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

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

FURTHER NOTICE OF PROPOSED RULE MAKING AND MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: July 14, 1997 Released: July 15, 1997

Comment Date: [30 days from Federal Register Publication]
Reply Comment Date: [45 days from Federal Register Publication]

By the Commission:

Table of Contents

I. INTRODUCTION

1. In the Further Notice of Proposed Rule Making portion of this Order, we expand the above-captioned docket to seek comment on proposed modifications to our rules in order to implement Section 258 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996.[1] The Act makes it unlawful for any telecommunications carrier to submit or execute a change in a subscriber's carrier selection except in accordance with the Commission's verification procedures, and provides that any carrier that violates these procedures and collects charges for telecommunications service from a subscriber after such violation shall be liable to the subscriber's properly authorized carrier for all charges collected. In the Further Notice we seek comment on our tentative conclusion that the consumer protection and competitive goals and policies underlying our *1995 Report and Order*[2] apply with equal force to all telecommunications carriers within the meaning of the Act. We specifically seek comment on the applicability of our verification rules contained in Sections 64.1100 and 64.1150[3] to all telecommunications carriers, and whether these rules should apply when carriers solicit subscribers regarding preferred carrier freezes.[4] In response to comments received in petitions for reconsideration of our *1995 Report and Order*, we also seek comment on whether the "welcome package" described in Section 64.1100(d) continues to be a viable and necessary carrier change verification alternative, and invite commenters to consider any benefits derived by consumers from this option. We also invite commenters to quantify the costs and benefits associated with in-bound verification to support the contention that in-bound calls should be exempt from the Commission's verification rules. In addition, we seek comment regarding subscriber-to-carrier liability,[5] carrier-to-carrier liability, and carrier-to-subscriber liability in light of the Act's new provisions. Finally, we ask for comment on whether to establish a "bright-line" evidentiary standard for determining whether a subscriber has relied on a resale carrier's identity of its underlying facilities-based network provider, hence requiring that the resale carrier notify the subscriber if the underlying network provider is changed.

2. In the Memorandum Opinion and Order on Reconsideration, we dispose of six petitions for reconsideration[6] of our *1995 Report and Order*, and amend our rules in three respects. First, we modify

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1 47 U.S.C. § 258. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (Act). The principal goal of the Act is to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." *See* Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996) (Joint Explanatory Statement).

2 Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94-129, Report and Order, 10 FCC Rcd 9560 (1995) (*1995 Report and Order*).

3 47 C.F.R. §§ 64.1100, 64.1150. We are proposing to expand our verification rules to also include Sections 64.1160 and 64.1170. *See* Appendix C.

4 A preferred carrier freeze (PC freeze), also called a block, prevents a carrier change unless the subscriber gives the carrier from whom the freeze was requested his or her express written or oral consent.

5 That is, we seek comment regarding whether slammed consumers should be liable for charges assessed by an unauthorized carrier.

6 Parties filing petitions for reconsideration and responsive pleadings are listed at Appendix A.

Section 64.1150(g) to clarify that IXCs using letters of agency (LOAs)[7] must fully translate their LOAs into the same language(s) as their associated promotional materials or oral descriptions and instructions. Second, we modify Section 64.1150(e)(4) to incorporate the terms interLATA and intraLATA,[8] as well as interstate and intrastate, in order to remove possible confusion or uncertainty about the scope of our rules, which are generally relevant to all jurisdictions. Third, we modify Section 64.1100(a) to clarify that carriers must confirm orders for long distance service generated by telemarketing using only one of the four verification options. Aside from these modifications and seeking further comment in the Further Notice of Proposed Rule Making as noted above, we otherwise decline to adopt the positions urged by petitioners.

II. BACKGROUND

3. Section 258 of the Act makes it unlawful for any telecommunications carrier[9] 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."[10] The section further provides that:

> [a]ny telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation.[11]

4. A subscriber may authorize a change of his or her telecommunications carrier by requesting

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7 Traditionally, an LOA has been defined as "a document, signed by the customer, which states that a particular carrier has been selected as that customer's 'primary interexchange carrier.'" *1995 Report and Order*, 10 FCC Rcd at 9560. Under the rules we propose herein, an LOA could also indicate that a particular carrier has been selected as the preferred carrier for other telecommunications services, such as local exchange.

8 The term "LATA," or local access and transport area, is generally defined as a contiguous geographic area established by a Bell operating company such that no exchange area includes points within more than one metropolitan statistical area or State. *See* 47 U.S.C. § 153(25). The Act defines "interLATA service" as "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21). IntraLATA service is telecommunications between two points located within the same local access and transport area.

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

10 47 U.S.C. § 258(a).

11 47 U.S.C. § 258(b).

the change directly from his or her local exchange carrier (LEC), or by authorizing the new carrier to request a change on his or her behalf in response to a written or telemarketing[12] solicitation, or an advertisement.[13] Section 258 reflects Congressional recognition that unauthorized changes in subscriber's carrier selections, a practice commonly known as "slamming," is a significant consumer problem.[14] Slamming has become prevalent because of developments in technology and telecommunications economics. Developments in technology enable carriers to make a large number of primary interexchange carrier (PIC) changes from one carrier's network to another with relative ease.[15] In addition, available automatic numbering identification (ANI) technology enables carriers to identify the telephone number associated with in-bound calling consumers. Carriers can then access other databases and map the ANI with other information such as social security numbers,[16] allowing them to gain access to the data necessary to make unauthorized changes. Carriers have an economic incentive to slam because they have high fixed costs for network equipment and low marginal costs for providing service to additional consumers. Thus, providing service to additional consumers, even without authorization, adds to a carrier's cash flow with little additional cost.[17] Moreover, carriers may provide service to slammed consumers for a considerable time before the consumers become aware of the unauthorized PIC change.[18] Hence, slamming distorts telecommunications markets by enabling companies engaged in misleading practices to increase their customer bases, revenues and profitability through illegal means.[19]

5. The Commission established safeguards to deter slamming when equal access was

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[12] Telemarketing solicitations may be in-bound (*i.e.*, consumer-initiated), or out-bound.

[13] For example, subscribers may contact either the incumbent LEC or the new LEC to change their local exchange service.

[14] Joint Explanatory Statement at 1. The 1996 Act does not define slamming, but the Joint Explanatory Statement states that the conference agreement adopted the House provision, which refers to slamming as "illegal changes in subscriber selections." Joint Explanatory Statement at 136. Prior to the Act, the Commission defined slamming as the unauthorized conversion of a consumer's interexchange carrier (IXC) by another IXC, an interexchange resale carrier, or a subcontractor telemarketer. Cherry Communications, Inc., Consent Decree, 9 FCC Rcd 2086, 2087 (1994).

[15] For example, in its petition, the National Association of Attorneys General (NAAG) describes allegations by the states that Sonic Communications, Inc. (SCI) "just switched the long distance service of those whose names and telephone numbers it obtained from a data source." NAAG Petition at 4 (referring to SCI's submission of changes electronically). States claim that, after switching 300,000 consumers, SCI collected approximately $13 million. *Id.*

[16] *See, e.g.*, Letter from Thomas N. Maze, International Network Communications to John Muleta, FCC (Aug. 13, 1996).

[17] *See, e.g.*, "*Slamming Scourge: Stealing of Customers Spreads With Resellers of Telephone Service*," Gautam Naik, The Wall Street Journal (Jul. 26, 1995).

[18] Many consumers are not aware of an unauthorized PIC change for at least one billing cycle. *See 1995 Report and Order*, 10 FCC Rcd at 9580.

[19] Revenues are increased by carrying the traffic of the consumers who have been switched, and profitability is increased because these revenues exceed the incremental cost of serving the consumer.

implemented in 1985.[20] The Commission's original safeguards against slamming recognized the need for flexibility as carriers moved from a monopoly to a competitive market for long distance interexchange services. Additional safeguards to deter slamming were needed, however, as the interexchange market became more competitive due to an increase in the number of interexchange carriers (IXCs) providing service. In 1992, in response to a petition by AT&T and MCI, the Commission adopted procedures for verification of out-bound (*i.e.*, carrier-initiated) telemarketing sales of long distance services.[21] That Order required IXCs to implement one of four procedures to verify PIC-change orders for long distance service generated by telemarketing.[22] In 1994, the Commission on its own motion and in response to continuing complaints from consumers regarding slamming by IXCs, instituted a rule making and adopted rules establishing further anti-slamming safeguards to deter misleading LOAs.[23]

6. With the enactment of Section 258, we again need to reexamine our rules. Today, there are over 500 firms providing long distance service and offering a wide variety of prices and support services to consumers.[24] This increase in the number of IXCs providing service, coupled with technological advances in telecommunications markets have created opportunities for unscrupulous carriers or their marketing agents to use deceptive practices to convert large numbers of consumers to their service to reap economic benefits. The Commission received 11,278 slamming complaints in 1995,[25] a six-fold increase over the number of such

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[20] *Allocation Order*, 101 FCC 2d 911 (1985), *recon. denied*, 102 FCC 2d 503 (1985); Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 935 (1985) (*Waiver Order*).

[21] *See generally* American Telephone and Telegraph Company, Petition for Rule Making, CC Docket No. 91-64, Notice of Proposed Rule Making, 6 FCC Rcd 1689 (1991) (*PIC Change NPRM*); Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, Report and Order, 7 FCC Rcd 1038 (1992) (*PIC Verification Order*), *recon. denied*, 8 FCC Rcd 3215 (1993) (*PIC Verification Reconsideration Order*).

[22] The four alternatives are: (1) obtain an LOA from the subscriber; (2) receive confirmation from the subscriber via a toll-free number provided exclusively for the purpose of confirming change orders electronically; (3) use an independent third party to verify the subscriber's order; or, (4) send an information package that includes a postpaid postcard which the subscriber can use to deny, cancel, or confirm a service order, and wait 14 days after mailing the packet before submitting the PIC change order. *PIC Verification Order*, 7 FCC Rcd at 1039; *PIC Verification Reconsideration Order*, 8 FCC Rcd at 3215-16.

[23] *See generally* Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Notice of Proposed Rule Making, 9 FCC Rcd 6885 (1994) (*NPRM*); *1995 Report and Order*, 10 FCC Rcd 9560.

[24] *See* Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 1 (Number of Carriers Reporting by Type of Carrier and 'Type of Revenue) (Dec. 1996). Table 1 indicates that 445 entities identified themselves as providers of long distance, or toll service; such entites include IXCs, Operator Service Providers (OSPs), Toll Resellers, and "Other" Toll Carriers. Our estimate of over 500 long distance service providers takes into account that some providers of long distance service did not submit information for this report, and that some entities not identified as toll carriers also provide long distance service.

[25] Internal Audit, Enforcement Division, Common Carrier Bureau. NAAG, representing the attorneys general of twenty-three states, indicates in its petition that states have continued to devote "increasing resources to stop the misleading, deceptive, and fraudulent practices and the outright theft perpetrated by slammers."

complaints received in 1993. The number of slamming complaints received in 1996 is over 16,000.[26]

7. The 1996 Act is intended to encourage competition in the local exchange area and further enhance competition in the long distance market. As a result of competition, consumers will have the ability to choose one or several carriers to provide all of their telecommunications services.[27] Competition will also fundamentally change the role of the LECs, which traditionally have been viewed as neutral third parties charged with implementing a subscriber's preferred long distance carrier choice in accordance with our equal access rules. Not only will LECs become competitors in the long distance business, IXCs and other carriers will compete with LECs to provide of local exchange service. Under the 1996 Act, the slamming rules apply to all telecommunications carriers; thus, we must assess whether existing safeguards against slamming[28] are adequate in a marketplace in which carriers can compete for local as well as long distance service customers, and where there may no longer be an independent third party executing changes in subscribers' telecommunications carriers.

III. FURTHER NOTICE OF PROPOSED RULE MAKING

8. Our continuing efforts to deter and punish slamming by IXCs reflect the serious impact of slamming on consumers. Slammed consumers are unable to use their preferred long distance service, may be overcharged, cannot use calling cards in emergencies or while travelling, and lose premiums provided by their properly authorized carrier.[29] Consumers continue to complain to the Commission that their accounts are "pirated" or "hi-jacked" through slamming and that they are "abused, cheated, and irreversibly exploited" by the offending carriers.[30] Some consumers have complained that slamming practices of certain IXCs are

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NAAG Petition at 3.

[26] Internal Audit, Enforcement Division, Common Carrier Bureau. The Commission has recently taken a number of enforcement actions against IXCs for slamming. *See, e.g.*, Heartline Communications, Inc., 11 FCC Rcd 18487 (1996) (Notice of Apparent Liability); MCI Telecommunications Corporation, 11 FCC Rcd 12630 (Com. Car. Bur. 1996) (Consent Decree); Excel Telecommunications, Inc., 10 FCC Rcd 10880 (Com. Car. Bur. 1995) (Forfeiture Order).

[27] *See, e.g.*, Letter from H. Richard Juhnke, Sprint general attorney, to John B. Muleta, FCC (Nov. 7, 1995).

[28] The Commission's current rules and orders require that IXCs either obtain a signed LOA from the consumer, or, in the case of telemarketing solicitations, complete one of four telemarketing verification procedures before submitting PIC-change requests to LECs on behalf of consumers. *See* 47 C.F.R. §§ 64.1100, 64.1150.

[29] *See, e.g.*, Letter from Mary T. Rossello to FCC (Mar. 4, 1996); Letter from Jian Zhao to AT&T (Dec. 4, 1995); Letter from Joy Kaston to FCC (Mar. 5, 1996); Letter from Frank Barbarino to FCC (Dec. 5, 1995). "Premiums" are additional products or services offered to customers for subscribing to a carrier's telecommunications service. *See* discussion at para. 30, *infra*.

[30] *See* Letter from Joy Kaston to FCC (Mar. 5, 1996); Letter from Lisa and George A. Kenney to Frank Panarisi, AT&T (May 9, 1996).

"fraudulent," "deceitful," "illegal," and "an invasion of privacy."[31] The numerous complaints filed with the Commission[32] reflect that consumers that have been slammed are incensed at the loss of control over their choice of telecommunications carriers.

9. Until now, our efforts to deter slamming have been concentrated on enhancing the verification of PIC changes. Through Section 258, Congress has substantially bolstered our continuing efforts to deter, punish and, ultimately, eliminate slamming. Section 258 has added an economic disincentive for carriers to slam because it requires an unauthorized carrier that violates our verification procedures to pay the charges it collects from a slammed consumer to the properly authorized carrier.[33] Carriers that violate our verification procedures will be required to forfeit revenues they have heretofore been able to keep.[34] Our verification procedures, coupled with the economic disincentives embodied in Section 258 and the rules that we propose today, will provide a two-pronged approach to deter slamming.[35] We tentatively conclude that our current rules, with the additions and modifications described below, will best implement the statutory prohibition against slamming by any telecommunications carrier, protect the right of consumers to be free of deceptive and misleading marketing practices, and help promote full and fair competition among telecommunications carriers in the marketplace by ensuring that consumers' choices are honored.

10. The verification procedures discussed herein are also important for ensuring that unauthorized access to a consumer's proprietary network information (CPNI)[36] is not obtained through slamming. Carriers that slam consumers may be able to obtain access to the CPNI of those consumers, while they would not have been able to absent the slamming. In Section 222 of the Act, Congress recognized the consumer's privacy interests in CPNI, and limited carriers' ability to use, disclose or permit access to CPNI.[37] The verification

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[31] Letter from Joe N. Eto, Soil and Environmental Testing Service, Inc., to FCC (Nov. 11, 1995); Letter from Mary T. Rossello to FCC (Mar. 4, 1996); Letter from Mathew F. Sipowicz to FCC (Dec. 1, 1995).

[32] *See supra* para. 6.

[33] 47 U.S.C. § 258(b).

[34] Under the Commission's current policy, a carrier that has slammed a consumer is permitted to collect from the consumer the amount that the consumer's properly authorized carrier would have charged. *See 1995 Report and Order*, 10 FCC Rcd at 9579.

