State of California **Public Utilities Commission**
San Francisco

M E M O R A N D U M

Date : January 20, 2006

To : The Commission
(Meeting of January 26, 2006)

From : Christopher Witteman, PU Counsel IV

Subject : Staff Seeks Authority to Comment on Application of Rural LECs for Review of FCC Ruling re LEC Obligations to Execute PIC Change Requests with Incorrect Information (CC Docket No. 94-129)

<u>RECOMMENDATION</u>: Staff requests permission to file comments in the FCC docket for the Rural LECs[1] Application for Review of the FCC's June 9, 2005 Declaratory Ruling, denying the LECs' Petition with Respect to Obligation to Execute PIC Change Requests with Incorrect Subscriber Information. A PIC is a primary interexchange carrier, and a customer selects a PIC when signing up for telephone service. In the case of a bundled offering, the customer often chooses a PIC which is the local exchange carrier's (LEC's) long-distance affiliate. [2] Staff is concerned with cases in which the customer selects a PIC other than the LEC's affiliate, often after receiving a telemarketing call from a competing long-distance carrier. Staff recommends filing comments describing the CPUC's experience in enforcement cases where non-

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[1] The Rural Local Exchange Carriers (LECs) are a consortium of approximately 38 smaller LECs throughout the country, represented by David Cosson at Kraskin, Moorman & Cosson, in Washington DC. .

[2] Such bundled service may be one reason that slamming numbers are generally trending down (although complaints about some competing carriers, for example Clear World, are again edging upward). This trend may not hold for the Rural LECs, as these smaller LECs are more often at arm's length from IXCs (long-distance interexchange carriers) than in the urban centers where the consolidation of the large LECs (e.g., SBC) with the large IXCs (e.g. AT&T) is moving ahead.

subscribers have authorized PIC changes to the subscriber's telephone service[3] so that the FCC will have this information before it as it reconsiders its ruling. The PIC change process is embedded in FCC rules and carrier practices, but Staff believes it has a direct effect on consumers and, as presently configured, may enable consumer fraud.

THE PETITION: The Rural LECs' petition is modest. The Rural LECs, and LECs generally, are the executing carriers, i.e., they execute the PIC change orders submitted by the IXCs (inter-exchange carriers, or submitting carriers). The LECs asked the FCC for permission to reject PIC[4] change orders when the name listed on the submitted order was neither that of the subscriber nor of a designated agent of the subscriber, as listed in the LEC's records. The Rural LECs, and LECs generally, reject PIC change orders from submitting carriers for other reasons, such as where the LEC's records show there is a PIC freeze on the line, or that the submitting carrier already services the line, or other incompatibility between the submitted order and the LEC's records. The FCC, however, denied the Rural LECs' request here, finding that their proposal would essentially duplicate the verification of subscriber identity and intent already performed by the submitting carrier[5] at or shortly after the time of sale, and that "the anti-competitive effects of reverification outweighed the potential benefits."[6]

THE PROBLEM: Staff's experience in enforcement is that there are often problems with subscriber verification where the PIC change order is obtained after a telemarketing sales pitch. Staff has seen repeated instances where the telemarketer coaches the person on the phone to answer "yes" to the verification questions, including verification that the person is either the subscriber *or authorized by the subscriber to change carriers for the subscriber.* The "submitting carrier" (usually some sort of long-distance reseller, often just a telemarketing organization with a utility license) may not care whether the voice on the phone is that of the subscriber, someone actually authorized by the subscriber, or just

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[3] The Commission several times has addressed the problem of the non-subscriber authorization which the subscriber later contests. See, e.g., *Investigation of Communication TeleSystems (CTS)* (1997) 72 CPUC2d 621, 635-36; *Investigation of Qwest* (2001), 72 CPUC 2d 621, D.02-10-059, Slip Op. at 10, 17. In these decisions, the Commission relied on agency law in finding that the assertions of someone other than the subscriber were insufficient to show the subscriber's intent when the subscriber denies that this other party was authorized to change service (i.e., when the principal denies the agency of the other party).

[4] A PIC change order goes from a submitting carrier to the executing carrier (usually a LEC), every time a customer requests a change in long distance or intra-LATA service. The LEC actually executes the PIC change, i.e., routes the customer's long-distance calls to the new submitting carrier.

[5] This verification is actually performed by a reputedly independent "third party verifier" hired by the carrier. The inherent conflict of interest for the third party verifier is also reflected in the fact that many verification scripts are actually written by the carrier.

[6] Declaratory Ruling in CC Docket No. 94-129 (*In the Matter of Implementation of the Subscriber Carrier Selection Change Provisions of the Telecommunications Act of 1996*), DA 05-1618, released June 9, 2005. Technically speaking, the executing carrier or LECs consulting its own records cannot be considered a verification (or re-verification) as that term is used in 47 CFR 64.1120(c) – the four methods of verification listed there each involve some interaction with the subscriber at the time of the PIC change order.

a casual visitor to the house. Ten years of slamming enforcement has demonstrated that telemarketers often focus on Spanish-speaking households where in numerous instances there are many related and unrelated people living in the same house, and where unauthorized individuals will often succumb to aggressive telemarketing.[7] The CPUC's proposed comments would document this problem to the extent reflected in Commission Decisions.

POTENTIAL SOLUTIONS: Key here is the fact that the Rural LECs ask the subscriber, at the point of initial subscription, who else is authorized to make changes on the account. If the submitting carrier provides a name not in the LECs' records, the Rural LECs ask permission to at least initially refuse to execute the PIC change on that basis.[8] The CPUC could seek approval of the Rural LEC proposal conditioned on the existence of a way for the subscriber to expeditiously add a new agent to those designated in the LEC's records, and have the PIC change order re-submitted, so as to mitigate any anti-competitive effect of this process.

The goal is to urge the FCC to provide the subscriber-as-principal the same level of protection the principal receives in other commercial settings (putative agents required to provide written proof of agency in banking, investment, and medical records contexts). At a minimum, the CPUC's comments would be salutary in informing the FCC of problems in the current system of PIC change administration, specifically that the third party verification of subscriber authority may be gamed by telemarketers focused upon Spanish speaking households.

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[7] As the Commission noted in *Qwest*, *supra*, "The slamming rate for Spanish and Asian preferred language residential customers for 1999 and 2000 was consistently higher than the rate for English language preferred customers … slamming activities have a disproportionate impact on ethnic communities."

[8] The proposed process should not run afoul of the DC Circuit's decision in *ATT v. FCC*, 323 F.3d 1081 (2003), which held that the FCC could not require actual subscriber verification (i.e., verification only by the subscriber and not by the agent of the subscriber) because that went beyond the legislative authorization to the FCC. In other words, Section 258 did not authorize the FCC to require that inter-exchange carriers acquire actual authorization from subscribers before submitting PIC changes. No such requirement is imposed here. A subscriber's agents could still initiate a PIC change, but that agent would have to have been previously identified to the executing carrier.