Decision **DRAFT DECISION OF COMMISSIONER WOOD** (Mailed 6/6/2002)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities.	Rulemaking 00-02-004 (Filed February 3, 2000)

INTERIM DECISION ISSUING GENERAL ORDER ___, RULES GOVERNING TELECOMMUNICATIONS CONSUMER PROTECTION

Summary

By this decision the Commission adopts General Order No. ___ (G.O. ___), Rules Governing Telecommunications Consumer Protection, applicable to all Commission-regulated telecommunications utilities. G.O. ___ sets forth: in Part 1, a telecommunications consumers' Bill of Rights, the fundamental consumer rights that all communications service providers must respect; in Part 2, a set of Consumer Protection Rules all carriers must follow to protect those rights; in Part 3, Rules Governing Billing for Non-communications-Related Charges, in response to recent state legislation; and in Part 4, Rules Governing Slamming Complaints, to implement federal rule changes enacted in 2000 by the Federal Communications Commission. Where the new rules supersede current rules, the order so notes. In addition, the Commission narrows the limitation of liability provisions formerly available to Commission- regulated

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telecommunications utilities. The Commission does not at this time implement the rulemaking order's proposal to have the Consumer Protection Rules replace tariffs for competitive telecommunications services. Carriers are required to revise their tariffs where they conflict with the new rules, provided, however, that no tariff changes will be permitted that reduce current consumer protections.

This rulemaking proceeding remains open to consider whether the Commission should implement a telecommunications consumer education program, and if so, how it should be structured.

Background

As the Commission observed in opening this rulemaking, the past decade has been witness to a rapid evolution in the telecommunications industry, not only in the technology the industry employs but as well in its structure, the mix of services it provides, and the ways it provides those services. A wide variety of what were once monopoly services is increasingly available from competing providers. Regulatory policies have likewise been evolving in ways aimed at enabling and promoting competition and all the benefits competition has promised to provide. At the same time, legislators and regulators have not been blind to the potential for abuse that may exist in any market, regulated or fully competitive. This Commission has for some time recognized that the ongoing shift to a more competitive telecommunications marketplace challenges it to find new methods to protect consumers, and it has made great strides in meeting that challenge.

The Commission's stated purpose for this proceeding, then, is to consider whether to revise its existing consumer protection rules and / or establish new rules applicable to regulated telecommunications utilities. If changes are needed,

the task is to decide what specific rules should be revised or established and for which classes of telecommunications utilities.

The rulemaking order that began this proceeding introduced a Commission staff report suggesting specific consumer protection measures, including a telecommunications consumers' bill of rights, rules to protect those rights, and changes to the industry's current tariffing and limitation of liability practices. Respondent utilities and interested parties were invited to submit comments and replies, and a full spectrum of stakeholders did so. Regulated utilities were well represented, individually and in groups and associations expressing shared views. Local, state and federal governments commented. Individuals and organized groups made presentations on behalf of residential and small business consumers. In all, the Commission received 71 submittals from 39 groups consisting of 67 named entities, some of which were in turn associations of many more unnamed members. Not surprisingly, commenters representing the telecommunications utilities were generally opposed to the staff report's proposed rights and rules and other measures, while consumer representatives were generally supportive. There were exceptions in each camp, both as to individual commenters and specific proposed measures. The rule-by-rule discussion sections to follow will provide more on the positions taken in comments, and some of the alternatives suggested.

The Commission's next step was to arrange to hear as much input as possible from consumers. The public was invited to 20 public participation hearing sessions in 13 locations throughout the state between mid-June and September, 2000. With the utilities' assistance, informative notices were published and mailed to virtually every telecommunications consumer in California. Those who couldn't attend were urged to express their views in writing. By Fall, 2000, some 1200 people had taken the time to attend one of the

public sessions and more than 300 of them made public statements. Those who spoke represented a cross section of the affected public: residential customers, large and small business customers, senior citizens, union members and representatives, public officials, minority business associations, low income groups, community-based organizations of every kind, and many others. Another 2000 responded and made their views known by letter or e-mail. The general public sentiment as expressed in both the public participation hearings and correspondence was overwhelmingly in favor of the Commission's taking on a much stronger consumer protection role.

After considering the extensive party and public input, the Commission is adopting the telecommunications consumers' Bill of Rights, and the Rules Governing Telecommunications Consumer Protection, set forth in G.O. ___, Parts 1 and 2, Appendix B to this order.

In January, 2001, assigned Commissioner Carl Wood issued two rulings seeking comments on two additional sets of proposed rules falling within the scope of the rulemaking proceeding. The first set was Proposed Rules on the Inclusion of Non-communications-Related Charges on Telephone Bills. On September 29, 2000, Governor Gray Davis signed Assembly Bill (AB) 994[1] extending a Public Utilities Code Section 2890[2] ban on non-communications-related charges in telephone bills to July 1, 2001. AB 994 also added Section 2890.1 to the Public Utilities Code, explicitly directing the Commission to adopt by that date any additional rules it determined necessary to implement the billing safeguards set forth in Section 2890. AB 994, Sections 1(c) and 1(d), cites

[1] AB 994, Stats. 2000, Ch. 931.

[2] All references are to the Public Utilities Code unless otherwise noted.

this rulemaking proceeding as a proper vehicle for the Commission to do so. After considering comments and replies from the parties, we issued Decision (D.) 01-07-030 adopting a set of interim rules governing the inclusion of non-communications-related charges on telephone bills. We stated that those rules, possibly with some modifications, would be incorporated into and superseded by the new general order we adopt in this decision. The D.01-07-030 rules, no longer interim, will now be Part 3, Rules Governing Billing for Non-communications-Related Charges, of new G.O. ___.

In the second January ruling, the assigned Commissioner sent out for comments his Proposed Rules for Slamming, prepared in response to the FCC's decision in CC Docket No. 94-129. The FCC rules gave each state the option to act as the adjudicator of slamming complaints, both interstate and intrastate. Under the FCC's order, each state which opts to take on that responsibility must notify the FCC of the procedures it will use to adjudicate individual slamming complaints. After considering comments and replies from the parties, the Commission is adopting for that purpose the Rules Governing Slamming Complaints included in G.O. ___, Part 4.

Below we discuss each part of new G.O. ___ in turn. For the consumer protection rights and rules in Parts 1 and 2, each right is addressed and then each rule, linking the rule to the right(s) it will help safeguard. The input we received on the draft rights and rules from the parties was extensive and generally very constructive. It would be unhelpful, and because so many contributed, impractical as well, to repeat every point raised in the comments. Instead, we summarize the significant issues raised and explain how these updated rules accommodate them.

Part 1: Bill of Rights

In 1993, the legislature passed and the governor signed AB 726, the Telecommunications Customer Service Act of 1993, adding Sections 2896 and 2897 to the Public Utilities Code. Under Section 2896(a), the Commission must require telephone corporations to furnish their customers with sufficient information to make informed service and provider choices, including, *e.g.*, providers' identities, service options, pricing, and terms and conditions of service. Under Section 2896(c), customers are to receive information concerning the regulatory process and how they can participate in that process and resolve complaints.[3] Further, through Section 2897, the Legislature directed the Commission to apply its Section 2896 policies to *all* providers of

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[3] § 2896. The commission shall require telephone corporations to provide customer service to telecommunication customers that includes, but is not limited to, all the following:

(a) Sufficient information upon which to make informed choices among telecommunications services and providers. This includes, but is not limited to, information regarding the provider's identity, service options, pricing, and terms and conditions of service. A provider need only provide information to its customers on the services which it offers.

(b) Ability to access a live operator by dialing the numeral "0" as an available, free option. The commission may authorize rates and charges for any operator assistance service provided subsequent to access.

(c) Reasonable statewide service quality standards, including, but not limited to, standards regarding network technical quality, customer service, installation, repair, and billing.

(d) Information concerning the regulatory process and how customers can participate in that process, including the process of resolving complaints.

§ 2897. Consistent with other provisions of this code, orders, rules, and applicable tariffs of telecommunications service providers, the commission shall apply these policies to all providers of telecommunications services in California. These policies are not exclusive and may be supplemented by the commission.

telecommunications services in California and invited the Commission to supplement them as necessary. The legislature thus acknowledged the need for some of the consumer protection measures we implement in this proceeding and directed the Commission to ensure that carriers of all classes abide by certain basic standards of disclosure and customer service.[4]

We are not the first to recognize the potential in a telecommunications bill of rights:

> Whether or not a commission wishes to pursue establishment of a bill of rights in a legal venue, the concept provides one perspective on the evolution of regulatory regimes beyond ratebase, rate-of-return regulation. We are in a period of dynamic change in the relationship of the institutional arrangements for production and delivery of telecommunications services to individuals as consumers and citizens. The pendulum is shifting away from a high degree of government control that worked well throughout the 20th century but would be over-regulation in the new era. Yet we continue to seek a good society and individual autonomy.
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> State regulatory commissions have frequently used a bill of rights as a way of informing consumers about service they should expect from utilities including telephone companies …. With the birth of local competition in telecommunications, several commissioners and consumer advocates realized that the idea of rights is a powerful tool for identifying and filling gaps in protections traditionally provided through ratebase, rate-of-return regulation. Their

[4] These new rules are part of an effort to *strengthen* our consumer protections. So, *e.g.*, where current tariffs provide stronger protections than these, they will remain; where we have enforcement actions underway based on § 2896, they will continue.

> proposals for a telecommunications bill of rights typically include claims for individuals as both consumers and citizens.[5]

This 1999 NRRI research report identified five other states whose commissions had entertained such proposals between 1995 and 1999. If the specific rights the rulemaking order proposed for comment were unique, the concept was not.

Many carrier representatives questioned whether this consumer protection proceeding and these rights and rules, indeed, *any* rights and rules, are needed. They made one argument time and again with respect to individual rules and the set of rules overall: Left to itself, the competitive marketplace will oust the least consumer-responsive carriers and bring out the best in service quality and marketing behavior. This comment, however, best reflects our view:

> In a perfect world, all telecommunications carriers would operate honorably and never seek unfair advantage at the expense of their residential and business customers. Unfortunately, perfection in competition and conduct remains only an ideal. In the meantime, it is the Commission's responsibility to enact clear and concise rules to guide industry conduct. In the long run, such rules will benefit consumers, carriers and the general public alike.

Our proposed rules generated considerable difference of opinion among those who responded. The proposed rights, in contrast, did not. Some parties proposed additional rights; a few proposed rewording these. Notwithstanding carrier resistance to the proceeding overall, the parties generally embraced both the rights concept and staff's proposed implementation of it. With that in mind, our discussion here will be limited.

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[5] A *Critical Perspective on a Telecommunications Bill of Rights*, The National Regulatory Research Institute, November, 1999.

The first two rights, *Disclosure* and *Choice*, have only minor wording changes. These rights were nearly universally accepted and we need not dwell on them.

The *Right of Privacy* was also accepted in principle even as parties differed as to how it should be translated to rule. Here perhaps as much as anywhere could be seen the schism between consumer advocates and carriers. The former treated privacy as a true right of the individual, as indeed it is.[6] Carrier advocates, on the other hand, were far more likely to view privacy in terms of the negative impacts it might have on their access to subscriber information as a commercial and marketing tool. Most subscribers, they maintain, want to be marketed to and value the convenience unfettered access to their records allows. Those who do not should bear the responsibility for opting out. Following that reasoning, carriers' comments went largely to marshaling legal arguments against Commission restrictions. Since it is the privacy rule and not privacy as a right that is at issue, we will pick up this discussion when we address implementation under Part 2, Rule 12 below.

The next two proposed rights, *Public Participation*, and *Oversight and Enforcement*, are related in that both address consumers' interaction with the agencies that establish telecommunications policies, rights and rules and ensure carrier compliance. As many commenters pointed out, what is perhaps the most important aspect from the consumer's perspective was inadvertently lost in the wording: Consumers' rights need to be enforced.

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[6] "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*." California Constitution, Article 1, Section 1, Declaration of Rights (Emphasis added).

