LECs begin offering long distance service, they have a vested interest in ensuring that their local exchange customers are assigned to their long distance affiliates, whether legitimately or otherwise.[321]

97. Ameritech, Bell Atlantic, and GTE urge the Commission to reject AT&T's request. Ameritech states that section 258 of the Act by its very terms applies only to carrier changes, as it authorizes the Commission to establish verification requirements for "a *change* in a subscriber's selection of a provider of telephone exchange or telephone toll service."[322] Ameritech also asserts that AT&T's petition violates the Administrative Procedure Act because the *Notice* in this proceeding in no way suggested that the Commission would for the first time require verification of new service orders.[323] Ameritech notes that AT&T's petition for reconsideration raises this issue for the first time and states that the Commission cannot impose a verification requirement for initial carrier requests without proper notice.[324]

98. Ameritech asserts that in any case such a requirement is wholly unnecessary, and disagrees with AT&T that slamming risks are high in initial carrier selections.[325] Ameritech asserts that slamming became pervasive because consumers often were not aware that their carrier was changed.[326] Ameritech states that establishing an initial account involves the provision of much more specific and unmistakable customer information than is contained in a carrier change request, and that a consumer establishing initial service is very likely to check the status of their account and closely monitor their first bill.[327] Thus, according to Ameritech, in new installation situations, a consumer is likely to detect the presence of any unauthorized service, and a LEC would therefore have great incentives to ensure that this does not occur.[328] Ameritech and GTE assert that AT&T offers no factual support for its bare assertion that slamming is or could be a problem for new installations.[329] SBC states that applying the slamming rules to new installations would unnecessarily add costs to fix a non-existent problem.[330]

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[318] AT&T Petition at 25; AT&T Motion at 5-6.

[319] AT&T Petition at 25.

[320] AT&T Motion for Expedited Decision at 3.

[321] *Id*.

[322] Ameritech Opposition at 5, citing 47 U.S.C. § 258(a)(emphasis added); *see also* Bell Atlantic Comments at 3-4, GTE Comments at 5.

[323] Ameritech Opposition at 5-6.

[324] *Id*.

[325] *Id*. at 6.

[326] *Id*. at 7.

[327] *Id*.

[328] *Id*.

[329] *Id*. at 7-8; GTE Comments at 5.

[330] SBC Reply at 10.

99. Sprint agrees that the slamming rules cannot be applied to new installations because the statutory language only addresses *changes* of preferred carriers.[331] Inasmuch as Sprint also agrees with AT&T that the potential for abuse by LECs nevertheless exists in such situations, Sprint asks instead that the Commission "remove the gatekeeper control from LECs and establish an independent third party administrator for the entire PC process."[332] WorldCom states that verification for new installations is not needed if a customer places an order with the executing carrier and chooses an IXC unaffiliated with the LEC for both long distance and local toll service.[333] However, WorldCom asserts that verification should be obtained if the LEC or its affiliate has an interest in the long distance carrier the customer chooses.[334] WorldCom states that, while Ameritech may correctly characterize unintentional, unauthorized changes as less likely in new installation situations given the amount of information the executing carrier typically collects, nothing prevents the ILEC from *intentionally* converting the customer to its affiliate. According to WorldCom, the rules should apply whenever LECs have the incentive and ability to change a customer's carrier selection.[335]

100. We decline AT&T's request to clarify, or in the alternative reconsider and hold, that our slamming rules apply to new installations.[336] As noted above, section 258 of the Act provides that "[n]o telecommunications carrier shall submit or execute a *change* in 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."[337] There is no indication in either the statute or the legislative history that the limitations imposed by Congress regarding carrier change requests should be expanded to apply to situations in which no carrier change has occurred. A finding to the contrary would contradict the plain language of the statue, and we therefore need not address the additional arguments raised in conjunction with AT&T's request. However, we recognize that, at the time of installation, an executing carrier may have only limited information regarding the subscriber's carrier, such as carrier identification codes, and may not be aware of more detailed information, such as the specifics of a customer's long distance calling plan. We stress that an executing carrier may advise a customer that has contacted it to arrange new service (such as when establishing service at a new residence) to contact his or her other carrier service providers to further ensure that all services are correctly installed. As noted above, Ameritech states that LECs have incentives to ensure that unauthorized services are not present in new installation situations; accordingly, we would expect that an executing carrier would find it in its best interest to advise the customer in such a way as to avoid potential confusion.

101. We emphasize, however, that the statue does encompass all *changes* in a subscriber's selection of a provider of telecommunications service, regardless of whether such change occurs at the same time a subscriber changes residences or when a business relocates or expands. As noted above, section 258 of the Act provides that "[n]o telecommunications carrier shall submit or execute a change in 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."[338] There is no

[331] Sprint Opposition at 8.

[332] *Id*.

[333] WorldCom Comments at 21-22; WorldCom Reply Comments at 7-8.

[334] *Id*. at 8-9.

[335] *Id*.

[336] Because we deny AT&T's petition for clarification or reconsideration, we do not address Ameritech's assertion that AT&T's petition violated the Administrative Procedures Act.

[337] 47 U.S.C. § 258 (emphasis added).

[338] *Id*..

indication in either the statute or the legislative history that carrier changes that coincide with new line installations should be exempt from the carrier change provisions of section 258. The statute is clearly intended to ensure that consumers receive service from the carrier of their choice without interference. It is no less important for carrier change verification to be obtained when a consumer is receiving the service on new lines than when the carrier change occurs without new line installations.

102. Carrier Reporting of Slamming Allegations (Form 478). Sprint and WorldCom ask the Commission to reconsider its carrier reporting requirement.[339] According to our rules, carriers providing telephone exchange service and/or telephone toll service must periodically submit to the Commission reports regarding complaints they receive concerning unauthorized carrier changes.[340] In the *Third Report and Order*, the Commission concluded that the information contained in these reports would enable the Commission to identify, as soon as possible, carriers that repeatedly initiate unauthorized changes.[341] Accordingly, the Commission directed each carrier to submit a reporting form (Form 478) identifying the number of slamming complaints received and the number of such complaints that the carrier has investigated and found to be valid.[342] The Commission also required carriers to identify the number of slamming complaints involving local, intrastate, and interstate exchange service, investigated or not, that the carrier has resolved directly with subscribers.[343] In addition, the Commission directed wireline or fixed wireless LECs providing service to end-user subscribers to report allegations of slamming by other carriers that they have received, and to include the name of the entities involved, and the number of complaints involving unauthorized changes that have been lodged against each one.[344] Finally, the Commission required reporting carriers to include the total number of subscribers served at the end of the relevant reporting period, and required the reports to be submitted semiannually on August 15 (covering January 1 through June 30) and on February 15 (covering July 1 through December 31).[345]

103. Sprint and WorldCom state that, because the rules require some carriers to report unsubstantiated complaints and allegations against their competitors, the resultant information is invariably misleading.[346] As such, they argue, it cannot legitimately be used by the Commission as a basis for investigation into a carrier's practices and can unfairly damage a carrier's reputation.[347] Sprint and WorldCom note that the Commission in fact recognized that "a subscriber complaint is not, in and of itself, dispositive proof of a slam." Petitioners also state that carriers have strong incentives to inflate the number of slamming allegations received against competitors, and may not even possess the information necessary to enable them to accurately identify the carrier that allegedly slammed the consumer.[348] For example, because LECs base their reporting on the carrier identification codes (CICs), allegations against

[339] 47 C.F.R. § 64.1180.

