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## COMMENTS

# HANGING UP ON CONSUMERS: WHY THE FCC CANNOT STOP SLAMMING IN THE NEW TELECOMMUNICATIONS MARKET

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## INTRODUCTION

The Telecommunications Act of 1996<sup>1</sup> ("1996 Act") sets forth a na-

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1. Pub. L. No. 104-104, 1996 U.S.C.A.N. (110 Stat.) 56 (to be codified in scattered sections of 15, 18, and 47 U.S.C.) [hereinafter 1996 Act]. The 1996 Act represents the most significant change in U.S. communications law since the passage of the Communications Act of 1934, which established the FCC and provided for regulation of interstate radio and telephone communications. See MICHEL CARPENTIER, TELECOMMUNICATIONS IN TRANSITION 4-5 (C.P. Skrimshire trans., 1992). The major goal of the 1996 Act is to create a competitive, deregulated environment for all forms of telecommunications, including local and long distance phone service, cable television, broadcasting, and Internet services. See Dan Carney, *Congress Fires Its First Shot In Information Revolution*, CONG. Q., Feb. 3, 1996, at 289. Some of the most significant changes under the 1996 Act occur in the area of local telephone service. First, the 1996 Act preempts all state and local laws that bar competition in local phone services. See 47 U.S.C.A. § 253 (West Supp. 1997). Second, the measure requires all local phone companies to allow the "resale" of their facilities through the process of interconnection, gives competitors the rights to use the incumbent local phone company's pole and conduits to set up transmission lines, and requires that incumbent local phone companies allow customers to keep their local phone numbers if they change to a competitor's service. See *id.* § 251. Third, the 1996 Act mandates that local telephone companies offer a minimum package of local telephone services at reasonable prices to ensure that all Americans have access to phones. The "universal service" requirement forces the FCC to set standards for the type and level of services offered by all local telephone companies in the United States. See *id.* § 254.

The 1996 Act also changes the way that long distance telephone service is offered in the United States. Under the legislation, regional Bell Operating Companies ("BOC"), which are prohibited from providing long distance service under terms of the AT&T consent decree, have the opportunity to provide local service if they can prove to the FCC that they have opened their local markets fully to competition. See *id.* § 271.

The 1996 Act also deregulates most of the cable industry, except for the basic level of services that includes local and educational programming. See *id.* § 612. Additionally, the Act allows BOCs to offer cable services through their phone transmission lines, permits telephone companies to purchase cable systems in rural areas, and stipulates that local telephone companies may own up to ten percent of cable systems in urban areas. See *id.* § 572.

tional policy "to provide for a pro-competitive, de-regulatory national policy framework . . . by opening all telecommunications markets to competition . . . ." <sup>2</sup> One of the main goals of the 1996 Act is to increase competition in local phone markets in the same manner that the long-distance telephone market expanded following the breakup of the American Telegraph and Telephone Company ("AT&T"). <sup>3</sup> As was the case in developing effective competition in the long-distance market, the Federal Communications Commission ("FCC") asserts that "moving customers from one local carrier to another rapidly will be essential to fair local competition."<sup>4</sup>

Although the increased competition in long-distance telephone service has been largely positive,<sup>5</sup> it also has spawned a practice known as "slamming,"<sup>6</sup> where a long distance telephone company

2. See H.R. CONF. REP. NO. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124 (statement of Joint Managers).

3. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) [hereinafter *Modification of Final Judgment*]. The *Modification of Final Judgment* was the result of a consent decree between the Department of Justice and AT&T. Under its terms, AT&T retained its interest in long distance services and combined its BOCs, which provided local service, into seven regional holding companies. Each holding company controlled local phone service in its geographic area. The consent decree also allowed AT&T to retain control over Western Electric, which developed various telecommunications devices, and also gave AT&T permission to enter the computer market. See CARPENTIER, *supra* note 1, at 19.

4. See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, F.C.C. 96-325, *available in* 1996 WL 452885, at \*1 (Aug. 8, 1996) [hereinafter Interconnection Order]. The Interconnection Order discusses and implements national regulations for competition in local telephone service. Under the 1996 Act, potential entrants into the local telephone market have three options: (1) they can construct new networks to provide local service; (2) they can use "unbundled elements" of the incumbent local phone company's network, which allows competitors to buy only the portions of the local network that they need; or (3) they can buy access to the incumbent phone company's "local loops," which provide service from the phone company switching station to the customer's home. See *id.* at \*10-12. Since the easiest way for a competitor to provide service in a local telephone market is through the resale of local loops, the Interconnection Order seeks to establish national pricing guidelines and regulations requiring local phone companies to negotiate in good faith with potential competitors for access to their networks. See *id.* at \*12.

Additionally, the Interconnection Order also addresses many peripheral issues concerning the rules requiring the resale of the facilities of incumbent local phone companies and provisions for competitors to build new networks. These issues include access to rights of way, collection of resources, and procedures for dialing parity, which allows a customer to switch from one local phone service provider to another without having to switch phone numbers. See *id.* at \*13.

5. See *infra* note 32 and accompanying text (noting AT&T's drop in market share following the MFJ, and the rise of other competitors in the long-distance market).

6. See *generally* Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, 10 F.C.C.R. 9560 n.1 (1995) [hereinafter 1995 LOA Order] (report and order). The FCC officially defines "slamming" as "the unauthorized conversion of a customer's interexchange carrier by another interexchange carrier, interexchange resale carrier, or a sub-contracted telemarketer." *Cherry Communications, Inc., Consent Decree*, 9 F.C.C.R. 2086, 2087 no.10 (1994) [hereinafter *Cherry Consent Decree*]. Although the exact origin of the term 'slamming' is unclear, it appears that AT&T coined the term as a way of describing the unauthorized switching of its customers. MCI described the illegal switches as "SWOPs" (switched without permission), but the term never became popular. See *American Telephone and Tele-*

changes a customer's service provider without authorization.<sup>7</sup> Since the origin of effective long distance telephone service competition in 1984, the FCC has tried a number of strategies to limit the impact of slamming, most of which have met with limited success.<sup>8</sup> In just the last two years, over a million consumers in the U.S. have fallen victim to incidents of slamming.<sup>9</sup> The recent dramatic increase in slamming poses a threat to the continued development of the seventy-billion-dollar-a-year long distance telephone industry<sup>10</sup> and it threatens to cripple the development of emerging competition in the local telephone market. New measures must be taken to protect consumers against this practice.<sup>11</sup>

This Comment examines the effects of slamming on the competitive telecommunications market and explores the effect that provisions in the 1996 Act may have in deterring this anti-competitive activity. Part I traces the origin of slamming and reviews the FCC's initial rules to promote competition in the long distance market fol-

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graph Co., Petition for Rulemaking, 6 F.C.C.R. 1689, 1696 n.5 (1991) [hereinafter AT&T Petition] (notice of proposed rulemaking). "Slamming is a pervasive consumer problem that threatens to undermine the Commission's goal of fostering competition in telecommunications markets while protecting consumers from unfair or abuse practices by carriers." RCI Long Distance, Inc., 11 F.C.C.R. 8090, 8104-05 (1996) (memorandum opinion and order).

7. The problem of slamming, however, is no longer limited to just telecommunications services. With the advent of effective competition in other regulated utilities, such as gas and electricity, there is potential for the unauthorized conversion of service in those areas as well. See Dan Richard & Melissa Lavinson, *Something for Everyone: The Politics of California's New Law on Electric Restructuring*, 134 No. 21 PUB. UTIL. FORT. 37, 41 (explaining that California has already adopted rules for the newly deregulated electric power industry that require confirmation from a consumer, in writing or from a third party, before switching their electric power supplier).

8. See FCC Adopts 'Slamming' Prevention Rules, FCC WEEK, Dec. 16, 1991, available in 1991 WL 2617762, at \*1 (explaining that the FCC adopted methods of verification). In November 1991, the FCC's Common Carrier Bureau's Enforcement Division received 99 slamming complaints. See *id.* By June 1995, the Enforcement Division was receiving more than 700 slamming complaints a month, despite a 1992 FCC Order imposing stricter regulations on marketing and switching procedures used by long distance companies. "It is the No. 1 complaint category at the commission," stated Kathleen Wallman, former chief of the FCC's Common Carrier Bureau. See *FCC Plans New Rules for Phone Service Promos*, L.A. TIMES, June 13, 1995, at D2. Some state public utility commissions have received even more complaints. The Nevada public utility commission, for instance, now receives more than 7000 slamming complaints a month. See *The Switch is on at Phone Companies*, CHI. TRIB., Aug. 21, 1995, at 6 (describing the volume of slamming complaints).

9. See Michael G. Wagner, *Long-Distance Phone Customers Being "Slammed"*, L.A. TIMES, Sept. 1, 1996, at A1 [hereinafter Wagner, *Long-Distance Phone Customers*] (explaining that unauthorized switching of long-distance service often escapes consumers for months).

10. See *id.* As of September 1996, there were approximately 860 long distance companies licensed to provide service in the United States. In fact, all an entrepreneur needs is \$25,000 and a business plan to obtain a license. "We've made it ridiculously easy to get a license. The joke around here is that all you need to do is send in two cereal box tops and 50 cents," comments Larry McNeely, chief investigator for the California Public Utilities Commission. See *id.*

11. See Catherine Arnst, *Hold the Phone—It's a Marketing Free-For-All*, BUS. WK., Feb. 19, 1996, at 32 [hereinafter Arnst, *Hold the Phone*] (discussing marketing strategies of local telephone companies).

lowing the AT&T divestiture. Part II examines some of the more recent actions taken by the FCC to deter slamming. Part III examines key provisions of the 1996 Act that address the issue of slamming. Part IV describes why the 1996 Act fails to adequately protect consumers. Finally, Part V details legislative changes that Congress should enact to protect a competitive telecommunications market.

## I. BACKGROUND: THE ORIGINS OF SLAMMING FOLLOWING THE AT&T DIVESTITURE

### A. *The AT&T Consent Decree and Bell System Breakup*

The near monopoly over the U.S. telecommunications industry, which AT&T had possessed since the invention of the telephone by Alexander Graham Bell in 1876, came to an end on January 1, 1984. A consent decree between the Department of Justice and AT&T<sup>12</sup> stated that AT&T was to relinquish all of its interests in the twenty-two Bell Operating Companies ("BOC") that provided local telephone service.<sup>13</sup> The BOCs were spun off into seven separate regional holding companies that would then have responsibility for providing local service in their areas.<sup>14</sup> The consent decree also mandated that BOCs provide access to other long distance services that were "equal in type, quality, and price" to the access provided to AT&T.<sup>15</sup> The FCC implemented these equal access provisions through a process of pre-subscription, which allowed each telephone customer to choose their primary interexchange carrier from among a number of competing long-distance carriers.<sup>16</sup>

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12. See CARPENTIER, *supra* note 1, at 1-2. In 1969, the FCC began to allow companies other than AT&T to set up their own interstate common carrier networks, following the approval of an application by Microwave Communications, Inc. ("MCI") to provide service between Chicago and St. Louis. Because consumers had to dial access codes to reach a carrier other than AT&T, however, the use of these "other common carriers" ("OCC") was impaired. As a result, by 1983 OCCs only represented about eight percent of the long distance market. See *id.* at 13.