[35] Section 258(a) also provides that it does not preclude states from enforcing "such procedures with respect to intrastate services." 47 U.S.C. § 258(a).

[36] Section 222(f)(1) defines CPNI as "information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship." 47 U.S.C. § 222(f)(1)(A). *See* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Notice of Proposed Rule Making, 11 FCC Rcd 12513 (1996) (*CPNI NPRM*).

[37] 47 U.S.C. § 222(c). In the *CPNI NPRM* the Commission tentatively concluded that Section 222 requirements can be interpreted to require that a telecommunications carrier must obtain authorization from a customer before using that customer's CPNI, which it obtained in providing one traditional telecommunications service

procedures proposed in this proceeding give effect to the statutory prohibition against slamming and in so doing, will have the secondary effect of also protecting consumers from unauthorized access to CPNI.

A. Section 258(a) (Prohibition)

Application of the Verification Rules to All Telecommunications Carriers

11. The PIC-change verification procedures set forth in our current rules were specifically developed to address slamming and associated deceptive and misleading marketing practices by IXCs in the interexchange marketplace.[38] We emphasized in our *1995 Report and Order* that for any competitive market to work efficiently, consumers must have information about their possible market choices and the opportunity to make choices about the products and services they buy.[39] We determined that slamming takes away those choices from consumers and distorts the long distance competitive market because it rewards companies that engage in deceptive and misleading practices by unfairly increasing their customer base at the expense of those companies that market in a fair and informative manner.[40] The 1996 Act expands the scope of the Commission's authority to address slamming by all carriers that "submit" or "execute" preferred carrier (PC) changes.[41] We seek comment on whether our current verification rules are adequate in light of this expansion to all carriers. We also seek comment on whether our rules would have consumer protection and pro-competition effects in the local market and whether they can or should be applied to the local market in whole or in part.

12. We propose to incorporate the specific language of Section 258(a) of the Act into Part 64 of our rules to reflect the statutory prohibition of slamming by any telecommunications carrier, not just IXCs as is the case under our current rules.[42] Mirroring the language in Section 258, proposed Section 64.1160(a) would state that no telecommunications carrier shall submit *or* execute a change in a subscriber's selection of a provider of telecommunications service[43] except in accordance with the Commission's verification procedures. We propose to increase the scope of Sections 64.1100 and 64.1150 of our rules by expanding them to include all telecommunications carriers. We also propose to modify Section 64.1100 to use the term "subscriber" in

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(e.g., long distance), to market another traditional telecommunications service (*e.g.*, local exchange). *See CPNI NPRM*, 11 FCC Rcd at 12523-24.

38 A detailed history of the evolution of our PIC-change verification rules is set forth in our *1995 Report and Order*, 10 FCC Rcd at 9561-63.

39 *1995 Report and Order*, 10 FCC Rcd at 9564.

40 *Id*.

41 We use the term "preferred carrier" or PC to describe the subscriber's properly authorized or primary carrier(s) (a subscriber may have multiple PCs - one for local exchange service and one for long distance service), as contemplated by the Act. Where appropriate, we will continue to use the term "PIC" to describe a subscriber's primary interexchange carrier prior to the 1996 Act.

42 *See* Appendix C.

43 "Telecommunications service" includes both telephone exchange and telephone toll service.

place of "customer." This proposed modification is consistent with the use of the term "subscriber" in Section 258.[44] We also propose other modifications to Sections 64.1100 and 64.1150 of our rules for clarification purposes.[45] Section 258 and our proposed rules significantly expand the application of our PIC-change requirements to cover all "telecommunications carriers" that "submit or execute" PC changes on behalf of telecommunications service subscribers.[46] Thus, LECs are also subject to Section 258(a) of the Act if they "*submit or execute*" a change in a subscriber's selection of a preferred carrier.

13. The Act does not define "submitting" and "executing" carriers. Under our current verification procedures, the submitting carrier is the IXC that requests on behalf of a consumer that a PIC change be made, and the executing carrier is the LEC that effects the PIC change. Under our proposed rules, submitting and executing carriers may be IXCs or LECs, or both. Moreover, the same carrier could serve as both submitting and executing carrier for a particular PC change. To ensure that our proposed verification procedures will apply to all carriers involved in PC-change transactions, we tentatively conclude that a submitting carrier is any carrier that requests that a consumer's telecommunications carrier be changed, and that an executing carrier is any carrier that effects such a request. We seek comment on these definitions, and on whether they are sufficiently broad in scope to hold accountable all carriers involved in PC-change transactions.

14. We believe that, with the modifications and clarifications discussed elsewhere in this Further Notice, the verification procedures under our existing rules are sufficient as they pertain to all "submitting" telecommunications carriers under the Act. The application of our verification procedures to "executing" telecommunications carriers is more complex, however. We believe that Section 258 does not require that an executing telecommunications carrier duplicate the PC-change verification efforts of the submitting telecommunications carrier.[47] In fact, requiring independent verification by an executing carrier in all instances could have the effect of doubling the transaction costs associated with a subscriber's selection of a primary carrier. In most cases, the submitting carrier's compliance with our verification rules should facilitate timely and accurate execution of the PC change to the benefit of the subscriber and submitting carrier. We seek comment on this tentative conclusion and invite interested parties to identify and describe specific additional or separate verification procedures, if any, that should apply to telecommunications carriers that "execute" PC changes within the meaning of Section 258. Commenters suggesting additional or separate verification procedures for telecommunications carriers that execute PC changes should address the effects on competition

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[44] The term "subscriber" is also appropriate in this context, because the only individual qualified to authorize a preferred carrier change is the telephone line subscriber. *See 1995 Report and Order*, 10 FCC Rcd 9560, 9564 n.16.

[45] *See* Appendix C, proposed § 64.1100(b),(d); § 64.1150(b),(d),(e)(2).

[46] The *1995 Report and Order* adopted rules and procedures for changing a consumer's PIC. The Act expands the scope of those entities and services that may be affected by the Commission's "carrier selection" rules to include a subscriber's selection of any "telephone exchange service or telephone toll service." 47 U.S.C. § 258.

[47] That is, we believe that Section 258 does not impose an independent requirement on executing carriers (*e.g.*, LECs) to verify a PC-change request submitted by another carrier (*e.g.*, an IXC). Because the submitting carrier, not the executing carrier, is guilty of slamming in most instances, we believe requiring that both the submitting and executing carriers verify PC changes would not likely lessen the number of slamming instances.

and on consumer protection, if any, of such procedures.[48] In doing so, commenters should bear in mind the different interests and functions of submitting and executing carriers, and should consider that the same telecommunications carrier could be both the submitting and the executing carrier for purposes of Section 258.

15. Commenters should also address whether incumbent LECs should be subject to different requirements and prohibitions because of any advantages that their incumbency gives them compared to carriers that are seeking to enter the local exchange markets.[49] Under the current approach, an incumbent LEC would be responsible for executing PC-change requests for local service from competing carriers, which will result in a loss of business for the incumbent LEC. To avoid losing local customers, the incumbent LEC could potentially delay or refuse to process PC-change requests from local exchange service competitors.[50] A related concern is that a PC change may lead a carrier to engage in conduct that blurs the distinction between its role as executing carrier and its objectives as a marketplace competitor. For example, an incumbent LEC may send to its subscriber who has chosen a new LEC a promotional letter in an attempt to change the subscriber's decision to switch to another carrier.[51] We seek comment on whether such a letter would violate our verification rule prohibiting carriers from combining LOAs with inducements of any kind on the same document,[52] and on whether such a practice would be otherwise inconsistent with the Act's consumer protection and pro-competition goals. We also seek comment on whether LECs serving as both submitting carrier and executing carrier for changes in telecommunications service,[53] whether offering interexchange and local exchange service or just local exchange service, have an enhanced ability or incentive to make unauthorized PC changes on their own behalf without detection, and thus should be limited to verification by an independent, third-party.[54]

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[48] Under Section 258 (a), we could impose separate verification procedures upon "executing" telecommunications carriers, but the statute does not compel us to do so.

[49] Incumbent LECs arguably have an enhanced ability to make unauthorized PC changes on their own behalf without detection because of their established relationship with local customers. For example, by soliciting PC freezes from their local exchange customers, incumbent LECs may be able to erect an entry barrier for carriers seeking to enter the local market. *See* paras. 22-23, *infra*.

[50] On the other hand, heightened scrutiny of PC-change orders by incumbent LECs seeking to avoid *unlawful* PC changes to their detriment may have the positive effect of lessening or eliminating the occurrence of unauthorized PC changes.

[51] Such letters may contain elements of verification (*e.g.,*"we just want to make sure that you meant to change to a new carrier") as well as promotional elements (*e.g.*, "we'd love to keep you as a customer, and we'll give you a free month of service if you stay").

[52] 47 C.F.R. § 64.1150(c); *see also* 47 C.F.R. § 64.1150(b) (providing that the LOA must be a separate or an easily separable document).

[53] This might occur where a LEC offers bundled services. Commenters have addressed the similar instance in which LECs may have a conflict of interest between their role as executing carrier and their role as an *affiliate* of a submitting carrier (*e.g.*, IXC). *See* n.103, *infra*.

[54] While such anticompetitive behavior could be addressed in the context of a Section 208 complaint proceeding, we encourage commenters to discuss the need for additional safeguards in our rules to prevent such occurrences.

Viability of the "Welcome Package" Verification Option

16. As discussed above, Section 64.1100 of the Commission's rules requires IXCs to institute one of four confirmation procedures before submitting to LECs their PIC-change orders generated by telemarketing. The fourth confirmation procedure, set forth in Section 64.1100(d), requires the IXC to send each new customer an information package, including, *inter alia*, a prepaid postcard, which the customer can use to deny, cancel, or confirm the change order. This option is sometimes referred to as the "welcome package" verification option. Section 64.1100(d)(8) provides that the package must contain:

> A clear statement that if the customer does not return the postcard the customer's long distance service will be switched within 14 days after the date the information package was mailed to [name of soliciting carrier].

17. In its petition for reconsideration of our *1995 Report and Order*, NAAG proposed that we revise the negative-option aspect of this provision by eliminating the automatic switching of consumers who do not return a postcard to the IXC within the 14-day period prescribed by the provision.[55] NAAG asserts that such an amendment will bring these provisions into conformity with the Commission's *1995 Report and Order* and new Section 64.1150(f), which prohibits "negative-option" LOAs.[56] Several parties oppose NAAG's petition on this issue, arguing that this verification option is unlike a negative-option LOA in that consumers have already given their oral agreement during a telemarketing call to change their service.[57]

18. A negative-option LOA requires a consumer to take some action to *avoid* a PIC change. Nearly every entity choosing to comment on the matter supported the Commission's prohibition of negative-option LOAs.[58] In adopting the prohibition against negative-option LOAs, we found that such LOAs impose an unreasonable burden on consumers who do not desire to change their PICs.[59] However, as stated above, not all carriers agree with NAAG that the "welcome package" option operates the same as a negative-option LOA. We do not yet have enough information in the record to determine the effect of eliminating this verification option,[60] but we are inclined to agree with NAAG that it could be used in the same manner as a negative-option LOA. Accordingly, we tentatively conclude that the "welcome package" verification option should be eliminated, and seek comment on this tentative conclusion.

Application of the Verification Rules to In-Bound Calls

19. We concluded in our *1995 Report and Order* that we should extend our verification

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55 NAAG Petition at 16-17.

56 *Id.* at 17.

57 *See* para. 63, *infra*.

58 *See 1995 Report and Order*, 10 FCC Rcd at 9565.

59 *Id.*

60 *See* para. 64, *infra*.

procedures to consumer-initiated "in-bound" calls.[61] We remain convinced that it serves the public interest to offer consumers who place calls to carrier sales or marketing centers the same protection under our verification rules as those consumers who are contacted by carriers.[62] Moreover, with the Section 258 extension of slamming restrictions to all telecommunications carriers, and the potential for a single carrier to offer local exchange and interexchange service, it is likely that problems with in-bound calling will be of even greater significance. Without any requirement for verification of in-bound calls, carriers may be motivated to use the call to switch a consumer to other telecommunications services they provide (*i.e.*, local or long distance service).[63] We tentatively conclude that verification of in-bound calls is necessary to deter slamming, and seek further comment on the volume of in-bound calls received by carriers, and the per-consumer costs for verification using the Commission's requirements versus alternative verification techniques.

20. Section 258 applies only if a carrier violates our verification procedures.[64] Commenters who disagree with applying the Commission's verification procedures to in-bound calls should consider the implications under Section 258 of "exempting" in-bound calls from our verification rules. Would such an exemption undermine both the letter and spirit of Section 258? We also encourage commenters to consider whether, without in-bound verification requirements, carriers' contests and sweepstakes advertisements could potentially be used to induce consumers to call the carriers' in-bound marketing centers, and possibly switch the consumer to another carrier, either through deceptive practices or through the use of electronic information now widely available, such as ANI. Would such a practice place an unfair burden on consumers to prove that an unauthorized conversion occurred? With in-bound telemarketing, the consumer and the Commission might not have any record of the transaction that resulted in the carrier change;[65] the lack of a record would make it difficult to ascertain the facts involved in any in-bound slamming dispute. We also encourage commenters to consider the case of bundled service offerings. Entities would be able to generate in-bound calls to marketing

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61 *1995 Report and Order*, 10 FCC Rcd at 9560. The Commission, on its own motion, stayed its *1995 Report and Order* insofar as it extends the PIC-change verification requirements set forth in Section 64.1100 of the Commission's rules to consumer-initiated calls. Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Order, 11 FCC Rcd 856 (1995) (*In-bound Stay Order*). The stay was imposed before the effective date of the *1995 Report and Order*. The consumer-initiated or in-bound telemarketing provision is the only component of its new slamming rules that the Commission stayed. The stay of this provision of the Order remains in effect.

62 *See* discussion at para. 51, *infra*.

63 *See, e.g.*, Letter from Marilyn Diamond to AT&T (Mar. 29, 1996), forwarded to the Commission by the State of New York Department of Public Service (May 9, 1996) (alleging that AT&T changed the local provider without authorization); Letter from Jeffrey S. Stevens to New York Telephone (Apr. 5, 1996) (alleging that AT&T made an unauthorized local provider change); Letter from Michael Cammer to NYNEX and MCI Telecommunications (May 11, 1996) (alleging that MCI made an unauthorized local provider change).

64 Section 258(a) provides, in pertinent part, that "[n]o telecommunications carrier shall submit or execute a change . . . except in accordance with such *verification procedures* as the Commission shall prescribe." 47 U.S.C. § 258(a) (emphasis added). Section 258(b) provides in pertinent part that "[a]ny telecommunications carrier that *violates the verification procedures* described in subsection (a). . . ." 47 U.S.C. § 258(b) (emphasis added).

65 With out-bound calls, the "record" of the transaction would be the LOA or other proof of verification as prescribed in our rules.

centers that accept service orders for affiliate carriers, thereby facilitating slamming by carriers that are not directly contacted by the consumer.[66] None of these scenarios is desirable, and commenters are urged to suggest appropriate mechanisms to guard against such abuses. Commenters should provide specific information to justify exemption of in-bound calling from the PIC-change verification requirements.

Verification and Preferred Carrier Freezes

21. We also seek comment on whether our PIC-change verification procedures should be extended to PC-freeze[67] solicitations. Although neither the Act, nor the Commission's rules and orders specifically address carrier PC-freeze solicitation practices,[68] concerns about PC-freeze solicitations have been raised with the Commission.[69] Moreover, MCI filed a Petition for Rule Making on March 18, 1997, requesting that the Commission institute a rule making to regulate the solicitation, by any carrier or its agent, of PIC freezes or other carrier restrictions on a consumer's ability to switch its choice of interexchange (interLATA or intraLATA toll) and local exchange carrier.[70] We have determined that it

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66 For example, XYZ Cable Co. generates an in-bound call and as part of the transaction, the consumer agrees to take long distance service from XYZ Long Distance Co. either because the representative for XYZ Cable slammed the consumer or there was a misunderstanding as to what service the consumer wanted. Even though there are rules to prevent carriers from using CPNI in this manner, *see supra* para. 10 (regarding the restrictions on the use of CPNI to market a different traditional telecommunications service), requiring verification of in-bound calls would offer an extra measure of protection.