[340] *Third Report and Order,* 15 FCC Rcd 15996, at paras. 55-56; *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*, CC Docket No. 94-129, Order, FCC 01-67, 16 FCC Rcd 4999 (2001) (*Order*) at ¶ 4-7.

[341] *Third Report and Order,* 15 FCC Rcd 15996, ¶ 55.

[342] *Id*. at ¶ 56.

[343] *Id.*

[344] *Third Report and Order,* 15 FCC Rcd 15996, ¶¶ 55-56; *Order*, 16 FCC Rcd 4999, ¶ 7.

[345] *Order*, 16 FCC Rcd 4999, at paras. 5, 7.

[346] Sprint Petition at 1-2; WorldCom Petition at 4-5.

[347] *Id*.

[348] WorldCom Petition at 5; Sprint Petition at 3.

switchless resellers using the CIC of their underlying facilities-based carrier will be reported against the underlying carrier rather than the reseller.[349] Sprint and WorldCom state that any reporting requirement should at most require that only complaints received by the carrier from either the Commission or the relevant state regulatory authority be reported (thus helping to ensure that there may be at least some basis for the allegation), and note that, in any case, the Commission already requires the reporting of such information.[350] Petitioners further state that the carrier reporting requirement places unnecessary burdens on carriers because the other carrier change rules adopted by the Commission sufficiently deter slamming and provide the means to track offenders, and they note that carriers that do not resolve disputes with consumers will be closely monitored through the complaint processes of state agencies and the Commission.[351]

104. No parties commented in opposition to the Sprint and WorldCom petitions, and AT&T, BellSouth, and Qwest filed comments supporting them.[352] BellSouth agrees that these rules should be eliminated and, while it takes issue with any suggestion of LEC impropriety in relation to reports of slamming allegations, BellSouth agrees in principle that the Commission should not require one competitor to report on the actions of another.[353] BellSouth also states that the reporting requirements place unfair burdens on LECs and are a needless waste of resources for both carriers and the Commission.[354] Qwest agrees that the reporting requirements lead to false or misleading results due to their inclusion of unsubstantiated slamming allegations.[355] Qwest acknowledges that LEC tracking, with respect to IXC slamming, is "not terribly refined" and can produce imprecise data such that the "'sins' of a slamming reseller are visited upon the facilities-based carrier in terms of tracking the allegations."[356] AT&T also advocates the elimination of these requirements, and reiterates that the raw data included in the reports is misleading and should not be used to guide additional agency investigation.[357] AT&T further notes that, between the time that the reporting obligation was proposed in the *Second Report and Order* and its adoption in the *Third Report and Order*, the Commission modified the slamming complaint procedures by providing for resolution of many such complaints by state agencies.[358] AT&T, like Sprint and WorldCom above, notes that these rules expressly contemplate that states that elect to administer slamming enforcement procedures will furnish reports to the Commission that detail the number of valid complaints adjudicated against each carrier. AT&T states that that Commission failed to acknowledge this change in procedures in the *Third Report and Order*, and thus failed to justify the burdens placed on

[349] WorldCom Petition at 5, nt. 16.

[350] Sprint Petition at 5; WorldCom Petition at 5. States that choose to administer the Commission's carrier change rules are required to file regularly with the Commission information that details slamming activity in their regions. The reports filed by the states contain the number of slamming complaints handled, including data on the number of valid complaints per carrier; the identity of top slamming carriers; slamming trends; and other relevant information. *See First Order on Reconsideration*, 15 FCC Rcd 8158 ¶¶ 23-28.

[351] *Id*. at 6.

[352] AT&T Comments at 3; BellSouth Comments at 2; Qwest Comments at 2.

[353] BellSouth Comments at 2-3.

[354] *Id*.

[355] Qwest Comments at 2-3.

[356] *Id.*

[357] AT&T Comments at 3.

[358] *Id.* at 6-8.

carriers to provide information that overlaps with, but is much less reliable than, the reports submitted by the state agencies.[359]

105. Upon reconsideration, we find that the carrier reporting requirement should be eliminated. We therefore delete section 64.1180 of our rules. Our experience since the adoption of the requirement has shown that the information contained in such reports is of limited utility in investigating allegations of slamming; at the same time, it appears that the burdens associated with filing the reports are significant. As noted by commenters above, LECs in particular may have great difficulty complying with the requirements in an accurate manner. For example, many LECs utilize mechanized systems that track the total number of lines that a consumer alleges were slammed; however, these LEC do not generally have mechanized systems that convert the per-line numbers to actual per-subscriber numbers. In addition, if a slam is associated with a particular trunk group, a LEC's order processing system may attribute a slam to each channel within that trunk group (*e.g.*, a slam within a trunk group comprised of 24 channels will be reported as 24 slams against the carrier). We also note that hundreds of carriers that submit reports each reporting period do not appear to have experienced any slamming problems.

106. More Stringent Verification Requirements. In its Petition for Reconsideration of the *First Reconsideration Order*, WorldCom asks the Commission to clarify that, when determining whether a change was authorized, the states must use the Commission's definition of subscriber as set forth in the *Third Report and Order*.[360] WorldCom asserts that, if state agencies are permitted to apply different meanings to key terms in the adjudication of slamming complaints, the federal rules begin to have little or no purpose.[361] We decline to provide here the clarification sought by WorldCom. In the *Third Report and Order*, the Commission recognized that states have valuable insight into the slamming problems experienced by consumers.[362] The Commission clearly stated that it would not require "states to limit their verification requirements so that they are no more stringent than those promulgated by this Commission."[363] We confirm that, in the areas in which the states have jurisdiction, federal verification procedures constitute a "floor," and the states may choose to impose more stringent requirements, so long as they are consistent with the federal requirements.[364] WorldCom does not identify a specific state law or laws that it would seek to have preempted, nor does it describe how the particular law(s) conflicts federal law or obstructs federal objectives. In the absence of such evidence, we decline to preempt state laws regarding the definition of "subscriber" in the context of carrier change verification.

107. Underlying Facilities-Based Carrier Changes. In the *Second Report and Order*, the Commission adopted rules to clarify the appropriate use of preferred carrier freezes.[365] The Commission stated that, while it believed that preferred carrier freezes can offer consumers an additional level of protection against slamming, "they also create the potential for unreasonable and anti-competitive behavior that might affect negatively efforts to foster competition in all markets."[366] Specifically, the Commission noted that carriers are often dependent on LECs to administer preferred carrier freeze

[359] *Id.*

[360] WorldCom Petition at 9.

[361] *Id*.

[362] *Third Report and Order* at ¶ 87.

[363] *Id*.

[364] *Id*.

[365] *Second Report and Order* at ¶¶ 112-138.