Thus, these two proposed rights have now been combined to address consumers' relationship with regulators:

> *Public Participation and Enforcement: Consumers have a right to participate in public policy proceedings, to be informed of their rights and what agencies enforce those rights, and to have effective recourse if their rights are violated.*

Two statements have been moved to the rules from the proposed *Right of Accurate Bills and Redress*, and additional qualifications have been added. We agree that both statements in the original draft of this right are important requirements of carriers: "Vendors of telecommunications services shall provide clear information explaining how and where consumers can complain"; and, "Consumers shall have their complaints addressed without harassment." The first is explicit in Rules 1, 6 and 9, and the second is subsumed within this right as rewritten and implicit in Rule 11. Other parties point out that redress should be fair, prompt and courteous, and we concur. This right then becomes:

> *Accurate Bills and Redress: Consumers have a right to accurate and understandable bills for products and services they authorize, and to fair, prompt and courteous redress for problems they encounter.*

In addition to their comments on the rights proposed in the staff report, parties suggested several more which could be summarized as rights to: safety; non-discrimination (also labeled equal access); service guarantees; immediate access to impartial dispute resolution; and adequate representation in public policy proceedings. Among those, we address here a *Right to Safety*, and a *Right to Non-Discrimination*. Service quality is a real issue of concern that we will have more to say about later. Access to dispute resolution is part of *Accurate Bills and Redress* and *Public Participation and Enforcement*; consumer representation in public policy proceedings is part of the *Right to Public Participation and Enforcement*.

At least six parties, including the state's two largest incumbent local exchange carriers, endorse adding a *Right to Non-Discrimination*. As with the *Right to Safety*, although it was not explicit in the first iteration, neither was it ignored in the draft rules. A carrier expressed it best: "Many of the rules promulgated by staff are already directed to the implementation of such a right, but its express enumeration will ensure that consumer protection is implemented in a non-discriminatory fashion."

Commenters advocating adding a *Right to Non-Discrimination* introduced it from three distinct but overlapping approaches. First, two commenters mentioned non-discrimination only in the narrow context of freedom from redlining.[7] Others suggested a *Right to Non-Discrimination* more broadly in the context of (in various combinations) race, color, creed, ethnicity, disability, gender, age, economic status, or language. Lastly, one commenter described it as an obligation under the law to treat all similarly situated customers the same, as required by Section 453.[8] We are often called on to interpret and apply Section

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[7] The practice of excluding a geographic area (*e.g.*, a low-income or minority neighborhood or community) from some beneficial service or opportunity is often referred to as redlining. The Commission addressed telecommunications redlining in Decision (D.) 96-12-056: "Redlining refers to the discriminatory provision of telecommunications services whereby areas characterized by minority customers might not be afforded access to the same types or quality of telecommunications services offered to customers in non-minority areas." In that same decision, it set forth this regulation: "Redlining is prohibited and the Commission shall take strong action against any carrier engaging in redlining."

[8] § 453 (a) No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.

(b) No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of race, religious creed, color, national origin,

Footnote continued on next page

453 in our role as regulators, and it is in this most broad sense expressed by Section 453 that we will interpret the *Right to Non-Discrimination*.

The suggestion to add a *Right to Safety* came from two participants. One wrote,

> Although perhaps less acute than in electric and gas service, consumers have a basic right to practices that will promote (or at least not endanger) their physical safety. Rule 14 (Employee Identification) and Rule 15 (Access to 911 Emergency Services) are two examples of rules that promote consumer safety.

Our intent to promote telecommunications consumers' safety was indeed an unwritten foundation for both of those rules. We agree that *Safety* should be added as a basic right.

Part 2: Consumer Protection Rules

We begin with some overall observations on the input we received through parties' comments and replies on the proposed consumer protection rules distributed with the rulemaking order. First, we were gratified to see the thoroughness with which the parties approached the task. Not only did the parties tender their positive and negative reactions to each rule, but in most cases they then went on to explain those reactions and suggest changes we might make to conform each rule to their positions. Commenters were also imaginative in proposing additional rights and rules. A number of them on both sides of the service relationship will recognize their handiwork in the new general order.

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ancestry, physical handicap, medical condition, occupation, sex, marital status or change in marital status….

(c) No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Second, while we could have anticipated that consumer representatives would in general be enthusiastic toward new rules and carrier representatives much less so, there was a remarkable degree of crossover. Even some of the more prominent carriers and consumerists were quick to acknowledge the strengths of positions opposed to theirs when that was appropriate. Third, there were many suggestions that were on the periphery of what was originally envisioned in the rulemaking order. Some of those, such as enhanced enforcement and consumer education programs, we will mention later in this order. Others advanced topics that are outside the scope of the proceeding but we may follow up on in new proceedings in the near future. Service quality is perhaps the most prominent example. We draw a distinction in this proceeding, however, between consumer protection rules and service quality rules. The latter are much more likely to involve objective measures of performance subject to technical analysis and perhaps evidentiary hearings.

Relationship to Existing Rules and Tariffs

Many parties in their comments urged us to make clear which of our earlier requirements we intend to supersede by these rules. The Commission has enacted other sets of carrier-class specific consumer protection rules in its proceedings over the years, and those rules were in fact the source for many of the rules staff proposed in its report. There are also consumer protections set forth in federal and state statutory requirements, FCC rules, Commission general orders, and Commission decisions, many of which we have drawn on in addition to the parties' comments in drafting this final set of rules applicable to all carriers. In defining the relationship of these new rules to existing rules and tariffs and which of our earlier requirements we intend be superseded, we here address each source of current consumer protection requirements: tariffs, carrier-

class specific rules, Commission decisions and general orders, and state and federal statutes and FCC orders.

Tariffs

Tariffs have historically been the primary source of Commission-initiated consumer protection rules for all classes of carriers. Each tariffed carrier class generally has begun with a core set of rules[9] which Commissions past then required and / or allowed to be modified and updated to reflect changes in technology, law and the marketplace over the years. With the advent of competition, the local exchange carriers (LECs), competitive local exchange carriers (CLCs), and incumbent LEC (ILEC) affiliated interexchange carriers (IECs) are still tariffed, while the non-ILEC affiliated IECs have a choice of being tariffed or non-tariffed. Commercial mobile radio service (CMRS) carriers were exempted by D.96-12-071 from having to file tariffs, but required to continue following their formerly-tariffed consumer protection rules under a transition procedure set up in D.96-12-071, as explained below. With today's rules, we establish updated standards for consumer protection to be applied across all carrier classes. It is perhaps inescapable in drafting a single set of rules for all carriers and carrier classes that some carriers will have in force individual tariff requirements that already exceed various requirements in the new rules. We do not intend by these rules to encourage or allow carriers to relax any current tariffed consumer protections. Where current tariffs fall short of our new standards, we will require carriers to modify their tariffs accordingly. Where the

[9] See, *e.g.*, G.O. 96-A, Section II.C(4), which outlines a set of 19 subjects appropriate for the stationary utilities to include in their tariffs.

tariffs already provide an equivalent or greater level of protection, those higher levels are to continue in force.

CLC Rules

The current CLC-specific consumer protection rules were established in Order Instituting Rulemaking (R.) 95-04-043 and Order Instituting Investigation (I.) 95-04-044, our rulemaking and investigation into competition for local exchange service, when CLCs first became eligible for certification. D.95-07-054, Appendix B, Consumer Protection and Consumer Information Rules for CLCs, served as an important source document for the rules in this proceeding. Those Appendix B rules have been considered and are superseded in their entirety by our new G.O. ___. Subsequently, D.95-12-056 in the same local exchange competition proceeding introduced additional requirements. Some of those relate to our new general order in the areas of, *e.g.*, disclosures in languages other than English, deposits, redlining, and end-user 911 service. Those requirements were not classified as consumer protection rules *per se* in D.95-12-056, but we have reviewed them in preparing G.O. ___. None are inconsistent with our new G.O. ___, so all of the requirements of D.95-12-056 will remain in effect.

Detariffed IEC Rules

IECs have been tariffed since they were first certificated as a separate carrier class in the 1980's. As we observed in D.98-08-031, "Our current consumer protection rules [for IECs] are reflected in our Decisions, General Orders and other rules, as well as in the utilities' tariffs." That decision in R.94-02-003 and I.94-02-004, our proceeding to establish a simplified registration process for non-dominant telecommunications firms, offered non-ILEC affiliated IECs an exemption from tariffing. Pursuant to Section 495.7(c), the Commission

established in D.98-08-031 a set of consumer protection rules for the exempted services. Again, those rules have been considered and are superseded by our new G.O. ___.

CMRS Rules, and the CMRS Proceeding

CMRS carriers are a diverse group of sub-classes that followed different paths to reach today's state of regulation.[10] In D.96-12-071 we exempted all regulated CMRS carriers from filing tariffs, and also allowed them to offer service through customer-specific contracts without Commission pre-approval. To replace the consumer protections formerly in tariffs, we stated our intent to develop and adopt one uniform set of consumer protection rules applicable to all CMRS providers, after which any previously filed CMRS tariff rules would be superseded by those newly adopted rules:

> The purpose behind any tariff filing requirements would be to adjudicate any consumer complaints and protect consumer interests. In the event such information is needed to resolve a particular consumer complaint or dispute that falls within our current jurisdiction, we still have the authority to require carriers to promptly provide the Commission with the requisite rate and other information. Therefore, we shall continue to require each CMRS provider to maintain a record of its rates, other terms and conditions and revisions thereto, at its general office. While we have concluded that the filing

[10] D.96-12-071 defined CMRS broadly as including cellular services, personal communication services (PCS), wide-area specialized mobile radio services (SMR), and radiotelephone utilities (RTU or paging) services. In D.95-10-032, we addressed in general which CMRS providers are subject to Commission jurisdiction, and what effect the federal Omnibus Budget Reconciliation Act of 1993 had on the CMRS regulatory program. We provided further clarification in D.96-12-071. The term 'CMRS' in today's decision refers only to those sub-classes over which we have previously asserted continuing jurisdiction.

> of CMRS tariffs should no longer be required, we still remain concerned that the terms and conditions of service offered by each CMRS provider continue to provide adequate protection to consumers. We have traditionally relied upon the filing of tariffs to assure that the consumer protection provisions within those tariffs were adequate. *We believe, however, that a more efficient alternative to requiring the separate filing of tariffs by every CMRS provider is to develop and adopt one uniform set of Consumer Protection Rules applicable to all CMRS providers.*
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> In order to provide for regulatory continuity between now and the time we adopt a set of consumer protection rules applicable to CMRS providers, as an interim measure, we shall continue to enforce each CMRS provider's existing consumer protection rules. By existing consumer protection rules, we refer to those categories of rules summarized in G.O. 96-A, Section II.C(4). These rules as categorized in G.O. 96-A are set forth in the existing tariffs currently in effect for each CMRS provider, even though a copy of every CMRS provider's currently effective tariff may not be on file with the Commission. We shall apply these existing rule provisions in dealing with any CMRS consumer complaints or billing disputes that come before us during this interim period. If necessary to resolve a complaint, we shall direct the CMRS provider to supply a copy of its currently effective consumer protection rules to the Commission if a currently-effective copy was not previously filed. *Once we adopt a generic set of consumer protection rules for CMRS providers, any previously filed G.O. 96-A CMRS tariff rules shall be superseded by those newly adopted rules.* (D.96-12-071). (Emphasis added).

Accordingly, we intend the consumer protection rules we adopt today to fulfill the purpose anticipated in D.96-12-071 by superseding any previously-filed CMRS provider tariff rules.

General Orders

The new rules have been carefully coordinated with recently-enacted portions of our forthcoming General Order 96-B, Rules Governing Advice Letters and Information-only Filings.[11] The primary area of overlap is in Rule 8, Tariff Changes, Contract Changes, Notices and Transfers and, as described later below, those recently-enacted portions of G.O. 96-B have in fact already determined much or most of what is in our new Rule 8. In addition to the G.O. 96 series, we also believe these rules to be entirely consistent with all other Commission general orders, and thus no part of any Commission general order is superseded.

State and Federal Statutes, and FCC Orders

As noted, we have also drawn from state and federal statutes and FCC orders in assembling these consumer protection rules. We are acutely aware of the need to remain within bounds where those authorities constrain us, and we have been cautious to do so. In those areas where our rules are more consumer-protective than those other authorities might be, it is because we have authority to do so. We have provided cross-references to certain state and federal statutes and regulations in comments to the rules for the convenience of carriers and the public, and in some instances to clarify the relationship of our

[11] The Commission has a proceeding currently underway, R.98-07-038, to adopt a new general order, G.O. 96-B, Rules Governing Advice Letters and Information-only Filings, to supersede G.O. 96-A. Pending G.O. 96-B's enactment, the Commission has issued D.01-07-026, Interim Opinion Adopting Certain Requirements for Publishing and Providing Service Under Tariffs, and D.02-01-038, Second Interim Opinion Adopting Certain Requirements for Notifying Telecommunications Customers of Proposed Transfer, Withdrawal of Service, or Higher Rates or Charges. The rules adopted in those two interim decisions will eventually be codified in G.O. 96-B.

rules to those authorities. All carriers need to be aware that we have not attempted to echo in these rules every legal requirement that applies to them, and of their need to comply with all applicable legal requirements.