67 *See supra* note 4.

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

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

70 MCI Petition for Rule Making, RM-9085 (filed Mar. 18, 1997). AT&T has indicated that it "strongly supports" MCI's petition to establish regulations governing PC freezes. Letter from Mark C. Rosenblum, AT&T Corp. to Regina M. Keeney, FCC (Apr. 9, 1997). The Commission has established a pleading cycle for comments regarding MCI's petition. *See* Public Notice, DA 97-942 (rel. May 5, 1997).

is appropriate to consider MCI's petition in the instant notice and comment proceeding. We therefore incorporate MCI's petition and all responsive pleadings into the record of this proceeding.[71]

22. PC freezes are designed to offer consumers protection against slamming by preventing carriers from effecting carrier changes on their behalves. They may also, however, have the effect of limiting competition among carriers. Enabling carriers to request PC changes on behalf of consumers that authorize such changes saves consumers time and effort. Once the consumer gives a carrier its authorization to submit a PC change order, the carrier can submit the change order on behalf of the consumer, and the change can be effected without further effort by the consumer. With a PC freeze in place, a carrier cannot submit the request on the consumer's behalf. The consumer must advise the carrier from whom he or she requested the freeze to lift the freeze before a change can be effected. Not all consumers are willing to take this additional, affirmative step, even when they have agreed to take a competing carrier's service. Hence, PC freezes may increase the burden of competing carriers in securing new customers. We seek comment on how best to reconcile the competing strains of providing adequate consumer protection and facilitating competition among carriers.

23. We tentatively conclude that a carrier that mails to a subscriber (a) an explanation of a PC freeze, (b) an explanation of the subscriber's right to request such a freeze for its telecommunications service, and (c) advice on how the subscriber can obtain a PC freeze, would be acting consistent with the goals and policies of the Act and the Commission's rules and orders.[72] In contrast, a carrier that mails to a subscriber a package that includes information and/or promotional materials regarding PC freezes along with a "response form" that the subscriber is asked to sign and return to the carrier to effect a freeze could involve marketing solicitations designed to enhance the competitive position of the incumbent carrier in a manner that may be at odds with the requirements of the Act and the Commission's rules and orders. For example, to the extent that an IXC soliciting a PC freeze is also the subscriber's LEC, the practice could be designed to, or have the effect of, giving the IXC/LEC an unfair advantage in the toll service and local exchange markets. This practice might also foster wide-spread confusion and dissatisfaction among consumers if, *e.g.*: (1) it is unclear from a carrier's solicitation materials whether the PC freeze relates to the consumer's local service, long distance service, or both; (2) the identity of the soliciting carrier is unclear or somehow misrepresented, or (3) the solicitation contains an inaccurate explanation of a consumer's rights to cancel the PC freeze. Another practice that might raise concerns about anticompetitive behavior would be a LEC's imposition of terms and conditions for processing PC-freeze requests of non-affiliated IXCs different from those required of affiliated IXCs.[73]

24. Commenters should address whether we should extend our current PIC-change verification procedures to PC-freeze solicitations, as well as what alternative verification procedures might be applied to PC-freeze solicitations. We encourage commenters to describe any benefits to consumers that might result from either such action. In particular, we seek comment on what practices would promote both competition

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71 *See* Appendix A.

72 Such a mailing would serve to inform and educate the subscriber without requiring or soliciting a particular action or response that could be used to effect a PC freeze in circumstances in which the subscriber may not have expressly authorized it.

73 Such a practice by a Bell operating company (BOC) would violate Section 272 of the Act, which provides in part that a BOC "may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities and information, or in the establishment of standards . . . ." 47 U.S.C. § 272(c)(1).

and consumer protection. For example, commenters should address whether, when a consumer that has "frozen" his or her IXC selection switches LECs, the consumer must request another PC freeze, or whether the new LEC must automatically establish the same PC freeze on the consumer's behalf. We also seek comment on what factors we should consider in assessing the lawfulness of a particular PC-freeze solicitation practice in a Section 208 complaint proceeding.[74] We tentatively conclude that such factors may include: (1) the degree of certainty that the PC freeze was obtained through lawful means and the extent to which circumstances suggest the existence of deception or fraud; (2) whether the solicitation practice at issue is unreasonable, unreasonably discriminatory, or anticompetitive in purpose or effect; and (3) the impact of the solicitation practice on consumers, including whether the consumer is fully and accurately informed of the nature of the solicitation and the effect of a PC freeze, is clearly given the option of selecting or declining the PC freeze, and is informed of his or her right to cancel the PC freeze and select a different PC at any time.

B. Section 258(b) (Liability)

Liability of Subscribers to Carriers

25. When a subscriber pays charges assessed by an unauthorized carrier, Section 258(b) of the Act makes it clear that the unauthorized carrier is not entitled to keep such revenue gained through slamming.[75] The Act does not, however, address whether subscribers must pay any unpaid charges assessed by an unauthorized carrier to the properly authorized[76] carrier, or whether charges collected from the unauthorized carrier should be returned to the subscriber who has been slammed.

26. In the Notice of Proposed Rulemaking preceding our *1995 Report and Order* we sought comment on whether any adjustments to long distance charges should be made for consumers who are the victims of unauthorized PIC changes. Specifically, we asked for comment on whether consumers should be liable for: (a) the total billed amount from the unauthorized IXC; (b) the amount the consumer would have paid if the PIC had never been changed; or (c) nothing at all.[77] We concluded in the *1995 Report and Order* that "the equities tend to favor the [remedy]" of option (b).[78] NAAG, in its petition for reconsideration of our *1995 Report and Order*, urges the Commission to absolve slammed consumers of all liability for the toll charges assessed by unauthorized IXCs.[79] Citing the Commission's own reservations about the efficacy of its chosen "remedy" to the consumer liability problem,[80] NAAG argues that "to reward the wrongdoer by allowing it to

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74 47 U.S.C. § 208; *see also* the Commission's rules governing Section 208 complaint proceedings, 47 C.F.R. §§ 1.720-1.735.

75 47 U.S.C. § 258(b).

76 The terms "properly authorized" and "preferred" may be used interchangeably throughout this rule making.

77 *NPRM*, 9 FCC Rcd at 6888.

78 *1995 Report and Order*, 10 FCC Rcd at 9579 (concluding that "the slammed consumer does receive a service, even though the service is being provided by an unauthorized entity.").

79 NAAG Petition at 5.

80 *Id.* (citing *1995 Report and Order*, 10 FCC Rcd at 9579).

receive any benefit from its wrongful actions is contrary to long established equitable principles and would encourage, rather than deter further slamming."[81] Section 258(b) of the Act, however, appears to mitigate those concerns by ensuring that the unauthorized carrier is liable to the properly authorized carrier for all charges it collects from the subscriber for service rendered by that unauthorized carrier.

27. Although the 1996 Act removes the economic incentive for carriers to slam, we believe that additional measures may be appropriate in light of the consumer protection goals and policies of the Act and the Commission's rules. Under Section 258(b), the liability between properly authorized and unauthorized carriers exists only to the extent that the unauthorized carrier actually collects charges from a slammed subscriber.[82] Therefore, we seek comment on whether slammed consumers should have the option of refusing to pay charges assessed by an unauthorized carrier. We recognize that if subscribers are absolved of all liability for charges assessed after being slammed, as NAAG proposes, the properly authorized carrier would be deprived of foregone revenue.[83] Thus, we seek comment on the impact to properly authorized carriers that would result if slammed subscribers are absolved of liability for unpaid charges. We recognize that, by establishing a rule that absolves slammed subscribers of liability for charges assessed by an unauthorized carrier, we may create an incentive for subscribers to delay reporting that they have been slammed. We also recognize the potential for subscribers to fraudulently claim that they have been slammed to avoid payment for telecommunications service that they may both have requested and received. Therefore, we also invite comment on whether we should limit the time during which a subscriber would not be liable for charges, and seek recommendations regarding what that time should be.[84] Although we decline at this time to grant NAAG's proposal that the Commission absolve slammed consumers of all liability for toll charges assessed by unauthorized IXCs,[85] we seek comment on the advantages and disadvantages of absolving subscribers of liability for unpaid charges. We also urge commenters to consider the desirability of NAAG's proposal in the broader context of both local exchange and interexchange service.

Liability of Unauthorized Carriers to Properly Authorized Carriers

28. We propose to amend our rules to provide in Section 64.1160(b) that "[a]ny telecommunications carrier that violates [the Commission's verification procedures] and that collects charges for telecommunications service from a subscriber shall be liable to the subscriber's properly authorized carrier

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81 NAAG Petition at 5.

82 To the extent that a subscriber does in fact pay the charges to the unauthorized carrier, the liability of the unauthorized carrier to the properly authorized carrier, and to the subscriber, is discussed below.

83 The legislative history of Section 258 supports the view that carriers violating our verification procedures "must reimburse the [properly authorized] carrier for forgone revenues." Joint Explanatory Statement at 136.

84 For example, the New York Public Service Commission has proposed a rule providing that carriers violating their slamming rules "shall refund to the end user the entire amount of such end user's telephone charges attributable to intrastate telephone service from the carrier for *up to four months* of such unauthorized service." Unauthorized Switching of Telephone Customers From One Telephone Carrier to Another Through the Practice Known as "Slamming," Notice Soliciting Comments, Case 95-C-0806 (Dec. 13, 1996) (attaching Proposed New York Slamming Rules) (emphasis added).

85 *See* para. 65, *infra*.

in an amount equal to all charges paid by such subscriber after such violation."[86] Our proposal mirrors Section 258(b) of the Act by requiring that a carrier in violation of our verification procedures remit to the properly authorized carrier all charges paid from the time the slam occurred.[87] We seek comment on this proposed rule and on whether the unauthorized carrier should also be liable to the properly authorized carrier for expenses incurred to collect such charges.

Liability of Carriers to Subscribers

29. While Section 258(b) addresses the liability of the unauthorized carrier to the properly authorized carrier, it does not specifically address the liability of either carrier to the subscriber. We believe that a slammed subscriber should receive prompt and full reparation for harm suffered as a consequence of unauthorized PC changes. The legislative history of Section 258 is in accord with this view, stating that "the Commission's rules should also provide that consumers are made whole."[88] Thus, we seek comment on the duties and obligations of both the unauthorized carrier and the properly authorized carrier with regard to making slammed subscribers whole, and on what steps should be taken to "make whole" the subscriber victimized by an unauthorized PC change.[89] Commenters should address specifically whether, in the event that a subscriber pays charges assessed by an unauthorized carrier (perhaps because the subscriber is unaware that he or she was slammed), a properly authorized carrier collecting charges paid by the subscriber to the unauthorized carrier, must then reimburse the slammed subscriber.

30. The legislative history of Section 258 supports the view that restoration of premiums that subscribers would have earned if they had not been slammed, such as travel bonuses, are part of making subscribers whole.[90] Premiums are additional products or services offered to consumers for subscribing to a carrier's telecommunications service. While premiums may include products and services not related to telecommunications service, they may also include telecommunications service-related benefits, such as volume discounts or free service minutes. Thus, we seek comment on what types of products and services offered by telecommunications carriers should be restored to slammed subscribers. In light of Congress' apparent intent to hold slamming carriers liable for premiums, we propose that the unauthorized carrier remit to the properly authorized carrier an amount equal to the value of such premiums, as reasonably determined by the properly

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86 *See* Appendix C.

87 Of course, a carrier accused of slamming may demonstrate to the properly authorized carrier that the PC change was in fact authorized by providing an LOA signed by the subscriber that complies with Section 64.1150 or other reliable evidence that the PC-change order was confirmed in accordance with the Commission's verification procedures.

88 Joint Explanatory Statement at 136. However, neither the language in Section 258(b), nor the legislative history specifically addresses carrier-to-consumer liability.

89 For example, we believe that one aspect of making the consumer whole is restoring his or her service to that of the preferred carrier upon notification that an unauthorized PC change has occurred.

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

authorized carrier.[91] Under our proposal, upon receiving the value of such premiums from the unauthorized carrier, the properly authorized carrier must then provide or restore to the subscriber any premiums to which the subscriber would have been entitled if the subscriber had not been slammed.[92] We believe that placing responsibility on the preferred carrier to make its subscriber whole by restoring lost premiums (after receiving the value of such premiums from the unauthorized carrier) would fairly and reasonably balance the interests of all parties involved and is the most administratively feasible.[93] We seek comment on our proposed rule on this aspect of our "make whole" approach. We also seek comment on whether carriers should be required to restore premiums to subscribers who have not paid charges assessed by an unauthorized carrier. Interested parties are encouraged to identify, in detail, any alternative proposals that would accomplish our goal of ensuring that subscribers victimized by slamming practices receive full reparations for harm suffered as a consequence of such practices.[94]

Dispute Resolution

31. We also propose to require that, in the event of disputes between carriers under these liability provisions, the carriers involved in such disputes must pursue private settlement negotiations regarding the transfer of charges and the value of lost premiums from the unauthorized carrier to the properly authorized carrier prior to petitioning the Commission to make a determination.[95] The statutory mandate is clear that the unauthorized carrier must remit to the authorized carrier those "charges paid by [a] subscriber after [a] violation" of our PC-change rules. Because the charges recoverable from the unauthorized carrier are so defined, we tentatively conclude that private negotiations are appropriate in this situation. It would appear that any dispute regarding, for example, the method or timing of payment between carriers, could best be resolved by the carriers involved through negotiations. Under this approach, we would entertain a request for enforcement of proposed Section 64.1170(a) only after the parties have certified that they have undertaken private negotiations and that, following these steps, unresolved issues remained.[96] We propose to establish this prerequisite to requesting enforcement action pursuant to our general discretion under Section 258 to adopt procedures associated with PC changes. We seek comment on these proposals and our tentative conclusions underlying them. We also seek comment on procedures for implementing these requirements.

Liability Between Carriers

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91 *See* Appendix C, proposed § 64.1170(b).

92 *See* Appendix C, proposed § 64.1170(c).

93 In other words, the properly authorized carrier is in the best position to take prompt and effective action to make sure that a consumer is "made whole" because that carrier and the consumer will have a continuing carrier-customer relationship.

94 For example, commenters should consider whether the properly authorized carrier should be required to give the consumer a "make whole" equivalent premium or dollar amount where the properly authorized carrier cannot restore a particular premium.

95 *See* Appendix C, proposed § 64.1170(d).

96 By requiring private negotiations, we do not intend to mandate formal dispute resolution procedures such as arbitration. Carriers that attempt in good faith to resolve any disputes and certify that they have done so would be in compliance with this requirement.

32. Section 258 requires both the submitting and executing telecommunications carriers to ensure that a PC change comports with procedures established by the Commission to protect consumers and promote fair competition. Hence, to the extent that a submission or execution fails to comport with established procedures, the Act contemplates that either or both telecommunications carriers could be liable for an unauthorized change in a subscriber's telecommunications service. Therefore, the verification duties and obligations of the submitting and executing carriers should be delineated in order to avoid or minimize disputes over the source or cause of unauthorized PC changes, or over liability for such PC changes. We also believe it is appropriate to establish a mechanism that can be used to determine reasonably the liability between submitting and executing carriers if the facts suggest some wrongdoing or malfeasance on the part of both carriers involved in a PC-change transaction. The Commission would address liability between submitting and executing carriers only if the carriers are unable to resolve the dispute between themselves.[97]

33. In deciding the appropriate liability test to apply when reviewing unauthorized PC-change complaints by consumers, we considered tests traditionally applied in the tort liability context. The "but-for" test, generally applicable to determine causation in fact, asks whether a plaintiff would not have suffered injury "but for" the action of the defendant.[98] The "substantial factor" test, generally applicable to determine legal or proximate causation,[99] asks whether the defendant's actions were a substantial factor in bringing about the plaintiff's harm.