[366] *Id*. at ¶ 113.

programs.[367] However, given LEC entry into the market for interLATA services, and competition in the local exchange and interLATA toll markets, incumbent LECs "may have incentives to market 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] Since the implementation of the *Second Report and Order*, we have received inquiries from LEC representatives who expressed concern about the risks of "lifting" a customer's preferred carrier freeze in order to permit the customer's preferred carrier, a switchless reseller, to begin using the network of a different facilities-based carrier. Based on our experiences, we clarify here that we do not consider it a lifting of a preferred carrier freeze when a LEC implements the request of a switchless reseller to change its underlying carrier, and makes the technical changes necessary to permit the reseller's customer to retain his or her chosen carrier. Under these circumstances, the subscriber's preferred carrier is the switchless reseller, and the subscriber does not experience a carrier change when the reseller merely makes a change to the underlying facilities it utilizes.

108. Resolution of Informal Complaints. In the *First Order on Reconsideration*, we modified our informal complaint rules to better address the adjudication of unauthorized carrier change complaints.[369] The rule modifications were intended to give consumers a wider array of remedies than was available under the former informal complaint rules, which did not provide for the Commission to order monetary payments by carriers to consumers in situations involving unauthorized carrier changes.[370] The rule modifications also provided for carrier change disputes to be handled by appropriate state commissions or this Commission, in cases where the state has not opted to administer our rules, rather than by authorized carriers.[371] Our current rules regarding informal complaints filed pursuant to section 258 state that "[t]he Commission will issue a written (or electronic) order informing the complainant, the unauthorized carrier, and the authorized carrier of its finding, and ordering the appropriate remedy, if any, as defined by §§ 64.1160 through 64.1170 of this chapter."[372] Our rules also require that the "relevant governmental agency will determine whether an unauthorized change, as defined by § 64.1100(e), has occurred . . . ."[373] In addition, our rules state that, when a carrier is notified by the relevant governmental agency of an unauthorized carrier change complaint, the carrier shall remove all unpaid charges for the first 30 days after the alleged unauthorized transfer "pending a determination of whether an unauthorized change . . . has occurred, if it has not already done so."[374] Given our experience with the resolution of unauthorized carrier change complaints since the promulgation of these rules, we believe that permitting flexibility as to the form of complaint determinations allows for more efficient use of Commission resources and would speed the resolution of complaints. Accordingly, we clarify that, under the appropriate circumstances, the Commission may issue an order addressing an informal slamming complaint in the form of a letter, written or electronic, containing the information required by our rules.

[367] *Id*. at ¶ 116.

[368] *Id*.

[369] 47 C.F.R. § 1.719.

[370] *See First Order on Reconsideration*, 15 FCC Rcd 8158, note 72.

[371] *Id*. at ¶¶ 22-43.

[372] 47 C.F.R. § 1.719(c).

[373] 47 C.F.R. § 64.1150(d).

[374] 47 C.F.R. § 64.1150(c).

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Third Party Verifications

109. Background. As noted above, in the *Third Report and Order*, the Commission declined to mandate specific language to be used in third party verification calls. However, in order to eliminate uncertainty as to what constitutes necessary and acceptable practices, the Commission adopted minimum content requirements for third party verification.[375] The Commission stated that minimum requirements for such calls would provide useful guidance to the third party verifiers and carriers without locking carriers into using a set script.[376] In addition, the Commission stated that the requirements would also permit more streamlined enforcement by helping the Commission to determine the adequacy of steps taken by independent third parties in the verification process.[377] Accordingly, the Commission concluded that scripts for third party verifications should elicit, at a minimum, the identity of the subscriber; confirmation that the person on the call is authorized to make the carrier change; confirmation that the person on the call wants to make the change; the names of the carriers affected by the change; the telephone numbers to be switched; and the types of service involved (*i.e.*, local, in-state toll, out-of-state toll, or international service).[378] The Commission noted that these content requirements do not differ in substance from the rules regarding LOAs.[379]

110. In addition, the Commission found that the third party verification must be conducted in the same language that was used in the underlying sales transaction, and that the entire third party verification transaction must be recorded.[380] The Commission also reiterated that, consistent with its rules regarding verifications generally, submitting carriers must maintain and preserve the recordings for a minimum period of two years after obtaining such verification.[381] The Commission observed that, if a slamming dispute arises, a recorded verification will help determine whether the subscriber was simply seeking information or was in fact agreeing to change carriers and, if so, which service(s) the subscriber had agreed to change.[382]

111. Discussion. Based on our experience since the effective date of the *Third Report and Order*, we seek comment on the need for additional minimum requirements for third party verification calls in order to maximize their accuracy and efficiency for consumers, carriers, and the Commission. These additional possible requirements address issues we have seen repeatedly in our enforcement of the slamming liability rules. First, we seek comment on whether third party verifiers should state the date during the taped verification process. Through our slamming enforcement efforts, we have become aware of situations in which, for example, a carrier may have obtained a valid authorization for a past carrier change, but the customer has since switched away from the carrier and now alleges that he or she was switched back to that carrier without authorization. Without a clearly articulated date on the verification tapes, the carrier could use the former verification tape to defend itself against the subsequent unauthorized change.

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[375] *Third Report and Order* at ¶ 40.

[376] *Id.*

[377] *Id.*

[378] *Id.*

[379] *Id.*

[380] *Id*. at ¶ 41.

[381] *Id*. *See also Second Report and Order* at ¶ 74.

[382] *Third Report and Order* at ¶ 41.

112. Next, we seek comment on whether the verifier should explicitly state that, if the customer has additional questions for the carrier's sales representative regarding the carrier change after verification has begun, the verification will be terminated, and further verification proceedings will not be carried out until after the customer has finished speaking with the sales representative. We note that, according to our rules, final verification cannot be obtained until after the carrier's sales representative has ceased speaking to the customer. Accordingly, we seek comment as to whether such a requirement would lessen possible customer confusion in situations in which a verification is terminated because the customer seeks further discussions with the carrier's sales agent. We also seek comment on whether the verifier should convey to the customer that the carrier change can be effectuated without any further contact with the customer once the verification has been completed in full. We have found that customers may not realize that a carrier cannot in most cases "undo" a PIC change after it has been submitted, even if the subscriber quickly requests cancellation of the change order.

113. We seek comment on whether verifiers should be required to make clear to a customer that he or she is not verifying an intention to retain existing service, but is in fact asking for a carrier change. We have observed instances in which, for example, carriers seeking to obtain customer authorization for a carrier change merely inform customers that they are consenting to an "upgrade" of the customers' service or to bill consolidation. We also note that it can be difficult to ascertain whether a subscriber has fully and knowingly provided an answer to each question posed by a third party verifier if some questions are presented as a group rather than individually. Accordingly, commenters should address whether each piece of information that a third party verifier must gather under our rules should be the subject of a separate and distinct third party verifier inquiry and subscriber response. Finally, we seek comment on whether, when verifying an interLATA service change, the verifier should specify that interLATA service encompasses both international and state-to-state calls,[383] and whether a verifier should define the terms "intraLATA toll" and "interLATA toll" service. We have observed that carriers sometimes use differing terms for these services; for example, a carrier might refer to intraLATA service as "short haul long distance, local toll, local long distance, or long distance calls within your state." Accordingly, we have received numerous complaints from consumers that assert they unknowingly gave up the flat rate for intraLATA service they paid to their LEC when consenting to a carrier change for different services.