Applicability

To Carriers

First, we affirm that we intend these rules to be applicable to all Commission-regulated telecommunications utilities and, through them, to agents acting on their behalf. We have reworded the definition of "carrier" to clarify that it includes all entities, whether certificated or registered, that provide telecommunications-related products or services and are subject to the Commission's jurisdiction pursuant to the Public Utilities Code.[12] Carriers pointed to a number of areas where we qualified the proposed rules through reference to specific carrier classes, frequently local exchange or basic service providers. Some carriers would have us exempt them from these rules entirely, or from specific rules, or set up a separate set of rules for their classification. We have considered the carriers' comments as well as those of others and, as a result, have made many adjustments to the rules as originally drafted. The rules are now more situational than carrier-class specific; where a carrier class doesn't encounter a given situation, the rule remains effective but is applicable only where the specified circumstances exist.

[12] § 885, e.g., makes prepaid telephone debit card providers, as specified, subject to the registration requirements of §1013 unless they are certificated to provide telephone service, and thus required to comply with rules the Commission may establish relating to them. See §1013(b) and §1013(g)(5). The Commission's current practice is to certificate such providers under §1001.

To Consumers

Having decided to apply these rules to all carriers, the question arises, to whom should these protections be afforded on the consumer side? In making their case to be exempted entirely from the rules, the CMRS carriers point out that the historical LEC distinction between business and residential service doesn't generally apply to wireless carriers. A traditional wireline telephone number or instrument is almost always associated with a location, typically either a place of business or a residence. A wireless instrument and wireless number are more often thought of as associated with an individual, and that individual is far less likely to define personal wireless access as exclusively business or exclusively residential. It is also true that there are many small business customers[13] who suffer the same problems as residential customers: slamming, cramming, the difficult process of gathering sufficient information to make informed service choices, billing problems, and so forth. In short, there is a strong case for applying the consumer protection rules to both individuals and businesses.

On the other hand, large businesses are much more capable than individuals and small businesses of reaping advantage from the competitive markets for communications services.[14] Large businesses are more likely to have the sophistication and resources to evaluate their choices, to call into play the high volumes that give customers leverage with providers, and to participate in

[13] Protections have been extended to non-individual subscribers other than businesses (*e.g.*, government and quasi-governmental agencies, associations, *etc.*) by treating them identically with businesses for purposes of these rules.

[14] According to the FCC, as of June 2, 2000, CLCs served 17.5% of big businesses and institutions, but only 3.2% of homes and small businesses.

contractual arrangements through which they can negotiate for terms and non-standard service configurations that best suit their needs. Large businesses are less dependent on the kind of rules we are establishing here, and in some cases rules could even stand in the way of large businesses that desire to negotiate specific, non-conforming contract provisions. On balance, we agree with commenters who would have carriers be bound by the rules in their dealings with small businesses but leave carriers and large businesses the latitude to negotiate. One commenter representing small businesses suggested drawing the dividing line between large and small businesses at twenty lines. We know of no rigorous rationale for using any specific number, and no party took issue with that figure or suggested another. Thus, except where noted, each carrier will be required to observe these rules when dealing with any customer having, or applicant seeking, the carrier's service on twenty or fewer access lines. That is not to say that larger customers will receive no benefit from these rules. Many of the improvements they generate will help all customers: straightforward carrier disclosure and marketing practices; customer notices of all types; and access to the regulatory process for disputes. And even the largest businesses that rely heavily on negotiated contracts for services will still have available the traditional protections of tariffs when they choose tariffed services.

Other

It has also been suggested we make clear that we do not intend by issuing these rules to foreclose consumers, district attorneys, the Attorney General, or other agencies from enforcing consumer protections through the courts. That clarification has been added.

The New Consumer Protection Rules

To begin our discussion of specific Part 2 rules, it is useful to distinguish generally among the coverages of Rules 1, 2 and 3. Rule 1 focuses on information the Commission requires carriers to provide consumers to enable them to make informed choices and enforce their rights. Rule 2 sets standards the Commission requires carriers to follow if they choose, as all active carriers do, to solicit consumers, and prohibits certain practices related to obtaining or retaining customers. Rule 3 sets standards the Commission requires carriers to follow in initiating service once a consumer has selected the provider. There is some overlap in that certain requirements could fall into more than one area, and that has engendered minor misunderstandings reflected in the comments. Service agreements are perhaps the best example because they may serve as tools to help consumers make choices and enforce their rights (Rule 1), offers to consumers and thus solicitations directed at them (Rule 2), and statements of terms and conditions to be implemented in initiating and providing service once the consumer has chosen (Rule 3). This iteration of the rules attempts to clarify what was intended through careful wording and explanatory comments set forth below each rule.

Rule 1: Carrier Disclosure

Disclosure is one of the fundamental telecommunications consumer rights in this proceeding, and is also key to safeguarding other rights. Rule 1 will help ensure that consumers are able to learn what products and services are available to them from regulated telecommunications carriers, and at what rates, terms and conditions of service (*Right to Disclosure*). With that information, they should be able to choose the providers, products and services that best suit their needs (*Right to Choice*). Having chosen their providers and services, they need to be able to verify their bills using the true rates, terms and conditions of services

to which they subscribe, to know how to reach their providers for inquiries, disputes and complaints (*Right to Accurate Bills and Redress*), and to know how to reach the Commission's Consumer Affairs Branch (CAB) when they are unable to obtain satisfaction through the carrier (*Right to Public Participation and Enforcement*). Lastly, subscribers and potential subscribers need to know a carrier's customer information-handling practices so they can balance their need for privacy with their need for the carrier's products and services (*Right to Privacy*).

Reactions to Rule 1 as proposed in the staff report were mixed. While many carriers argue that no rules are needed, most don't oppose disclosure in the general sense but do suggest revisions to Rule 1. Consumer representatives overwhelmingly favor more disclosure, oftentimes in far more detail than the staff report suggests. They maintain that there are currently few if any satisfactory sources of telecommunications consumer information. Tariffs are too complex and usually not readily available. Carrier marketing often features incomplete information focused on recruiting customers rather than educating them. And where carriers rely on oral disclosures, they put the alleged disclosure beyond any possibility of effective proof or disproof. Not unexpectedly, Internet web-posting drew the greatest attention, as described below.

In response to these comments and to customer input through the public participation hearings and correspondence, we have made a number of changes in Rule 1. First, it clarifies that utilities meeting certain size criteria are indeed required to establish World Wide Web sites on the Internet and to publish on those web sites the rates, terms and conditions of their services. The former Rule 1(b) requirement to provide information on request has been differentiated into information to be provided to customers and information to be provided to the

public. Rule 1 now pays more heed to timeliness in accepting customer and public telephone requests and in responding to them. We have added a provision defining the minimum level of customer disclosure information basic service providers must include in their alphabetical telephone directories, complemented by another requiring Commission approval before they may remove such information. Last, the restriction against incorporating formulae by reference has been clarified to apply to service agreements and contracts and responding to inquiries.

As noted, consumer representatives overwhelmingly favor disclosure, and Internet disclosure in particular. In fact, among them they proposed a long list of detailed requirements for carriers' Internet sites. All carriers would be required to adopt standard language and a common format for displaying web-posted information. All would be required to post the Commission's and carrier's toll-free telephone numbers; to post carrier U-numbers and all California names under which they do business; to post carrier practices such as disconnection, deposit, refund and privacy policies; to post links to the Commission and to these consumer protection rules; to post information on fees and taxes, low-income programs and eligibility rules; etc. One commenter would facilitate rate comparisons by using this proceeding to require all carriers to bill in standard units; require a standard format for all carriers to send the Commission electronic disclosure and complaint information; and have the Commission become in effect a clearinghouse for all carriers' rate and service disclosure information.

Several carriers either endorsed posting disclosure information on the World Wide Web or would not oppose it with limitations. The most frequently expressed reservation was that carriers may have literally thousands of services, many of which are no longer offered to new customers but have a few remaining active subscribers. And even for those services they do offer, carriers would like

to post only a representative sample. Some cite in their opposition the expense or the administrative burden involved. One picks up a consumer representative's observation that non-standardized web sites can become labyrinths to suggest that if the Commission were to require carriers to post as much detail as some would have them, the result would be confusing and overwhelming rather than helpful to consumers.

We favor the view that telecommunications carriers are among the more technically sophisticated players in the business world today. Comments made by a number of them indicate their concern lest the Commission's new rules inhibit delivering to their customers the very latest in communications and marketing technology. In an industry embracing greater Internet compatibility, it should not be too much to expect the larger participants to set up informative and consumer-friendly web sites. As one carrier put it, "In the Information Age, publication of a carrier's tariffed rates, terms and charges on a web site is a consumer-friendly and commercially feasible method of implementing full disclosure, and web site publication [is] appropriate for residential service offerings."

By D.01-07-026, an interim decision in our proceeding to revise G.O. 96-A, the Commission enacted the following provision applicable to the stationary utilities, including the regulated telecommunications carriers:

> The Commission strongly encourages all utilities, and requires certain utilities as described below, to publish and keep up-to-date their respective tariffs, as currently in effect, at sites on the Internet freely accessible to the public.
>
> A utility that serves California customers under tariffs, and whose gross intrastate revenues, as defined in Public Utilities Code Section 435(c) and reported to the Commission for purposes of the Utilities Reimbursement Account, exceed $10 million, shall publish, and shall

> thereafter keep up-to-date, its currently effective California tariffs at a site on the Internet. The Internet site shall be accessible, and the tariffs shall be downloadable, at no charge to the public. At all times, the utility shall identify at the site any tariffs that would change as the result of Commission approval of modifications the utility has proposed in a pending application or advice letter. The utility shall update the site within five business days of the effective date of any such approval. The utility shall also provide instructions at the site for getting copies of such pending application or advice letter, and of no longer effective tariffs. If it is difficult to publish at the site the maps or forms in the utility's tariffs, the utility shall provide a means of downloading the maps or forms, or shall provide instructions for getting copies in printed format.
>
> A utility whose gross intrastate revenues, as last reported to the Commission, exceed $10 million, shall comply with this Internet publication requirement no later than January 1, 2002. Any other utility whose gross intrastate revenues, as reported in the utility's annual report to the Commission after January 1, 2002, exceed $10 million, shall comply with this Internet publication requirement no later than 180 days after the date of the annual report.

For telecommunications carriers that meet the $10 million threshold and file tariffs with the Commission, the new Rule 1(a) requirement here is consistent with that adopted in D.01-07-026. Telecommunications carriers that meet the $10 million criterion and provide Commission-regulated, non-tariffed services, *e.g.*, the CMRS carriers and non-tariffed IECs, are covered under Rule 1(b) and will post on the web the rates, terms and conditions of each offering under which they are currently providing or offering to provide California intrastate service to individual subscribers or small businesses.

Since carriers' Rule 1(b) web postings are anticipated to be prime sources of information for consumers, it is critical that carriers' service descriptions, rates, terms and conditions be understood. To that end, and because they are in effect offers to provide service, Rule 1(b) defines these web postings as solicitations

subject to all of the other requirements applicable to solicitations under these Part 2 rules. Thus, they must comply with all Rule 2 requirements by clearly, conspicuously, unambiguously, legibly and accurately disclosing service rates, terms and conditions in the equivalent of 10-point type or larger, being truthful and not misleading, etc.

Staff's proposed Rule 1(b) has now become Rules 1(c) and 1(d), the distinction being whether a request for information comes from a subscriber or from another member of the public. For the former, the emphasis here is on ensuring the subscriber can obtain responses to enable him or her to understand and deal with the bill (or any other aspect of the service) regardless of whether the charges on it originate with this carrier or another. For the latter, the emphasis is on providing information that consumers can use to evaluate the carrier and its services.

One of the complaints most often heard in the Commission's many public participation hearings was the difficulty of reaching carriers by telephone and getting prompt, consistent answers and solutions the carrier would then follow through on. Many industry commenters advanced the notion here that no new rules were needed because their customers' increasing ability to vote with their feet gives carriers more than sufficient incentive to do right. Customers who spoke at the public participation hearings would clearly disagree. Carriers, and those entities to whom carriers refer requests, must arrange to accept all requests for customer service within a reasonable time and without excessive waiting intervals or rejections for lack of staffing or facilities. As a guideline, the telephone lines used to take subscriber inquiry, complaint and dispute calls should give access to a carrier representative as quickly and reliably as lines the carrier provides for receiving incoming sales calls. The Commission does have authority to set objective speed of answer standards for carriers' business offices,

and it has done so. G.O.133-B, Rules Governing Telephone Service, includes a requirement that all telephone utilities providing service in California answer 80% of their business office calls within 20 seconds in offices serving 10,000 or more lines.