34. Because we are primarily concerned with establishing the actual liability of each carrier, we tentatively conclude that we should apply a "but for" test to determine the liability of submitting and executing carriers. The "but for" approach to determining liability to the subscriber that we propose would operate as follows: (1) where the submitting carrier submits a PC-change request that fails to comply with the requirements of Section 64.1160 and the executing carrier performs the change in accordance with the submission, the submitting carrier is liable; (2) where the submitting carrier submits a change request that conforms with the requirements of Section 64.1160 and the executing carrier fails to execute the change in conformance with the submission, the executing carrier is liable; and (3) finally, where the submitting carrier submits a PC-change request that fails to comply with the requirements of Section 64.1160 and the executing carrier fails to perform the change in accordance with the submission, the submitting carrier is liable.[100]

35. Although we believe that executing carriers are not subject to independent verification requirements,[101] the "but for" test recognizes that executing carriers may, in some instances, be liable for

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97 *See* Appendix C, proposed § 64.1160(a)(3); *see also supra* note 96.

98 *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 240, 109 S.Ct. 1775, 1785 (1989).

99 Legal, or proximate cause is distinguishable from cause in fact. To be a legal cause, an act must not only be an actual cause (*i.e.*, cause in fact), it must also be a substantial factor in bringing about the plaintiff's injury. *See generally* Restatement (Second) of Torts § 431 cmt. a (1965).

100 *See* Appendix C, proposed §§ 64.1160(a)(1)-(3). As a practical matter, a PC-change request submission should always precede a PC-change execution; thus, the liability of an executing carrier for unauthorized PC changes would only be addressed after the actions of the submitting carrier are considered.

101 *See supra* note 47.

unauthorized carrier changes. For example, liability may attach to the executing carrier under Section 258 where the executing carrier changes the PC selection of the wrong subscriber, converts the subscriber to the wrong carrier, or fails to perform the PC change in a timely manner, thus depriving the subscriber and the authorized carrier of benefits. Hence, our use of the "but for" test would not preclude us from examining the actions of the executing carrier where the facts suggest wrongdoing or malfeasance on the part of the executing carrier. We seek comment on alternative mechanisms for executing PC changes, such as the use of an independent third party to execute PC changes neutrally, that might reduce PC-change disputes.[102] Commenters should address how such mechanisms would operate, the costs of implementation and operation, and how these costs should be funded. Commenters should also describe the benefits to consumers, if any, of any proposed alternative(s).

C. Evidentiary Standard Related to Lawfulness of a Resale Carrier's Change in Underlying Network Provider

36. The Telecommunications Resellers Association (TRA) filed a Petition for Clarification on December 11, 1995 that requests clarification of the circumstances under which resale carriers must notify their subscribers of a change in their underlying network provider.[103] We have determined that it is appropriate to consider TRA's petition, which asks us to issue a generally applicable clarification related to our PC-change verification rules and orders, in the instant notice and comment proceeding.[104] We are, therefore, incorporating TRA's petition, and all responsive pleadings, into the record of this proceeding.[105]

37. TRA filed its petition in response to a 1995 Common Carrier Bureau (Bureau) ruling that a resale carrier violated Section 201(b) of the Act[106] by unjustly and unreasonably changing its underlying

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102 Some carriers are concerned that as the competitive marketplace changes, LECs may have a conflict of interest between their role as LEC and their role as an affiliate of an interexchange competitor. *See, e.g.*, Letter from Bruce K. Cox, AT&T to John Muleta, FCC, CC Dkt No. 94-129 (Sept. 27, 1996) (*ex parte*). AT&T suggests that "to avoid the inherent conflict of interest between competing carriers, serious consideration should be given to establishing procedures under which neutral third parties administer PIC protection." *Id.*

103 *See generally* TRA Petition for Clarification of File No. ENF-94-05 (filed Dec. 11, 1995) (*TRA Petition*). In an effort to eliminate consumer confusion about the facilities-based IXC with whom reselling IXCs have contracted to obtain service in resale situations, we mandated in our *LOA Order* that only the name of the "rate-setting" IXC may lawfully appear on an LOA. *LOA Order*, 10 FCC Rcd at 9575. Thus, if an end-user executes and delivers an LOA designating a resale carrier as its PIC, the name of the resale carrier's underlying network provider must not appear on the LOA if the resale carrier sets the end-user's rates. The scope of TRA's Petition and our discussion below do not extend to modifying or clarifying this requirement.

104 TRA states that it has no objection to the initiation of a rule making proceeding to define in more detail those circumstances in which a resale carrier's failure to notify end-users of a change in network provider would violate Section 201(b) of the Act. *See* TRA Reply at 6-7.

105 *See* Appendix A.

106 47 U.S.C. § 201(b). Section 201(b) provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate] communication service shall be just and reasonable

network provider.[107] The Bureau's ruling was based on the evidence presented in an adjudicatory proceeding.[108] Based on the record, the Bureau found that: (1) a change in the resale carrier's underlying network was a material fact *vis-a-vis* the reseller's subscribers;[109] and (2) the resale carrier did not notify its subscribers of its network change despite having the means and opportunity to do so.[110]

38. TRA proposes that, instead of determining when subscriber notification is required on a case-by-case basis, we establish a "bright-line" test under which subscriber notification would be required only if a resale carrier either: (1) identified its underlying network provider to its subscribers and committed to those subscribers in writing that it would not switch networks; or (2) identified its network provider on a bill or other correspondence to its subscribers within six months prior to the change in network provider. If neither of these two circumstances exists, then under TRA's proposal, a resale carrier could lawfully change its underlying network provider without notifying its subscribers. TRA states that its "bright-line" test would offer the consumer safeguards now provided by the current case-by-case approach, while minimizing the regulatory burden on small to mid-sized carriers and the adverse impact on competition.[111] TRA also states that establishing a bright-line test would enhance competition by providing clear guidance as to the circumstances that make the identity of the underlying network provider a material fact. This guidance is particularly needed, according to TRA, by those resale carriers that emphasize their independent status and "brand" identity as full-fledged carriers in their marketing and promotional material.[112] TRA also notes that resale carriers are

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. . . ." *Id.*

107 *See* WATS International Corporation v. Group Long Distance (USA), Inc., Memorandum Opinion and Order, 11 FCC Rcd 3720 (Com. Car. Bur. 1995) (*Bureau Order*), *app. for rev. denied*, Memorandum Opinion and Order, FCC 97-18 (rel. Feb. 4, 1997).

108 The *Bureau Order* responded to a request for declaratory ruling, filed by the parties to a pending U.S. District Court proceeding, as to whether any of the defendants thereto had violated the Communications Act as the plaintiff alleged. *Id.*

109 The Bureau found that the network change was a material fact because, among other things, marketing material had induced end-users to subscribe to the resale carrier with the understanding that their traffic would be carried on a particular facilities-based IXC's network. *See Bureau Order*, 11 FCC Rcd at 3729.

110 The Bureau noted the resale carrier's apparently deliberate omission of this material fact in a letter sent to each end-user customer around the same date as its network change. *See id.*

111 TRA Petition at 5-6 (citing *PIC Verification Order*, 7 FCC Rcd at 1045). Specifically, TRA states that its proposal would provide resale carriers needed certainty by delineating the circumstances under which a change in their underlying network provider would be considered a material fact. According to TRA, this clarification is needed because the unpredictability of the case-by-case approach essentially requires resale carriers either to (1) notify their customers each time they change network provider, or (2) bear the risk that the change might be found unlawful after-the-fact. TRA Petition at 6-8 (adding that undue customer notification can also lead to customer confusion where none previously existed).

112 TRA Petition at 6-7. TRA states that as the long-distance industry has matured, "branding" and name identification have become an increasingly important part of a successful long-term business strategy. Customer notification can hinder this competitive strategy because, according to TRA, it sends the message that the resale carrier is not the "real" carrier and instead reinforces the brand recognition of the underlying facilities-based carrier. *Id.* at 7.

prohibited under the terms of some tariffs, or contracts with facilities-based carriers, from disclosing the facilities-based carrier's identity to their customers.

39. TRA asks that we delineate all of the circumstances under which we would consider a network change to be a material fact. While we agree with TRA that establishing a "bright-line" test could enhance competition by providing resale carriers with more certainty "before-the-fact" than is possible under a case-by-case approach, we are not convinced that "materiality" is the proper standard for such a test. We tentatively conclude that any test established to determine when a resale carrier must disclose to its subscribers a change in its underlying carrier should be based on the subscribers' reliance on statements by the resale carrier that it either (1) would provide service to its subscribers using a particular underlying carrier, or (2) would not change its underlying carrier (with or without notifying its subscribers).[113]

40. In view of the foregoing, we tentatively conclude that establishing a bright-line test to determine whether a consumer has relied on a resale carrier's identification of a particular underlying carrier would best serve the public interest by providing both certainty for carriers and protection to consumers from misleading or deceptive practices by carriers. We seek comment on what criteria would make possible substantially all of the benefits that TRA refers to in its petition, but without diminishing the consumer safeguards now provided by the case-by-case approach. Commenters should consider whether any test established should provide for a presumption (conclusive, rebuttable or otherwise) of reliance where a resale carrier publicly commits not to change its underlying network provider, *e.g.*, in advertisements, promotions, or telemarketing. Commenters should also consider whether reliance should be presumed where the resale carrier has identified its network provider in correspondence to its customers within six months prior to a change, or whether reliance should always be presumed, regardless of the timing of the customer correspondence.

[113] For example, an obvious case in which a reselling carrier must inform its subscribers of the identity of the underlying network provider would be if the resale carrier has expressly agreed, in a legally binding instrument, to carry the customer's traffic over a particular network.

IV. MEMORANDUM OPINION AND ORDER ON RECONSIDERATION OF *1995 REPORT AND ORDER*

41. The consumer protection mechanisms we adopted in our *1995 Report and Order* were designed to curb what we found to be widespread instances of slamming and associated deceptive or misleading marketing practices by many long distance carriers.[114] Specifically, we: (1) prescribed the general form and content of LOAs used by IXCs to obtain subscribers' permission to change their designated PIC; (2) prohibited the use of "negative-option" LOAs that require some affirmative action by a consumer to prevent a PIC change; (3) required LOAs to contain the appropriate language translations if they employ more than one language; and (4) extended the PIC-change verification requirements for PIC-change requests generated through telemarketing sales[115] to consumer-initiated "in-bound" calls to an IXC.[116]

42. Six parties filed petitions for reconsideration of the *1995 Report and Order*.[117] Allnet seeks clarification or, in the alternative, reconsideration of the language in Section 64.1150(e)(4) to reflect the terms "interLATA" and "intraLATA" instead of "interstate" and "intrastate," respectively.[118] AT&T, MCI and Sprint seek reconsideration and reversal of the Commission's decision to extend PIC-change verification requirements to customer-initiated calling.[119] MCI also seeks reconsideration of the Commission's decision to permit the use of LOAs that double as checks.[120] Frontier seeks reconsideration of the Commission's LOA rules, and maintains that the rules should not apply to consumers who have executed written contracts to obtain an IXC's

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[114] The *1995 Report and Order* stated that the Commission took further action against slamming, in part, because of the tens of thousands of additional complaints received by LECs and state regulatory bodies. *1995 Report and Order*,10 FCC Rcd at 9560.

[115] Specifically, Section 64.1100 requires IXCs to institute one of the following four confirmation procedures before submitting to a LEC PIC-change orders generated by telemarketing: (1) obtain the consumer's written authorization; (2) obtain the consumer's electronic authorization by use of an 800 number; (3) have the consumer's oral authorization verified by an independent third party; or (4) send an information package, including a prepaid, returnable postcard, within three days of the consumer's request for a PIC change, and wait 14 days before submitting the consumer's order to the LEC, so that the consumer has sufficient time to return the postcard denying, cancelling, or confirming the change order. 47 C.F.R. § 64.1100.

[116] The Commission has stayed this portion of its verification requirements. *See supra* note 61.

[117] Allnet, AT&T, Frontier, MCI, NAAG, and Sprint filed petitions for reconsideration.

[118] Allnet maintains that 47 C.F.R. 64.1150(e)(4) should read as follows:

> (4) That the subscriber understands that only one interexchange carrier may be designated as the subscriber's interLATA primary interexchange carrier for any one telephone number. To the extent that a jurisdiction allows the selection of additional primary interexchange carriers (e.g., for intraLATA or international calling), the letter of agency must contain separate statements regarding those choices. Any carrier designated as a primary interexchange carrier must be the carrier directly setting the rates for the subscriber. One interexchange carrier can be both a subscriber's interLATA primary interexchange carrier and a subscriber's intraLATA primary interexchange carrier.

Allnet Petition at 1.

[119] AT&T Petition at 1; MCI Petition at 2; Sprint Petition at 1.

[120] MCI Petition at 10.

services.[121] Finally, NAAG seeks reconsideration of several aspects of the Order. Specifically, NAAG urges the Commission: (1) to eliminate, as a general rule, any liability for consumers if the switching IXC cannot document that the consumer authorized the switch in accordance with the law; (2) to modify Section 64.1150 to require that: (a) LOAs be on a document separate from any promotional material, not just separable by a perforation; (b) combined check/LOAs be prohibited, unless additional safeguards are required; (c) if an LOA is provided in connection with any promotion, all or part of which is in a language other than English, the LOA must also be provided in that other language; and (d) any promotion in which any inducements to switch long distance service are in a language other than English, must contain a full explanation and make all disclosures in each language used to make the inducements; and (3) to modify Section 64.1100(d)(8) to eliminate the negative option in accordance with paragraph 11 of the *1995 Report and Order* and Section 64.1150(f).[122]

43. Because these petitions seek clarification or reconsideration of the *1995 Report and Order*, we address them in the context of our current rules. Hence, the modifications adopted herein apply only to interexchange service.[123] We nevertheless also consider these petitions in the context of the Section 258 extension of our slamming restrictions to all telecommunications carriers, and, as appropriate, seek comment in the Further Notice portion of this order. With the anticipated increase in local competition, the consumer protection and competitive goals and policies underlying the *1995 Report and Order* will be equally important in both local and long distance markets. As such, our analyses take into account whether the rules will be practical and effective in local as well as long distance markets.

A. Application of Verification Rules to In-Bound Calls

44. In the *1995 Report and Order*, we extended our verification procedures for PIC- change requests generated through telemarketing sales to consumer-initiated, in-bound calls to an IXC.[124] We found that consumers, in response to advertisements or other promotional materials, frequently call IXC telemarketing centers to request general information about the IXC or in response to the IXC's media advertisement. In many cases, consumers placing calls to IXCs do not intend to initiate a PIC change and may be susceptible to the same types of deceptive and misleading marketing practices associated with out-bound telemarketing calls. Our decision to extend the PIC-change verification procedures to PIC-change requests generated by consumer initiated in-bound calls was driven by our desire to ensure that these consumers were afforded the same protection from deceptive and misleading marketing practices

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[121] Frontier Petition at 1.

[122] NAAG Petition at 2.

[123] Modifications to extend the slamming rules to local exchange service are proposed in the Further Notice portion of this order.