VI. PROCEDURAL MATTERS

A. Regulatory Flexibility Analysis

113. As required by the Regulatory Flexibility Act, as amended (RFA),[384] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the proposals set forth in this Second FNPRM. The IRFA is set forth in Appendix C. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in this Second FNPRM, and must have a separate and distinct heading designating them as responses to the IRFA. Appendix B sets forth a Supplemental Final Regulatory Flexibility Analysis for the *Third Order on Reconsideration*.

[383] We note that, in least one state (Hawaii), international service is a separate service such that "interLATA service" would not encompass both international and state-to-state calls.

[384] *See* 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1966 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

B. Paperwork Reduction Act Analysis

114. This *Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking* contains either a proposed or modified information collection. As part of a continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due at the same time as other comments on this *Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking*; OMB comments are due 60 days from the date of publication of this *Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

C. Ex Parte Presentations

115. This is a permit-but disclose notice and comment rulemaking proceeding. Members of the public are advised that ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed under the Commission's rules.[385]

D. Filing of Comments and Reply Comments

114. We invite comment on the issues and questions set forth above. Pursuant to 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 45 days after publication in the Federal Register, and reply comments on or before 60 days after publication in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

115. 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, U. S. 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." A sample form and directions will be sent in reply. 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. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first- class or overnight U. S. Postal Service mail (although we continue to experience delays in receiving U. S. Postal Service mail). The

[385] *See generally*, 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

Commission's contractor, Vistronix, Inc., will receive hand- delivered or messenger- delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N. E., Suite 110, Washington, D. C. 20002. The filing hours at this location are 8: 00 a. m. to 7: 00 p. m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U. S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U. S. Postal Service first- class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D. C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Parties also should send four (4) paper copies of their filings to Kelli Farmer, Federal Communications Commission, Room 4- C740, 445 12th Street, S. W., Washington, DC 20554.

116. Written comments by the public on the proposed or modified information collections are due on or before 45 days after the date of publication 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 collection(s) contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1- C804, 445 12 th Street, S. W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N. W., Washington, D. C. 20503 or via the Internet to edward.springer@omb.eop.gov.

117. Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting Brian Millin of the Consumer & Governmental Affairs Bureau, at (202) 418- 7426, TTY (202) 418- 7365, or at bmillin@fcc.gov.

VII. ORDERING CLAUSES

118. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 206-208 and 258 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 206-208 and 258 and sections 1.421 and 1.429 of the Commission's rules, 47 C.F.R. §§ 1.421 and 1.429, that the *Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking* in CC Docket No. 94-129 IS ADOPTED, and that Part 64 of the Commission's rules, 47 C.F.R. Part 64, is amended as set forth in Appendix A. The requirements of this *Third Order on Reconsideration* shall become effective 30 days after publication of a summary thereof in the Federal Register. Sections 64.1120 64.1160, 64.1170 and 64.1180 contain new or modified information collections that have not been approved by OMB. The Commission will publish a document in the Federal Register announcing the effective date of these rules.

119. IT IS FURTHER ORDERED that the collection of information contained herein is contingent upon approval by the Office of Management and Budget.

120. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and section 1.429 of the Commission's rules, 47 C.F.R. §1.429, that the petition for partial stay, filed by VoiceLog, LLC, IS DENIED AS MOOT.

121. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and section 1.429 of the Commission's rules,

47 C.F.R. §1.429, that the petition for reconsideration, filed by VoiceLog, LLC, IS GRANTED IN PART AND DENIED IN PART, to the extent indicated herein.

122. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and section 1.429 of the Commission's rules, 47 C.F.R. §1.429, that the petition for reconsideration, filed by the Rural LECs, IS DENIED.

123. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and section 1.429 of the Commission's rules, 47 C.F.R. §1.429, that the petition for reconsideration, filed by NTCA, IS DENIED.

124. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and section 1.429 of the Commission's rules, 47 C.F.R. §1.429, that the petition for reconsideration, filed by SBC, IS GRANTED IN PART AND DENIED IN PART, to the extent indicated herein.

125. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and section 1.429 of the Commission's rules, 47 C.F.R. §1.429, that the petition for reconsideration, filed by AT&T on April 2, 2001, IS GRANTED IN PART AND DENIED IN PART, to the extent indicated herein, and that the petition for reconsideration, filed by AT&T on March 18, 1999, IS DENIED.

126. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and section 1.429 of the Commission's rules, 47 C.F.R. §1.429, that the petitions for reconsideration, filed by WorldCom on April 2, 2001 and September 5, 2000, ARE GRANTED IN PART AND DENIED IN PART, to the extent indicated herein.

127. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and section 1.429 of the Commission's rules, 47 C.F.R. §1.429, that the petitions for reconsideration, filed by Sprint on April 2, 2001, and September 5, 2000, ARE GRANTED IN PART AND DENIED IN PART, to the extent indicated herein, and the petition for reconsideration, filed by Sprint on March 18, 1999, IS DENIED.

121. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Third *Report and Order and Second Further Notice of Proposed Rulemaking* in CC Docket No. 94-129, including the Initial Regulatory Flexibility Analysis and the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
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. Part 64, Subpart K, the heading is revised to read as follows:

   Subpart K-Changes in Preferred Telecommunications Service Providers

2. Section 64.1120 is amended by revising the second sentence in paragraph (c)(3)(iii) to read as follows:

   § 64.1120 Verification of orders for telecommunications service.

   * * * * *
   (c) * * *
   (3) * * *
   (iii) * * * All third party verification methods shall elicit, at a minimum, the identity of the subscriber; confirmation that the person on the call is authorized to make the carrier change; confirmation that the person on the call wants to make the carrier change; the names of the carriers affected by the change (not including the name of the displaced carrier); the telephone numbers to be switched; and the types of service involved. * * *

   * * * * *

3. Section 64.1130 is amended by revising paragraph (j) to read as follows:

   §64.1130 Letter of agency form and content

   * * * * *

   (j) A telecommunications carrier shall submit a preferred carrier change order on behalf of a subscriber within no more than 60 days of obtaining a written or electronically signed letter of agency. However, letters of agency for multi-line and/or multi-location business customers that have entered into negotiated agreements with carriers to add presubscribed lines to their business locations during the course of a term agreement shall be valid for the period specified in the term agreement.

4. Section 64.1150 is amended by revising paragraph (b) to read as follows:

   § 64.1150 Procedures for the resolution of unauthorized changes in preferred carriers.