Several industry commenters objected to the staff's proposal that carriers provide immediate responses to customer and public inquiries. An organized and efficient carrier should have available all of the non-customer-specific information set forth in Rules 1(c) and 1(d), so it would be reasonable to require it be mailed by the following business day, and our Rule 1 guidelines now provide for that. With today's interactive customer databases, absent extraordinary circumstances most customer-specific information should be available immediately to a service representative answering a call. The parties' comments indicate some is not. Third-party billing can be particularly problematic. We find it troubling that carriers have set up and allowed to persist a system under which they bill the public for services assertedly provided, while at the same time they cannot give a prompt answer to a subscriber who wants to know what entity originated the charge and why. At the behest of a billing aggregator, a LEC sells the power and intimidation of its bill without being able to give an honest answer to the most basic customer question of all, "Do I really owe this?" A major wireless carrier bills its subscriber for calls another carrier says were made, and then "would not expect the roaming carrier to answer questions about roaming charges," nor find it feasible to put the customer in touch with the roaming carrier.

One day lead times to send prepackaged, non-customer-specific information, and real-time responses to most customer-specific inquiries, are not unreasonable expectations for the public to hold. Carriers who currently do not meet that standard should revisit their procedures.

Our draft rules made no mention of one of the most valuable sources of disclosure information telephone subscribers are likely to turn to: their local telephone directories. Under Section 728.2, the Commission no longer has jurisdiction or control over classified telephone directories or commercial advertising included in carriers' alphabetical directories, but it does retain jurisdiction over other aspects of alphabetical telephone directories. A casual inspection of the largest ILEC's San Francisco white pages introductory section shows a praiseworthy assortment of essential, telephone-related information ranging from how to place calls of every type, to an overview of rates and conditions for basic service, to how, when and where to pay a bill and how to reach the telephone company for billing and service problems. One can find the area code for Antigua or the country code for Zimbabwe. There is information on reaching 911 emergency centers, crisis hotlines, and a first aid and survival guide. Residential customers can find basic information on reaching the company in at least six different languages in addition to English.

Nonetheless, at our public participation hearings around the state and in public correspondence from those who were unable to attend, we learned of the public's great concern with the attrition of other essential information from the white pages over the years. We have recently seen several formal complaints charging that the lists of prefixes that could be reached as local calls have disappeared from the white pages. The problem has become all the more acute with the advent of dial-up access to the Internet, requiring customers to know which of an Internet service provider's access numbers are local calls and which will generate local toll or long distance charges. The white pages tell customers to call the operator for that information, but we hear discouraging reports that when they do, the operator may not be able to help. Local service providers point to Internet service providers who in turn point back at the carrier, and by

the time their first bill arrives customers who get it wrong are sometimes faced with horrendous local toll or long distance bills for calls they thought were local.

We have noted in the past that customers' white page directories are a substantial source of information regarding their telephone service, that the inability to know whether a call is a toll call is an important impediment to the functioning of a competitive market, and that adequate availability of customer information is a necessary component of the market structure[15]. In our Universal Service Proceeding, we defined basic exchange residential service to include a free white pages telephone directory.[16] We would not want to see this important source of customer disclosure continue to lose its effectiveness. But this is a relatively easy consumer protection problem to solve. Our new Rule 1(e) defines a minimum level of customer disclosure information basic service providers must include in their alphabetical telephone directories. The first three requirements are taken directly from Section 2889.6.[17] The fourth is from Section 2894.10. Because most of the remaining requirements were derived from a current ILEC directory, most of this information is currently included in at least some white pages editions. One notable exception, of course, is the local prefix information which has recently disappeared, as so many irate customers have

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[15] D.90-08-066.

[16] D.96-10-066 in R.95-01-020 and I.95-01-021.

[17] § 2889.6 directs the Commission to require local exchange carriers to include in their directories information concerning emergency situations which may affect the telephone network. That information must include the procedures which the carrier will follow during emergencies, how telephone subscribers can best use the telephone network in an emergency situation, and the emergency services available by dialing 911.

reminded us. It would be impractical to produce an exhaustive list of necessary white pages consumer information, but Rule 1(f), which requires prior Commission approval to remove customer disclosure information, makes that unnecessary.

Staff's proposed Rule 1(c), which now has become Rule 1(g), originated in the Commission's Streamlining decision, D.98-08-031 and may have lost something in the translation. In the D.98-08-031 context it required non-tariffed IEC contracts to include all applicable rates, terms and conditions of service without incorporations by reference, although it did allow formulae to be used to calculate rates or charges where the components could be readily ascertained from a public source. To be meaningful and effective, carrier disclosure must be understandable to its audience. In the context of Rule 1, consumer protection Rule 1(g) has been clarified to apply those same restrictions to all carriers' service agreements and contracts, and to responses to the other customer and public inquiries that are the subject of Rule 1.

Rule 2: Marketing Practices

Rule 2 sets forth requirements to be followed in soliciting consumers to purchase products and services, and in the service agreements and contracts that bind customers to the rates, charges and conditions for those products and services. Rules governing marketing practices are important to safeguarding consumers' *Right to Disclosure* and *Right to Choice.*

The term "solicitation" is used in this Rule to encompass all types of offers by carriers or their agents to individuals or the public to provide one or more specific products or services, no matter what the medium. Solicitations would include, for example, advertising through any medium, from brochures to billboards to Internet pages; sales pitches, whether from customer service

representatives or telemarketers or authorized sales agents; and proposed service agreements and contracts, be they verbal, hardcopy or electronic. While product- or service-specific advertising and other promotional materials fall within the definition of solicitation here, general promotions including brand-name and image advertising typically would not.

Several of these Rule 2 provisions are very similar to consumer protection rules we established for detariffed IEC service providers in D.98-08-031.

The most significant changes in Rule 2 compared to the draft version sent out for comment are its recognition that not all solicitations are definable in terms of typographic size, and its stronger reliance on concepts such as clarity, understandability and legibility that are meaningful regardless of the medium. The Rule for the first time states explicitly that solicitations must be truthful and not misleading. And new Rule 2(g) is added to ensure that customers are not abused by misleading advertising or disingenuous use of the filed rate doctrine to deflect their legitimate claims. We discuss the filed rate doctrine further in the Detariffing section later in this order.

With some exceptions, carrier commenters generally oppose any restrictions on their marketing, promotional, and contractual efforts, relying heavily on a belief that *laissez-faire* regulation will better serve to enforce the necessary standards. They see competition producing a race to the top in service quality and marketing behavior, a vision completely counter to the real-world observations related by most people who wrote, e-mailed and spoke in the public participation hearings. Comments filed by those not connected with the industry reflect positions closer to the public's: that consumers' experiences to date with competition-driven marketing practices have been less than satisfactory, and the Commission is to be commended for stepping up to its consumer protection responsibilities with these rules.

Rule 2(a) requires written solicitations to be unambiguous, legible and displayed in the equivalent of at least 10-point type. This rule in part echoes the requirements of Section 2890(b).[18] The obvious intent is to ensure that members of the public can read and understand the essential elements in written advertisements and offers directed to them, through whatever medium they are presented. The concept of 10-point type is troublesome when used in connection with other than paper-based documents, thus the "equivalent of 10-point type or larger" requirement.

Any number of factors can, by design or happenstance, work to prevent the disclosure a prospective purchaser needs to make an informed choice. The intent of Rule 2(a) would be violated, *e.g.*, in a newspaper advertisement by too-fine print which purports to convey details that a reasonable consumer would believe important to the offer, or by a lengthy qualifier message flashed for a few seconds on a television screen even if the message were otherwise legible.

Several commenters cited the California Uniform Electronic Transactions Act and the federal Electronic Signatures Act[19] in connection with provisions in

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[18] §2890(b) was § 2890(c) before July 1, 2001.

[19] *California Uniform Electronic Transactions Act*, California Civil Code, Title 2.5, §§ 1633.1 – 1633.17; and federal *Electronic Signatures Act*, 15 USCA §§ 7001 et seq. (E-Sign Act).

The *California Uniform Electronic Transactions Act* generally provides that: a record or signature may not be denied legal effect or enforceability solely because it is in electronic form; a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation; and, if a law requires a record to be in writing, or if a law requires a signature, an electronic record satisfies the law. It also authorizes the provision of written information by electronic record and sets forth provisions governing changes and errors, the effect of electronic signatures, and admissibility in evidence. These provisions are subject to numerous conditions and exceptions. Moreover, certain provisions of the California act may be preempted by the federal act, which contains additional safeguards to protect consumers.

the draft rules that required certain communications to be written or in writing. For purposes of these revised rules, we have been careful in defining those terms. Both "written" and "in writing" may describe material intended to be read in any medium, including through electronic media. Whenever anything is required to be done in writing or in written form, the requirement must be satisfied in the form of a tangible, hardcopy document unless both parties to the communication have agreed to having the required information (which may be, e.g., a disclosure, a notice, a confirmation, etc.) provided through electronic media. It is not possible in the context of this rulemaking proceeding to determine in advance which transactions will be governed by the federal act and which by the state's. We have reviewed both and conclude that neither precludes any of the protections in our rules. Carriers are responsible for determining which applies to their own transactions.

Rule 2(b) requires promotional and marketing materials not be combined with or into service agreements and contracts, again reflecting requirements in Section 2890(b). This requirement was also applied to IECs in D.98-08-031, which established rules applicable to non-tariffed IECs. Any service agreements or contracts presented to consumers should be clearly identifiable as such; only the elements of the transaction belong in binding agreements. Interposing marketing materials may distract the consumer from those essential elements and generate misunderstanding and disputes.

Rule 2(c) requires service agreements and contracts to be plainly stated and understandable, and available in each language the carrier uses for solicitations. A significant proportion of California's consumers to whom affordability matters most may not be sufficiently sophisticated, or may not read English well enough, to decipher service agreements written in complex or legalistic language. It is both good public policy and good business to

accommodate them. As with the preceding two rules, the intent is to ensure those who would be bound by carriers' service agreements and contracts are able to read, understand, and make informed choices about them before making a commitment. Section 2890(c) imposes a similar requirement. One carrier objected that Rule 2(c) as originally worded might prevent brand-name or image advertising in any language unless service agreements were also available in that language. As now defined, brand-name or image advertising that does not attempt to promote a product or service is not a solicitation and would not trigger the Rule 2(c) language requirement.

Advertising is playing an increasing role in informing the public. For some telecommunications services such as dial-around long distance, advertising may in fact be consumers' only source of information. One consumer group points out that the Commission currently has no rules specifically prohibiting misleading advertising for utility services, and suggests the wording which we have adopted in Rule 2(d).

Rule 2(d) ensures that solicitations, including sales agreements, contracts, advertisements and other marketing materials, include clear, conspicuous and accurate disclosure of all rates, terms and conditions of the product or service, and are truthful and not misleading. "Clear and conspicuous" is defined in the same words we used in D.01-07-030, our interim opinion in this proceeding which adopted the non-communications related charge billing rules, now Part 3 of new G.O. ___. Where a carrier or its agent does mislead consumers to sell a competitive product or service and a consumer asks the carrier to honor the offer, Rule 2(g) requires the carrier to do so. Rule 2(d), however, also accommodates the possibility of inadvertent error so long as the carrier timely makes a good-faith effort at correction.

Rule 2(e) simply implements the current prohibition against slamming found in Section 2889.5. All carriers must comply with Section 2889.5 and all other applicable provisions of state and federal law when changing customers' service providers.

Rule 2(f) incorporates into this general order the prohibition against re-establishing a customer's service without authorization, and against a carrier's relying on automatic renewal clauses in service agreements or contracts for that purpose. We established this requirement as Rule 3.b. in D.98-08-031 for detariffed IEC services.

The staff report pointed out in several places the difficulties consumers have in understanding the full scope of the tariff rules that may apply to a service they choose, and in attempting to resolve their disputes with utilities through the Commission or the courts. Section 532 provides, "[N]o public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time…," but also allows the Commission to establish such exceptions as it may consider just and reasonable. A carrier that lures a consumer into purchasing a product or service by, *e.g.*, advertising lower rates or more favorable terms and conditions than shown in its tariffs, may be protected from later court claims of unlawful charges and billing provided the carrier has billed the customer in accordance with its filed tariffs (the "filed rate doctrine"). New Rule 2(g) requires carriers who misrepresent their rates, terms or conditions for a competitive product or service to provide the product or service under the terms that were offered to and accepted by the consumer. Rule 2(g) applies to both tariffed and non-tariffed services; we discuss the implications

of the filed rate doctrine as a defense against consumer claims in the Detariffing section later in this decision.