13. See *id.* at 19.

14. See *id.*

15. Investigation of Access and Divestiture Related Tariffs, 101 F.C.C.2d 911 (1985) [hereinafter Allocation Order]. "Equal access allows end users to access facilities of a designated interexchange carrier by dialing '1' only." *Id.* Customers can also gain access to other long distance service providers by dialing "a five digit access code" (10XXX), which will bypass that customer's primary long-distance carrier for the duration of that call. See *id.*

16. See *id.* The BOCs were charged with implementing provisions for equal access, where "technically feasible," by September 1986. See *id.*

*B. Initial FCC Rules Regarding Presubscription of Customers' Long Distance Interexchange Service*

The FCC's first presubscription plan, which is generally referred to as the "Allocation Order,"<sup>17</sup> required all long-distance carriers to have a signed letter of agency ("LOA") from the customer before they were allowed to submit a notice to the consumer's local telephone company authorizing the conversion of long distance service to a new provider.<sup>18</sup> The Allocation Order engendered a great deal of criticism, however, from many of the new long-distance carriers seeking to enter the newly competitive long distance market.<sup>19</sup> The new entrants claimed that requiring signed LOAs before initiating a change in service would severely restrict the development of competition in the long distance market. In their view, many consumers would forget to return the signed LOA after orally agreeing to a change in long distance providers.<sup>20</sup>

After intense lobbying by new long-distance carriers seeking an easier method of entry into the long distance market, the FCC modified its rules in the "Waiver Order"<sup>21</sup> by stating that long-distance car-

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17. *See id.* at 935. The Allocation Order was designed to enhance competition in the long distance telephone market by establishing certain procedures for local phone companies to follow when conducting their initial "presubscription" arrangements following the implementation of equal access. Under the presubscription process, customers select a primary long-distance carrier that will carry all dial "1" only long distance calls. Under the Modified Final Judgment ("MFJ"), local phone companies were allowed to continue to route the calls of customers who did not select an alternative long-distance carrier to AT&T. *See id.* at 911. The FCC generally viewed this "default" system as anti-competitive because many consumers failed to return their "presubscription" ballots. Instead, the FCC chose to mandate a plan adopted by Northwestern Bell in which all consumers who did not return presubscription ballots are assigned to long-distance carriers based on the same ratio as those who did return ballots. This plan was designed to reward long-distance carriers who aggressively marketed their services by allocating larger shares of the "default" customers who did not return presubscription agreements. *See id.* at 912. The FCC also considered adopting a plan under which the long-distance carriers would share all default customers equally, but later rejected that plan, stating that "[t]here is no rationale for allowing long-distance carriers a larger portion of customers than what they acquired through their own marketing techniques." *Id.* at 922.

18. *See id.* at 929. The FCC defines a letter of agency as "a document, signed by the customer, which states that a particular carrier has been selected as that customer's 'primary interexchange carrier.'" 1995 LOA Order, *supra* note 7, at 9560. The industry also refers to "letters of agency" as "letters of authorization," "orders for long distance service," and "customer commitments." *See Policies and Rules Concerning Unauthorized Changes of Customers' Long Distance Carriers*, 9 F.C.C.R. 6885 n.4 (1994) [hereinafter 1995 LOA NPRM] (notice of proposed rule making).

19. *See Investigation of Access and Divestiture Related Tariffs*, 101 F.C.C.2d 935, 936 (1985) [hereinafter Waiver Order] (observing that the volume of long-distance carriers filing for waiver of the Allocation Order illustrated the widespread criticism).

20. *See id.* at 938 (discussing AT&T's belief that customers' oral assurance would satisfy the requirement that long-distance carriers obtain signed LOAs).

21. *See id.* at 935. In the FCC's Waiver Order, several local phone companies and long-distance carriers requested clarification of FCC rules regarding the selection of primary interexchange carriers, and whether an long-distance carrier must actually possess a signed LOA before they are authorized to submit lists of phone numbers for conversion to the local phone compa-

riers could change a consumer's primary long distance connection to their service as long as they had "instituted steps to obtain signed LOAs."<sup>22</sup> Following the FCC's relaxation of the primary interexchange carrier ("PIC") change rules in the Waiver Order, the Illinois Citizens Utility Board ("Illinois CUB")<sup>23</sup> challenged the FCC's conclusions, claiming that they did not provide sufficient protection to consumers against unauthorized PIC conversions.<sup>24</sup> The FCC denied the Board's challenge, claiming that the Waiver Order procedures protected consumers by ensuring that their local phone company would not charge them for any PIC change that the consumers failed

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nies. AT&T, in particular, requested that the FCC allow long-distance carriers to convert long distance service as long as the long-distance carrier has taken steps to obtain a signed LOA as specified in the Allocation Order. *See id.* at 938. In its discussion of the merits of such a change, the FCC restated its original rationale from the Allocation Order: "[t]he IXC [long-distance carrier] which has such signed letters of agency is protected from the effects of customer misunderstandings and from potential responsibility for unauthorized charges. The local exchange carrier ("LEC") has available for review an easily authenticated document in resolving consumer disputes." *Id.* In reaching its decision that long-distance carriers can convert consumer's long distance service as long as they "have instituted steps designed to obtain signed letters of agency or confirmations of choice from the end user," the FCC appears to ignore all of its earlier analysis. *See id.* at 942. If the "origins" of slamming are traced to any one FCC decision, the Waiver Order is the prime candidate.

22. *See id.* at 942.

23. *See* Illinois Citizens Utility Board Petition for Rule Making, 2 F.C.C.R. 1726, 1730 n.3 (1987) (memorandum opinion and order). "The Illinois Citizens Utility Board is an independent, nonprofit consumer group established by the State of Illinois in 1983 to represent the interests of Illinois residential and small business consumers with regard to telephone and other utility matters. It claims 170,000 members." *Id.*

24. *See id.* at 1726-27. In its petition, the Board raises several issues involving possible consumer confusion in light of the FCC's previous decisions in the Allocation and Waiver Orders. First, it alleges that consumers were being unfairly charged for changes in their presubscribed carrier when they submitted their long-distance carrier ballots. *See id.* at 1726. Second, it argues that many consumers had their primary interexchange carriers changed when they contacted various long-distance carriers for information on their services and not for the express purpose of making a change. *See id.* Its final contention was that long-distance carriers were using aggressive telemarketing practices to entice consumers to change carriers and this was causing confusion among many consumers. *See id.* CUB contends further that the FCC exacerbated this confusion by relaxing the requirement in the Waiver Order that long-distance carriers actually possess an LOA before submitting primary interexchange carrier changes to local phone companies. *See id.* at 1726-27. Letters in support of the Illinois Citizens Utility Board were submitted to the FCC by Consumers Union, Illinois Governor's Office of Consumer Services, Illinois Office of Consumers' Counsel, Kansas Corporation Commission, Labor Coalition of Public Utilities, Missouri Public Interest Research Group, New Mexico State Corporation Commission, New York State Attorney General, North Dakota Public Service Commission, Ohio Office of Consumer Counsel, Washington Utilities and Transportation Commission, and the Wyoming Public Service Commission. *See id.* at app. A. In the Illinois Citizens Utility Board Order, the FCC responded to the first contention of the Board and its supporters by stating that, "petitioners concerns appear to be based upon a misinterpretation of prior orders relating to changes charges." *Id.* at 1729. With regard to the second and third contention of the Board, the FCC stated that it felt that informing consumers of their rights regarding billing disputes as a result of unauthorized changes in service was a matter for state "public service commissions and offices of consumer counsel," and that the Illinois Board's proposal for a billing insert informing consumers of their rights "appears unnecessary and may be ineffective." *Id.*

to authorize by a signed LOA.<sup>25</sup> The FCC did not, however, discuss consumer inconvenience due to unauthorized changes, excess charges on the part of the slamming long-distance carrier, or the expense incurred by the BOCs and other independent local telephone companies that were often forced to absorb the expense of switching slammed consumers back to their original carrier.<sup>26</sup>

## II. THE RISE OF SLAMMING COMPLAINTS AND FCC EFFORTS TO STOP THE PRACTICE

After the release of the Waiver Order and the denial of the Illinois CUB Petition, slamming complaints began to increase dramatically, affecting nearly every segment of the market.<sup>27</sup> Increasing numbers of consumers began to complain that unscrupulous telemarketers were switching the primary interexchange carriers without even attempting to obtain a signed LOA, as FCC rules required.<sup>28</sup> The long-distance carriers also felt the negative effects of slamming, losing many of their long distance customers as a result of unfair competition.<sup>29</sup> Additionally, BOCs and other local telephone service providers faced additional burdens as a result of the dramatic increases in PIC changes submitted.<sup>30</sup>

### A. *The AT&T Petition to Revise PIC Change Rules*

In January 1990, this situation came to a head when AT&T filed a petition with the FCC to revise the PIC change rules.<sup>31</sup> AT&T contended that the FCC rules had resulted in a large increase in slamming incidents among its customers.<sup>32</sup> AT&T also filed suit against

25. *See id.*

26. *See, e.g.,* Policies and Rules Concerning Changing Long Distance Carriers, 7 F.C.C.R. 1038 (1992) [hereinafter PIC Verification Order] (deciding only on safeguards to protect consumers from unauthorized switching); 1995 LOA Order, *supra* note 7, at 9560 (stating that the Order is in response to the large number of consumer complaints related to unauthorized changes of long distance services).

27. *See* AT&T Petition, *supra* note 6, at 1690 (discussing notice of proposed rulemaking).

28. *See id.* at 1689 (explaining that AT&T petitioned for revision of FCC carrier selection rules due to increase in unauthorized switching).

29. *See id.*

30. *See id.* One of the most enduring problems of slamming is its impact upon local telephone companies, which will likely only get worse. Ameritech, the BOC serving much of the Midwest, estimated that about 26,000 of its customers were slammed in 1995. The problem has become so severe that Ameritech has started putting notices in customers' phone bills asking them to return forms that lock in their present carrier and disallow any changes without the specific written permission of the customer. *See Thousands File Forms; Long-Distance Switching Deterred*, CHI. TRIB., Jan. 24, 1996, at 3 (describing positive consumer response to Ameritech's precautionary measures to prevent slamming).

31. *See* AT&T Petition, *supra* note 6, at 1689 (accusing MCI of deceptive marketing practices and slamming).