   * * * * *

   (b) Referral of Complaint. Any carrier, executing, authorized, or allegedly unauthorized, that is informed by a subscriber or an executing carrier of an unauthorized carrier change shall direct that subscriber either to the state commission or, where the state commission has not opted to administer these rules, to the Federal Communications Commission's Consumer & Governmental

Affairs Bureau, for resolution of the complaint. Carriers shall also inform the subscriber that he or she may contact and seek resolution from the alleged unauthorized carrier and, in addition, may contact the authorized carrier.

* * * * *

5. Section 64.1160 is revised by adding paragraph (g) to read as follows:

§ 64.1160 Absolution procedures where the subscriber has not paid charges.

* * * * *

(g) When a LEC has assigned a subscriber to a carrier without authorization, and where the subscriber has not paid the unauthorized charges, the LEC shall switch the subscriber to the desired carrier at no cost to the subscriber, and shall also secure the removal of the unauthorized charges from the subscriber's bill in accordance with the procedures specified in paragraphs (a)-(f) of this section.

6. Section 64.1170 is revised by adding paragraph (g) to read as follows:

§ 64.1170 Reimbursement procedures where the subscriber has paid charges.

* * * * *

(g) When a LEC has assigned a subscriber to a non-affiliated carrier without authorization, and when a subscriber has paid the non-affiliated carrier the charges for the billed service, the LEC shall reimburse the subscriber for all charges paid by the subscriber to the unauthorized carrier and shall switch the subscriber to the desired carrier at no cost to the subscriber. When a LEC makes an unauthorized carrier change to an affiliated carrier, and when the customer has paid the charges, the LEC must pay to the authorized carrier 150% of the amounts collected from the subscriber in accordance with paragraphs (a)-(f) of this section.

7. Remove § 64.1180.

§ 64.1180 [Removed]

APPENDIX B

Supplemental Final Regulatory Flexibility Analysis.

1. As required by the Regulatory Flexibility Act (RFA),[386] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Third Report and Order and Second Order on Reconsideration*.[387] The Commission sought written public comment on the proposals in the *Third Report and Order*, including comment on the IRFA. A Final Regulatory Flexibility Analysis (FRFA) was incorporated in the *Third Report and Order*.[388] The Commission received a number of petitions for reconsideration in response to the *Third Report and Order*. Certain comments received are discussed below, including two received in response to the IRFA. The instant *Order* addresses issues raised in those reconsideration petitions and other petitions. This associated Supplemental Final Regulatory Flexibility Analysis (SFRFA) reflects revised or additional information to that contained in the FRFA. This SFRFA is thus limited to matters raised in response to the *Third Report and Order* and addressed in the instant *Order*. This SFRFA conforms to the RFA.[389]

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

2. Section 258 prohibits any telecommunications carrier from submitting or executing an unauthorized change in a subscriber's selection of a provider of telephone exchange service or telephone toll service. This practice, known as "slamming," distorts the telecommunications market by enabling companies that engage in fraudulent activity to increase their customer and revenue bases at the expense of consumers and law-abiding companies. In this *Order*, we address certain issues raised in petitions for reconsideration of the *Second Report and Order and Further Notice of Proposed Rulemaking*, the *First Order on Reconsideration*, and the *Third Report and Order*. Specifically, in this *Order* we modify the drop-off rule to allow the sales agents of certain carriers to remain on the line during the Third Party Verification (TPV).[390] We also discuss small business concerns with respect to this rule.[391] We exempt "multi-line and/or multi-location business customers" from our rule imposing a 60-day limit on the amount of time a Letter of Agency (LOA) may be considered valid.[392] We decline to hold Interexchange Carriers (IXCs) liable for slamming pursuant to section 258 when the unauthorized carrier change was the result of a LEC mistake, and LECs must verify carrier change requests made by a customer directly to the LEC according to our verification rules. We no longer require carriers that provide telephone exchange service and/or telephone toll service to periodically submit to the Commission allegations of slamming. We do not require a subscriber to identify, either in LOAs or third party verifications, the identity of the

[386] *See* 5 U.S.C. § 603. The RFA, s*ee* 5 U.S.C. § 601 *et. seq*., was amended by the Contract with America Advancement Act of 1996, Pub. L. 104-121, 110 Stat. 87 (1996) (CWAA). Title II of the CWAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[387] *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,* CC Docket No. 94-129, Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996 (2000) (*Third Report and Order*); Errata, DA 00-2136 (rel. Sept. 25, 2000); Erratum, DA 00-292 (rel. Oct. 4, 2000).

[388] *Section 258 Order*, 14 FCC Rcd at 1611.

[389] *See* 5 U.S.C. § 604.

[390] *See supra* ¶¶ 35-37.

[391] *See supra* ¶¶ 35-42.

[392] *See supra* ¶¶ 49-53.

displaced carrier. This *Order* also contains a Further Notice of Proposed Rulemaking, in which we propose several additional modifications to our carrier change rules. Specifically, we seek comment on rule modifications with respect to third party verifications.

B. Summary of Significant Issues Concerning Small Entities

3. Two commenters responded directly to the IRFA: Voicelog and SBA. VoiceLog filed a Petition for Partial Stay and Reconsideration of the *Third Report and Order*. VoiceLog argues that that drop-off rule is overbroad, impractical, and unenforceable and is not competitively neutral with respect to other third party verification methods.[393] The SBA argues that the Commission adopted the drop-off rule without raising the issue in an IRFA and that the Commission did not solicit comment on compliance costs and alternatives in either the *Second Report and Order* or the *Third Report and Order*.[394] In response to VoiceLog's arguments, the Commission modified the drop-off requirement to balance the independence of the third party verification with the concerns of those smaller carriers. The Regulatory Flexibility concerns of VoiceLog and SBA are discussed in paragraphs 44-45, supra.

C. Description and Estimate of the Number of Small Entities to which the Rules Will Apply.

4. 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 proposed rules, if adopted.[395] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[396] In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act.[397] Under the Small business Act, a "small business concern" is one that: (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).[398] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[399] Nationwide, as of 1992, there were approximately 275,801 small organizations.[400]

5. The definition of "small governmental jurisdiction" is one with populations of fewer than 50,000.[401] There are approximately 85,006 governmental entities in the nation.[402] This number includes

[393] *See supra* ¶¶ *38-44*.

[394] *See supra* ¶ *44*.

[395] See 5 U.S.C. § 603(b)(3).

[396] 5 U.S.C. § 601(6).

[397] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), 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 definitions(s) in the Federal Register."

[398] 15 U.S.C. § 632.

[399] 15 U.S.C. § 601(4).

[400] Department of Commerce, U.S. Bureau of the Census, 1992 Economic Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

[401] 5 U.S.C. § 601(5).

such entities as states, counties, cities, utility districts and school districts. There are no figures available on what portion of this number has populations of fewer than 50,00. However, this number includes 38,978 counties, cities and towns, and of those, 37,556, or ninety-six percent, have populations of fewer than 50,000.[403] The Census Bureau estimates that this ratio is approximately accurate for all government entities. Thus, of the 85,006 governmental entities, we estimate that ninety-six percent, or about 81,600, are small entities that may be affected by our rules.