[124] *See supra* note 61 regarding our stay of the PIC-change verification requirements set forth in Section 64.1100 for consumer-initiated calls.

associated with telemarketing calls initiated by IXCs or their marketing agents. We found that extending the verification rules to in-bound calls was the least burdensome method of protecting consumers.[125]

45. AT&T, MCI and Sprint filed petitions seeking reconsideration of the Commission's decision to extend the PIC-verification rules to in-bound calls.[126] Petitioners state that complying with this provision will cost them millions of dollars in start-up and annually-recurring costs without concomitant public benefits.[127] Petitioners claim that the relatively few consumer complaints regarding in-bound slamming do not justify the cost of the remedy adopted by the Commission.[128] MCI later reversed its position on this issue and now "no longer opposes the imposition of such a requirement on sales involving residential and small business consumers."[129] Moreover, MCI recently agreed to use an independent third party to verify nearly 100 percent of all residential and small business orders generated through LOAs.[130]

46. The petitioners' analyses of the costs and benefits of the in-bound PIC-change verification requirement offer little to counter our earlier conclusion that the requirement offers the most practical, cost-effective means of protecting in-bound callers against slamming by unscrupulous IXCs. The crux of the petitioners' arguments is that the costs to IXCs to implement the in-bound verification requirements are too high and the public benefits are too low.[131] Each petitioner claims that its costs for start-up and recurring maintenance of an in-bound verification program would be measured in the millions and perhaps tens of millions of dollars.[132] The cost figures petitioners cite, however, appear to include cost estimates of instituting and maintaining a full (in-bound and out-bound) PIC-change verification program. Despite the fact that all

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125 *1995 Report and Order*, 10 FCC Rcd at 9564.

126 General Communication, Inc. (GCI), Airtouch and CompTel later filed comments supporting AT&T, MCI and Sprint's position that the PIC-change verification rules should not be extended to in-bound calls. GCI Comments at 2.; AirTouch Comments at 1; CompTel Comments at 3-6.

127 AT&T Petition at 10; Sprint Petition at 10; MCI Petition at 8. *See* note 132, *infra*.

128 AT&T Petition at 11-12; MCI Petition at 8-10; Sprint Petition at 13-16.

129 *See* Letter from Donald F. Evans, Vice President, Federal Regulatory Affairs, MCI Telecommunications Corporation to William F. Caton, Secretary, FCC (Feb. 13, 1996) (filed with a letter from Donald J. Elardo, MCI, to John Muleta, FCC (May 30, 1996)).

130 MCI Telecommunications Corp., Consent Decree, DA 96-1010 (Com. Car. Bur. Jun. 21, 1996). In a separate letter to the Commission, MCI also indicated its support for mandatory independent third-party verification for residential and small business consumers, unless the consumers directly contact their LECs to change their service providers. Letter from Mary J. Sisak, MCI Telecommunications Corp. to William Caton, FCC, CC Docket No. 94-129 (Jan. 13, 1997) (*ex parte*).

131 *See, e.g.*, AT&T Petition at 7.

132 For example, AT&T estimates that in-bound verification could cost up to $36.5 million annually (with start-up costs of as much as $3.1 million). AT&T Petition at 10. *Cf.* MCI Petition at 8 (estimating the cost to be as much as $10 million the first year, with $1.5 million for capital expenses and $6.3 million for operational costs); Sprint Petition at 12 (estimating first-year costs to be $10.1 million, and annual recurring costs to be $8.9 million).

IXC telemarketers are already required to verify out-bound PIC changes, no petitioner explains why its cost estimates focus on full start-up costs and not the incremental costs of adding in-bound calls to the existing verification process. In estimating the additional time required to verify in-bound PIC changes, some petitioners also include the cost of revenues foregone because of the additional time involved in obtaining verification. However, any revenues lost because of delays caused by verification of new customer PIC changes would be offset by revenues gained because of the delay in switching existing customers to other PICs.

47. In addition, petitioners fail to provide call volume or per-consumer cost information in their oppositions. While volume estimates, combined with cost estimates, could be a relevant method for considering the costs and benefits associated with extending the verification rules to in-bound calls, the petitioners have failed to provide any information that could be used in such an analysis. For example, none of the petitioners identified over how many in-bound calls its estimated costs are spread. We also note that we received three widely varying cost estimates from three different companies,[133] which cannot be reconciled without some indication of their respective business strategies or projected call volumes.

48. Nor are we persuaded by petitioners' claims that few consumers have actually lodged complaints with the Commission regarding instances of slamming as a result of in-bound calls to IXCs. AT&T and Sprint argue that information obtained from the Commission indicates that there are few complaints of in-bound slamming. Petitioners do not provide any specific information to support that claim; rather, the pleadings provided by the petitioners are anecdotal. Even if there are presently only a small number of in-bound slamming complaints, that number will no doubt rise if local competition develops and triggers increased marketing. We believe that application of our PIC-verification rules to in-bound calls is the most cost-effective way to deal with this projected increase in in-bound slamming complaints.

49. AT&T also asserts that in-bound verification is burdensome for consumers. AT&T claims that "[r]esidential consumers who place calls to an IXC's in-bound telemarketing or call servicing center requesting a change in their long distance carrier expect those orders to be implemented conveniently and promptly by the IXC, without further involvement by the consumer."[134] AT&T has not, however, convinced us that in-bound callers are any more burdened by PIC verification than consumers receiving out-bound calls. AT&T's petition does not address whether consumers would find such additional protective steps valuable, nor does any petitioner or commenter cite to any relevant market research supporting their claims of consumer indifference or opposition to such safeguards. Sprint argues that consumers making in-bound calls are more focused on their long distance service needs than consumers receiving out-bound calls.[135] Of course, a consumer's focus could depend on whether it was making a service request call or responding to incentive advertising. Based on the limited information provided by the petitioners in this regard, we are not convinced that there is sufficient difference between the two modes of telemarketing to justify such vastly different treatment.

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133 *Id.*

134 AT&T Petition at 10-11.

135 Sprint Petition at ii.

50. Moreover, the cost concerns raised by petitioners must be balanced against the interests of consumers in deciding whether verification procedures should apply to in-bound calls.[136] Important questions to be considered are "what level of privacy protection adequately balances the legitimate interest of individuals and service providers" and whether current regulations provide the desired level of protection.[137] Developments in technology have enabled telecommunications carriers to obtain calling information about in-bound calling consumers.[138] We believe that access to such information may provide increased incentive and opportunity for IXCs to "submit or execute"[139] unauthorized changes. Moreover, given the frequency and extent of slamming evidenced over the past few years, it appears likely that if in-bound calls were exempted from the Commission's verification procedures, in-bound calling could be used as an alternative to compliance with the Commission's verification procedures. Consumers could continue to be subjected to deceptive and misleading practices associated with slamming. Therefore, it is important that the Commission's verification requirements apply to in-bound calls to safeguard consumers' privacy.

51. We continue to believe that consumers who place calls to a carrier's sales or marketing center should receive the same protection as consumers who are contacted by the carrier. With the availability of consumer information provided as part of an in-bound call, protecting consumer rights to privacy and control of their telecommunications service is in the public interest. If we did not extend PIC verification to in-bound calls, we believe that some "IXCs may switch from mailing inducement-laden LOAs to mailing marketing pieces in which a consumer is urged to call a business number in order to receive a promised inducement"[140] where "[a]n unauthorized conversion could easily take place on such a call."[141] Therefore, we deny the petitions for reconsideration insofar as they request that we do not extend our PIC-change verification requirements to in-bound calls.[142] We seek further comment, however, in our Further Notice of Proposed Rule Making, *supra*, on the volume of in-bound calls received by carriers, and on the per-consumer costs for verification.

B. LOAs Combined with Checks (Section 64.1150(d))

52. In the *1995 Report and Order*, we found that much of the abuse, misrepresentation, and consumer confusion concerning LOAs occurred when an inducement and an LOA are combined in the same document in a deceptive or misleading manner. The LOA slamming complaints generally described deceptive marketing practices in which consumers were induced to sign form documents that did not clearly advise the consumers that they were authorizing a change in their PICs. We determined that the only way to ensure that the consumer can always make a truly informed choice was to require that the LOA be a separate or severable

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136 *See supra* paras. 4-7.

137 *Privacy and the NII: Safeguarding Telecommunications-Related Personal Information*, U.S. Dept. of Commerce, Nat'l Telecommunications Info. Admin., at 7 (Oct. 1995) (*NTIA Privacy Report)*.

138 *See supra* para. 4.

139 47 U.S.C. § 258(a).

140 *See NPRM* Comments of Consumer Action at 3-4.

141 *Id*.

142 *See supra* paras. 19-20.

document.

53. We also decided, however, that a limited exception should be made for checks that authorize PIC changes. Although some IXCs had used checks combined with LOAs to mislead and deceive consumers, we recognized that most IXCs use checks in their marketing campaigns in an appropriate and non-misleading manner, resulting in few consumer complaints. To ensure that such checks do not mislead or confuse consumers, we instituted certain safeguards. We required that a valid LOA check contain only the required LOA language and the necessary information to make it a negotiable instrument, and that the check not contain any promotional language or material. Further, we required carriers to continue to place the required LOA language near the signature line on the back of the check. In addition, we required that carriers print, in easily readable, bold-face type on the front of the check, a notice that the consumer is authorizing a PIC change by signing the check.

54. In its petition for limited reconsideration, MCI urges the Commission to prohibit IXCs from combining LOAs with checks in all instances.[143] Citing Commission concerns expressed in the *1995 Report and Order*, MCI states that it found the Commission's rationale for permitting LOA/checks difficult to understand.[144] MCI contends that LOA/checks represent a significant portion of the complaints received by the Commission with regard to unauthorized conversions.[145] MCI cites a December 30, 1994 response by the Commission to a Freedom-of-Information Act (FOIA) request.[146] MCI contends that the Commission "indicates that, from a representative sample of 430 complaints, 47 of those involved alleged unauthorized conversions due to problems with checks."[147] Further, MCI cites numerous newspaper articles describing the nation-wide slamming problem, including a Newsday article concerning Sonic Communications and the LOA/checks it used to market its services in a deceptive manner.[148] Although MCI concedes that it has used LOA/checks as part of its strategy to acquire new consumers, it argues that, "on balance, the better approach would be to forbid their use by all carriers."[149] Making a similar argument, NAAG, in its petition, also urges the Commission to prohibit combined check/LOAs.[150] GCI supports both MCI and NAAG on this issue.[151]

55. AT&T opposes both petitions. AT&T argues that the Commission decision allowing the LOA/check exception to the "separate or severable document" requirement "properly balances the need for

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143 MCI Petition at 10-15.

144 *Id.* at 11.

145 *Id.*

146 *Id.* at 11-12.

147 *Id.* at 12.

148 *Id.*

149 *Id.* at 15.

150 NAAG Petition at 2.

151 GCI Petition at 6.

consumer protection from slamming against the public interest in preserving vigorous competition in the long distance marketplace."[152] AT&T further argues that "MCI's reconsideration petition proceeds from the erroneous premise that all IXCs should be precluded from using non-deceptive check/LOAs for legitimate marketing purposes, simply because some unethical carriers may employ such documents (albeit without Commission-prescribed disclosures) to mislead long distance consumers."[153]

56. We are not persuaded that we should further revise the rules to prohibit all combined checks/LOAs. A full record was developed on the issue of separate and severable documents, and the LOA/check exception. The petitioners and commenters add no new information or arguments that would persuade us to reverse our determination on this issue. With regard to the complaints identified in the Commission's response to the FOIA request, MCI fails to mention that all of the 47 complaints were against one former IXC. We have instituted significant safeguards to protect consumers from abuses, including requiring carriers to print the required LOA language in easily readable bold-face type on the front of the check and requiring that no promotional material be included on the check. In our *1995 Report and Order*, we described the kind of LOA/check we believed to be acceptable.[154] Furthermore, although we have received large numbers of complaints regarding the use of LOAs and other promotional materials, as stated above, we have received relatively few complaints alleging that LOA/checks were the basis of an unauthorized PIC change. For the foregoing reasons, we will continue to permit the use of LOAs combined with checks.

C. Separable LOAs (Section 64.1150(b))

57. As stated above, we have required that the LOA be a separate or separable document. Although we initially sought comment on whether LOAs and promotional materials should always be physically separate and not merely separable, we were persuaded by commenters that a separable LOA be allowed to permit more flexibility in their marketing efforts. In order to provide for both consumer protection and marketing flexibility, we decided to require that LOAs be separable (*i.e.*, "ultimately" separate) from all promotional material. Further, we prescribed the minimum requirements for LOAs so that the potential slamming abuses described by commenters would be eliminated or severely reduced.

58. NAAG, in its petition, argues that all LOAs should be physically separate from all promotional materials and not merely separable.[155] NAAG avers that the current Commission rules will result in consumer frustration and confusion.[156] MCI, Sprint, and TRA have offered opposing views, citing much of the Commission's original rationale for allowing separable as well as separate LOAs.[157]

59. Requiring that LOA language and promotional material be physically separate would be the

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152 AT&T Opposition at 2.

153 *Id*. at 7-8.

154 *1995 Report and Order*, 10 FCC Rcd at 9573-74.

155 NAAG Petition at 11-12.

156 *Id.*

157 MCI Opposition at 3-4; Sprint Opposition at 5; and TRA Comments at 9-10.

most extreme demarcation between the two that we could establish. We continue to believe that the lesser requirement that the two be separable reasonably balances the informational interests of consumers and the marketing flexibility of the industry. Because this issue was fully explored in the *1995 Report and Order* and because the petitioners and commenters have raised no new facts or issues, we deny the petitions for reconsideration and continue to allow "separable" LOAs.

D. Consistency of Translation Between LOAs and Promotional Materials (Section 64.1150(g))

60. In the *1995 Report and Order*, we recognized that the non-English speaking population represents a growing market in this country that IXCs are targeting for domestic and international business. Some of these consumers have alleged that the non-English versions of the LOA do not contain all of the text of the English versions of the LOA. As a result, material portions of the LOA are in only one language, typically English, which the non-English speaking consumers may not fully understand. We asked whether we should require *all* parts of an LOA to be translated if *any* part were translated. Supported by the overwhelming majority of commenters, we adopted such a rule.

61. In its petition, NAAG argues that our LOA rules should require that if an "LOA is provided in connection with any promotion, all or part of which is in a language other than English, the LOA must also be provided in that other language."[158] Such a requirement, NAAG contends, "would foreclose such abuses as the use of all-English LOAs in connection with a face to face or telemarketing promotional campaign conducted in a language other than English."[159] NAAG suggests that although we correctly require that LOAs provide full disclosure in any language used on an LOA, the applicable provision is "silent as to the use of more than one language in the interexchange advertising and promotional materials."[160] NAAG argues:

> oversight could lead to multi-lingual promotions in which the claims made to motivate consumers to choose an interexchange carrier would differ depending on what language is used . . . . Unless the FCC amends section 64.1150(g), an LOA used in connection with a multi-lingual promotional campaign might be entirely in English.[161]

NAAG recommends that "any promotion, in which any inducements to switch long distance service are in a language other than English, must contain a full explanation and make all disclosures in each language used."[162] No oppositions or comments were filed on this aspect of NAAG's petition.

62. Consistent with the approach we took in the *1995 Report and Order*, we are persuaded by NAAG's arguments that the LOA should be fully translated into the same language as the associated written promotional materials or oral claims and instructions. While we did not in the *1995 Report and Order*, and do not now, prescribe requirements for promotional materials, we do not intend to allow IXCs to provide

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158 NAAG Petition at 2.

159 *Id*. at 15.

160 *Id.* at 16.

161 *Id*.

162 *Id*.

promotional materials, oral descriptions or instructions in one language that instruct unsuspecting consumers to fill out and sign an LOA that is entirely in another language. Therefore, we will require IXCs to fully translate their LOAs into the same language(s) as their associated promotional materials, oral descriptions and instructions.