32. *See* 1995 LOA Order, *supra* note 6, at 9561. Prior to the filing of AT&T's petition, MCI

its main competitor, MCI, alleging that it was responsible for deceptive advertising and the unauthorized conversion of AT&T's customers.<sup>33</sup> MCI had previously filed suit against AT&T alleging deceptive marketing practices in this and other areas of concern.<sup>34</sup> In time, AT&T and MCI settled their civil suits and jointly proposed that the FCC adopt additional regulations concerning the conversion of consumers' primary interexchange carriers.<sup>35</sup>

### B. *The FCC's PIC Verification Order*

In the PIC Verification Order, the FCC issued a new set of procedures designed to substantially reduce incidents of slamming.<sup>36</sup> The new rules required long-distance carriers to initiate one of four procedures to ensure that consumers' primary interexchange carriers were not changed without their express authorization: (1) obtain the customer's written authorization; (2) obtain the customer's electronic authorization by means of a toll-free number established exclusively for that purpose; (3) have the customer provide oral authorization to an independent third party; or (4) send the customer, within three days of the requested primary interexchange carrier change, an information package, which must contain a prepaid postcard allowing the customer to confirm or cancel the order, and wait for fourteen days before submitting any primary interexchange carrier change to allow the customer time to return the postcard.<sup>37</sup>

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had filed suit against AT&T, alleging that they had engaged in deceptive business practices. The suit did not allege any incidents of slamming on the part of AT&T. See 1995 LOA NPRM, *supra* note 18, at 6886 n.15. It appears that AT&T did not direct its petition towards individual incidents of slamming *per se*, but rather towards the overall beating that it was taking in the fiercely competitive long distance market. In 1984, AT&T controlled 90.1% of the long distance market, while MCI only controlled 4.5%. By 1990, AT&T's share had dropped to 65% and MCI's had risen to 14.2%. Additionally, by 1990, AT&T's advertising budget had grown to \$797 million, compared to the \$60 million MCI spent that year. See Bruce Horowitz, *Long Distance Overload*, L.A. TIMES, Jan. 19, 1992, at D1.

33. See *American Tel. & Tel. v. MCI Communications Corp.*, 736 F. Supp. 1294 (D.N.J. 1990) (acknowledging that AT&T filed a counterclaim against MCI).

34. See 1995 LOA NPRM, *supra* note 18, at 6886 n.15 (recognizing MCI's prior suit against AT&T).

35. See PIC Verification Order, *supra* note 26, at 1039 (describing AT&T and MCI's agreement to propose to the Commission certain safeguards that would protect consumers from unauthorized switching).

36. See *id.* at 1046 (stating that the Order was adopted to protect consumers against unauthorized switching of their long distance company).

37. See *id.* at 1048-49. The PIC Verification Order also discusses a number of additional procedures that commentators suggested as potential solutions to the slamming problem. For example, the Public Utilities Commission of Ohio suggested that the FCC require long-distance carriers to file regular reports detailing complaints logged with the FCC. In cases where a long-distance carrier repeatedly violates FCC rules, a written LOA requirement for all primary interexchange carrier changes should be imposed. Bell Atlantic commented that the FCC should require all long-distance carriers to submit their primary interexchange carrier change records to local phone companies upon request, in order to ease the burden on local phone companies

While the PIC Verification Order did represent a concerted effort by the FCC to specifically target slamming, the rules had little overall impact in curbing incidents of slamming.<sup>38</sup> From 1992, when the FCC released its regulations, to 1995, incidents of slamming rose dramatically.<sup>39</sup> Much of the increase was attributed to LOAs<sup>40</sup> that were disguised as contest forms or requests for charitable contributions.<sup>41</sup> Another questionable scheme involved checks, commonly known as "inducement checks," that long-distance carriers sent out as incentives, which automatically authorized conversion of long distance service for many uninformed consumers who signed and cashed the checks.<sup>42</sup>

in ensuring that primary interexchange carrier changes are not submitted fraudulently. Some smaller long-distance carriers also stated that they believed the FCC's consideration of the third-party verification proposal improperly favored larger long-distance carriers who would be able to bear the increased costs of setting up a third-party verification center. CompTel and Convergent Communications both stated that third-party verification requirements should bind only "large scale" long-distance carriers. *See id.* at 1041, 1048.

38. In 1993, the FCC received more than 1700 complaints alleging unauthorized conversion of long distance service. In 1994, that number grew to 2500. *See* 1995 LOA NPRM, *supra* note 18, at 6885. By 1995, the number had ballooned to nearly 700 complaints a month, or 8400 a year. *See The Switch is on at Phone Companies, supra* note 8, at 6.

39. *See* 1995 LOA NPRM, *supra* note 18, at 6885.

40. The FCC's 1992 PIC Verification Order did not specify a set form for LOAs. Instead, it prescribed the following guidelines:

No long-distance carrier shall submit a PIC [primary interexchange carrier] change order to a[n] LEC generated by telemarketing unless and until the order has first been confirmed in accordance with the following procedures:

- 1) the IXC has obtained the customer's written authorization to submit the order that explains when a primary interexchange carrier is changed and confirms:
  - a) the customer's billing name and address and each telephone number to be covered by the PIC change order,
  - b) the decision to change the PIC to the IXC, and
  - c) the customer's understanding of the PIC change fee.

PIC Verification Order, *supra* note 26, at 1048 (defining information required in written authorizations).

41. One example of a deceptive LOA involves an authorization form used by Heartline Communications, a long-distance carrier based in Texas. *See Phone Company Switches Slammed*, CHI. TRIB., Dec. 4, 1994, at 12. The form prominently stated at the top that they were "Raising Funds for National Children's Charities," and further stated that "[t]wo percent of my domestic long distance bill . . . will be donated to a national children's charity every month." *Id.* In small print at the bottom of the form, it stated that people signing the form would have their long distance service switched if they did not check a box next to the statement. *See id.*

Another deceptive LOA was disguised as a contest to win a free Chevrolet Camaro. *See Wagner, Long-Distance Phone Customers, supra* note 9, at A1. Consumers filled out what appeared to be a contest entry form and later found out they had been slammed because they did not notice the small print at the top of the form that stated "Letter of Authorization." *See id.*

42. *See Wagner, Long-Distance Phone Customers, supra* note 9, at A1. The most flagrant example of checks being used as deceptive LOAs was carried out in California by a Georgia long-distance carrier, Sonic Communications. Sonic Communications sent out \$10 checks that appeared to be prize winnings. Unfortunately, many consumers did not read the fine print below the endorsement line on the back of the checks that stated that their signature gave Sonic the authority to convert their long distance service. Almost 100,000 consumers in California cashed the checks. Additionally, the California Public Utility Commission found evidence that Sonic

### C. The FCC's 1995 LOA Order

In November 1994, the FCC initiated, on its own motion, yet another rulemaking docket to further clarify the LOA requirements and specify what information inducement checks must contain to serve as valid letters of agency.<sup>43</sup> Specifically, the FCC sought to deter certain "marketing practices" in which the "inducement is combined with the LOA and the inducement language is prominently displayed on the inducement/LOA form while the PIC change language is not, thus leading to consumer confusion."<sup>44</sup>

In its 1995 LOA Order, the FCC moved to establish general standards for the form and content of LOAs,<sup>45</sup> and required that LOAs be "separate" or "severable" from any promotional or inducement material received.<sup>46</sup> Additionally, the FCC required translation of LOAs into the same language used in the accompanying promotional materials if the promotional materials are not in English,<sup>47</sup> and prohibited the use of "negative option" LOAs, which require the person signing the form to take some action to avoid having their primary interexchange carrier switched.<sup>48</sup> The new FCC regulations that required "severable" or "separate" LOAs excluded checks that serve as LOAs, so long as the check clearly states that the endorsement constitutes a change of long-distance carriers.<sup>49</sup> The 1995 LOA

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targeted the checks to predominantly Latino communities where many residents did not speak English. Complaints from the incident overwhelmed the commission and led to a ban on Sonic as a long-distance carrier in California. *See id.* AT&T also used checks as an inducement to get consumers to switch to their service, however, relatively few complaints have been reported against that long-distance carrier. *See* 1995 LOA Order, *supra* note 6, at 9573 (noting that some IXCs who use checks in promotional materials in a "non-misleading manner" have received "minimal consumer complaints").

43. *See* 1995 LOA NPRM, *supra* note 18, at 6885.

44. *Id.* at 6887.

45. *See* 47 C.F.R. § 64.1150(e) (1996) (requiring LOAs to "be printed with a type of sufficient size and readable type to be clearly legible").

46. *See id.* § 64.1150(c) ("[T]he letter of agency shall not be combined with inducements of any kind on the same document.")

47. *See id.* § 64.1150(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.")

48. *See id.* § 64.1150(f) (LOAs "shall not suggest or require that a subscriber take some action in order to retain the subscriber's current interexchange carrier").

49. *See id.* § 64.1150(d) ("[T]he 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 interexchange carrier change by signing the check."). AT&T and MCI strenuously oppose any regulations by the FCC that would ban the use of combined inducement and LOA checks. *See* 1995 LOA Order, *supra* note 6, at 9570-71 (noting that opponents argue that such a rule may be "unconstitutional"). Consumer Action, LDDS Long Distance, and Sprint contest the contentions of AT&T and MCI. *See id.* at 9570 n.38 (identifying those who support proposal to "separate the LOA from promotional material"). Sprint was vehemently opposed to the use of combined check and LOAs, and stated that this combination has "the potential for outright deception, or at the very least for leading to misunderstandings between consumers and carriers." *Id.* at 9570.

Order concluded by stating that "although our evolutionary approach to the 'slamming' problem has generally been one of regulatory restraint, we will not tolerate continued abuses."<sup>50</sup>

The FCC's bark, however, has been far more severe than its bite. A reading of the plain language put forth in the regulations reveals that they require only that LOAs "be clearly legible and contain clear and unambiguous language" that the consumer intends to change their primary interexchange carrier.<sup>51</sup> Thus, even with the FCC requirements mandated by the 1995 LOA Order, such as translating the LOA and making it physically "severable" from any enclosed promotional material, the potential for abuse still existed because the FCC did not require a standard, separate LOA for all long-distance carriers to use to execute primary interexchange carrier changes.<sup>52</sup> Additionally, the 1995 LOA Order took almost no action against inducement checks, except to require that the primary interexchange carrier change information be in "easily readable, bold-face type" on both sides of the check.<sup>53</sup> The net effect of the FCC's new slamming regulations was minimal, at best, as slamming complaints reported to the FCC rose to a new high in the early months of 1996.<sup>54</sup>

50. 1995 LOA Order, *supra* note 6, at 9583.

51. *See* 47 C.F.R. § 64.1150(e).

52. The 1995 LOA Order states that the FCC "will allow IXC's the flexibility to design the LOA in a manner that is complementary to their associated promotional material." 1995 LOA Order, *supra* note 6, at 9566. The FCC took no action on requiring a standard LOA form even though two of the largest BOCs, NYNEX and Southwestern Bell, asked the FCC to promulgate such a regulation in order to combat the dramatic rise in primary interexchange carrier changes submitted to local telephone companies as a result of slamming. *See id.* at 9567 n.28 (noting arguments in favor of requiring more controls and penalties to increase consumer protection). In rejecting a rule requiring standardized LOAs, the FCC relied mainly on First Amendment concerns. *See id.* at 9567-69. In so doing, the FCC relied on somewhat questionable analysis that inferred that a standardized LOA would impinge on the rights of long-distance carriers to effectively promote their services. *See id.* at 9569 (theorizing that restrictions will not be placed on long-distance carriers promotional materials or campaigns). This analysis, however, ignores the fact that long-distance carriers will still be able to use a variety of promotional materials in soliciting new consumers. Additionally, the use of a standardized separate LOA comports with Supreme Court rulings concerning the protections that must be afforded commercial speech. *See* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) (holding that "[t]he government may ban forms of communication more likely to deceive the public than to inform it"); *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (concluding that it is permissible to use some restrictions on the time, place, and manner of commercial speech, "provided that they are justified without reference to the context of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information").

53. *See* 47 C.F.R. § 64.1150(d).