6. We have included small incumbent LECs in this RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, wireline telecommunications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[404] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[405] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

7. **Incumbent Local Exchange Carriers.** Neither the Commission nor the SBA has developed a specific small business size standard for providers of incumbent local exchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.[406] According to the FCC's *Telephone Trends Report* data, 1,329 incumbent local exchange carriers reported that they were engaged in the provision of local exchange services.[407] Of these 1,329 carriers, an estimated 1,024 have 1,500 or fewer employees and 305 have more than 1,500 employees.[408] Consequently, we estimate that the majority of providers of local exchange service are small entitles that may be affected by the rules and policies adopted herein.

8. **Competitive Local Exchange Carriers.** Neither the Commission nor the SBA has developed a specific small business size standard for providers of competitive local exchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.[409] According to the FCC's *Telephone Trends Report* data, 532 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services.[410] Of these 532

(...continued from previous page)

[402] 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce.

[403] *Id*.

[404] 5 U.S.C. § 601(3).

[405] *See* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to Chairman William E. Kennard, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 5 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

[406] 13 C.F.R. § 121.201, NAICS code 513310.

[407] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, at Table 5.3, p 5-5 (May 2002) (*Telephone Trends Report*).

[408] *Id*.

[409] 13 C.F.R. § 121.201, NAICS code 513310.

[410] *Telephone Trends Report*, Table 5.3.

companies, an estimated 411 have 1,500 or fewer employees and 121 have more than 1,500 employees.[411] Consequently, the Commission estimates that the majority of providers of competitive local exchange service are small entities that may be affected by the rules.

9. **Competitive Access Providers**. Neither the Commission nor the SBA has developed a specific size standard for competitive access providers (CAPS). The closest applicable standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.[412] According to the FCC's *Telephone Trends Report* data, 532 CAPs or competitive local exchange carriers and 55 other local exchange carriers reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services.[413] Of these 532 competitive access providers and competitive local exchange carriers, an estimated 411 have 1,500 or fewer employees and 121 have more than 1,500 employees.[414] Of the 55 other local exchange carriers, an estimated 53 have 1,500 or fewer employees and 2 have more than 1,500 employees.[415] Consequently, the Commission estimates that the majority of small entity CAPS and the majority of other local exchange carriers may be affected by the rules.

10. **Local Resellers.** The SBA has developed a specific size standard for small businesses within the category of Telecommunications Resellers. Under that standard, such a business is small if it has 1,500 or fewer employees.[416] According to the FCC's *Telephone Trends Report* data, 134 companies reported that they were engaged in the provision of local resale services.[417] Of these 134 companies, an estimated 131 have 1,500 or fewer employees and 3 have more than 1,500 employees.[418] Consequently, the Commission estimates that the majority of local resellers may be affected by the rules.

11. **Toll Resellers.** The SBA has developed a specific size standard for small businesses within the category of Telecommunications Resellers. Under that SBA definition, such a business is small if it has 1,500 or fewer employees.[419] According to the FCC's *Telephone Trends Report* data, 576 companies reported that they were engaged in the provision of toll resale services.[420] Of these 576 companies, an estimated 538 have 1,500 or fewer employees and 38 have more than 1,500 employees.[421] Consequently, the Commission estimates that a majority of toll resellers may be affected by the rules.

12. **Interexchange Carriers.** Neither the Commission nor the SBA has developed a specific size standard for small entities specifically applicable to providers of interexchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.[422] According to the FCC's

[411] *Id*.

[412] 13 C.F.R. § 121.201, NAICS code 513310.

[413] *Telephone Trends Report*, Table 5.3.

[414] *Id*.

[415] *Id*.

[416] 13 C.F.R. § 121.201, NAICS code 513330.

[417] *Telephone Trends Report*, Table 5.3.

[418] *Id*.

[419] 13 C.F.R. § 121.201, NAICS code 513330.

[420] *Telephone Trends Report*, Table 5.3.

[421] *Id*.

[422] 13 C.F.R. § 121.201, NAICS code 513310.

Telephone Trends Report data, 229 carriers reported that their primary telecommunications service activity was the provision of interexchange services.[423] Of these 229 carriers, an estimated 181 have 1,500 or fewer employees and 48 have more than 1,500 employees.[424] Consequently, we estimate that a majority of IXCs may be affected by the rules.

13. **Operator Service Providers.** Neither the Commission nor the SBA has developed a specific size standard for small entities specifically applicable to operator service providers. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees. [425] According to the FCC's *Telephone Trends Report* data, 22 companies reported that they were engaged in the provision of operator services.[426] Of these 22 companies, an estimated 20 have 1,500 or fewer employees and two have more than 1,500 employees.[427] Consequently, the Commission estimates that a majority of local resellers may be affected by the rules.

14. **Prepaid Calling Card Providers.** The SBA has developed a size standard for small businesses within the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[428] According to the FCC's *Telephone Trends Report* data, 32 companies reported that they were engaged in the provision of prepaid calling cards.[429] Of these 32 companies, an estimated 31 have 1,500 or fewer employees and one has more than 1,500 employees.[430] Consequently, the Commission estimates that a majority of prepaid calling providers may be affected by the rules.

15. **Other Toll Carriers.** Neither the Commission nor the SBA has developed a specific size standard for small entities specifically applicable to "Other Toll Carriers." This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees. [431] According to the FCC's *Telephone Trends Report* data, 42 carriers reported that they were engaged in the provision of "Other Toll Services."[432] Of these 42 carriers, an estimated 37 have 1,500 or fewer employees and five have more than 1,500 employees.[433] Consequently, the Commission estimates that a majority of “Other Toll Carriers" may be affected by the rules.

D. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements

[423] *Telephone Trends Report*, Table 5.3.

[424] *Id*.

[425] 13 C.F.R. § 121.201, NAICS code 513310.

[426] *Telephone Trends Report*, Table 5.3.

[427] *Id*.

[428] 13 C.F.R. § 121.201, NAICS code 513330.

[429] *Telephone Trends Report*, Table 5.3.

[430] *Id*.

[431] 13 C.F.R. § 121.201, NAICS code 513310.

[432] *Telephone Trends Report*, Table 5.3.

[433] *Id*.

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

17. *Verification of Carrier Changes – Independent Third Party Verification*. We modify our rule on third party verification to exempt carriers that certify to the Commission that they are unable to comply with the rule. We are persuaded that compliance with the current drop-off rule may be infeasible for carriers, including smaller carriers, that lack the technical means to comply or for which enabling equipment upgrades are economically infeasible. However, if a sales agent of an exempted carrier responds to a request by the customer for additional information, the third party verification must be terminated. A new third party verification may commence only after the sales agent has finished responding to the customer inquiry. Any third party verification obtained before a carrier's sales representative has finished providing information regarding the carrier change will not be considered valid. The modification, as created here, will therefore likely reduce the costs for upgrading the network and revising internal processes for signing up new customers, and retraining employees on how to use the new network upgrades and internal processes. We were not able to identify alternatives that would have lessened the economic on small entities while remaining consistent with the Commission's objectives.