E. "Welcome Package" Verification Option

63. In its reconsideration petition, NAAG argues that the "welcome package" option of Sections 64.1100(d)(7) and (8) should be amended to eliminate the "negative-option" aspect of these PIC-change verification rules.[163] NAAG asserts that the provisions need to be revised to eliminate the automatic switching of a consumer, if the consumer does not return a postcard to the IXC within the 14-day period prescribed by the provision.[164] AirTouch Communications, AT&T, MCI, and Sprint oppose NAAG's petition on this issue. These opponents argue that NAAG confuses the negative-option LOAs with one of the PIC verification procedures IXCs use to provide notice to consumers of an already-authorized service change.[165] The important distinction, the parties claim, is that in the latter, consumers have already made their choice orally during a telemarketing call and the follow-up communication (consumer-information package with return postcard) is provided as additional notice and confirmation of the pending service change.[166] The opponents state that the former case, the negative-option LOA, purports to authorize a service change in and of itself, without any prior oral agreement.[167]

64. We agree with these latter commenters regarding the distinction between a post-sale verification pursuant to Section 64.1100(d) and negative-option LOAs, which are prohibited by Section 64.1150(f). We also agree with NAAG, however, that in practice, this distinction may be blurred. While Section 64.1100(d) was intended as a *post-sale* verification option, it could be used to switch a subscriber who has not actually previously consented to a PC change in the following manner: an unscrupulous telemarketer sends to a subscriber who has not consented to a PC change a post card designed to be used by the subscriber to deny, cancel, or confirm a PC-change order. Under the current rule, if the subscriber does not return the post card, the carrier may execute the PC change after 14 days, even if the subscriber does not return the post card. We are concerned that such activity could have the practical effect of operating like a negative- option LOA, to the detriment of the consumer. Because we do not have sufficient information in the record to assess the potential effect of eliminating the "negative-option" aspect of this verification option, we decline to adopt NAAG's proposal at this time. However, we invite additional comment in our Further Notice of Proposed Rule Making, *supra,* on whether Section 64.1100(d), to the extent that it may be used to circumvent our prohibition of negative-option LOAs under Section 64.1150(f), should be eliminated in whole or in part.[168]

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163 *Id.* at 16-17.

164 *Id.*

165 *See, e.g.,* Sprint Opposition at 5.

166 *See, e.g.,* MCI Opposition at 8.

167 *See, e.g., id.*

168 *See supra* paras. 16-18.

F. Consumer Liability to Unauthorized Carriers

65. NAAG, in its petition for reconsideration, urges the Commission to absolve slammed subscribers of all liability for charges assessed by unauthorized IXCs.[169] We do not have sufficient information in the record to determine whether total forgiveness of charges would further deter IXCs from slamming. Therefore, we decline to adopt NAAG's petition at this time. However, we invite commenters, in our Further Notice of Proposed Rule Making, *supra*, to consider whether a subscriber whose carrier selection has been changed without authorization should be liable for charges assessed by an unauthorized carrier in the contexts of both local and interexchange service.[170]

G. Interstate/Intrastate vs. InterLATA/IntraLATA (Section 64.1150(e)(4))

66. Section 64.1150(e)(4) provides, in part, that, "[t]o the extent that a jurisdiction allows the selection of additional primary exchange carriers (*e.g.*, for intrastate or international calling), the letter of agency must contain separate statements regarding those choices."[171] Allnet, in its petition, urges the Commission, "in order to avoid any unnecessary confusion," to clarify Section 64.1150(e)(4) by using the terms "interLATA" and "intraLATA"[172] instead of the terms "interstate" and "intrastate."[173] Sprint subsequently filed comments in support of Allnet's position.[174] MCI and GCI disagree, and note that LATAs were not established in either Alaska or Hawaii,[175] and urge the Commission to amend Section 64.1150(e)(4) so that both sets of terms are allowed, namely interstate/intrastate and interLATA/intraLATA.[176]

67. We used "interstate/intrastate" in the *1995 Report and Order* in order to adopt rules that would be generally relevant to all jurisdictions. GCI correctly states that LATAs were created as a result of the divestiture of the Bell System, and that this action did not create LATAs in Alaska or Hawaii.[177] In order to accommodate the concerns raised by the parties, and to remove possible confusion or uncertainty about the scope of our rules, we will modify Section 64.1150(e)(4) to use both the interstate/intrastate and interLATA/intraLATA terms.

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169 NAAG Petition at 5. *See supra* para. 26.

170 *See supra* para. 27.

171 47 U.S.C. § 64.1150(e)(4).

172 *See supra* note 8.

173 Allnet Petition at 1. Allnet seeks this modification because consumers in some jurisdictions may choose separate carriers for their interLATA and intraLATA toll service, but there is no evidence that consumers anywhere in the country may select separate interstate vs. intrastate interexchange carriers. *Id.*

174 Sprint Opposition at 2.

175 *See, e.g.,* GCI comments at 2.

176 GCI Comments at 3-4.

177 *Id.*

H. Service Contracts and the Commission's LOA Rules (Section 64.1150)

68. Frontier argues that the Commission's rules concerning the format of an LOA should not apply to consumers who have executed written contracts to obtain an IXC's services.[178] Notwithstanding its position, however, Frontier states that it would not object to a requirement that written contracts contain no promotional materials or be severable from such materials.[179] SWBT disagrees with Frontier and argues that a contract should contain language that adheres to the Commission's LOA requirements.[180]

69. We agree with SWBT that, to the extent a telecommunications services contract also authorizes a change in a business or residential PIC, that contract should be consistent with our LOA requirements. We believe that this clarification of our rules will ensure that business consumers and industry alike will be clearly informed as to what will be expected to authorize a change of that consumer's long distance telephone service. We have applied this rule to all other LOAs that authorize PIC changes. We see no meaningful distinction that would lead us to depart from this approach for contracts that serve as LOAs.

I. Clarification of Verification Procedures

70. Section 64.1100 of our rules lists four options from which carriers may choose to confirm PIC-change orders generated by telemarketing. The Commission first adopted this provision in 1992 in its *PIC Verification Order*, which required IXCs who submit PIC-change orders to LECs on behalf of customers to implement one of four procedures to verify such orders.[181] When this rule was modified by our *1995 Report and Order*, the word "or" was inadvertently deleted after option (a) of the revised rule. The Commission has always intended to require that only one of the four verification options be used to verify subscriber PIC-change orders.[182] Thus, we amend the rule by adding "or" after option (a).[183] We find the correction of this inadvertent omission to be good cause for amending the rule; hence, we adopt this rule change without prior notice pursuant to our authority under Section 1.412(c) of our rules.[184]

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178 Frontier Petition at 1.

179 Frontier Petition at 2.

180 SWBT Reply at 3.

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

182 *See, e.g., PIC Verification Reconsideration Order*, 8 FCC Rcd at 3215-16 ("we required [in the *PIC Verification Order]* IXCs that submit PIC change orders on behalf of customers to LECs to institute *one of four* confirmation procedures . . .") (emphasis added).

183 *See* Appendix B.

184 47 C.F.R. § 1.412(c) ("Rule changes may in addition be adopted without prior notice in any situation in which the Commission for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.").

V. PROCEDURAL MATTERS

A. *Ex Parte* Presentations

71. This Further Notice is a permit-but-disclose rule making proceeding. *Ex parte* presentations are permitted, in accordance with the Commission rules, provided that they are disclosed as required.[185]

B. Initial Regulatory Flexibility Analysis

72. As required by the Regulatory Flexibility Act (RFA),[186] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in the Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Further Notice of Proposed Rule Making (Further NPRM*)*. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Further NPRM provided in paragraph 109. The Secretary shall send a copy of this Notice to the Chief Counsel for Advocacy of the Small Business Administration (SBA) in accordance with the RFA.[187]

1. Need for and Objectives of the Proposed Rules

73. The Commission, in its efforts to protect consumers from unauthorized switching of preferred carriers, and to implement provisions of the Telecommunications Act of 1996 pertaining to illegal changes in subscriber carrier selections, is issuing this Further NPRM to propose specific verification requirements for all carriers and to seek comments regarding the liability of (1) slammed consumers to carriers, (2) unauthorized carriers to properly authorized carriers, and (3) carriers to slammed consumers.

2. Legal Basis

74. This Further NPRM is adopted pursuant to Sections 1, 4(i), 4(j), 201-205, 258, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 258, 303(r).

3. Description and Number of Small Entities Which May be Affected

75. As set forth above, the Commission is seeking comment on rules regarding subscriber carrier selection changes in its specific efforts to prevent illegal changes in subscribers' properly authorized carriers. Specifically, the Commission is: (1) seeking comment on the applicability of Sections 64.1100 and 64.1150 of our verification rules, 47 C.F.R. §§ 64.1100, 64.1150, to all telecommunications carriers; (2) seeking comment on the applicability of our verification rules when carriers solicit consumers regarding preferred carrier freezes; (3) seeking comment on whether the "welcome package" described in Section 64.1100(d) continues to be a viable and necessary carrier change verification alternative, and whether consumers may derive any benefits from this option; (4) seeking comment on the quantity of costs and benefits associated with

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185 *See generally* 47 C.F.R. §§ 1.1200, 1.1202, 1.1204, 1.1206.

186 5 U.S.C. § 603.

187 5 U.S.C. § 603(a).

in-bound verification procedures; (5) seeking comment regarding consumer-to-carrier, carrier-to-carrier, and carrier-to-consumer liability in light of the Act's new provisions; and (6) seeking comment on whether to establish a "bright-line" evidentiary standard for determining whether a consumer has relied on a resale carrier's identity of its underlying, facilities-based network provider, hence requiring that the resale carrier notify the consumer if the underlying network provider is changed. Under the Act and proposed rules, small entities that violate the Commission's PC-change verification rules by slamming consumers shall be liable to the consumer's properly authorized carrier for all charges paid by the slammed consumer and for the value of any premiums to which the consumer would have been entitled if the slam had not occurred.

76. For the purposes of this analysis, we examined the relevant definition of "small entity" or "small business" and applied this definition to identify those entities that may be affected by the rules adopted in this Further NPRM. The RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.[188] 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) meets any additional criteria established by the SBA.[189] Moreover, the SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have fewer than 1,500 employees.[190] We first discuss generally the total number of small telephone companies falling within both of these categories. Then, we discuss the number of small businesses within other categories, and attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

77. As discussed *supra*, and consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of "small entity" and "small business concerns" for the purpose of this IRFA. Because the small incumbent LECs subject to these rules are either dominant in their field of operations or are not independently owned and operated, consistent with our prior practice, they are excluded from the definition of "small entity" and "small business concerns."[191] Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."

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188 *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

189 15 U.S.C. § 632.

190 13 C.F.R. § 121.201.

191 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499, 61 Fed. Reg. 45476 at paras. 1328-30, 1342 (rel. Aug. 8, 1996) (*Local Competition First Report and Order*). We note that the U.S. Court of Appeals for the Eighth Circuit has stayed the pricing rules developed in the *Local Competition First Report and Order*, pending review on the merits. *Iowa Utilities Board v. FCC*, No. 96-3321 (8th Cir., Oct. 15, 1996).

Telephone Companies (SIC 4813)

78. *Total Number of Telephone Companies Affected.* The decisions and rules adopted herein may have a significant effect on a substantial number of small telephone companies identified by the SBA. The United States Bureau of the Census (Census Bureau) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone service, as defined therein, for at least one year.[192] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."[193] For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this Further NPRM.

79. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telecommunications companies other than radiotelephone (wireless) companies (Telephone Communications, Except Radiotelephone). The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[194] According to the SBA definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons.[195] Of the 2,321 non-radiotelephone companies listed by the Census Bureau, 2,295 companies (or, all but 26) were reported to have fewer than 1,000 employees. Thus, at least 2,295 non-radiotelephone companies might qualify as small incumbent LECs or small entities based on these employment statistics. However, because it seems certain that some of these carriers are not independently owned and operated, this figure necessarily overstates the actual number of non-radiotelephone companies that would qualify as "small business concerns" under the SBA definition. Consequently, we estimate using this methodology that there are fewer than 2,295 small entity telephone communications companies (other than radiotelephone companies) that may be affected by the proposed decisions and rules and we seek comment on this conclusion.

80. *Local Exchange Carriers.* Although neither the Commission nor the SBA has developed a definition of small providers of local exchange services, we have two methodologies available to us for making these estimates. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813) (Telephone Communications, Except Radiotelephone) as previously detailed, *supra*. Our alternative method for estimation utilizes the data that we collect annually in connection with the Telecommunications Relay Service (TRS). This data provides us with the most reliable source of information of which we are aware regarding the number of LECs nationwide. According to our most recent data, 1,347 companies reported that they were engaged in the provision of local

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192 United States Department of Census, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, Firm Size 1-123 (1995) ("*1992 Census*").

193 15 U.S.C. § 632(a)(1).

194 *1992 Census* at Firm Size 1-123.

195 13 C.F.R. § 121.201 (SIC Code 4812).

exchange services.[196] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of incumbent LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small LECs (including small incumbent LECs) that may be affected by the actions proposed in this Further NPRM.

81. *Non-LEC Wireline Carriers.* We next estimate the number of non-LEC wireline carriers, including interexchange carriers (IXCs), competitive access providers (CAPs), Operator Service Providers (OSPs), Pay Telephone Operators, and resellers that may be affected by these rules. Because neither the Commission nor the SBA has developed definitions for small entities specifically applicable to these wireline service types, the closest applicable definition under the SBA rules for all these service types is for telephone communications companies other than radiotelephone (wireless) companies. However, the TRS data provides an alternative source of information regarding the number of IXCs, CAPs, OSPs, Pay Telephone Operators, and resellers nationwide. According to our most recent data: 130 companies reported that they are engaged in the provision of interexchange services; 57 companies reported that they are engaged in the provision of competitive access services; 25 companies reported that they are engaged in the provision of operator services; 271 companies reported that they are engaged in the provision of pay telephone services; and 260 companies reported that they are engaged in the resale of telephone services and 30 reported being "other" toll carriers.[197] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs, CAPs, OSPs, Pay Telephone Operators, and resellers that would qualify as small business concerns under SBA's definition. Firms filing *TRS Worksheets* are asked to select a single category that best describes their operation. As a result, some long distance carriers describe themselves as resellers, some as OSPs, some as "other," and some simply as IXCs. Consequently, we estimate that there are fewer than 130 small entity IXCs; 57 small entity CAPs; 25 small entity OSPs; 271 small entity pay telephone service providers; and 260 small entity providers of resale telephone service; and 30 "other" toll carriers that might be affected by the actions and rules adopted in this Further NPRM.

82. *Radiotelephone (Wireless) Carriers*. The SBA has developed a definition of small entities for Wireless (Radiotelephone) Carriers. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[198] According to the SBA's definition, a small business radiotelephone company is one employing fewer than 1,500 persons.[199] The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable to estimate with greater precision the number of radiotelephone carriers and service providers that would both qualify as small business concerns

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196 Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue) (Dec. 1996) ("*TRS Worksheet*").

197 *TRS Worksheet* at Tbl. 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue).

198 *1992 Census* at Firm Size 1-123.

199 13 C.F.R. § 121.201 (SIC Code 4812).

under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that might be affected by the actions and rules adopted in this Further NPRM.

83. *Cellular and Mobile Service Carriers.* In an effort to further refine our calculation of the number of radiotelephone companies affected by the rules adopted herein, we consider the categories of radiotelephone carriers, Cellular Service Carriers and Mobile Service Carriers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to Cellular Service Carriers and to Mobile Service Carriers. The closest applicable definition under SBA rules for both services is for telephone companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of Cellular Service Carriers and Mobile Service Carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 792 companies reported that they are engaged in the provision of cellular services and 138 companies reported that they are engaged in the provision of mobile services.[200] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of Cellular Service Carriers and Mobile Service Carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 792 small entity Cellular Service Carriers and fewer than 138 small entity Mobile Service Carriers that might be affected by the actions and rules adopted in this Further NPRM.

84. *Broadband PCS Licensees.* In an effort to further refine our calculation of the number of radiotelephone companies affected by the rules adopted herein, we consider the category of radiotelephone carriers, Broadband PCS Licensees. The broadband PCS spectrum is divided into six frequency blocks designated A through F. As set forth in 47 C.F.R. § 24.720(b), the Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[201] Our definition of a "small entity" in the context of broadband PCS auctions has been approved by SBA.[202] The Commission has auctioned broadband PCS licenses in Blocks A through F. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 183 winning bidders that qualified as small entities in the Blocks C, D, E, and F auctions. Based on this information, we conclude that the number of broadband PCS licensees affected by the decisions in the *Infrastructure Sharing Report & Order* includes, at a minimum, the 183 winning bidders that qualified as small entities in the Blocks C through F broadband PCS auctions.

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200 *TRS Worksheet* at Tbl. 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue).