54. In 1995-96, more than one million customers in the United States had their primary interexchange carriers changed without permission. *See* Wagner, *Long-Distance Phone Customers*, *supra* note 9, at A1 (recognizing that growing number of consumers will encounter slamming in the coming years).

## III. THE TELECOMMUNICATIONS ACT OF 1996

## A. Overview

The Telecommunications Act of 1996 presents the first major change in sixty-two years in the way communications services are provided.<sup>55</sup> The major goals of the 1996 Act are to create a giant market for combined telecommunications services and eliminate much of the "segmentation" that currently exists.<sup>56</sup> Under various provisions of the 1996 Act, customers can receive local telephone service through a long-distance provider, or even through their local cable television company.<sup>57</sup> In fact, with interconnection between the local loops that now terminate phone calls at consumers' premises and the networks of cable and other utility companies, consumers can potentially receive all of their communications services, including telephone, Internet, and cable service, through one provider in a process known as "bundling" of services.<sup>58</sup>

Unfortunately, while the 1996 Act is long on details of how the "information superhighway" will operate in the next century, it is very short on provisions that will protect consumers from abuses by the new telecommunications giants that will likely dominate the industry.<sup>59</sup> As Bradley Stillman of the Consumer Federation of America elaborates, "For every step taken to encourage competition, the bill has provisions which undermine its goals."<sup>60</sup>

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55. See Carney, *supra* note 1, at 289 (noting that the last major revision of U.S. communications laws was the Communications Act of 1934).

56. See *id.* (describing purpose of bill as creating "one giant marketplace for telecommunication services").

57. See *id.* (forecasting the future changes in local phone service for consumers nationwide).

58. See Mike Mills, *On the Web, Finding a Carrier to Fit Your Calling Patterns*, WASH. POST, Oct. 29, 1996, at C1 (noting that bundling of services will allow customers to pay for all services on one bill). Industry giant AT&T already offers long distance service, cellular service, Internet access, satellite TV, and will soon offer local telephone service in many markets. See Catherine Arnst, *The Coming Telescramble*, BUS. WK., Apr. 8, 1996, at 64. MCI provides long distance service, cellular service, and will soon offer satellite TV and the Internet. Other telecommunications companies have decided to merge in order to provide "bundled" services; in February 1996, for example, US West Communications announced that it was buying Continental Cablevision. See *id.* This arrangement will allow the combined company to provide cable TV as well as local and long distance phone service in one package. See *id.* (describing sweeping changes that the 1996 Act will entail in eliminating the barriers between communication services).

59. See Carney, *supra* note 1, at 290 (recognizing that consumer groups are concerned that major telephone companies may continue to control the industry).

60. *Id.*

*B. Section 258 of the 1996 Act*

*1. Congressional intent*

One of the very few consumer protections within the 1996 Act is Section 258,<sup>61</sup> which represents Congress' first effort to attack slamming.<sup>62</sup> The Senate Commerce Committee draft of the 1996 Act did not contain Section 258, or even address the issue.<sup>63</sup> Instead, Section 258 was part of a series of amendments contained in a House of Representatives bill<sup>64</sup> that called for stronger deregulatory measures than those provided in the Senate version of the 1996 Act.<sup>65</sup> Although the Conference Committee stripped most of the House amendments from its final Report, the Conferees decided to adopt section 258 in its entirety.<sup>66</sup>

The Conference Committee's Explanatory Statement indicates that the House primarily intended the Amendment to apply the same FCC rules applicable to slamming long-distance carriers to local phone companies.<sup>67</sup> The final Conference Agreement reveals, however, that the Conferees intended Section 258 to have a much broader scope.<sup>68</sup> In addition to ensuring that the FCC's regulations

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61. See 47 U.S.C.A. § 258 (West Supp. 1997) (prohibiting changes in telephone services provider without proper verification; setting forth liability for violations).

62. Prior to the enactment of the Telecommunications Act of 1996, the FCC regulated the problems of slamming through the broad general authority granted the agency by the Communications Act of 1934, as amended, *see id.* §§ 151-613, as well as the authority "reasonably ancillary to the effective performance of the Commission's various responsibilities." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *see also* *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) (holding that FCC has ancillary jurisdiction over certain non-common carrier activities of common carriers). *But see* *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (holding that FCC's ancillary jurisdiction over cable television is not unlimited).

63. See H.R. CONF. REP. NO. 104-458, at 136 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 148 (statement of Joint Managers).

64. H.R. 1555, 104th Cong. (1995). The House Report to H.R. 1555 states that "Section 251 requires the Commission to adopt rules to prevent illegal changes in subscriber carrier selections, a practice known as 'slamming.' . . . The Committee intends that the Commission should adopt rules to thwart the development of similar illegal practices as local exchanges become open to competition." H.R. REP. NO. 104-204, pt. 1, at 84 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 50.

65. See Carney, *supra* note 1, at 289 (noting that the 1996 Act deregulates much of the telecommunications industry).

66. See H.R. CONF. REP. NO. 104-458, at 136 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 148 (statement of Joint Managers).

67. See *id.* The Explanatory Statement of the House Amendment states that:

Section 251 requires the Commission to adopt rules to prevent illegal changes in subscriber selections, a practice known as "slamming." The Commission has adopted rules to address problems in the long distance industry of unauthorized changes of a consumer's long-distance carrier. The House provision is designed to extend the provisions of the current rule to local exchange carriers as well.

*Id.*

68. See *id.* The final Conference Agreement states:

also covered local exchange companies, the Conference Agreement stated that the goal of the FCC's regulations was to make slammed consumers "whole," with remedies to include all premiums that the consumer would have received with their specific calling plan,<sup>69</sup> including frequent flier miles<sup>70</sup> and free Internet service.<sup>71</sup>

## 2. *Statutory language in Section 258*

The original text of the House Amendment went unchanged by the Conference Committee,<sup>72</sup> and became law.<sup>73</sup> Consequently, any interpretation of Section 258 is extremely problematic because the section's language appears only to grant the FCC authority to regu-

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The conferees adopt the House provision as a new section 258 of the Communications [sic] Act. It is the understanding of the conferees that in addition to requiring that the carrier violating the Commission's procedures must reimburse the original carrier for foregone revenues, the Commission's rules should also provide that consumers are made whole. Specifically, the Commission's rules should require that carriers guilty of "slamming" should be held 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 under this section.

*Id.*

69. *See id.*

70. For example, MCI has a program with Delta and American Airlines where consumers earn five frequent flier miles on either airline for each dollar they spend using MCI long distance, cellular, or calling card long distance service. Under this plan, for example, a consumer or small business owner who usually spends \$500 a month in combined telecommunications services on MCI and was slammed by another provider for three months (an average time period for receipt of a phone bill and arrangement to have service restored to the original provider), would lose 7500 frequent flier miles. *See* Advertisement from American Airlines sent to the Author (July 8, 1996) (on file with author); *see also* USA TODAY, Oct. 29, 1996, at 5A (offering five frequent flier miles on Delta Airlines for every dollar spent on MCI services). The advertisement also offers a one-time "bonus" of 2000 frequent flier miles for switching telecommunications service to MCI. *See id.*

71. Customers who use AT&T's long distance service also receive 5 free hours of Internet service for each month they continue to use AT&T's services. If a customer is slammed and continues to use AT&T's Internet services, they would have to pay the regular fee for unlimited access of \$19.95 per month. *See* AT&T Advertisement (Nov. 1, 1996) <<http://www.att.com/college>>.

72. *See* H.R. CONF. REP. NO. 104-458, at 136 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 148 (statement of Joint Managers).

73. Section 258 reads:

(a) PROHIBITION.- No telecommunications carrier shall 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. Nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services.

(b) LIABILITY FOR CHARGES.- Any telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously elected by the subscriber in an amount equal to all charges paid by such subscriber after such a violation, in accordance with such procedures as the Commission may prescribe. The remedies provided by this subsection are in addition to any other remedies available by law.

47 U.S.C.A. § 258 (West Supp. 1997).

late incidents of slamming by long-distance carriers or local exchange carriers and to promulgate rules requiring "slamming" telecommunications providers to reimburse telecommunications providers that lose business as a result of the unauthorized conversion.<sup>74</sup>

#### IV. THE 1996 ACT AND FCC IMPLEMENTING REGULATIONS FAIL TO ADEQUATELY PROTECT CONSUMERS

##### A. *The FCC's Section 258 Further Notice and Reconsideration Order*

The FCC's 1997 Section 258 Further Notice of Proposed Rulemaking and Reconsideration Order<sup>75</sup> ("Section 258 Further Notice and Order") further illustrates the FCC's inability to move from the failed slamming rules only covering long-distance telephone service to a new regulatory framework that will protect all consumers in the completely deregulated telecommunications market. The major rule change proposed in the Section 258 Further Notice and Order is the expansion of the definition of carriers affected from just long-distance telephone carriers to any "telecommunications carrier."<sup>76</sup> Unfortunately, the Section 258 Further Notice and Order also rejected various petitions to reconsider current FCC rules allowing telecommunications carriers to design their own LOAs and attach LOAs to promotional materials,<sup>77</sup> and continues to permit the use of inducement checks as LOAs.<sup>78</sup> Therefore, while the 1996 Act and the Section 258 Further Notice and Order expands the definition of entities covered by the slamming regulations, from long-distance carriers to all telecommunications carriers, the proposed FCC rules essentially retain the current FCC regulations that have failed to deter slamming in the long-distance market. Thus, section 258 and the Section 258 Further Notice and Order may actually cause more harm than good by expanding the FCC's lax verification standards to the entire market. Under the current regulatory regime, section 258 gives the appearance of being a tough response against slamming, when in effect it is nothing more than a paper tiger.

74. *See id.* § 258(b).

75. Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumer's Long Distance Carriers, 12 F.C.C. Rcd. 10,674 (1997) (Further Notice of Proposed Rulemaking and Memorandum Order on Recon.) [hereinafter Section 258 Further Notice and Order].

76. *Id.* at 10,682-83.

77. *See id.* at 10,703-04 (stating that current requirements allowing an LOA to be attached to promotional materials as long as it is ultimately separable and "reasonably balances the informational interests of consumers and the marketing flexibility of the industry").

78. *See id.* at 10,703 (allowing the continued use of checks as LOAs).

*B. Section 258 and FCC Implementing Regulations Cannot Make Slammed Consumers "Whole"*

*1. Lost premiums*

Section 258 likely does not provide authority for the FCC to insure that consumers are made whole with regard to lost premiums because the Act provides no enforcement mechanism or clues as to implementation, even though the Conference Committee Report expressly states that consumers are to be compensated for their losses.<sup>79</sup> In the Section 258 Further Notice and Order, the FCC tentatively concluded that disputes between authorized and unauthorized carriers over the value of premiums that were to be provided by the authorized telecommunications carrier must be resolved through "private settlement negotiations regarding the transfer of charges and the value of lost premiums . . . prior to petitioning the Commission to make a determination."<sup>80</sup> In essence, this represents a codification of the status quo, as it provides aggrieved consumers with no further protections than existed before the passage of the 1996 Act and section 258.<sup>81</sup> Under the FCC's interpretation of section 258(b), consumers still will not have an independent enforcement entity to approach for resolution of slamming complaints that involve a loss of premiums.