18. *60-Day Limit on the Effectiveness of an LOA*. We exempt multi-line and/or multi-location business customers from the 60-day limit. The Commission concludes that this requirement would not impose significant additional costs or administrative burdens on small carriers.[434]

19. *Unauthorized Carrier Changes Resulting From LEC Actions*. We decline to hold the IXC liable for slamming when the unauthorized carrier change was the result of a LEC mistake. LECs will be liable for unauthorized carrier changes that are the result of the LEC's mistake. LECs will also be required to follow the Commission's series of verification rules when a customer contacts the LEC directly to request a carrier change.[435]

20. *Carrier Reporting of Slamming Allegations (Form 478)*. The Commission will no longer require carriers that provide telephone exchange service and/or telephone toll service to periodically submit to the Commission reports regarding complaints they receive alleging unauthorized carrier changes – form 478. The change in the rule will alleviate the administrative burdens associated with filing the reports.

E. Steps Taken to Minimize the Significant Economic Impact of This *Order* on Small Entities, Including the Significant Alternatives Considered.

21. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[436]

22. *Verification of Carrier Changes – Independent Third Party Verification.* The

[434] *See supra* ¶¶ 52-53.

[435] *See supra* ¶¶ 86-89.

[436] 5 U.S.C. § 603(c)(1) – (c)(4).

Commission was persuaded by VoiceLog that compliance with the rule as created in the *Third Report and Order* may have been infeasible for some carriers, including smaller carriers, and therefore in order to minimize any adverse impact of the TPV rule on small entities, the Commission modified the TPV rule to allow for an exception for those carriers that certify that they are unable to comply with the drop-off rule. Other alternatives where suggested by VoiceLog and AT&T, including allowing the sales agent to remain on the line and answer questions during verification were rejected because they either compromised the independent nature of the third party verification or were not likely to have an effect on our goals of reducing slams. Self-certification will likely be less costly to a small business than the costs in upgrading the network and revising internal processes for signing up new customers, and retraining employees on how to use the new network upgrades.

23. *60-Day Limit on the Effectiveness of an LOA*. We expect that exemption we create will have no significant economic impact on carriers.

24. *Unauthorized Carrier Changes Resulting from LEC Actions*. The Commission is persuaded that when a LEC has assigned a subscriber to a non-affiliated carrier without authorization, and where the subscriber has paid the non-affiliated carrier the charges for the billed service, the LEC shall reimburse the subscriber for all charges paid by the subscriber to the unauthorized carrier and shall switch the subscriber to the desired carrier at no cost to the subscriber. When the subscriber has not paid the unauthorized carrier, the LEC shall switch the subscriber to the desired carrier at no cost to the subscriber, and shall also secure the removal of the unauthorized charges from the subscriber's bill. In order to deter such actions, we believe that a LEC should be held responsible for unauthorized carrier changes that favor its long distance affiliate, in the same manner that an IXC would be held responsible if it submitted an unauthorized change itself. The alternatives, *i.e*., holding the customer or the carrier liable for mistakes made by the LEC were rejected as contrary to the slamming portions of the Act and fundamentally unfair. Because LECs will be held responsible for their own mistakes, LECs must also follow our verification rules when contacted directly by a subscriber that requests a carrier change, such that a record of the carrier change request is created and maintained.

25. *Carrier Reporting of Slamming Allegations (Form 478).* In eliminating our rule requiring carriers to submit Form 478, the Commission removed the burdens placed on carriers to provide information that could be misleading and damaging to a carrier; LEC's in particular may have great difficulty complying with the requirements in an accurate manner. This change in our rule will likely reduce significantly the administrative burdens on carriers, including those smaller carriers.

26. Report to Congress: The Commission will send a copy of the *Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking* (*Second Further Notice*), including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[437] In addition, the Commission will send a copy of the *Third Order on Reconsideration*, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Third Order on Reconsideration* and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.[438]

[437] *See* 5 U.S.C. § 801(a)(1)(A).

[438] *See* 5 U.S.C. § 604(b).

APPENDIX C

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act (RFA), as amended,[439] 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 *Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking* (*Second Further Notice*). Written public comments are requested on this IRFA. Comments must be identified as responses to the *Second Further Notice*. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. § 603(a). In addition, the Notice and the IRFA (or summaries thereof) will be published in the Federal Register.

A. Need for, and Objectives of, the Proposed Rules

2. Section 258 prohibits any telecommunications carrier from submitting or executing an unauthorized change in a subscriber's selection of a provider of telephone exchange service or telephone toll service. This practice, known as "slamming," distorts the telecommunications market by enabling companies that engage in fraudulent activity to increase their customer and revenue bases at the expense of consumers and law-abiding companies. In this *Order*, we address certain issues raised in petitions for reconsideration of the *Second Report and Order and Further Notice of Proposed Rulemaking*, the *First Order on Reconsideration*, and the *Third Report and Order*. This *Order* also contains a Second Further Notice of Proposed Rulemaking, in which we propose several modifications to our carrier change rules. Specifically, we seek comment on rule modifications with respect to third party verifications.

B. Legal Basis

3. The *Second Further Notice* is adopted pursuant to Sections 1, 4(i), 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. 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 proposed rules, if adopted.[440] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[441] In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act.[442]

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[439] 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 CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[440] See 5 U.S.C. § 603(b)(3).

[441] 5 U.S.C. § 601(6).

[442] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), 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

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Under the Small business Act, a "small business concern" is one that: (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).[443] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[444] Nationwide, as of 1992, there were approximately 275,801 small organizations.[445]

5. The definition of "small governmental jurisdiction" is one with populations of fewer than 50,000.[446] There are approximately 85,006 governmental entities in the nation.[447] This number includes such entities as states, counties, cities, utility districts and school districts. There are no figures available on what portion of this number has populations of fewer than 50,000. However, this number includes 38,978 counties, cities and towns, and of those, 37,556, or ninety-six percent, have populations of fewer than 50,000.[448] The Census Bureau estimates that this ratio is approximately accurate for all government entities. Thus, of the 85,006 governmental entities, we estimate that ninety-six percent, or about 81,600, are small entities that may be affected by our rules.

6. We have included small incumbent LECs in this RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a wireline telecommunications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[449] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[450] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

7. **Incumbent Local Exchange Carriers.** Neither the Commission nor the SBA has developed a specific small business size standard for providers of incumbent local exchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.[451] According to the FCC's *Telephone Trends Report* data, 1,329 incumbent local exchange carriers reported that they were engaged in the

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for public comment , establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

[443] 15 U.S.C. § 632.

[444] *Id*. § 601(4).

[445] Department of Commerce, U.S. Bureau of the Census, 1992 Economic Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

[446] 5 U.S.C. § 601(5).

[447] 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce.

[448] *Id*.

[449] 5 U.S.C. § 601(3).

[450] *See* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to Chairman William E. Kennard, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 5 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

[451] 13 C.F.R. § 121.201, NAICS code 513310.

provision of local exchange services.[452] Of these 1,329 carriers, an estimated 1,024 have 1,500 or fewer employees and 305 have more than 1,500 employees.[453] Consequently, we estimate that the majority of providers of local exchange service are small entitles that may be affected by the rules and policies adopted herein.