Rule 3 (and Former Rule 4): Service Initiation

Rule 3 combines and modifies what were Rules 3 and 4 in the staff's proposal. The combined rule is important to safeguarding subscribers' *Right to Disclosure* and *Right to Choice* when they sign up for services, and later their *Right to Accurate Bills and Redress.* Each time a customer or prospective customer initiates service, Rule 3 requires they be fully and proactively informed of the options available to them so they can make timely and informed choices. Carriers are then required to follow up by confirming all applicable rates, terms and conditions for each service ordered.

Together, these notifications are the essence of the *Right to Disclosure.* Requiring that orders be confirmed in writing, and giving customers a cancellation period, ensures they did indeed intend to place an order with that carrier for that service and have thereby exercised their *Right to Choice.* And, with a written record of the rates, terms and conditions in hand, customers can monitor their charges to enforce their *Right to Accurate Bills and Redress.* The remainder of Rule 3 will ensure that customers know what actions will result in charges; level the playing field by making it difficult for carriers to place unauthorized charges on subscribers' bills; help consumers protect their privacy and reduce identity theft; assist consumers to understand and remedy any problems that lead to service denials; and encourage carriers to recognize that their subscribers' time is valuable to them.

Consumer representatives commended the ideas behind staff's original Rule 3 and Rule 4 proposals. Several drafted modest revisions to clarify or tighten the wording, and some of those changes are reflected in the combined

new rule. Rule 3 as redrafted here adopts in major part a consumer group coalition's suggested realignment of staff's proposal for confirming orders. Rules 3(c), 3(d) and 3(e) draw a distinction between the treatments for orders for tariffed services and orders for non-tariffed services, and allow customers to cancel orders for services that they find, after reviewing the carrier's confirmation materials, don't match their expectations.

Many carriers requested their carrier class be explicitly exempted from draft Rule 4 because the description indicated "local exchange service." Others pointed to the distinction staff had drawn between local exchange rules and all other rules as a justification for scrapping altogether the idea of a single set of rules applicable to all carrier classes. Upon review, it became clear that none of the three former Rule 4 subsections needed to be limited in that way because the situations they address are not, or will not always be, confined to local exchange carriers. Beyond their overarching belief that no new rules are needed, or that any new rules shouldn't apply to their particular carrier class, carriers' greatest concerns were that staff's proposed rules would reduce their flexibility in taking service orders and delay them in initiating service.

Rule 3(a) originally proposed allowing service to be initiated based on written, electronic or oral agreements, and carriers applauded the idea even as they questioned the definitions of "electronic" and "oral" and expressed reservations about the remainder of the rule. New Rule 3(a) simplifies that statement to say that carriers may initiate service upon request. The intent is to make it clear that carriers may initiate new services as quickly as their systems permit, regardless of how the order reaches them. There was little or no opposition to this condition *per se*, but considerable concern on consumer representatives' part with ensuring a good process is put in place to follow up. That has been done. As will be seen, consumers' rights are safeguarded by the

way former Rules 3(b) and 3(c) have been reframed. They now give the consumer and carrier an opportunity to correct any mistakes, misunderstandings or misrepresentations that survive the initial ordering process.

Several carriers interpreted Rule 3(b) (formerly Rule 4(a)) as obligating every carrier to offer each of the service options listed. We did not interpret that as being staff's intent, although one subsection as formerly worded did impose such an obligation. The various subparts of Rule 3(b) apply only when the information is relevant to service options a carrier provides; any requirement to offer those options would arise from a separate statute, decision, rule or tariff.

Proposed Rule 4(a)(5) would have required local exchange service providers to inform subscribers initiating service about the availability and effect of blocking non-telecommunications related services from being billed with their telephone bills. Our new Rules Governing Billing for Non-communications-Related Charges (Part 3 of G.O. ___, discussed later in this order) establish an opt-in approach to this new service. Carriers may not place non-communications-related charges on a new subscriber's bill unless and until the customer has been fully informed and has given express written authorization to do so.[20] Thus, proposed Rule 4(a)(5) was superseded by the Part 3 rules and no longer needed here.

Rule 3(b)(5) is new and reflects the Section 2889.4 requirement that local exchange providers inform new residential customers of pay per use features during the order process. Rule 3(b) extends that requirement beyond residential local exchange customers, to all individual and small business customers to whom pay per use features apply.

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[20] See G.O. ___, Part 3, C(1)(a) attached.

Rules 3(b)(8) and 3(b)(9) have also been added. We have previously noted the Section 2896 provision that the Commission "require telephone corporations to provide customer service to telecommunication customers that includes… sufficient information upon which to make informed choices among telecommunications services and providers." Customers and would-be customers calling carriers to order service have expressed their frustration at trying to obtain information about the least expensive options available to them. Carriers are understandably eager to maximize their revenues, and increasing sales through aggressive marketing is unquestionably one way to do that. Where carriers enjoy monopoly power with respect to particular services, however, they also have a responsibility to provide honest, basic information about those services. Rule 3(b)(8) requires those carriers to inform customers initiating service or adding additional lines to provide information about their least expensive service(s) that would meet the customer's needs. We know of no other reliable way to ensure consumers who need monopoly services are not inappropriately misdirected away from those services.

Staff's proposed Rules 3(b) and 3(c) as initially presented were largely overlapping, one calling for carriers to confirm orders within seven days, and the other to inform the customer of the service's rates, terms and conditions. Those provisions are now subsumed into new Rules 3(c) and 3(d), which draw a strong distinction between the processes for tariffed and non-tariffed services. Orders for tariffed services (Rule 3(c)) require a written confirmation by the carrier within seven days after the order is accepted, complete with all rates, terms and conditions in a form the customer can understand. Orders for non-tariffed services (Rule 3(d)) call for that same written confirmation, but in the form of a

proposed contract.[21] Several commenters suggested the rules include a three-day right to cancel agreements or contracts. We have adopted that suggestion in Rule 3(e). Customers may always cancel a request for tariffed service without penalty after the carrier sends the written confirmation, and have three days to cancel after entering into a signed, written contract for non-tariffed service. The three-day clock tolls when the customer has *received* the carrier's contract and executed it, which may be immediately if the transaction is done face to face and the required confirmation provided in person. Contracts with early termination fees call for a longer cancellation period, discussed below.

Some may point out that the carrier is at risk if it initiates service immediately and the customer later either declines to execute and return the contract or cancels the order. While that may be true, the carriers in making their arguments to be allowed to bind customers to electronic and telephonic orders imply that they and their customers are in harmony on the overwhelming majority of the orders they process. If that is the case, very few customers will find anything so objectionable about the confirmations and contracts they receive as to renege or cancel. As one carrier representative put it, "California's millions of wireless consumers are accustomed to and demand immediate service changes and activations available through telephonic, Internet, and oral agreements, as well as the ability to conduct all kinds of business on a signatureless, often paperless basis." We agree this represents, if not reality, a worthy goal. To make distance-enrollment for carrier services work to this

[21] Carriers making a change in a residential subscriber's service provider may wish to include the Rule 3(c) or 3(d) tariffed or non-tariffed order confirmation notice in the same envelope with the 14-day notice required by § 2889.5(a)(4), provided the seven-day requirement is met.

degree, carriers either have to communicate clearly the first time nearly every time, or have to be flexible and forgiving when the inevitable miscommunication occurs, or both. We think they can and will, and the carriers' risks from customer cancellations will be minimal.

Staff's proposed Rule 3(d) addressed a problem that later was mentioned many times in the public statements, letters and e-mail: penalties charged customers who terminate services before their contracts are up. Almost universally, these were customers who believed they had not been informed of or had not agreed to an early-termination penalty, or felt the service had been misrepresented. The problem is confined to non-tariffed services, and one part of the solution ties in nicely with the requirement that non-tariffed services will henceforth require a signed contract. All provisions in all contracts must meet the Rule 2 requirements to be legible, understandable, unambiguous, and so forth, and include clear, conspicuous and accurate disclosure of all rates, terms and conditions. New Rule 3(f) adopts a well-accepted practice from the world of commerce: where there are terms of a contract that are particularly important or merit additional emphasis for any reason, the party accepting the contract may be required to sign or initial those terms in addition to signing the contract as a whole. Rule 3(e) already gives subscribers three business days to cancel contracts for service, but one commenter suggested the rules allow up to 120 days when the contract includes early termination penalties. We agree that consumers who must accept early termination penalties in order to receive utility service of unknowable quality deserve an added measure of protection. When a contract calls for early termination penalties, Rule 3(e) allows 30 days after signing to cancel the contract, which should be sufficient time to discover most problems. Because Rule 3(e) is not to be interpreted as relieving the subscriber from payment for any actual use made of the service before canceling, we reject

one carrier group's characterization that this proposal "allows the consumer 4 months to use the service and then walk away free of any charges."

Rule 3(g) establishes that charges for pay per use features are not considered authorized unless the customer knowingly and affirmatively activates the service by dialing or some other affirmative means. Simply lifting the receiver, or remaining on the line, or failing to remain on-hook for a sufficient time, or any other ambiguous action can not by itself be sufficient to incur a charge. The nomenclature has been changed to "pay per use features," the term used in Section 2889.4 and equivalent in this context, from "customer-activated services" in response to suggestions that customer-activated services be defined.

Rule 3(h) is similarly straightforward: For any service for which no record of affirmative subscriber authorization is available, all disputed charges are subject to a rebuttable presumption that the charges are unauthorized.

Rule 3(i) has been added: A carrier may not deny service for failure to provide a social security number, and whenever a carrier requests a consumer's social security number, the carrier must inform the consumer that providing it is optional and that failure to provide it is not cause for denying service.[22] The first part of this provision, which we previously established for CLCs in D.95-07-054, was suggested in comments by both a consumer organization and by a carrier.

[22] Concerns about the privacy and security risks stemming from the widespread use of social security numbers as personal identifiers have increased in recent years. *See* Testimony of John G. Huse, Jr., Inspector General of the Social Security Administration, Before the Subcommittee on Social Security of the House Ways and Means Committee Hearing on Protecting Privacy and Preventing Misuse of Social Security Numbers (May 22, 2001); *see also* Greidinger v. Davis, 988 F.3d 1344, 1353-1354 (9th Cir. 1993); State ex rel Beacon Journal Publishing Co. v. City of Akron, 640 N.E.2d 164 (Ohio 1994).

Rule 3(j) requires a carrier to disclose its reasons when it denies an application for a regulated telecommunications service. The largest local exchange carrier supported this rule as proposed, while another large LEC labeled it burdensome because of the labor and mailing expense involved. When consumers are denied utility service, they need to know why, and we suspect there are very few carriers who would deny them that right. The rule will be adopted as proposed, except that the disclosure need not be in writing if the consumer concurs.

Rule 3(k) requires carriers to offer a four-hour appointment window for the worker to arrive when a subscriber must be present for an installation or repair. Not surprisingly, consumer representatives supported and carriers generally opposed this subsection. The earlier version was ambiguous in that it could also be read to require the carrier to give the subscriber a $25 credit if the installation or repair were not *completed* within a four-hour window. One consumer advocacy group suggested the credit be $25 per access line, but gave no support for that change. Another used this subsection to suggest a new right to service guarantees. To enforce that right, carriers would grant not only a $25 credit for missing a residential service appointment, but also a $100 credit for businesses; free installation plus a $25 credit per extra day for every installation taking more than five days; and increased monetary credits for prolonged outages. Our intent in adopting Rule 3(k) is somewhat more limited. Subscribers' time has value to them, and carriers need to recognize that value. Civil Code Section 1722(c) enables utility customers to bring an action for damages in small claims court against utilities that miss their four-hour windows. Our requirement is more strict than that in Civil Code Section 1722(c) because it requires the customer be offered the four-hour window when the appointment is made, and makes no exception for unforeseen or unavoidable

occurrences beyond the control of the utility. At the same time, however, the $25 credit is much lower than the $500 cap on damages set forth in Civil Code Section 1722(c). Nothing in these rules is intended to limit subscribers' right to proceed in court under Civil Code Section 1722(c).

Rule 4: Prepaid Calling Cards and Services

Rule 4, Prepaid Calling Cards and Services, is new.