In the case of lost premiums, however, much of the enforcement problem essentially can be traced to poor legislative drafting of section 258, and the fact that it provides no specific jurisdiction to the FCC to regulate what essentially are general consumer protection issues. Additionally, under the current section 258 framework and the FCC's general mandate to regulate telecommunications, the FCC likely does not have ancillary jurisdiction to directly regulate the pro-

79. See 47 U.S.C.A. § 258 (West Supp. 1997). Section 258 provides no mechanism for consumer remedies that would address lost premiums or charges for telecommunications services that are higher than the customer's previous provider. Additionally, it is highly doubtful that any remedies could be provided by the FCC, since the issue of lost premiums associated with the "bundling" of services is probably not "reasonably ancillary to the effective performance of the Commission's various responsibilities." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). Activities involving lost premiums would most likely fall under the jurisdiction of the Federal Trade Commission. See *infra* notes 83-84 and accompanying text.

80. Section 258 Further Notice and Order, *supra* note 75, at 10692.

81. In the Section 258 Further Notice and the Order, the FCC opines that "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." *Id.* This entire argument, however, ignores the fact that the system the FCC endorses is essentially the current system where an authorized carrier must try to force a slamming carrier to turn over ill-gotten revenue. Because private carriers lack any enforcement powers, slamming carriers are generally able to ignore their requests for reimbursement with relative impunity.

visions of premiums, such as frequent flier miles, because such premiums are not closely connected to the regulation of telecommunications.<sup>82</sup>

One possible explanation for the lack of detail and delegation of authority in Section 258 is that Congress lacked information about the level of consumer abuse present in the deregulated long distance market.<sup>83</sup> Unfortunately, previous legislation regulating “pay-per-call” services,<sup>84</sup> primarily “900” number providers offering information services for a fee,<sup>85</sup> presents ample evidence that such an explanation is false.<sup>86</sup> Following years of abusive practices by many pay-per-call services and inaction by the FCC, Congress enacted the Telephone Disclosure and Dispute Resolution Act (“TDDRA”) in 1992.<sup>87</sup> TDDRA establishes a unique framework for prevention of abuses in pay-per-call services by setting up “a system of national regulation and review that will oversee interstate pay-per-call services” managed by the FCC,<sup>88</sup> and a mechanism for dispute resolution overseen by the Federal Trade Commission (“FTC”).<sup>89</sup>

Under Title I of TDDRA, the FCC has exclusive jurisdiction to regulate the technical aspects of pay-per-call services, including the method of billing utilized by these services and procedures that consumers can use to block access to these services from their home phone numbers.<sup>90</sup> Title II of TDDRA deals exclusively with the enforcement of regulations designed to prohibit deceptive advertising

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82. *See supra* note 62 and accompanying text. The FCC’s ancillary jurisdiction extends only to actions “necessary to ensure the achievement of the Commission’s statutory responsibilities.” *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979).

83. Although Congress may have lacked information on the scope of the problem, it is likely that recent FCC actions should have at least indicated that the FCC was having trouble controlling the slamming problem. *See generally* 1995 LOA Order, *supra* note 6, at 9563 (admitting that the FCC continues to receive a large number of slamming complaints from consumers despite its efforts to foster industry self-regulation).

84. *See* Telephone Disclosure and Dispute Resolution Act, Pub. L. No. 102-556, 106 Stat. 4181-95 (1992) (codified at 15 U.S.C. §§ 5701, 5711-5714, 5721-5724 (1994)) (amended 1996).

85. Pay-per-call services are generally provided via “900” numbers that are billed directly to a consumer’s local telephone bill. In some cases, however, the services are provided through a toll-free number (“800” or “888”) if the consumer has a presubscription agreement with the information provider that manages the pay-per-call service. *See id.* § 1, 106 Stat. at 4181.

86. *See id.*

87. *See id.* The congressional findings cited in TDDRA are remarkably similar to many of the problems that plague consumers today with incidents of slamming. Congress found that “[t]he lack of nationally uniform regulatory guidelines has led to confusion for callers, subscribers, industry participants, and regulatory agencies as to the rights of callers and the oversight responsibilities of regulatory authorities.” *Id.* The findings conclude that “[t]he continued growth of the legitimate pay-per-call industry is dependent upon consumer confidence that unfair and deceptive behavior will be effectively curtailed and that consumers will have adequate rights of redress.” *Id.*

88. *See id.* § 228(a)(1), 106 Stat. at 4182.

89. *See id.* § 228(a)(2), 106 Stat. at 4182.

90. *See id.* § 228, 106 Stat. at 4182-86.

in connection with pay-per-call services.<sup>91</sup> Title II reserves all enforcement power over deceptive advertising to the FTC, which can take action under section 5 of the Federal Trade Commission Act.<sup>92</sup> Title III of TDDRA establishes a detailed system for the resolution of billing and collection disputes between consumers and pay-per-call providers.<sup>93</sup>

Much of the TDDRA model could have been adopted by Congress in the 1996 Act to regulate incidents of slamming, provide a method for dispute resolution, and to allow for the recovery of premiums lost as a result of slamming violations. The reason why Congress did not adopt the TDDRA model is unclear. Much of the rationale, however, probably revolves around the fact that most pay-per-call providers are small companies with little, if any, political clout, whereas long distance companies are generally able to fend off efforts to impose greater consumer protections at both the legislative and regulatory level.<sup>94</sup>

## 2. *Lost access to the former long-distance companies' rates*

Under the express language of section 258(b), the slammed consumer is liable for the full amount of any services provided to the telecommunications provider that converted the consumer's service without authorization.<sup>95</sup> Section 258 actually could cause greater harm to consumers. In the new market a much wider array of services will be available through telecommunications providers, exposing consumers to higher levels of liability under section 258(b).<sup>96</sup>

91. *See id.* § 201, 106 Stat. at 4187-89.

92. *See id.* § 201(c), 106 Stat. at 4189.

93. *See id.* § 301, 106 Stat. at 4191-92.

94. Although most of the major long distance companies affected by the FCC's slamming regulations are multimillion dollar companies (or in the case of AT&T, Sprint, and MCI, multibillion dollar companies), most pay-per-call services are "Mom and Pop" type operations with limited revenues. Even some of the smaller companies, however, have hired lobbyists in an effort to ease rules against slamming at both the legislative and regulatory levels. Cherry Communications, for instance, is a long-distance carrier with only 500,000 customers, but is growing rapidly due to its aggressive marketing techniques. Seeking to settle complaints filed with the California Public Utilities Commission against Cherry Communications, owner James Elliot (a former real estate agent and convicted felon) hired former Senator Paul Laxalt to meet with the commission's chief investigator. *See* Michael G. Wagner, *PUC Slams Door on Carrier for Illegal Switching*, L.A. TIMES, Sept. 7, 1996, at A1 [hereinafter Wagner, *PUC Slams Door*].

95. Section 258 states that a telecommunications carrier that "collects charges" for service "shall be liable to the carrier previously selected by the subscriber in an amount equal to *all charges paid by such subscriber* after such violation." 47 U.S.C.A. § 258(b) (West Supp. 1997) (emphasis added). The logic of this section punishes consumers by requiring them to pay the fees charged by the slamming telecommunications provider, while the consumer's old provider receives a windfall.

96. Under the provisions of the 1996 Act, it is likely that consumers will have their telecommunications services "bundled" and will receive their long distance and local phone service from the same telecommunications company. If a customer who has bundled services is

"The sad thing is, it actually pays to slam people . . . . The FCC has given the green light," states Val Heffner of the Discount Long Distance Digest.<sup>97</sup> Under a literal reading of section 258(b), a customer who is slammed remains liable to the slamming telecommunications provider, which then must turn the proceeds over to the "slammed" telecommunications provider.<sup>98</sup> This perverse logic subjects the customer, who is the real victim, to liability for charges that almost always are higher than those charged by the previous long-distance carrier. Meanwhile, the previous long-distance carrier gets a windfall above what it would have received if the customer had not been slammed.<sup>99</sup> The slamming long-distance carrier theoretically loses the cost of services provided to the slammed consumer. Unfortunately, because many incidents of slamming are not detected, it often makes economic sense for long-distance carriers to play the odds and slam as many consumers as possible.<sup>100</sup>

The Section 258 Further Notice and Order does take some positive steps in the area of consumer liability by discussing possible new regulations that would absolve consumers of liability for charges when a telecommunication service is converted without consent.<sup>101</sup> The FCC does not, however, provide any concrete proposals in this area, mainly due to apparent confusion over the congressional intent behind section 258.<sup>102</sup> Therefore, until the ongoing regulatory rou-

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slammed, it is likely that the slamming company will convert all of the subscriber's services, which could lead to larger potential liabilities for consumers. See Catherine Arnst, *The Not-So-Calm Before the Storm*, BUS. WK., Jan. 8, 1996, at 96.

97. Wagner, *Long-Distance Phone Customers*, *supra* note 9, at A1.

98. See 47 U.S.C.A. § 258(b) (West Supp. 1997).

99. Current FCC regulations allow slamming long-distance carriers to collect the amount that the customer would have paid to their old long distance provider had the unauthorized conversion not occurred. See 1995 LOA Order, *supra* note 6, at 9572. Section 258(b) is drafted in a manner, however, that seems to allow slamming long-distance carriers or other telecommunications providers to collect the full amount of their services, which would then be turned over to the customer's old telecommunications provider if the customer can prove they were slammed. See 47 U.S.C.A. § 258(b).

100. For every dollar of revenue, most small long distance providers make from 25 to 40 cents in profit. Thus, even if one out of every five slammed customers complains and proves they are a victim of slamming (a very liberal assumption), the average long distance company can still make a profit. See Wagner, *Long-Distance Phone Customers*, *supra* note 9, at A1.

101. See Section 258 Further Notice and Order, *supra* note 75, at 10,689-90 (requesting comments on the issue of "whether slammed consumers should have the option of refusing to pay charges assessed by an unauthorized carrier").

102. The text of the Section 258 Further Notice and Order states that "[u]nder section 258(b), the liability between properly authorized and unauthorized carriers exist only to the extent that the unauthorized carrier actually collects charges from a slammed consumer," thus tending to support the proposition that the FCC could easily promulgate rules absolving slammed consumers of liability for unauthorized charges. See *id.* at 10,690. In the footnotes accompanying the text of the order, however, the FCC appears to recognize that such a change may not comport with congressional intent behind the section in noting that "[t]he legislative history of Section 258 supports the view that carriers violating our verification procedures 'must

lette over consumer liability for unauthorized charges is resolved, it is likely that the slammers will continue to prey on telecommunications consumers.

### 3. *Slamming in the local service market*

One of the major goals of the 1996 Act is to open up local telephone service, now a near-monopoly controlled by the former Bell Operating Companies, to the same competition that transformed the long distance market.<sup>103</sup> Under section 258(a) of the 1996 Act, Congress defined slamming as an unauthorized change in "telephone exchange service or telephone toll service" by a "telecommunications carrier."<sup>104</sup> This definition significantly expands the FCC's old definition by including local telephone service providers as parties that are potentially liable for incidents of slamming.<sup>105</sup>

This expansion of liability for incidents of slamming would appear to provide consumers with additional protection. Because Section 258 and the FCC's implementing regulations essentially retain current FCC verification policies, however, the situation could become much worse. In the current telecommunications market, slammed consumers can turn to their local telephone service providers for assistance and verification that a slamming long-distance carrier submitted a faulty primary interexchange carrier change request.<sup>106</sup> Many local telephone service providers also waive the charge to change a primary interexchange carrier back to the original carrier and allow customers to sign contracts forbidding any primary interexchange carrier changes without a customer's specific authorization.<sup>107</sup>

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reimburse the [properly authorized] carrier for forgone revenues." *Id.* at 10,690 n.83.