8. **Competitive Local Exchange Carriers.** Neither the Commission nor the SBA has developed a specific small business size standard for providers of competitive local exchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.[454] According to the FCC's *Telephone Trends Report* data, 532 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services.[455] Of these 532 companies, an estimated 411 have 1,500 or fewer employees and 121 have more than 1,500 employees.[456] Consequently, the Commission estimates that the majority of providers of competitive local exchange service are small entities that may be affected by the rules.

9. **Competitive Access Providers**. Neither the Commission nor the SBA has developed a specific size standard for competitive access providers (CAPS). The closest applicable standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.[457] According to the FCC's *Telephone Trends Report* data, 532 CAPs or competitive local exchange carriers and 55 other local exchange carriers reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services.[458] Of these 532 competitive access providers and competitive local exchange carriers, an estimated 411 have 1,500 or fewer employees and 121 have more than 1,500 employees.[459] Of the 55 other local exchange carriers, an estimated 53 have 1,500 or fewer employees and 2 have more than 1,500 employees.[460] Consequently, the Commission estimates that the majority of small entity CAPS and the majority of other local exchange carriers may be affected by the rules.

10. **Local Resellers.** The SBA has developed a specific size standard for small businesses within the category of Telecommunications Resellers. Under that standard, such a business is small if it has 1,500 or fewer employees.[461] According to the FCC's *Telephone Trends Report* data, 134 companies reported that they were engaged in the provision of local resale services.[462] Of these 134 companies, an estimated 131 have 1,500 or fewer employees and 3 have more than 1,500 employees.[463] Consequently,

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[452] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, at Table 5.3, p 5-5 (May 2002) (*Telephone Trends Report*).

[453] *Id*.

[454] 13 C.F.R. § 121.201, NAICS code 513310.

[455] *Telephone Trends Report*, Table 5.3.

[456] *Id*.

[457] 13 C.F.R. § 121.201, NAICS code 513310.

[458] *Telephone Trends Report*, Table 5.3.

[459] *Id*.

[460] *Id*.

[461] 13 C.F.R. § 121.201, NAICS code 513330.

[462] *Telephone Trends Report*, Table 5.3.

[463] *Id*.

the Commission estimates that the majority of local resellers may be affected by the rules.

11. **Toll Resellers.** The SBA has developed a specific size standard for small businesses within the category of Telecommunications Resellers. Under that SBA definition, such a business is small if it has 1,500 or fewer employees.[464] According to the FCC's *Telephone Trends Report* data, 576 companies reported that they were engaged in the provision of toll resale services.[465] Of these 576 companies, an estimated 538 have 1,500 or fewer employees and 38 have more than 1,500 employees.[466] Consequently, the Commission estimates that a majority of toll resellers may be affected by the rules.

12. **Interexchange Carriers.** Neither the Commission nor the SBA has developed a specific size standard for small entities specifically applicable to providers of interexchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.[467] According to the FCC's *Telephone Trends Report* data, 229 carriers reported that their primary telecommunications service activity was the provision of interexchange services.[468] Of these 229 carriers, an estimated 181 have 1,500 or fewer employees and 48 have more than 1,500 employees.[469] Consequently, we estimate that a majority of IXCs may be affected by the rules.

13. **Operator Service Providers.** Neither the Commission nor the SBA has developed a specific size standard for small entities specifically applicable to operator service providers. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.[470] According to the FCC's *Telephone Trends Report* data, 22 companies reported that they were engaged in the provision of operator services.[471] Of these 22 companies, an estimated 20 have 1,500 or fewer employees and two have more than 1,500 employees.[472] Consequently, the Commission estimates that a majority of local resellers may be affected by the rules.

14. **Prepaid Calling Card Providers.** The SBA has developed a size standard for small businesses within the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[473] According to the FCC's *Telephone Trends Report* data, 32 companies reported that they were engaged in the provision of prepaid calling cards.[474] Of these 32 companies, an estimated 31 have 1,500 or fewer employees and one has more than 1,500 employees.[475] Consequently, the Commission estimates that a majority of prepaid calling providers may be affected by the rules.

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[464] 13 C.F.R. § 121.201, NAICS code 513330.

[465] *Telephone Trends Report*, Table 5.3.

[466] *Id*.

[467] 13 C.F.R. § 121.201, NAICS code 513310.

[468] *Telephone Trends Report*, Table 5.3.

[469] *Id*.

[470] 13 C.F.R. § 121.201, NAICS code 513310.

[471] *Telephone Trends Report*, Table 5.3.

[472] *Id*.

[473] 13 C.F.R. § 121.201, NAICS code 513330.

[474] *Telephone Trends Report*, Table 5.3.

[475] *Id*.

15. **Other Toll Carriers.** Neither the Commission nor the SBA has developed a specific size standard for small entities specifically applicable to "Other Toll Carriers." This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.[476] According to the FCC's *Telephone Trends Report* data, 42 carriers reported that they were engaged in the provision of "Other Toll Services."[477] Of these 42 carriers, an estimated 37 have 1,500 or fewer employees and five have more than 1,500 employees.[478] Consequently, the Commission estimates that a majority of "Other Toll Carriers" may be affected by the rules.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

16. As noted, we have sought comment on the need for additional minimum requirements for third party verification calls in order to maximize their accuracy and efficiency for consumers, carriers, and the Commission. These additional possible requirements address issues we have seen repeatedly in our enforcement of the slamming liability rules. We do not believe that adoption of any or all of the proposals would create the need for any additional professional skills beyond those already employed to comply with the current third party verification rules.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

17. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[479]

18. *Third Party Verification*. The Commission is considering additional requirements which would address issues we have seen in the enforcement of our slamming rules, and we therefore seek comment on the need for additional minimum requirements for third party verification calls and of the impact of any additional requirements on small entities. We especially seek information addressing the possible financial impact on smaller carriers.

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

19. None.

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[476] 13 C.F.R. § 121.201, NAICS code 513310.

[477] *Telephone Trends Report*, Table 5.3.

[478] *Id*.

[479] 5 U.S.C. § 603(c).

Appendix D

Petitioners
AT&T Corp. (Petitions filed on April 2, 2001, and March 18, 1999).
National Telephone Cooperative Association (NTCA)
Rural LECs
SBC Communications
Sprint Corporation (Petitions filed on April 2, 2001, Sept. 5, 2000, and March 18, 1999).
VoiceLog, LLC
WorldCom (Petitions filed April 2, 2001, and Sept. 5, 2000).

Commenters
Ameritech
Association of Communications Enterprises (ASCENT), formerly Telecommunications Resellers Association (TRA)
AT&T Corp.
Bell Atlantic
BellSouth
Buyers Online
Cable & Wireless
Cox Communications
Erbia Network
Excel
Fionda
GTE
Hughes Telecom
IDS Telecom
John Ring Enterprises
Long Distance Post
PromiseVision
Qwest
SaveTel Communications
SBC Communications
Sprint Corporation
Telephone Company of Central Florida
TCM Communications
Telecom New Zealand
USTA
US West
Velocity Networks of Kentucky
Verizon
WorldCom