In 1998, the Legislature passed and the governor signed Assembly Bill 1994, adding a section to the Unfair Competition Law (Bus. & Prof. Code § 17538.9) imposing for the first time specific disclosure and service requirements on all providers of prepaid calling cards (also known as prepaid telephone debit cards) and prepaid calling services. The accompanying legislative analysis described the problem:

> Prepaid phone cards are a relatively new and very popular service in the long distance industry. Nationally, sales have grown from $12 million in 1992 to $1.5 billion in 1997. With the growth has come consumer harm. Consumers are falling victim to the fraud and unfair and deceptive business practices that often surface with any new industry. Consumer loss is very common in this industry because prepaid services such as this generally lend themselves to abuse and fraud. Specifically, consumers face the risk of sellers not meeting their obligations. Examples of consumer harm include outright fraud such as non-working access numbers and deceptive advertising where pricing structures, minimum charges and surcharges, and higher rates for the first minute of a call are not disclosed.

Our own experience confirms the Legislature's observations: Each year, our Consumer Affairs Branch receives hundreds of informal prepaid calling card complaints, and prepaid calling card abuse is becoming a significant focus of Consumer Services Division's enforcement efforts.

In the same session, the Legislature also enacted Assembly Bill 1424, adding Article 9, Prepaid Telephone Debit Cards (Sections 885 and 886) to the Public Utilities Code. Under Section 885, entities offering prepaid telephone debit cards who are not already Commission-certificated carriers are subject to the registration requirements in Section 1013 and are thus required to comply with those rules and regulations the Commission may establish for them. With the addition of Section 885, all prepaid calling card providers, whether certificated carriers or registrants, came under Commission jurisdiction for their prepaid calling card services.[23]

Rule 4 is in most ways identical to provisions in the Unfair Competition Law, for several reasons. First, these are provisions we know the Legislature intended to be enforced. At the same time, we recognize that they constitute only the behavioral floor, the lowest legally permissible standard for calling card service providers, so as we build enforcement experience we will be considering how Rule 4 should be strengthened. Second, we are sensitive to the fact that prepaid calling cards and prepaid calling services are national products. We choose to avoid creating requirements today that potentially conflict with those in other jurisdictions. And third, retaining the Unfair Competition Law wording minimizes the possibility of conflicting interpretations that could arise from differently worded laws and rules covering the same topic. Again, however, none of these reasons will dissuade us from revising the rules as our enforcement

[23] Vendors who do not administer the actual service offered through these cards are not subject to Section 885 and Commission jurisdiction. Non-jurisdictional entities include those whose activities are limited to participating in the distribution chain, such as wholesalers and retailers who simply sell cards and do not buy blocks of calling time from certificated carriers and package it for resale as prepaid calling card services.

experience exposes the gaps, loopholes and gaming opportunities unscrupulous providers may attempt to exploit.

As we noted previously, our Part 2 Consumer Protection Rules are intended to apply to all carrier classes, a given rule coming into play whenever any carrier of whatever type faces a particular situation. Business and Professions Code § 17538.9(b)(4) makes a single exception to that principle by not requiring facilities-based CMRS carriers to establish and maintain toll-free customer service telephone numbers with live operators to answer incoming calls 24-hours a day, seven days a week if they chose to offer prepaid calling card services. We have not incorporated that same exception into our corresponding Rule 4(d) because to do so would grant a competitive advantage to some prepaid calling card providers over others. Many of the facilities-based CMRS carriers are owned by the largest telecommunications corporations in the nation. Neither CMRS resellers, which are typically much smaller than facilities-based CMRS carriers, nor carriers of other types, from the largest to the very smallest, are granted a similar preference under the Unfair Competition Law. We know of no reason that would justify our tilting the playing field by establishing lower performance standards for otherwise-identical products distributed to the public by facilities-based CMRS carriers.

We take this opportunity to make two more observations before moving on. Some parties in their comments have questioned whether the Commission has authority to enforce provisions of the Business and Professions Code, implying that some of the rules proposed in the rulemaking order would be doing just that. As we discuss in much greater depth in the Enforcement section later, the Commission clearly does not have such authority. Just as clearly, however, the Commission may consider parallel requirements of the applicable laws when it is fashioning its own rules, including in this case Section 17538.9 of

the Business and Professions Code. That is precisely what we have done with Rule 4. And, as we point out in our Enforcement section, remedies under the Unfair Competition Law are cumulative and in addition to remedies that may be imposed under other laws. The Commission's consumer protection rules, and any action it may take to enforce them, do not deprive the courts of jurisdiction to entertain actions against regulated utilities brought by law enforcement officers under the Unfair Competition Law.

Rule 5: Deposits to Establish or Re-establish Service

Rule 5, proposed as "Local Exchange Service Credit and Deposits" in the staff report has now become a deposit rule applicable to all carrier classes for all types of service, not just local exchange. By setting limits on what all carriers can require of consumers before initiating service, Rule 5 protects consumers' *Right to Non-Discrimination*.

As proposed, Rule 5 did not engender as much controversy among commenters as some of the other proposed rules. The largest local exchange carrier supported it; the next largest expressed no objection but did suggest a modest revision. The CMRS carriers typically wanted it made explicit that the rule didn't apply to wireless, some giving reasons and others not. Consumer representatives offered numerous changes, some of them minor, some significant. We have included in revised Rule 5 several new provisions drawn from the comments of both consumer representatives and carriers.

The most significant change is the distinction Rule 5 draws between deposits for basic exchange service and deposits for other services. This change arises from two considerations. First, our Part 1 Bill of Rights is intended to protect consumers' rights with respect to all regulated services, but the rule as originally drafted related only to local exchange service. There was nothing to

keep providers from refusing to accept a deposit in lieu of establishing satisfactory credit for other services. Second, staff and commenters alike recognize a tension between the need to refund deposits quickly and the need to hold them long enough for all charges to clear. That tension can be seen in staff's Rule 5 recommendation to refund local exchange deposits within thirty days after service is discontinued, contrasted with its Rule 7 recommendation to allow four or five months for backbilling some other, non-basic service charges. Rule 5 now addresses deposits for all services, distinguishing them by allowing thirty days to refund basic service deposits and 120 days for other deposits.

Three other factors bear on our distinction between deposits for basic service and for other services. Carriers are highly motivated to sell optional, non-basic services and thus not likely to impose deposits so high as to price purchasers out of the market. The great variety of optional services and payment methods makes it more difficult to devise a cap on deposits for non-basic services that would be suitable across the board. And the potential for a single subscriber to run up substantial charges quickly is greater for non-basic than basic services. Thus, we have limited the amount of deposits for basic service, but not for non-basic services.

We have not attempted to devise objective criteria for what constitutes acceptable credit for basic service because Section 779.5 leaves that up to the carrier: "The decision of … [a] telephone …corporation to require a new residential applicant to deposit a sum of money with the corporation prior to establishing an account and furnishing service shall be based solely upon the credit worthiness of the applicant as determined by the corporation." Instead, we require carriers to accept deposits in lieu of credit for applicants who do not meet their standards, and limit the size of those deposits.

Rule 5(b) limits deposits to establish or re-establish basic service to twice the estimated or typical monthly bill for that service. The staff report proposed allowing carriers to charge an additional deposit to establish basic service for applicants who owe an outstanding balance to another utility. We have dropped that provision. Our rules do not allow providers to disconnect basic exchange service for nonpayment of other services, and it would be inconsistent to deny would-be subscribers basic service under those same circumstances.

Rule 5 has other changes as well. A carrier may not require for its own benefit a deposit for services provided by others. First, this will protect subscribers and would-be subscribers against a carrier's buying the receivables of others and enforcing collection through its regulated billings. Second, it could invite anticompetitive mischief to allow an ILEC providing competitive services to charge high deposits for subscribers who choose its rivals' services while waiving them for its own. The carrier providing the service should be the one to decide what deposit to require for that service.

Rule 6: Billing

Rule 6 is a series of requirements to ensure that subscribers' bills are complete, accurate and understandable. The underlying principle we intend to follow is that subscribers deserve sufficient information to confirm that their bills reflect only services they have ordered at prices they have agreed to. Rule 6 is aimed at safeguarding consumers' *Rights of Disclosure, Choice, Public Participation and Enforcement*, and *Accurate Bills and Redress.*

Consumer groups and carriers alike had considerable constructive input on this topic. As a result, Rule 6 as adopted incorporates many revisions gleaned from the comments while still retaining all of the essential elements staff proposed to protect consumers' rights. Because the subsections have been

rewritten in major part, our discussion of them will follow their new arrangement.

Several carrier representatives suggested that parts of Rule 6 as originally proposed should not apply to all carrier classes. We have a different view. As we have noted in earlier proceedings, the telecommunications industry is evolving and what were once clear boundaries between the various carrier classes are becoming less distinct. In D.00-03-020, our slamming and cramming rules, we noted that where only ILECs now provide third party billing, that may change in the future. The parties' comments in this proceeding indicate that they hold a similar expectation. We have previously expressed our anticipation that carriers other than ILECs would in the future become carriers of last resort as competition draws new participants into what were once the ILECs' exclusive province.[24] And in our Universal Service Proceeding, we provided for periodic review of the definition of the most fundamental service level, basic exchange service, as the competitive industry evolves and matures. Our earlier rules established for ILECs, CLCs and non-tariffed IECs had considerable overlap, and most of what was in them can be seen in these consolidated rules for all carriers.

Many carriers say they are currently revising their national billing programs to conform to the FCC's recently issued Truth-in-Billing rules. One of their major concerns has been that we not impose on them new, California-specific requirements that would make those programs immediately obsolete. We have taken care here not to let that happen. The FCC has explicitly allowed

[24] At least one CLC (Cox California Telcom, LLC) is already a carrier of last resort; and WWC License, LLC (U-3025-C), a CMRS carrier, has tendered an advice letter requesting the Commission designate it as a carrier of last resort for providing basic service.

the states to adopt and enforce their own truth-in-billing requirements so long as they are consistent with the FCC's.[25] Drawing on the best of the parties' suggestions, we have done so.

Rule 6(a) states simply that bills must be clearly organized and include only subscriber-authorized charges. Where carriers choose to bill for non-communications-related products and services in the same billing envelope, they must comply with provisions in Part 3 of this general order, Rules Governing Billing for Non-communications-Related Charges.

Rule 6(b) melds an FCC Truth-in-Billing requirement with our recent slamming / cramming decisions which took an in-depth look at how carriers should be identified. Carriers must associate each service on the bill with the service provider responsible for placing that charge, and the providers' names must meet the identification requirements we set forth in D.00-03-020 as modified by D.00-11-015. While several carriers objected to the staff's proposal here, no carrier explained how it was exempted from Section 2890 which also contains that provision.

Rule 6(c) requires grouping charges by carrier, consistent with Truth-in-Billing.

Staff had suggested identifying as "new" any services appearing on the bill for the first time. Many commenters representing both carriers and consumers pointed out that the FCC had come out with a slightly different proposal after the staff's report was issued. New Rule 6(d) combines staff's suggested requirement with the FCC's Truth-in-Billing. In the FCC's words,

[25] 47 CFR 64.2400(c).

> [O]ur rule requiring highlighting of new service providers will apply only to providers that have continuing arrangements with the subscriber that result in periodic charges on the subscriber's telephone bill. Thus, changes in a subscriber's presubscribed local and long-distance service providers clearly would be subject to the rule. Additionally, charges on telephone bills for such services as voice mail and internet access would also be subject to the rule because these services typically involve monthly or other periodic charges on an ongoing basis until the service is cancelled. On the other hand, our modified rule excludes services billed solely on a per transaction basis, such as dial-around interexchange access service, operator service, directory assistance, and non-recurring pay-per-call services. [26]

This addresses commenters' concerns that, *e.g.*, wireless carriers would have to list as new every roaming call, and billing LECs would have to note every dial-around or customer-activated charge.

Several carriers objected to staff's proposal that carriers describe each service or product on the bill, and show the associated rate or charge. This, however, is in essence what Section 2890(e)(2)(A) already requires. The wording of new Rule 6(e) combines Section 2890 and Truth-in-Billing to ensure that each charge is accompanied by a brief, clear, non-misleading description, sufficiently specific for the subscriber to know that it reflects an ordered service and an agreed rate.

In D.00-11-015, we refined our rule prohibiting disconnection of basic residential or single line business service for nonpayment of other services on the bill. Rule 6(f) reflects both the FCC's Truth-in-Billing and our specific non-disconnect criteria to ensure subscribers understand their rights. Carriers must

[26] CC Docket No. 98-170, Order on Reconsideration, (released March 29, 2000), at Paragraph 5.

now explain the distinction and clearly and conspicuously identify on the bill which charges must be paid to retain basic service.