103. See Carney, *supra* note 1, at 289. The 1996 Act preempts all state and local laws that bar telecommunications companies from offering local service. To spur competition in local markets, the 1996 Act also requires that all incumbent local service providers allow interconnection to their networks at the same level and quality of service that they provide themselves. To encourage the regional Bell companies to enter into interconnection agreements, the 1996 Act provides that the companies will be allowed to offer long distance services as soon as they allow competition in their local service area. See *id.* at 290.

104. 47 U.S.C.A. § 258(a).

105. Prior to the passage of the 1996 Act, consumers could only receive local telephone service from their incumbent local telephone company. The 1996 Act, however, preempts all state and local laws prohibiting competition in the local phone market, thus making consumers in all states susceptible to incidents of slamming in both the local and long distance telephone markets. See Carney, *supra* note 1, at 290.

106. See Jon Van, *State Bans Long-Distance Phone Firm*, CHI. TRIB., Mar. 6, 1995, at 5. Many local phone companies now provide assistance to consumers who are victims of slamming. Ameritech, the BOC that serves Illinois and much of the rest of the Midwest, provides a toll-free number for consumers to call if they are slammed or if they wish to place a block on their long distance service so that it will not be changed without their written approval. See *id.*

107. See Denise Gellene, *Long-Distance 'Slams' on the Rise*, L.A. TIMES, Jan. 7, 1994, at D3.

When competitive services become widely available in the local market, it is highly likely that many customers will have both their local and long distance services converted by the same telecommunications provider.<sup>108</sup> In such cases, customers will have serious difficulty resolving a slamming complaint since the slamming company will likely have used a fraudulent LOA to self-execute a change of a consumer's entire telephone service package.<sup>109</sup> Under the current system, long-distance carriers must submit primary interexchange carrier change requests to local telephone service providers that will execute the change, thus providing independent verification of the change and a means of challenging the change through the local company.<sup>110</sup>

Alternatively, if the FCC or Congress does not move to implement additional procedures to ensure that telecommunications providers follow strict primary interexchange carrier verification guidelines, it is likely that many telecommunications providers will move towards adopting their own rules which will stifle competition through a patchwork of competing verification procedures.<sup>111</sup> Ameritech, for instance, has already sent out contracts to many of its subscribers in

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Usually, local telephone companies will switch consumers who allege they have been slammed back to their original provider, free of charge. *See id.* The local phone company can then contact the long-distance carrier that submitted the change order and ask it for an LOA verifying that the customer requested the change. If the long-distance carrier cannot produce an LOA or evidence of third party verification, then they are required by the FCC to reimburse the local phone company for the cost of the primary interexchange carrier change. *See* 1992 PIC Verification Order, *supra* note 26, at 1050 (explaining that long-distance carriers remain responsible to local phone companies for disputed charges for which they cannot produce an LOA).

108. *See* Arnst & Mandel, *supra* note 59, at 64. AT&T, for instance, has plans to control one-third of the local phone market within the next three to four years by using its name to lure customers into package deals where they will receive all of their telecommunications services through one company. *See* Catherine Arnst, *Ready, Set, Devour?*, BUS. WK., July 8, 1996, at 118. One big advantage for consumers, at least in the short run, are the pricing reductions for bundled services. "When I look into the future, I see local phone service in some cases given away for free," commented John Hoffman, policy chief of Sprint Corporation. *See* Arnst, *Hold the Phone*, *supra* note 11, at 32.

109. *See Telephone Service: Don't Fall Prey to the Slam Scam*, CONSUMER REP., Oct. 1996, at 62 [hereinafter *Telephone Service*] (explaining that, as competition increases in the local telephone service market, consumers will have greater slamming problems with unauthorized conversions of all telecommunications services, not merely telephone long-distance).

110. *See* 1992 PIC Verification Order, *supra* note 26, at 1038. The fact that long-distance carriers do not have to submit a signed LOA has engendered a great deal of criticism from many commentators. They contend that these procedures make it far too easy for long-distance carriers to illegally convert a consumer's long distance phone service. Additionally, the fact that local phone companies are allowed to charge the customer a fee for the primary interexchange carrier change, usually around five dollars, does not help matters because many local phone companies are more than happy to accept this money, with no questions asked. *See* Wagner, *Long-Distance Phone Customers*, *supra* note 9, at A1.

111. *See Telephone Service*, *supra* note 109, at 62 (warning that "as competition increases for local telephone service, any number of companies may start handling switching, billing, and freeze requests").

the Chicago area asking them to "lock in" their local service to prevent slamming of local service.<sup>112</sup> While such "lock in" contracts will undoubtedly prevent slamming, they also have the potential to create an anticompetitive environment by locking customers into their current carriers.<sup>113</sup>

## V. RECOMMENDATIONS

### A. *Tighter Verification Requirements*

The FCC's 1992 PIC Verification Order adopted four verification procedures, discussed in Part II,<sup>114</sup> requiring long-distance carriers to use one to verify changes in primary interexchange carriers.<sup>115</sup> Of these four options, the most confusing verification procedures are those that require consumers to return a postcard to avoid conversion, or provide for electronic authorization of primary interexchange carrier changes. Therefore, Congress should amend Section 258(a)<sup>116</sup> by deleting the first sentence, which specifies that no telecommunication provider shall change a subscriber's services "except in accordance with such verification procedures as the Commission shall prescribe."<sup>117</sup> In its place, Congress should add language stating that "no telecommunications carrier shall 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 subsection (c)." The new subsection (c) should prescribe two acceptable forms of verification: (1) submission of a written LOA from the subscriber giving their consent to conversion of services;<sup>118</sup> or

112. See *Thousands File Forms*, *supra* note 30, at 3 (discussing the fact that the slamming problem is so severe in the Chicago area that Ameritech has sent out forms in customer's monthly phone bills asking them to lock in their preferred long-distance carrier).

113. See *id.*

114. See *supra* notes 36-42 and accompanying text.

115. The FCC has tentatively concluded that the "Welcome package" option should be eliminated, leaving three permissible verification procedures. See Section 258 Further Notice and Order, *supra* note 75, at 10,685-86 (concluding that the "welcome package" option functions as a negative LOA). As this Comment went to press, the section 258 Final Report and Order had not yet been released.

116. 47 U.S.C.A. § 258(a) (West Supp. 1997).

117. *Id.*

118. In obtaining signed LOAs, telecommunications providers or marketers should attempt to verify that the information on the LOA is accurate. See *In re AT&T Corp.*, 1996 WL 709120, at \*7 (F.C.C. Dec. 11, 1996) (order). In this consent decree, AT&T agreed that all customer names and signatures would be verified at the point of sale through customer provider identification. In cases where the LOA is sent to AT&T or where the customer is unable to provide identification at the point of sale, AT&T agreed that it will re-contact these customers by telephone prior to executing a primary interexchange carrier change to ensure that the LOA is genuine. See *id.* Although this Comment does not endorse any one form of LOA verification, it is very likely that most providers will adopt stricter verification procedures to escape the height-

(2) unambiguous oral verification of a change in telecommunication services, which is verified and recorded by a third party with no financial connection to the telecommunications provider. If oral recorded verification is used, the independent third-party verification agency should also be required to pay employees on an hourly basis, not based on how many customers they convert.<sup>119</sup> In both cases, telecommunications providers should be requested to keep records, for a period of six months, of their customers' oral or written consent to prove that they properly obtained verification.<sup>120</sup>

### B. Standardized LOAs

In the 1995 LOA Order, the FCC stated that, "Our experience indicates that for fair competition to continue, consumers must have clear and unambiguous information about the actions and the choice they are being asked to make."<sup>121</sup> Having made that statement, the FCC then decided to continue to "allow IXCs the flexibility to design the LOA in a manner that is complimentary to their associated promotional material."<sup>122</sup> The Section 258 Further Notice and Order unfortunately allows the practice of individual LOA design to continue.<sup>123</sup> This is an inappropriate response to the problem of confusing and misleading LOAs. Instead of focusing on the fact that an LOA should serve as a form showing that the consumer gave his or her informed consent to a change in the long distance service, the FCC sadly treats the LOA as merely an extension of a long-distance carrier's marketing techniques.<sup>124</sup>

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ened liability provided for in these recommendations.

119. *See id.* In this order, AT&T entered into a consent decree with the FCC in which AT&T agreed to contact 500 customers each month using "contracted temporary personnel" who "will be paid on an hourly basis instead of a volume-driven compensation plan." *Id.*

120. Almost all long-distance carriers currently keep LOAs and other records on hand for at least this period of time due to current FCC requirements. *See supra* notes 19-21 and accompanying text (explaining that long-distance carriers should have LOAs on hand to protect themselves from customer misunderstandings and liability for unauthorized charges); *see also AT&T Corp.*, 1996 WL 709120, at \*8 (announcing that AT&T had reached a consent decree with the FCC in which AT&T agreed to keep LOAs and other records on hand for a period of two years and make such records available to the FCC within 14 days of the commission's written request).

121. 1995 LOA Order, *supra* note 6, at 9567.

122. *See id.* at 9564.

123. *See* Section 258 Further Notice and Order, *supra* note 75, at 10,704 (denying NAAGs petition to mandate separate LOAs and continuing LOAs that are attached to promotional materials as long as the LOA is "separable").

124. In the 1995 LOA Order, the FCC rejected a standardized LOA form because the agency believed that a standardized LOA would restrict long-distance carriers' marketing techniques and raise serious First Amendment concerns. *See* 1995 LOA Order, *supra* note 6, at 9566-67 (describing arguments put forward by both supporters and opponents of standardized LOAs). This analysis completely ignores the FCC's own experience in implementing the Allocation Order, which required long distance providers to use a standardized LOA. *See* Allocation Order, *supra* note 15, at 912. In the Allocation Order, the FCC required all local telephone

To rectify this problem, Congress should amend Section 258 to add a new subsection (d). The amendment would establish a standard format for the LOA that all telecommunications providers choosing to use them as a verification procedure would have to use. The standard LOA form should contain: (1) a listing of the subscriber's billing name, address, and phone number to be converted;<sup>125</sup> (2) an affirmation of the subscriber's decision to convert telecommunications service from the current provider to the prospective provider;<sup>126</sup> (3) a statement that the subscriber understands that there may be only one preferred interexchange service provider;<sup>127</sup> and (4) a list of all telecommunications services covered by the LOA (i.e., local service, long distance service, cellular service, etc.).<sup>128</sup> The heading of the LOA should state in conspicuous letters, "Application to Change Telecommunications Provider."<sup>129</sup> Also, if any part of the LOA appears in a language other than English, then the entire LOA form must also be translated into that language.<sup>130</sup>

### C. Enhanced Penalties for Slamming Violations

One of the easiest ways to eliminate slamming is to eliminate the profit potential that drives the practice.<sup>131</sup> Under current FCC prac-

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companies that were subject to the MFJ to provide customers with ballots to choose their pre-subscribed long-distance carrier. *See id.* at 921, 925. The ballots provided by local telephone companies had to conform to a *standard form* set forth by the FCC, and could be accompanied by marketing materials only on a limited basis. *See id.* app. B at 927 (allowing for distribution of marketing information if approved by LEC). Specifically, the ballots had to contain: (1) a standardized caption; (2) the name of the local phone company and the customer's name, address, and telephone number; (3) instructions on how to fill out the ballot; (4) a list of long-distance carriers from which the customer could choose; (5) the date on which the service conversion would take place; (6) a due date for the ballot; and (7) a signature and date line for the customer to verify their consent to the new selection. *See id.* Because a standardized presubscription ballot was permissible under the Allocation Plan, why is a standardized LOA not permissible under present circumstances?