201 *See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap,* Report and Order, FCC 96-278, WT Docket No. 96-59, para. 60 (1996), 61 FR 33859 (Jul. 1, 1996).

202 *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding,* PP Docket No. 93-253, Fifth Report & Order, 9 FCC Rcd 5532, 5581-84 (1994).

85. *SMR Licensees.* Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar years. This definition of a "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.[203] The rules proposed in this Further NPRM may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. We assume, for purposes of this IRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by the rules proposed in this Further NPRM.

86. *Potential SMR Licensees*. The Commission completed its auctions for geographic area licenses in the 900 MHz SMR band on April 15, 1996. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rule proposed in this Further NPRM includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this IRFA, that all of the licenses may be awarded to small entities who, thus, may be affected by the rules proposed in this Further NPRM.

87. *Cable Systems*. SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than $11 million in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,423 such cable and other pay television services generating less than $11 million in revenue that were in operation for at least one year at the end of 1992.[204]

a) The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.[205] Based on our most recent

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[203] *See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool*, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, 11 FCC Rcd 1463 (1995).

[204] *1992 Census* at Firm Size 1-123.

[205] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. *Implementation of Sections of the*

information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.[206] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the rules proposed in this Further NPRM.

b) The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[207] The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[208] Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450.[209] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

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

88. The proposed rules would impose verification and disclosure requirements upon telecommunications carriers that wish to submit or execute a change in a subscriber's selection of a provider of telecommunications service. Both submitting and executing telecommunications carriers may be required to ensure that a carrier change comports with the verification requirements of 47 C.F.R. §§ 64.1100 and 64.1150 established by the Commission. Furthermore, if a subscriber is a victim of slamming, the unauthorized carrier would be required to remit to the properly authorized carrier (1) all charges paid by the subscriber from the time the slam occurred, and (2) the value of any premiums to which the subscriber would have been entitled if the slam had not occurred. The properly authorized carrier would be required to request such payments from the unauthorized carrier within ten days of notification from the subscriber that an unauthorized carrier change has occurred. Upon notification that the subscriber has been slammed, the unauthorized carrier must remit such payments to the properly authorized carrier. The subscriber's preferred telecommunications carrier would then be responsible for making its subscriber whole by restoring any premiums to which the subscriber would have been entitled had the slam not occurred. In the event of disputes

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1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393.

206 Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

207 47 U.S.C. § 543(m)(2).

208 47 C.F.R. § 76.1403(b).

209 Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

between carriers regarding the transfer of charges and the value of lost premiums, the carriers would be required to pursue private settlement negotiations before instituting proceedings before the Commission to resolve such disputes.

5. Significant Alternatives to Proposed Rules Which Minimize the Significant Economic Impact on Small Entities and Small Incumbent LECs and Accomplish Stated Objectives

89. The Commission has considered proposing no rule changes beyond those specifically required by the Act. Therefore, as discussed above, we are proposing very limited rule changes from our existing rules which, given that slamming is becoming an increasingly prevalent practice, we believe are minimally intrusive steps necessary to discourage possible evasion of the Subscriber Carrier Selection Change requirements contained in Section 258 of the Communications Act. We propose that, in the event of a dispute between carriers under this liability provision, the carriers involved in such disputes must pursue private settlement negotiations regarding the transfer of charges and the value of lost premiums from the unauthorized carrier to the properly authorized carrier. We believe that the adoption of such a dispute mechanism will lessen the economic impact of a dispute on small entities. Under the proposed rules, telecommunications carriers, including small entities, that violate the Commission's PIC verification rules and slam consumers would be liable to the consumer's properly authorized carrier in an amount equal to all charges paid by the "slammed" consumer plus the value of premiums to which a slammed consumer would have been entitled had the slam not occurred. We invite parties commenting on this regulatory analysis to provide information as to the number of small businesses that would be affected by our proposed regulations and identify alternatives that would reduce the burden on these entities while still ensuring that consumers' telecommunications carrier selections are not changed without their authorization.

90. Although we proposed no rule regarding the circumstances under which resale carriers must notify their subscribers of a change in their underlying network provider, we received a request for clarification of this issue from TRA.[210] TRA proposes that, instead of determining the materiality of such changes on a case-by-case basis, we establish a "bright-line" test that would offer the consumer safeguards now provided by the current case-by-case approach, while minimizing the regulatory burden on small to mid-sized carriers.[211] According to TRA, the unpredictability of the case-by-case approach is unduly burdensome on small to mid-sized resale carriers, and thus diminishes competition. We invite parties to comment on whether the current case-by-case approach has a significant economic impact on small entities, and on whether our proposal to establish a bright-line test for determining whether a consumer has relied on a resale carrier's identity of its underlying facilities-based network provider, hence requiring that the resale carrier notify the consumer if the underlying network provider is changed, would minimize

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[210] *See Further NPRM*, *supra*, paras. 36-40.

[211] TRA proposes that customer notification be required only if a resale carrier either: (1) identified its underlying network provider to its customers and committed to those customers in writing that it would not switch networks; or (2) identified its network provider on a bill or other correspondence to its customers within six months prior to the change in network provider. *See supra* para. 37.

any significant economic impact. We also seek comment on alternatives that would reduce the burden on these entities without diminishing consumer safeguards now in place.

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

91. None.

C. Final Regulatory Flexibility Analysis

92. As required by Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rule Making (NPRM) in the Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carrier.[212] The Commission sought written public comment on the proposals in the NPRM, including on the IRFA.[213] The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Memorandum Opinion and Order on Reconsideration conforms to the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. 104-121, 110 Stat. 847 (1996).[214]

1. Need for and Objectives of this Memorandum Opinion and Order on Reconsideration and the Rules Adopted Herein

93. The Commission adopts in this Order on Reconsideration rules that: (1) modify Section 64.1150(g) to clarify that interexchange carriers (IXCs) using LOAs must fully translate their LOAs into the same language(s) as their associated promotional materials, oral descriptions and instructions; (2) modify Section 64.1150(e)(4) to incorporate the terms "interLATA and intraLATA," as well as "interstate and intrastate"; and (3) modify Section 64.1100(a) to clarify that IXCs must employ only one of the four verification options in Section 64.1100 to verify subscriber change orders generated by telemarketing. The objectives of the rules adopted in this Order on Reconsideration are to provide adequate safeguards to protect consumers from unauthorized switching of their long distance carriers and to encourage full and fair competition among telecommunications carriers in the marketplace.

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

94. In the IRFA, the Commission found that the rules it proposed to adopt in this proceeding may have a significant impact on a substantial number of small businesses as defined by section 601(3) of the RFA. Specifically, small entities may feel some economic impact in additional

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212 *NPRM*, 9 FCC Rcd. 6885 (1994).

213 *NPRM* paras. 20-27.

214 SBREFA was codified as Title II of the Contract With America Advancement Act of 1996 (CWAAA), 5 U.S.C. § 601 *et seq*.

printing costs due to the new requirement that IXCs must fully translate their LOAs into the same language(s) as their associated promotional materials, oral descriptions and instructions under Section 64.1150(g). The IRFA solicited comment on alternatives to our proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding. Although the Commission has requested further comment on a number of these rules, the Commission received no comment(s) on the potential impact on small business entities with respect to the rules we adopt today.

3. Description and Estimates of the Number of Small Entities to Which the Rules adopted in the Memorandum Order and Opinion on Reconsideration in CC Docket No. 94-129 Will Apply

95. For the purposes of this analysis, we examined the relevant definition of "small entity" or "small business" and applied this definition to identify those entities that may be affected by the rules adopted in this Order on Reconsideration. The RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.[215] 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) meets any additional criteria established by the Small Business Administration (SBA).[216] Moreover, the SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have fewer than 1,500 employees.[217]

Telephone Companies (SIC 4813)

96. *Total Number of Telephone Companies Affected.* The decisions and rules adopted herein may have a significant effect on a substantial number of small telephone companies identified by the SBA. The United States Bureau of the Census (Census Bureau) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone service, as defined therein, for at least one year.[218] This number contains a variety of different categories of carriers, including local exchange carriers (LECs), IXCs, competitive access providers (CAPs), cellular carriers, mobile service carriers, operator service providers (OSPs), pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms are not IXCs, or may not qualify as small entities because they are not "independently owned and

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215 *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

216 15 U.S.C. § 632.

217 13 C.F.R. § 121.201.

218 *1992 Census* at Firm Size 1-123.

operated."[219] For example, a PCS provider that is affiliated with an IXC having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity IXCs that may be affected by this Order on Reconsideration.

97. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telecommunications companies other than radiotelephone (wireless) companies (Telephone Communications, Except Radiotelephone). The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[220] According to the SBA definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons.[221] Of the 2,321 non-radiotelephone companies listed by the Census Bureau, 2,295 companies (or, all but 26) were reported to have fewer than 1,000 employees. Thus, at least 2,295 non-radiotelephone companies might qualify as small incumbent LECs or small entities based on these employment statistics. However, because it seems certain that some of these carriers are not independently owned and operated, this figure necessarily overstates the actual number of non-radiotelephone companies that would qualify as "small business concerns" under the SBA definition. Moreover, although the rules adopted herein apply only to IXCs, this figure includes entities other than IXCs. Consequently, we estimate using this methodology that there are fewer than 2,295 small entity telephone communications companies (other than radiotelephone companies) that may be affected by the proposed decisions and rules and we seek comment on this conclusion.

98. *Non-LEC wireline carriers.* We next estimate the number of non-LEC wireline carriers, including IXCs, CAPs, OSPs, Pay Telephone Operators, and resellers that may be affected by these rules. Because neither the Commission nor the SBA has developed definitions for small entities specifically applicable to these wireline service types, the closest applicable definition under the SBA rules for all these service types is for telephone communications companies other than radiotelephone (wireless) companies. However, the TRS data provides an alternative source of information regarding the number of IXCs, CAPs, OSPs, Pay Telephone Operators, and resellers nationwide. According to our most recent data: 130 companies reported that they are engaged in the provision of interexchange services; 57 companies reported that they are engaged in the provision of competitive access services; 25 companies reported that they are engaged in the provision of operator services; 271 companies reported that they are engaged in the provision of pay telephone services; and 260 companies reported that they are engaged in the resale of telephone services and 30 reported being "other" toll carriers.[222] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time

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[219] 15 U.S.C. § 632(a)(1).

[220] *1992 Census* at Firm Size 1-123.

[221] 13 C.F.R. § 121.201 (SIC Code 4812).

[222] *TRS Worksheet* at Tbl. 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue).

to estimate with greater precision the number of IXCs, CAPs, OSPs, Pay Telephone Operators, and resellers that would qualify as small business concerns under SBA's definition. Firms filing *TRS Worksheets* are asked to select a single category that best describes their operation. As a result, some long distance carriers describe themselves as resellers, some as OSPs, some as "other," and some simply as IXCs. Consequently, we estimate that there are fewer than 130 small entity IXCs; 57 small entity CAPs; 25 small entity OSPs; 271 small entity pay telephone service providers; and 260 small entity providers of resale telephone service; and 30 "other" toll carriers that might be affected by the rules proposed in this Order on Reconsideration.

99. *Radiotelephone (Wireless) Carriers*. The SBA has developed a definition of small entities for Wireless (Radiotelephone) Carriers. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[223] According to the SBA definition, a small business radiotelephone company is one employing fewer than 1,500 persons.[224] The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable to estimate with greater precision the number of Radiotelephone Carriers and service providers that would qualify as small business concerns under SBA's definition. We are also unable to estimate how many of these entities are IXCs. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that might be affected by the rules proposed in this Order on Reconsideration.

100. *Cellular and Mobile Service Carriers*. In an effort to further refine our calculation of the number of radiotelephone companies affected by the rules adopted herein, we consider the categories of radiotelephone carriers, Cellular Service Carriers and Mobile Service Carriers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to Cellular Service Carriers and to Mobile Service Carriers. The closest applicable definition under SBA rules for both services is for telephone companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of Cellular Service Carriers and Mobile Service Carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 792 companies reported that they are engaged in the provision of cellular services and 138 companies reported that they are engaged in the provision of mobile services.[225] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of Cellular Service Carriers and Mobile Service Carriers that would qualify as small business concerns under SBA's definition. We are also unable to estimate how many of these entities are IXCs. Consequently, we estimate that there are fewer than 792 small

223 *1992 Census* at Firm Size 1-123.

224 13 C.F.R. § 121.201 (SIC Code 4812).

225 *TRS Worksheet* at Tbl. 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue).

entity Cellular Service Carriers and fewer than 138 small entity Mobile Service Carriers that might be affected by the rules proposed in this Order on Reconsideration.

101. *Broadband PCS Licensees.* In an effort to further refine our calculation of the number of radiotelephone companies affected by the rules adopted herein, we consider the category of radiotelephone carriers, Broadband PCS Licensees. The broadband PCS spectrum is divided into six frequency blocks designated A through F. As set forth in 47 C.F.R. § 24.720(b), the Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[226] Our definition of a "small entity" in the context of broadband PCS auctions has been approved by SBA.[227] The Commission has auctioned broadband PCS licenses in Blocks A through F. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 183 winning bidders that qualified as small entities in the Blocks C, D, E, and F auctions. We are unable to estimate how many of these entities are IXCs. Based on this information, we conclude that the number of broadband PCS licensees in Blocks C through F that might be affected by the rules proposed in this Order on Reconsideration includes, at most, the 183 winning bidders that qualified as small entities in the Blocks C through F broadband PCS auctions.

102. *SMR Licensees.* Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar years. This definition of a "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.[228] The rules adopted in this Order on Reconsideration may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many IXCs provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by IXCs that are small

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226 *See* Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order, FCC 96-278, WT Docket No. 96-59, para. 60 (1996), 61 FR 33859 (July 1, 1996).

227 *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report & Order, 9 FCC Rcd 5532, 5581-84 (1994).

228 *See* Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, 11 FCC Rcd 1463 (1995).

entities, which may be affected by the decisions and rules adopted in this Order on Reconsideration.

103. The Commission completed its auctions for geographic area licenses in the 900 MHz SMR band on April 15, 1996. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. We are unable to estimate how many of these entities are IXCs. Based on this information, we conclude that the number of geographic area SMR licensees that may be affected by the rules adopted in this Order on Reconsideration includes, at most, these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses, or how many of these entities will be IXCs. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this FRFA, that all of the licenses may be awarded to IXCs that are small entities which, thus, may be affected by the decisions in this Order on Reconsideration.

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

104. The Commission, by this Order on Reconsideration, (1) directs carriers that use LOAs to fully translate their LOAs into the same language(s) as their associated promotional materials, oral descriptions and instructions; (2) rules that it will modify Section 64.1150(e)(4) to incorporate the terms "interLATA" and "intraLATA," as well as "interstate" and "intrastate" in the statutory language; and (3) clarifies that IXCs must employ only one of the four options in Section 64.1100(a) to verify subscriber change orders generated by telemarketing. The Commission has determined that compliance with these provisions may require carriers to modify their marketing and advertising materials.

5. Steps Taken to Minimize the Significant Economic Impact of This Memorandum Opinion and Order on Small Entities and Small Incumbent LECs, Including the Significant Alternatives Considered and Rejected

105. After consideration of potential alternatives, the Commission determined that the requirement that carriers translate LOAs into the same language as their associated promotional materials or oral descriptions and instructions may have a significant impact on a substantial number of small businesses as defined by section 601(3) of the RFA. Specifically, small entities may feel some economic impact in additional printing costs due to the new requirement under Section 64.1150(g). Nevertheless, the overwhelming majority of commenters supported our adoption of this rule, without providing specific comment regarding the economic impact to small entities or alternatives to lessen the economic impact. Since IXCs are already required by statute to comply with the Commission's PIC-change verification procedures, this new requirement regarding the use of LOAs would not have a significant economic impact on those telecommunications carriers that employ other verification

options. Moreover, because the rules will not take effect for one hundred fifty (150) days, we believe all IXCs, large and small, will have sufficient advance time to revise and print new LOAs, if necessary. By enacting this rule, the Commission is only requiring that IXCs using LOAs ensure that the language of their promotional material matches that which authorizes a change in subscriber service. Even if the economic impact is significant to some small entities, the benefit of protecting non-English speaking consumers from being mislead by language that they may not fully understand is consistent with the stated objectives, and thus justifies any increase in printing costs.