Staff's proposal that taxes and surcharges be separately identified on bills as "mandated charges" drew considerable fire from carriers, but was universally embraced in consumer groups' comments. It was sometimes difficult to tell from the carriers' comments whether they were confused or simply disingenuous. Among them were these: "[A]lthough carriers' costs increase because of the commission imposed charges, for those charges they are not required to recover directly from end-users, carriers are left effectively without a recovery mechanism"; "When a carrier has provided service to a customer at the customer's request, these fees are due and payable, without regard to whether the regulatory agency ordered the carrier to collect the fee directly from the customer, or whether the agency allows the carrier to collect the fee from the customer"; and, "[T]he Commission should not condone any rule that leads consumers to believe that they are not obligated to pay these charges." The first comment is wrong, the second is off-point, and the third misrepresents the proposal. The rule is intended to make clear to subscribers which of the charges carriers place on their bills are taxes and fees carriers have been *ordered* to collect, and which are aimed at recovering carriers' costs of doing business, including costs of meeting regulatory requirements. As restated here, Rule 6(g) makes it abundantly clear that carriers are required to list government-mandated taxes and fees in a separate section entitled "Taxes," and are not to label or describe discretionary charges in any other bill section in a way that could mislead subscribers to believe they are taxes as well.

Rule 6(h) gathers into one place the basic items most carriers already include in their bills. Several changes have been incorporated in response to the comments. "Mailing date" has been dropped because it is not critical to

consumer protection, mass-mailing practices can sometimes make it difficult to pinpoint the exact date, and the postmark in most instances serves the same purpose. Likewise, including a separate mailing date is unnecessary for bills transmitted over the Internet (see Rule 6(i) following). Billing carrier names must be consistent with our requirements in Rule 6(b) above. And we agree that carriers who routinely grant their subscribers an additional grace period should be allowed to show the date after which a late-payment penalty is authorized rather than the date they actually intend to apply it.

Some carriers offer services which they make available only with Internet billing, and others have made arrangements with subscribers to transmit bills by e-mail or make them accessible on web sites rather than send paper copies. Rule 6(i) responds to comments seeking clarification that carriers need not send duplicate, paper bills to these subscribers, and that carriers are required to meet the same billing disclosure requirements regardless of the medium.

Rule 6(j) is an extension of Section 2890(b) intended to allow consumers who choose to do so to block non-presubscribed carriers' charges from their bills. Part 3 of this general order, Rules Governing Billing for Non-communications-Related Charges, gives subscribers additional tools for controlling what charges may be included in their bills.

Lastly, a surprising number of carriers objected to including Commission and FCC contact information on their bills. These are in part disclosures already required by Section 2890. The obvious purpose is to safeguard consumers' Rights to *Public Participation and Enforcement* (consumers have a right to be informed of their rights and what agency enforces those rights) and *Accurate Bills and Redress* (consumers have a right to fair, prompt and courteous redress for problems they encounter). Without this information, many or most consumers won't realize what their options are. Some of the carriers' reasons for wanting to

withhold the information were strained, but we do sympathize with their concern lest the billing message undermine their opportunity to address customers' problems. Rule 6(k) has been revised to strengthen the message: contact the carrier first if there is a problem, and then contact the regulator if it hasn't been addressed fairly. Revised Rule 6(k) now also notifies consumers that these rights and rules are available on the Commission's web site.

Rule 7: Late-Payment Penalties, Backbilling, and Prorating

Rule 7 establishes billing guidelines all carriers are to follow with respect to, *e.g.*, time allowed to make payment, maximum permissible late payment penalties, limitations on backbilling by carriers and overbilling claims by subscribers, and prorating charges for a partial month's service. Carriers are free to adopt more consumer-favorable practices where they wish. By establishing standards carriers must follow and reasonable periods for both carriers and subscribers to complete, correct or challenge billings, Rule 7 helps safeguard consumers' *Right to Accurate Bills and Redress.* Carriers and consumer representatives alike generally accepted the need for these practices, although the carriers offered a number of modest revisions, some adopted below.

Rule 7(a) has a pair of changes to conform it to the results of an earlier Commission investigation into telephone company late payment charges and to current practice, and several changes to make it more clear. This rule does *not* authorize carriers to impose late-payment penalties if they were not previously so authorized.

Staff's proposed Rule 7(a) allowed 16 days from the bill mailing date before a carrier might impose a late payment penalty not to exceed 1.5% per month on the undisputed, overdue amount. This is approximately the same as the 15 days currently in effect for CLCs and IECs. It was suggested in comments

that the 16 days be revised to match the ILECs' current 22 day period; no party addressed that suggestion in reply comments. The Commission investigated telephone companies' late payment charges in I.85-01-024, finding that the large ILECs' bills were due and payable upon receipt and considered delinquent if not paid by 15 days after mailing, and that the 22 to 31 day periods then observed by the large ILECs before late payment charges were imposed were just and reasonable. The resulting decisions[27] established the 22 day minimum interval for all ILECs, and ordered customer bills under $20 exempted from late payment charges. Rule 7(a) has been revised accordingly.

Consumer representatives were concerned that under draft Rule 7(a), a carrier might unfairly apply late penalties where payments were received on time but not posted until after the due date; and carriers held it unrealistic to expect them to post payments in all cases on the same day they are received. Both should find relief in a minor wording change to require carriers to credit payments with an *effective date* of the business day they are received. Payments arriving on a weekend or holiday would be credited the following business day. Similarly, the last sentence of Rule 7(a) should satisfy both groups by ensuring that late charges are forgiven when they result from disputed billings which are later resolved in the subscriber's favor.

Rule 7(b) also follows the staff's proposal, with one significant modification. Section 737 imposes a three-year statute of limitations for utility claims against a customer, and we have cited that section in the past where customer fraud was involved. We agree with the carriers who argued these rules should not shorten the limit on backbilling when that backbilling is necessitated

[27] D.85-12-017 (large LECs) and D.86-04-046 (independent LECs).

by customer fraud. Here, we also continue our established practice of limiting other carrier backbilling to periods much shorter than the three years in Section 737 as the staff has proposed.[28]

Section 736 likewise sets a three-year maximum on customer claims against a utility, and allows the customer to file a claim with the courts where they are vested with concurrent jurisdiction, requirements which are affirmed in Rule 7(c).[29]

Many carriers questioned whether staff's proposed Rule 7(c) (now Rule 7(d)) should apply broadly across all carrier classes and services. While our intent is to protect consumers of all regulated telecommunications services, our priority is ensuring the highest degree of protection goes to services considered essential and for which consumers have the fewest choices. Thus Rule 7(d) is modified here to apply to basic service. We anticipate providers will follow its spirit in applying its principle to other, more competitive offerings.

Rule 7(e) is new. Carriers will be required to base their bills on the rates in effect at the time the service was used; and any delays or lags in billing must not result in a higher total charge than if the usage had been posted to the account in the same billing cycle in which the service was used. This seems so simple and straightforward that one might wonder why it should be necessary to state it in a

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[28] See D.86-12-025 in R.85-09-008 setting telephone corporation backbilling limits which we today reaffirm with minor exceptions in the interest of making them more consistent across carrier classes.

[29] Both § 736 and § 737 may be read to apply only to tariffed rates, but since the Commission has jurisdiction to establish both broader requirements (*i.e.*, applicable to both tariffed and non-tariffed utility services) and tighter requirements (backbilling limits shorter than three years) that do not conflict with those sections, they need not be examined further here.

rule. At our public participation hearings and in the very great volume of public correspondence we received, we were surprised to hear that some carriers have adopted a practice of shifting some of the calls made in one billing period to bills for a subsequent billing period. Thus, a subscriber who, for example, has chosen a plan that advertises an allowance of 400 minutes of free calling per month and $0.35 per minute thereafter might be careful to stay within the 400-minute limit, only to find later that the carrier has unexpectedly shifted 150 minutes of actual usage from one month to the bill for one or more subsequent months. The customer's bill then shows 250 minutes one month and 550 the next, resulting in 150 minutes of excess usage at $0.35 per minute. A call that was to have been free at the time it was placed is instead billed at the overtime rate. No subscriber should be subjected to such unpredictability, nor have to accept it as a condition of receiving service. If carriers find it challenging to generate bills that meet the conditions of the service plans they sell, they should either modernize their accounting and billing systems or revisit their marketing practices.

Rule 8: Tariff Changes, Contract Changes, Notices and Transfers

Rule 8 is intended to ensure that any changes to rates, terms or conditions of service are timely communicated to affected subscribers. Likewise, subscribers must be informed when carriers seek authority to transfer their subscribers to others, or to withdraw service. Where service is provided under tariff, notice of changes must be provided early enough for the subscriber's views to be made known to the Commission, and for the subscriber to choose whether to retain, change or cancel the revised tariffed service. Where service is non-tariffed and provided under contract, the carrier may not make unilateral changes which bind the subscriber to higher rates or more restrictive terms or

conditions. Rule 8 helps safeguard consumers' *Right to Disclosure*, *Right to Choice*, and *Right to Public Participation and Enforcement*.

While consumer representatives supported the principles underlying Rule 8, carriers were typically opposed. The most commonly heard objection was that it was too restrictive in that it had the effect of denying carriers flexibility in determining how to deliver notices, applied the same notice standard for minor as major rate increases, and stifled carriers' ability to employ telephone and electronic commerce. Carriers overall maintained that Rule 8 was unnecessary.

Since the initial rulemaking order with staff's proposed rules was issued in this proceeding, the assigned Administrative Law Judge has mailed a draft decision in R.98-07-038, the rulemaking to revise G.O. 96-A, the general order governing informal filings at the Commission. The Commission subsequently issued two interim opinions, D.01-07-026 and D.02-01-038, in that proceeding. Our task here has been simplified by the fact that D.02-01-038 (the provisions of which are intended to be included in G.O. 96-B when it is issued) conveys definitive guidelines for many or most of the issues raised by proposed Rule 8. We intend Rule 8 to be entirely consistent with D.02-01-038 and, when it is issued, G.O. 96-B.

Commenters found Rules 8(a) and 8(b) (formerly 8(c)) to be mildly confusing in that they could be interpreted as covering the same ground: requiring notice before higher rates or more restrictive conditions could be imposed where there are existing carrier / subscriber agreements; and barring enforcement of any changed rates, terms or conditions in carrier / subscriber contracts unless signed in writing by the subscriber.

As redrafted, Rule 8(a) reflects the notice requirements set forth in D.02-01-038[30] for carrier-proposed changes to their tariffed services that may result in higher rates or charges or more restrictive terms or conditions. Rule 8(a) requires only *affected* subscribers be noticed. And, to address comments several carriers made, this rule applies only to changes in the *carrier's tariffed services*, so it does not include, *e.g.*, changes in taxes, or changes in charges incurred by the subscriber on another carrier's system and simply passed through by the carrier.

Former Rule 8(c) survives as Rule 8(b) and applies to contracts for non-tariffed services: "No material change in any of the rates, terms or conditions of service specified in a written contract shall be enforceable unless the change is also set forth in writing and signed by the subscriber." As simple, straightforward and fair as this might seem, it was roundly denounced by a number of carriers. If it achieved nothing else, it drew the one riposte that so clearly illustrates why these consumer protection rules are needed that it begs to be quoted: "[Our] Terms and Conditions allow a change in rates and terms that may adversely affect customers upon prior written notice of one bill cycle. If the customer has had service less than 90 days the customer may cancel without an early termination fee. Carriers should retain the flexibility to handle these types of changes as they see fit based on competitive market pressures." In case it isn't

[30] D.02-01-038 was adopted in anticipation of G.O. 96-B. Under G.O. 96-B as currently proposed, changes implemented by Tier 1, Tier 2 and Tier 3 advice letters (Industry Rules 7.1, 7.2 and 7.3 respectively) would require customer notice in compliance with Industry Rules 3 and 3.3: not less than 25 days' advance notice; a statement of the current and proposed rates, charges, terms or conditions; for general rate case LECs (GRC-LECs), a statement of the reasons for the proposed change and its impact expressed in dollar and percentage terms; and for Tier 3 filings, specific wording which includes procedures to protest.

clear on first reading, this carrier is saying it should be permitted to change a contract unilaterally to the detriment of a subscriber, and once the contract has been in force for 90 days the subscriber's only recourse is to cancel and pay the termination fee. In effect, "They're our sheep and we'll shear 'em any way we please."