125. *See* Allocation Order, *supra* note 15, at 912.

126. *See id.*

127. *See id.*

128. *See id.*

129. In 1995, Consumer Action, New York Public Service, and the American Carrier Telephone Association submitted comments requesting the FCC to adopt a standard title for all LOA forms such as, "An Order to Change My Long Distance Telephone Service Provider," "Application to Change My Long Distance Company," or "Order Form to Change My Long Distance Telephone Service." *See* 1995 LOA Order, *supra* note 6, at 9581. The FCC's response was that "[a]lthough we will not prescribe a particular title for the LOA, we agree with these commenters [sic] and strongly suggest that all IXCs use a clear, easily understood title." *Id.*

130. This represents a codification of current FCC regulations. *See* 47 C.F.R. § 64.1150(g) (1996).

131. *See* CHARLES H. KENNEDY, AN INTRODUCTION TO U.S. TELECOMMUNICATIONS LAW 122 (1994) (describing economic forces that motivate suppliers to pursue only profitable strategies). In a purely competitive telecommunications market, all buyers should be fully informed about the prices and quality of telecommunications services available from all suppliers. *See id.* app. at 122, 126 & n.9. Then, after considering all of the available suppliers, a consumer will be able to

tice, long-distance carriers that repeatedly commit slamming violations are issued "Notices of Apparent Liability"<sup>132</sup> in which they are asked to explain their actions in a manner satisfactory to the FCC.<sup>133</sup> If the long-distance carrier is unable to do so, the FCC issues a "Notice of Forfeiture" against the long-distance carrier, which operates as a fine and is designed to serve as a deterrent.<sup>134</sup> Unfortunately, most

make a fully informed choice regarding the most efficient provider.

"The key is that in pure competition the market—not the supplier—sets the price for the product . . ." *Id.* at 122. Telecommunications "providers" who engage in slamming reverse the pure competition model by giving the consumer no information and no choice. In effect, slammers are able to make millions of dollars in profit by using supplier set prices which far exceed the price they pay for service and the small fines that are occasionally levied by the FCC. *See The Switch is on at Phone Companies, supra* note 8, at 6 (describing efforts of state attorneys general and federal regulators' efforts to recover millions of dollars each year). Therefore, the only way to insure that anti-competitive forces are driven out of the telecommunications market is to take away ill-gotten profits. *See KENNEDY, supra*, at 119-22 (providing overview of economic principles governing newly deregulated telecommunications market).

132. Under the Communications Act of 1934, as amended, the FCC has the authority to levy a forfeiture of up to one hundred thousand dollars for each violation or each day of a continuing violation to a maximum of one million dollars for any one act. *See* 47 U.S.C. § 503(b)(2)(B) (1994). In assessing such a penalty, the FCC must take into account the "nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." *Id.* § 503(b)(2)(D). After a Notice of Apparent Liability is released, the alleged violator can present evidence, with regard to the above categories, to show that it should not be liable for the forfeiture or that it should pay a lesser amount. Generally, the FCC looks to a telecommunications provider's gross revenues to set the amount of apparent liability. *See generally* Matrix Telecom, Inc., 11 F.C.C.R. 1258, 1259-60 (1995) (utilizing defendants' financial information as basis for setting forfeiture amount).

133. *See generally* Matrix Telecom, Inc., *supra* note 133, at 1258 (finding that provider failed to adequately explain its actions). *See* Excel Telecommunications, Inc., 10 F.C.C.R. 10,880, 10,880 (1995) (finding Excel liable for \$80,000 forfeiture because it had "willfully or repeatedly violated Commission rules and orders by changing the primary interexchange carrier designated by [a consumer]"); Interstate Sav., Inc., 10 F.C.C.R. 10,877, 10,878 (1995) (finding ICI liable for \$40,000 forfeiture due to "willful" violations in slamming case).

134. Fines assessed against slamming long-distance carriers have questionable impact. In May 1994, the FCC entered into a consent decree with Cherry Communications "after receiving a large volume of consumer complaints alleging that Cherry may have engaged in widespread violation of Commission rules and orders pertaining to primary interexchange carrier (PIC) changes." Cherry Consent Decree, *supra* note 6, at 2086. As part of the consent decree, Cherry agreed to implement "remedial measures," including verification of every LOA by non-sales personnel, and payment of \$500,000 in monthly installments to the U.S. Treasury over a period of 36 months. *See id.* at 2087. Evidently, the consent decree had little effect on Cherry's marketing practices because in 1996, state regulators in California banned Cherry from conducting any business in the state for a period of two years. *See* Wagner, *PUC Slams Door, supra* note 94, at A1. In one particularly egregious incident, Cherry slammed 19 telephone lines of a California business after the owner requested the conversion of only five lines to test Cherry's prices. When the business owner asked to have his phone lines connected back to the original long-distance carrier, Cherry refused and slammed his phones six more times over the next seven weeks. *See id.* Later, Cherry sent the owner a bill for the slammed services, and when he refused to pay, Cherry sued. Cherry finally relented after the business owner hired a lawyer who initiated a formal proceeding before California regulators that lead to Cherry's banishment from the state. *See id.* Cherry has also been under investigation in at least 10 other states, including Illinois, where the company agreed to pay a fine of \$100,000 and reimburse slammed consumers. *See* Rob Karwath, *Cherry Communications Settles Long-Distance Case*, CHI. TRIB., Dec. 9, 1993, at 2; *see also* Common Carrier Bureau Adopts Consent Decree Agreement with MCI Resolving Notice of Apparent

of the fines levied by the FCC fall far below the amount required to diminish the profit margins of slamming long-distance carriers.<sup>135</sup> Thus, most long-distance carriers that engage in slamming likely view the FCC fines as a cost of doing business.<sup>136</sup>

The easiest way of diminishing this profit motive is to absolve slammed customers of liability for charges incurred while they are using the slamming carrier's services. The FCC considered adopting this approach in its 1995 LOA Order, but ultimately rejected it,<sup>137</sup> despite the urging of attorneys general from 25 states.<sup>138</sup> The 1996 Act, and its accompanying legislative history, further complicates matters in this area by providing conflicting standards regarding slamming carrier's liability to authorized carriers and consumers.<sup>139</sup>

Therefore, because the FCC has thus far refused to adopt a regulation absolving slammed consumers from charges incurred by the offending company, and because of the ambiguity in current section 258, Congress should amend Section 258(b)<sup>140</sup> to require the commission to protect consumers in this manner by requiring telecommunication companies to absolve slammed consumers of charges for

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*Liability for Forfeiture for Slamming*, Federal Document Clearing House, June 21, 1996, available in LEXIS, Nexis Library, Curnws File. In this consent decree, MCI agreed to make a "voluntary contribution" of \$30,000 to the U.S. Treasury and stated its intention to add additional protections against slamming by using a third party to verify all of its home and small business conversions. John B. Muleta, Chief of the FCC's Enforcement Division, Common Carrier Bureau, hailed the agreement as "a victory for consumers, for the FCC and for MCI," and stated that it represents "a better way to protect customers from errors and to ensure that they are hooked up to the long-distance carrier of their choice." *Id.* Unfortunately for consumers, this agreement applies only to MCI.

135. David Giangreco, President of Cherry Communications, estimates that the company has monthly revenues in the area of \$40 to \$45 million dollars. See Wagner, *PUC Slams Door*, *supra* note 95, at A1. Thus, the FCC's fine imposed upon Cherry in its 1994 consent decree represents less than 2% of Cherry's monthly revenues.

136. See 1995 LOA Order, *supra* note 6, at 9579 (acknowledging that revenue is driving force behind slamming).

137. See *id.* The FCC acknowledged that, "[S]ome IXCs engaging in slamming may not be deterred unless all revenue gained through slamming is denied them." Later in the same paragraph, the FCC seemed to admit that its own rules probably do not go far enough, stating, "we may have to revisit this question at a later date." *Id.*

138. See Jube Shiver, Jr., *Crackdown on Phone Service Switching Sought*, L.A. TIMES, Aug. 15, 1995, at D1. The 25 states seeking more aggressive enforcement against slamming are: Arizona, Arkansas, California, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Pennsylvania, Rhode Island, Tennessee, Vermont, West Virginia, and Wisconsin. In their joint petition, the Attorneys General stated that "[t]o reward the wrongdoer by allowing it to receive any benefit from its wrongful actions is contrary to long-established, equitable principles and would encourage rather than deter further slamming." *Id.*

139. See *supra* notes 61-71, 95-102 and accompanying text (discussing section 258 and its emphasis that authorized carriers must be compensated for forgone revenue due to slamming, whereas the legislative history emphasizes the conference committee's belief that the consumer not be liable for charges associated with unauthorized conversions of telecommunications services).

140. 47 U.S.C.A. § 258(b) (West Supp. 1997).

illegally converted service for a three-month period after the illegal change is executed.<sup>141</sup> Not only would such action reduce the profit motive available to slamming telecommunications providers, it would also eliminate the potential windfall that Section 258(b) presently affords to the previous telecommunications provider.<sup>142</sup>

*D. The FTC Should Have Jurisdiction Over Consumer Slamming Complaints*

Since the breakup of the AT&T monopoly in 1984, the FCC has established a solid record of fostering competition in the U.S. long-distance telephone market.<sup>143</sup> Unfortunately, the FCC has done little to halt anticompetitive practices in the deregulated market during this time.<sup>144</sup> Much of the FCC's inability to stop fraudulent practices is directly attributable to the fact that the FCC has a dual mission.<sup>145</sup>

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141. See 1995 LOA Order, *supra* note 6, at 9579. In the 1995 LOA Order, the FCC stated, "[D]espite the compelling arguments of those favoring total absolution of all toll charges from unauthorized long-distance carriers, we are not convinced that we should, as a policy matter, adopt that option at this time." *Id.* The FCC rests this rationale on the fact that, "The 'slammed' consumer does receive a service, even though the service is being provided by an unauthorized entity." *Id.* Additionally, the FCC states that the adoption of such a rule would lead to consumers intentionally converting their service, and then claiming that they were slammed in order to receive free long distance service. See *id.* This argument, however, carries little weight. Fraudulent slamming claims made by consumers are easily dispelled by providers who abide by the current FCC requirements that all LOAs be signed by the consumer requesting the change. Thus, the telecommunications provider will have evidence that a consumer ordered its service and, therefore, is not entitled to the absolution of charges. See Telephone Consumer Slamming Prevention Act of 1997, H.R. 2120, 105th Cong., § 2 (proposing that consumers be absolved of up to six-months of charges following an unauthorized conversion of telecommunications service); Slamming Prevention and Consumer Act of 1997, H.R. 3050, 105th Cong. (providing for the absolution of charges for up to three-months charges following an unauthorized conversion of service). This Comment concludes that absolving consumers of liability for up to a three-month period best protects the interest of the aggrieved consumers, while decreasing the incentive to delay reporting an incident of slamming in order to receive free telecommunications service.