106. The Commission determined that the rule incorporating the terms "interLATA and intraLATA" as well as "interstate and intrastate" contained in this Order on Reconsideration will not impose any additional requirements on IXCs. These terms were incorporated only to remove possible confusion or uncertainty as to the scope of our rules as pertaining to all jurisdictions. Likewise, the rule clarifying that IXCs must employ only one verification option will not impose any additional requirements on IXCs. Therefore, adoption of these rules should have little or no economic impact on small entities. Because we conclude that adoption of these rules will cause little or no economic impact on small entities, we have identified no significant alternatives, nor were any offered by parties commenting on the IRFA.

6. Report to Congress

107. The Commission shall send a copy of this FRFA, along with this Memorandum Opinion and Order on Reconsideration, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.

D. Initial Paperwork Reduction Act of 1995 Analysis

108. This Further NPRM contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this Further NPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this Further NPRM; OMB comments are due 60 days from date of publication of this Further NPRM 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.

E. Comment Filing Procedures

109. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before **[30 days from Federal Register publication]**, and reply comments on or before **[45 days from Federal Register publication]**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and eleven copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with a copy to Cathy Seidel of the Common Carrier Bureau, 2025 M Street, N.W., Washington, D.C. 20554. In addition, parties should file two copies of any such pleadings with the Formal Complaints Branch, Enforcement Division, Common Carrier Bureau, Mail Stop 1600A1, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, N.W., Washington, D.C. 20037.

110. Parties may also file informal comments or an exact copy of formal comments electronically via the Internet to http://gullfoss.fcc.gov/cgi-bin/comment/comment.hts, or via e-mail to slamming@comments.fcc.gov. Only one copy of electronically-filed comments must be submitted. Parties must put the docket number of this proceeding in the subject line if comments are sent via e-mail (see the caption at the beginning of this Notice), or in the body of the text if by Internet. Parties must note whether an electronic submission is an exact copy of formal comments on the subject line. Parties also must include their full name and Postal Service mailing address in the electronic submission.

111. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to the formal filing requirements addressed above. Parties submitting diskettes should submit them along with their formal filings to the Office of the Secretary, and to Cathy Seidel of the Common Carrier Bureau, 2025 M Street, N.W., Room 6120, Washington, D.C. 20554. Such submission should be on 3.5 inch diskettes formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskettes should be submitted in "read only" mode. The diskettes should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments), Docket or Rule Making number, and date of submission. The diskette should be accompanied by a cover letter. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. 20554. Electronically filed comments will be placed on the Commission's Internet server.

112. Written comments by the public on the proposed and/or modified information collections are due **[30 days]** from Federal Register publication. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications

Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

VI. CONCLUSION

113. We seek comment on the foregoing issues regarding implementation of Section 258 of the 1996 Act and PC-change verification procedures to deter slamming as discussed herein. Any party disagreeing with our tentative conclusions should explain its position with specificity in terms of costs and benefits. We also reaffirm, with minor modifications, our verification procedures adopted in the *1995 Report and Order*.

VII. ORDERING CLAUSES

114. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4, 201-205, 215, 218, 220 and 258 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, 220, and 258, the Petitions for Reconsideration of Allnet Communication Services, Inc., AT&T Corporation, Frontier Communications International, Inc., MCI Telecommunications Corporation, National Association of Attorneys General, and Sprint Communications Company ARE GRANTED to the extent described herein and ARE DENIED in all other respects.

115. IT IS FURTHER ORDERED that the Petition for Rule Making filed by MCI Telecommunications Corporation on March 18, 1997, RM-9085, and all responsive pleadings ARE INCORPORATED and made a part of the record of the captioned proceeding.

116. IT IS FURTHER ORDERED that the Petition for Clarification filed by the Telecommunications Resellers Association, on December 11, 1995, in File No. ENF-94-05, and all responsive pleadings, ARE INCORPORATED and made a part of the record of the captioned proceeding.

117. IT IS FURTHER ORDERED that the Petition for Clarification of the Telecommunications Resellers Association IS GRANTED to the extent described herein and IS DENIED in all other respects.

118. IT IS FURTHER ORDERED that 47 C.F.R. Part 64 is amended as set forth in the Appendix B.

119. IT IS FURTHER ORDERED that the policies, rules and requirements set forth in this MEMORANDUM OPINION AND ORDER are effective one hundred fifty (150) days after publication in the Federal Register, except for the collections of information which are contingent upon approval by the Office of Management and Budget.

120. IT IS FURTHER ORDERED that a FURTHER NOTICE OF PROPOSED RULE MAKING IS ISSUED, proposing the amendment of 47 C.F.R. Part 64 as set forth in the Appendix

C.

121. IT IS FURTHER ORDERED that the Chief of the Common Carrier Bureau is delegated authority to require the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding.

122. IT IS FURTHER ORDERED that the Secretary shall send a copy of this FURTHER NOTICE OF PROPOSED RULE MAKING, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A

PARTIES FILING PETITIONS FOR RECONSIDERATION AND RESPONSIVE PLEADINGS CC DOCKET NO. 94-129

Petitioners

Allnet Communication Services, Inc. (Allnet)
AT&T Corporation (AT&T)
Frontier Communications International, Inc. (Frontier)
MCI Telecommunications Corporation (MCI)
National Association of Attorneys General (NAAG)
Sprint Communications Company (Sprint)

Parties Filing Responsive Pleadings

Airtouch Communications (Airtouch)
AT&T Corporation
Competitive Telecommunications Association (CompTel)
General Communication, Inc. (GCI)
GTE Service Corporation (GTE)
MCI Telecommunications Corporation
Southwestern Bell Telephone Company (SWBT)
Sprint Communications Company
Telecommunications Resellers Association (TRA)

PARTIES FILING PETITIONS FOR CLARIFICATION AND RESPONSIVE PLEADINGS RELATING TO FILE NO. ENF-94-05

Petitioners

Telecommunications Resellers Association

Parties Filing Responsive Pleadings

AT&T
WATS International Corporation (WIC)
Telecommunications Resellers Association

PARTIES FILING PETITIONS FOR RULEMAKING AND RESPONSIVE PLEADINGS

Petitioners

MCI Telecommunications Corporation

APPENDIX B

RULES AMENDED

Part 64 of the Commission's Rules and Regulations, Chapter I of Title 47 of the Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 228, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 226, 228, unless otherwise noted.

2. Part 64, Subpart K, is amended by amending Section 64.1100(a) to read as follows:

§ 64.1100 Verification of orders for long distance service generated by telemarketing.

*****

(a) The IXC has obtained the customer's written authorization in a form that meets the requirements of § 64.1150; or

*****

3. Part 64, Subpart K, is amended by amending Section 64.1150(e)(4) to read as follows:

§ 64.1150 Letter of Agency Form and Content

*****

(4) That the subscriber understands that only one interexchange carrier may be designated as the subscriber's interstate or interLATA primary interexchange carrier for any one telephone number. To the extent that a jurisdiction allows the selection of additional primary interexchange carriers (e.g., for intrastate, intraLATA or international calling), the letter of agency must contain separate statements regarding those choices. Any carrier designated as a primary interexchange carrier must be the carrier directly setting the rates for the subscriber. One interexchange carrier can be both a subscriber's interstate or interLATA primary interexchange carrier and a subscriber's intrastate or intraLATA primary interexchange carrier; and

*****

4. Part 64, Subpart K, is amended by amending Section 64.1150(g) to read as follows:

§ 64.1150 Letter of Agency Form and Content

*****

(g) If any portion of a letter of agency is translated into another language, then all portions of the letter of agency must be translated into that language. Every letter of agency must be translated into the same language as any promotional materials, oral descriptions or instructions provided with the letter of agency.

*****

APPENDIX C

PROPOSED RULE CHANGES

Part 64 of the Commission's Rules and Regulations, Chapter I of Title 47 of the Code of Federal Regulations, is proposed to be amended as follows:

1. The authority citation for Part 64 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 228, 258, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 226, 228, 258, unless otherwise noted.

2. The title of Part 64, Subpart K, is proposed to be amended to read as follows:

Subpart K - Verification of Changes in Telecommunications Service

3. Part 64, Subpart K, is further proposed to be amended by modifying Section 64.1100 to read as follows:

§64.1100 Verification of orders for telecommunications service generated by telemarketing.

No telecommunications carrier shall submit a primary carrier change order generated by telemarketing unless and until the order has first been confirmed in accordance with the following procedures:

(a) The telecommunications carrier has obtained the subscriber's written authorization in a form that meets the requirements of § 64.1150; or

(b) The telecommunications carrier has obtained the subscriber's electronic authorization, placed from the telephone number(s) on which the primary carrier is to be changed, to submit the order that confirms the information required in paragraph (a) of this section to confirm the authorization. Telecommunications carriers electing to confirm sales electronically shall establish one or more toll-free telephone numbers exclusively for that purpose. Calls to the number(s) will connect a subscriber to a voice response unit, or similar mechanism that records the required information regarding the primary carrier change, including automatically recording the originating automatic numbering identification; or

(c) An appropriately qualified independent third party operating in a location physically separate from the telemarketing representative has obtained the subscriber's oral authorization to submit the primary carrier change order that confirms and includes appropriate verification data (e.g., the subscriber's date of birth or social security number); or

(d) Within three business days of the subscriber's request for a primary carrier change, the telecommunications carrier must send the subscriber an information package by first class mail containing at least the following information concerning the requested change:

(1) An explanation that the information is being sent to confirm a telemarketing order placed by the subscriber within the previous week;
(2) The name of the subscriber's current carrier;
(3) The name of the newly-requested carrier;
(4) A description of any terms, conditions, or charges that will be incurred;
(5) The name of the person ordering the change;
(6) The name, address, and telephone number of both the subscriber and the soliciting carrier;
(7) A postpaid postcard which the subscriber can use to deny, cancel or confirm a service order;
(8) A clear statement that if the subscriber does not return the postcard the subscriber's long distance service will be switched within 14 days after the date the information package was mailed by [name of soliciting carrier];
(9) The name, address, and telephone number of a contact point at the Commission for consumer complaints; and
(10) Carriers must wait 14 days after the form is mailed to subscribers before submitting their primary carrier change orders. If subscribers have cancelled their orders during the waiting period, carriers cannot submit the subscribers' orders.

4. Part 64, Subpart K, is further proposed to be amended by modifying Section 64.1150 to read as follows:

§64.1150 Letter of agency form and content.

(a) A telecommunications carrier relying on a written authorization for a primary carrier change must obtain a letter of agency as specified in this section. Any letter of agency that does not conform with this section is invalid.

(b) The letter of agency shall be a separate document (or an easily separable document) containing only the authorizing language described in paragraph (e) of this section having the sole purpose of authorizing a telecommunications carrier to initiate a primary carrier change. The letter of agency must be signed and dated by the subscriber to the telephone line(s) requesting the primary carrier change.

(c) The letter of agency shall not be combined on the same document with inducements of any kind.

(d) Notwithstanding paragraphs (b) and (c) of this section, the letter of agency may be combined with checks that contain only the required letter of agency language as prescribed in paragraph (e) of this section and the necessary information to make the check a negotiable instrument. The letter of agency check shall not contain any promotional language or material. The letter of agency check shall contain in easily readable, bold-face type on the front of the check, a notice that the consumer is authorizing a primary carrier change by signing the check. The letter of agency language shall be placed near the signature line on the back of the check.

(e) At a minimum, the letter of agency must be printed with a type of sufficient size and readable type to be clearly legible and must contain clear and unambiguous language that confirms:

(1) The subscriber's billing name and address and each telephone number to be covered by the primary carrier change order;

(2) The decision to change the primary carrier from the current telecommunications carrier to the soliciting telecommunications carrier;

(3) That the subscriber designates [name of submitting carrier] to act as the subscriber's agent for the primary carrier change;

(4) That the subscriber understands that only one telecommunications carrier may be designated as the subscriber's interstate or interLATA primary interexchange carrier for any one telephone number. To the extent that a jurisdiction allows the selection of additional primary interexchange carriers (e.g., for intrastate, intraLATA or international calling), the letter of agency must contain separate statements regarding those choices. One telecommunications carrier can be both a subscriber's interstate or interLATA primary interexchange carrier and a subscriber's intrastate or intraLATA primary interexchange carrier; and

(5) That the subscriber understands that any primary carrier selection the subscriber chooses may involve a charge to the subscriber for changing the subscriber's primary carrier.

(f) Any carrier designated in a letter of agency as a primary carrier must be the carrier directly setting the rates for the subscriber.

(g) Letters of agency shall not suggest or require that a subscriber take some action in order to retain the subscriber's current telecommunications carrier.

(h) If any portion of a letter of agency is translated into another language then all portions of the letter of agency must be translated into that language. Every letter of agency must be translated into the same language as any promotional materials, oral descriptions or instructions provided with the letter of agency.

5. Part 64, Subpart K, is proposed to be amended by adding Sections 64.1160 and 64.1170 to read as follows:

§ 64.1160 Changes in Subscriber Carrier Selections

(a) Prohibition. No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telecommunications service except in accordance with the verification procedures prescribed in this Subpart. Nothing in this section shall preclude any State commission from enforcing these procedures with respect to intrastate services.

(1) Where the submitting carrier submits a verification that fails to comply with § 64.1160(a), the executing carrier will be liable where there has been some wrongdoing or malfeasance on the part of the executing carrier; otherwise the submitting carrier will be solely liable for violating § 64.1160(a).

(2) Where the submitting carrier has complied with § 64.1160(a), but the executing carrier executes the change inconsistent with the subscriber carrier change selection, the executing carrier will be solely liable for violating § 64.1160(a).

(3) When a dispute arises between the submitting and executing carriers regarding liability, the carriers must pursue private settlement negotiations prior to requesting that the Commission institute

proceedings to resolve any such dispute.

(b) Carrier Liability for Charges. Any telecommunications carrier that violates the verification procedures prescribed by the Commission and that collects charges for telecommunications service from a subscriber shall be liable to the subscriber's properly authorized carrier in an amount equal to all charges paid by such subscriber after such violation. The remedies provided by this subsection are in addition to any other remedies available by law.

§ 64.1170 Reimbursement Procedures

(a) Upon receiving notification from the subscriber that the subscriber's carrier selection was changed without authorization, the properly authorized carrier must, within ten days, request from the unauthorized carrier the following:

(1) An amount equal to the charges paid by the subscriber to the unauthorized carrier; and,

(2) An amount equal to the value of any premiums to which the subscriber would have been entitled if the subscriber's selection had not been changed.

Where a subscriber notifies the unauthorized carrier, rather than the properly authorized carrier, of an unauthorized subscriber carrier selection change, the unauthorized carrier must, within ten days, notify the properly authorized carrier.

(b) Upon notification of a violation of § 64.1160(a), the unauthorized carrier must remit to the affected subscriber's properly authorized carrier the total charges collected from the subscriber and the value of any premiums to which the subscriber would have been entitled if the subscriber's selection had not been changed.

(c) Restoration of Premium Programs. Upon receiving from the unauthorized carrier the value of premiums to which the subscriber would have been entitled if the subscriber's selection had not been changed, the properly authorized carrier must provide or restore to the subscriber any premiums to which the subscriber would have been entitled if the subscriber's selection had not been changed. Where a particular premium cannot be restored, the properly authorized carrier may substitute an equivalent premium or dollar amount as reasonably determined by the properly authorized carrier.

(d) Dispute Resolution. Carriers must pursue private settlement negotiations regarding the transfer of charges and the value of lost premiums from the unauthorized carrier to the properly authorized carrier prior to requesting that the Commission institute proceedings to resolve any dispute regarding such transfer of charges and the value of lost premiums.