142. See *supra* note 101 and accompanying text (noting that because many incidents of slamming go unreported, it may make economic sense for an IXC to slam as many customers as possible).

143. See Horovitz, *supra* note 32, at D1 (illustrating sharp decline in AT&T's share of long-distance telephone market from 1984 to 1990); see also Communications Reg. No. 96-39, at 1 (P&F) (Sept. 30, 1996) (explaining that in second quarter of 1996, AT&T's share of long-distance telephone market dropped to 54%).

144. See *supra* note 8 (recounting that, from November 1991 to June 1995, slamming complaints received by FCC rose from less than 100 per month to more than 700 per month). In 1995, 34% of all complaints received by the FCC concerned slamming, by far the largest category of complaints. See *Common Carrier Scorecard Report Goes On-Line*, Federal Document Clearing House, Dec. 10, 1996, available in LEXIS, Nexis Library, Curnws File.

145. See Debra Kay Thomas Graves, Comment, *The Consumer Protection Myth in Long-Distance Telephone Regulation: Remedies for the "Caveat Dialer" Attitude*, 27 TEX. TECH. L. REV. 383, 421 (1996) (stating that FCC has been "relentlessly pursuing a competitive market," while ignoring consumer complaints); see also *The Structure of the Savings and Loan Bailout: Hearing Before the Subcomm. on Fin. Insts. Supervision, Regulation and Ins., Resolution Trust Corp. Task Force of the Comm. on Banking, Finance and Urban Affairs*, 102d Cong. 63 (1991) (statement of Marshall J. Breger,

On one hand, the FCC seeks to encourage newcomers to enter the deregulated telecommunications market, which is an admirable goal.<sup>146</sup> On the other hand, the FCC also is charged with taking action against market entrants who engage in anti-competitive practices.<sup>147</sup> These competing interests within the FCC inherently lead to tough choices over which mission should take precedence.<sup>148</sup> Unfortunately, consumer protection has not emerged as a priority.<sup>149</sup>

Therefore, Congress should enact an amendment deleting section 45(a)(2) of the Federal Trade Commission Act, which currently exempts "common carriers" from the FTC's jurisdiction.<sup>150</sup> In its place, Congress should enact a new section 45(a)(2)(A) which explicitly grants the FTC jurisdiction to receive and resolve slamming complaints from consumers.<sup>151</sup> Additionally, Congress should enact a new section 45(a)(2)(B), which would set up a toll-free number at the FTC for consumers to call and file slamming complaints.<sup>152</sup> The new section 45(a)(2)(B) should also require all local and long-distance telephone service providers to list the toll-free FTC com-

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Chairman, Administrative Conference of the United States) (explaining problems with use of Federal Deposit Insurance Corporation's bureaucracy to administer most day-to-day functions of Resolution Trust Corporation in light of different missions of these agencies).

146. See Carney, *supra* note 1, at 289 (explaining that main goal of 1996 Act is to create competitive environment for all forms of telecommunications fostered through deregulatory policies implemented by FCC).

147. See 47 U.S.C.A. § 258 (West Supp. 1997).

148. See Graves, *supra* note 145, at 418-19 (explaining that FCC is generally non-responsive to many consumer complaints, and seems focused only on its main goal of achieving completely deregulated telecommunications market).

149. See *id.* (contrasting FCC's public relations efforts with those of other agencies).

150. 15 U.S.C. § 45(a)(2) (1994).

151. By shifting jurisdiction over slamming complaints to the FTC, consumers would finally have a wholly independent party to mediate slamming complaints; the FTC's mandate is limited to preventing "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." *Id.* § 45(a)(1). Additionally, the FTC is better equipped to handle many of the ancillary issues which are developing in the new telecommunications market, such as the "bundling" of telephone services with programs that grant customers frequent flier miles. See *supra* note 71 and accompanying text (noting that many long-distance telephone service providers have agreements with airlines to provide frequent flier miles for every dollar spent on telecommunications services); see also *supra* notes 82-84 and accompanying text (arguing that FCC does not have authority to promulgate rules concerning lost premiums, and that these issues must be resolved by FTC).

152. The FCC already has plans to set up a nationwide toll-free number for consumers to file complaints about slamming. According to then-FCC Chairman Reed Hundt, "Confusion over competition will lead to fairly significant growth in shady practices. Everyone can call up [the toll-free number] and complain and we can monitor this." Audra D.S. Burch & Mimi Whitefield, *Look for Odd and Exotic Offers to Sign Up*, NEWS & OBSERVER, Sept. 1, 1996, at D10 (alteration in original) (statement of Reed Hundt, FCC chairman). Unfortunately, the FCC views the toll-free number more as a monitoring device than a dispute resolution tool. See *id.* The FTC toll-free number should be explained to the public as a gateway to the slamming dispute resolution process. See Don Oldenburg, *FTC-Friendly to Consumers*, Wash. Post, Dec. 10, 1997, at D5 (explaining that the FTC already has a consumer response center where aggrieved consumers can file complaints or speak to consumer counselors who can assist with resolution of disputes).

plaint number on consumers' billing statements.<sup>153</sup> The phone number should be accompanied by a message stating: "[I]f you believe your local or long-distance telephone service has been changed to another provider without your permission, please contact the Federal Trade Commission's Consumer Response Center, Telecommunications Department, at the toll-free number listed below."<sup>154</sup>

Under this new regulatory model, the FCC can focus exclusively on technological issues that will increase competition in the U.S. telecommunications market,<sup>155</sup> while the FTC will be charged with pursuing telecommunications providers that engage in anti-competitive practices.<sup>156</sup>

Granting the FTC power to adjudicate disputes between consum-

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153. Telecommunications providers could also provide a number for their fraud departments which could assist consumers with slamming complaints. U.S. telecommunications providers could also follow the lead of their Canadian counterparts, who have established an industry ombudsman to resolve complaints between members of the telecommunications industry. *See Canada Telecom Group to Appoint Industry Ombudsman*, REUTERS FIN. SERV., Oct. 8, 1996, at 1, available in LEXIS, Nexis Library, Curnws File. Such a voluntary effort on the part of U.S. telecommunications providers would undoubtedly help government regulators ferret out many of the most egregious slammers.

154. One of the major problems confronting slammed consumers is confusion over the agency to call for redress. *See Telephone Service*, *supra* note 108, at 62. In the past, many consumers just called their local telephone service provider, who generally served as a neutral third party and helped resolve disputes between consumers and slamming long-distance carriers. In the deregulated market, however, consumers will no longer be able to rely on the incumbent local telephone company for assistance because it will likely be competing with other providers for both local and long-distance service. Thus, it is imperative that slammed consumers have an easily accessible third party to contact. By placing the FTC toll-free number on every telephone billing statement, consumers will, in most cases, have the information that they need to resolve slamming complaints.

155. *See* Cindy Skrzycki, *New Deregulation Game Leaves the FCC With Tough Calls*, WASH. POST, Feb. 16, 1996, at B1 (discussing massive increase in responsibilities placed on FCC by 1996 Act). Over the eighteen months following the enactment of the 1996 Act, the FCC plans to issue almost 80 different rules. The FCC also will have to deal with the many clarifications and associated issues that will arise as a result of the new rules. "The challenge is like that faced by Lewis and Clark." *Id.* (statement of then-FCC Chairman Reed Hundt). Based on this workload, the delegation of activities unrelated to telecommunications to another agency would be a rational choice.

156. Some commentators have argued that stricter verification procedures by LECs of long-distance carriers' primary interexchange carrier change requests is the solution to much of the slamming problem. *See* Nicole C. Daniel, Note, *A Return to Written Consent: A Proposal to the FCC to Eliminate Slamming*, 49 FED. COMM. L.J. 227, 244-48 (1996) (arguing that long-distance carriers should be required to submit signed LOAs to customers' LECs before any primary interexchange carrier change is made). Although this solution may have worked well in the old telecommunications market, it does not consider the realities of the newly deregulated market, where many of the same LECs that are supposed to be verifying LOAs will also be soliciting customers. Under the provisions of the 1996 Act, the LEC/long-distance carrier distinction will begin to fade, and along with it, the impartiality of LECs in resolving disputes among long-distance carriers. When these distinctions begin to blur, the only truly independent parties will be federal regulatory agencies like the FTC, state PUCs, and state attorneys general. *See Telephone Service*, *supra* note 109, at 62 (stating that telecommunications providers will soon try to sign consumers up for their entire telephone service package, making it more difficult for consumers to resolve slamming problems).

ers and telecommunications providers will also allow the FTC to gain valuable institutional experience that can be used to combat unfair practices in other deregulated utility markets, such as the electric power industry, that are beyond the jurisdiction of the FCC. On January 1, 1998, California will begin the process of deregulating that state's electric utilities.<sup>157</sup> As this process spreads across the rest of the United States through additional state and federal deregulation legislation, consumers must have access to an impartial party that can assist in the resolution of disputes involving formerly regulated utilities. The TDDRA model<sup>158</sup> provides ample evidence that such a bifurcated regulatory framework can work successfully in a new telecommunications market where services are bundled into packages containing both communications and non-communications related services.<sup>159</sup>

#### CONCLUSION

The Telecommunications Act of 1996 presents a comprehensive blueprint for many of the technical and regulatory changes that will occur in the U.S. telecommunications market as the U.S. enters an era of free competition. Unfortunately, while the 1996 Act presents fresh ideas for managing new technologies and services, it represents a step backward for consumer protection. For competition to flourish in the new, deregulated market, consumers must feel confident that they will be free to choose services from the telecommunications provider that best suits their needs. When cases of unfair competition and trade practices arise, regulatory agencies must be available to provide fair and equitable remedies. The 1996 Act and proposed FCC regulatory measures do not provide the assurances necessary to garner public confidence in the new market. Therefore, Congress should amend the 1996 Act to protect consumers from the unfair practices of unscrupulous telecommunications providers. With decisive action, Congress can finally disconnect the slammers, instead of

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157. See Dan Richard & Melissa Lavinson, *Something for Everyone: The Politics of California's New Law on Electric Restructuring*, 134 No. 21 Pub. Util. Fort. 37, 39 (detailing changes during California's electric utility deregulation transition period from January 1, 1998 to December 31, 2001). The unauthorized conversion of electric service is generally referred to as "shocking." See Vicki Torres, *Small Firms are Latest Victims of Phone Switching*, L.A. Times, Sept. 10, 1997, at D5.

158. See *supra* notes 86-94 and accompanying text (discussing bifurcated regulatory process established by TDDRA, in which FCC has jurisdiction over technical aspects of the pay-per-call industry and FTC has jurisdiction over advertising practices associated with those services).

159. See Slamming Prevention and Consumer Protection Act of 1997, H.R. 3050, 105th Cong. (establishing a bifurcated system for the resolution of slamming complaints where the FCC would get verification procedures and the FTC would regulate "unfair and deceptive acts and practices in any advertisements" for telecommunication services).

hanging up on consumers.