Rule 8(b) applies only to changes in rates, terms or conditions of service specified in a written contract, so it also would not typically encompass, *e.g.*, changes in taxes, or changes in roaming or other charges incurred by the subscriber on another carrier's system and simply passed through by the carrier without markup. And, since Rule 8(b) speaks to enforceability, it can be read not to bar carriers from signatureless changes that benefit subscribers, such as service enhancements and rate decreases to which subscribers would not object.

Rule 8(c) (formerly Rule 8(d) in staff's proposal) requires a carrier to notify each affected subscriber at least 30 days in advance whenever it requests approval for a transfer of subscribers. A transfer of subscribers does not include a transfer at the corporate level that does not affect the underlying utility or subscribers. The notice must follow the requirements where applicable of General Order 96-Series and / or Section 2889.3; describe the proposed transfer in straightforward terms; explain that the transfer is subject to Commission approval; identify the transferee; describe any changes in rates, charges, terms, or conditions of service; state that subscribers have the right to select another utility; and provide a toll-free customer service telephone number for responding to subscribers' questions. Rule 8(c) is now completely consistent with the corresponding rule for transfers in D.02-01-038. Subscriber notices of transfers requested by application are also governed by the Rules of Practice and Procedure and by the presiding officer's rulings during the course of the formal Commission proceeding.

The *Right to Choice* states that consumers have a right to select their services and vendors and to have those choices respected. Inherent in the right to choose with whom to do business are the rights to *know* with whom one is doing business and to choose with whom *not* to do business. Rule 8(c) is aimed at ensuring those as well. Drawing guidance from our recent slamming / cramming decision which took an in-depth look at how carriers should be identified, notices of transfers must show carriers' names as they appear on their certificates of public convenience and necessity. For carriers not certificated by the Commission, the notice must show the name under which the carrier is certificated by the FCC, if applicable, or the carrier's legal name as registered with the California Secretary of State. Carriers who market under other names may inform subscribers of any business names that are properly registered pursuant to Bus. & Prof. Code Section 17900 *et seq.* and registered with the Commission's Telecommunications Division, but that must be in addition to their certificated or registered legal name in the notice. Again, abbreviations may be used so long as there is sufficient information to make it abundantly clear to the subscriber who the carriers are.

Rule 8(d) is also consistent with the corresponding rule in D.02-01-038: A carrier shall notify each affected subscriber at least 25 days in advance of every request to withdraw service. The notice must describe the proposed withdrawal and proposed effective date, state that subscribers have the right to choose another utility, and provide the carrier's toll-free customer service telephone number for responding to subscribers' questions. If the service to be withdrawn is basic service, the carrier must also: explain in the notice that the withdrawal is contingent on Commission approval; arrange with the default carrier(s) for continuity of service to affected subscribers who fail to choose another utility; describe in the notice those arrangements and the subscribers' right to receive

basic service from the underlying carrier or carrier of last resort; and provide the default carrier's name and toll-free number.

Rule 8(e) is the refinement of staff's proposed Rule 8(b), again made consistent with D.02-01-038. Subscriber notices under these rules must be in writing, and must be distributed by one or a combination of bill inserts, notices printed on bills, or separate notices sent by first class mail. Electronic written notices may be substituted where the subscriber has agreed to receive notice in that manner. Notice by first-class mail is complete when the document is deposited in the mail, and electronic notice is complete upon successful transmission. In every case, the notice must be clear and legible and use the equivalent of 10-point type or larger.

Rule 9 (and Former Rule 10): Service Termination

Rule 9 sets forth procedures all carriers must follow when preparing to terminate a subscriber's service for nonpayment of a delinquent bill. These requirements help safeguard consumers' *Right to Disclosure*, *Right to Public Participation and Enforcement*, and *Right to Accurate Bills and Redress.*

Rule 9 as proposed in the rulemaking order related to termination for all services, while Rule 10 added additional rules to be applied to local service termination. In their comments and replies, carriers interpreted various subdivisions of each rule, or an entire rule, as not applying to their carrier class, sometimes correctly and sometimes not. Some asked that final Rules 9 and 10 be more explicit in that regard, while one suggested they be combined. After considering their suggestions and other parties' comments and replies, it became apparent that combining both into one rule, with distinctions for different types of service where appropriate, would make the requirements easier to understand and follow. We have done so.

The largest local exchange carrier accepted most of Rules 9 and 10 as proposed, while the next largest offered more changes; for the most part we agree with their suggestions and have included them. In most cases, the other carriers' comments repeated views and arguments noted earlier in these rules and in other proceedings, with mixed success. Some asked that the requirements for disconnecting basic service for nonpayment of other services be conformed with whatever result was to be reached in R.97-08-001 and I.97-08-002, rules to deter slamming and cramming, while others reargued positions we have since rejected. We subsequently issued D.00-03-020 and D.00-11-015 in that proceeding, and the results are reflected in revised Rule 9(d). Carriers asked that the final rules accommodate electronic notices where appropriate, and they now do so for confirmations of alternative payment plans. They asked to be allowed to disconnect on shortened or no notice where the subscriber's acts or omissions demonstrate an intention to defraud the carrier, or threaten the integrity or security of the carrier's operations or facilities, and we have done so. They objected to any implication in proposed Rule 11(d) that carriers are required to offer delinquent customers an alternative payment plan in lieu of disconnect. Our revised Rule 9(f) makes clear that there is no such requirement. We have also incorporated numerous refinements in response to their suggestions.

Consumer representatives generally favored the principles behind Rules 9 and 10. Their most significant suggestions were aimed at clarifying and strengthening provisions for shielding basic service from disconnection for nonpayment of other services. As requested, we have added a requirement that partial payments be applied first to a customer's basic service unless the customer directs otherwise. We have also added language requiring disconnect notices to state the minimum amount that must be paid to retain basic service where applicable. We decline, however, to re-entertain arguments heard and

rejected earlier as to which classes of carriers may leverage local service cutoffs to require payment of long distance and other non-basic service charges. That issue was decided in D.00-03-020 and D.00-11-015.

Proposed Rule 9(a) relating to deposit refunds covered the same topic as Rule 5(d) and has been deleted from this section.

New Rule 9(a) combines portions of former Rules 9(b), 9(d) and 10(a) to require notice not less than 7 calendar days prior to terminating service for nonpayment, and to list essential elements that must be in the notice. Consistent with their positions on many other customer communications, carriers asked to be allowed to give termination notices other than in writing. Loss of service is too serious a matter to compromise. Rule 9(a) still requires notice in writing. If carriers find it helpful, convenient or necessary, they are free to augment, but not replace, their notices in writing with e-mailed, telephoned, personally delivered or any other form of disconnect notices.

Rules 9(a)(1) through (6) list what must be included in each notice. We have made a number of refinements in response to the comments. Carriers' FCC numbers or Commission U-numbers are no longer required, but carriers must include names that conform to the guidelines in D.00-03-020 and D.00-11-015. The notice must now include the telephone number associated with the delinquent account, the amount by which the account is delinquent, information sufficient for the customer to understand what service or services are to be terminated, and, if basic service is at risk, the minimum amount that must be paid to retain it. The carrier need no longer include notice of how to lodge an internal carrier complaint or request an internal carrier investigation concerning its service, rates or charges. Carriers are still required, however, to provide a toll-free telephone number to reach a carrier service representative who can provide

assistance, and the telephone number of the Commission's Consumer Affairs Branch for information, appeals or complaints.

Rule 9(c) safeguards a carrier's right to disconnect a customer immediately for fraud. Several carriers pointed out the importance of prompt disconnection where a carrier's operations or facilities are at risk, and we have allowed for that as well now.

Rule 9(d) allows carriers to disconnect basic residential or single line business service only for nonpayment of those services. Basic service providers which are not carriers of last resort are the exception: they may disconnect basic service for nonpayment of long distance service they provide directly or through an affiliate. These provisions are now consistent with the guidelines we issued recently in D.00-03-020 and modified by D.00-11-015. Part 3 of this general order, Rules Governing Billing for Non-communications-Related Charges, also prohibits disconnecting basic service for nonpayment of non-communications-related charges.

Rule 9(e) is new: If a customer makes a partial payment, it must be applied first against the balance due on that customer's basic service unless the customer directs otherwise. This provision goes hand in hand with the prohibition against cutting off basic service for nonpayment of other services. If the customer makes a partial payment to preserve basic service, the earlier rule would be meaningless if the carrier were permitted to divert the funds to other purposes.

Through mis-communication or otherwise, customers sometimes find their service cut off even after they have made arrangements with a carrier's service representative to pay their overdue balances over time. Although there are some obvious benefits, carriers are under no obligation to make alternate payment arrangements. Once they do, however, it is important that both parties have the same understanding and adhere to their agreement until the account is once

again current. Under Rule 9(f), if an alternative payment plan is arranged, the carrier must confirm its terms in writing upon request. Written confirmation can be by e-mail or other electronic means if the customer agrees.

In D.91188, following California Supreme Court review, the Commission adopted a rule requiring every communications utility subject to its jurisdiction to refuse service to a new applicant and disconnect existing service to a customer when a magistrate has found probable cause to believe that the service was being or would be used in the commission or facilitation of illegal acts, and absent immediate action, significant dangers to public health, safety, or welfare would result. Rule 9(g) reflects the Commission's D.91188 rule, which is still in effect and binding on all carriers subject to its jurisdiction.

Rule 11: Billing Disputes

Rule 11 ensures subscribers have an opportunity to challenge questionable charges on their bills without fear of being disconnected for nonpayment. This helps secure their *Right to Accurate Bills and Redress*. As redrafted, it continues each of the essential elements of the staff's proposed Rule 11 and adds several provisions suggested in parties' comments.

When a customer questions charges on the bill, the carrier must investigate them to determine whether they were indeed authorized and correctly charged, and must inform the subscriber of its determination within 30 days. Rule 11(a) follows staff's proposal, but adds the 30-day time limit required by Public Utilities Code Section 2890(e)[31] and suggested in a consumer group's comments. A carrier suggested that the rule emphasize that carriers may employ agents to handle billing disputes, but that is not necessary because in every case these rules

[31] § 2890(f) was renumbered to § 2890(e) on July 1, 2001.

apply equally to carriers whether they act for themselves or through agents. In some cases, the agents who sold the service may not be the proper carrier representative to handle later billing problems. Rule 11(a) also has minor edits to implement a carrier's suggestion to clarify that the customer must affirmatively dispute a billed amount; nonpayment alone is not sufficient to trigger the rule's dispute provisions.

Staff's proposed Rule 11(b) allowed the utility to notify the customer when a bill is delinquent and warn that service may be terminated. Those provisions are now in Rules 7(a) and 9(a) and need not be repeated here.

Once the carrier has completed its investigation and informed the subscriber of the results, the subscriber needs time either to send payment of the disputed amount to the carrier, or to send it as a deposit to the Commission's Consumer Affairs Branch along with a request the charge be investigated. Rule 11(b) ensures the subscriber has at least 7 days to do that before service may be terminated.

When the subscriber has submitted a claim to CAB for informal review, deposited the disputed amount with the Commission, and either paid the undisputed amount to the carrier or deposited it with the Commission, the carrier may not disconnect the subscriber's service pending CAB's determination. Although we prefer to have the undisputed amount paid directly to the carrier, some complainants forward the entire bill payment to the Commission and CAB's practice is to accept it rather than allow the subscriber to be disconnected. Since the carrier is assured at this point of receiving the undisputed amount if CAB finds in its favor, it would serve little purpose to allow the subscriber to be disconnected for an inconsequential technical violation of the procedure, and former Rule 11(d), now Rule 11(c), has been revised accordingly.

Staff's Rule 11(e), now Rule 11(d), proposed that a subscriber who brings a complaint to the Commission not be held liable for a carrier's legal costs. Carriers objected that they should be free to seek compensation for their costs in frivolous complaints. For their part, consumer representatives would extend staff's rule to ensuring carriers don't abuse their leverage by contractually foreclosing consumers' ability to seek relief in California's courts or agencies. We agree with the consumer representatives here. Residential and small business consumers should be free to seek relief from the Commission, the courts and other agencies without the chilling effect that contractual, open-ended liability for carriers' legal costs would bring. Consumer representatives also provided a copy of a carrier standard contract that would require California consumers to agree to submit themselves to the jurisdiction of the courts of another state as a condition of obtaining California-jurisdictional regulated utility services, and would limit their rights to legal recourse in other ways. We can and will bar carriers from locking California consumers into contracts with such unconscionable terms.

Rule 12: Privacy

Both California and federal law require telecommunications providers to obtain a subscriber's permission before using or disclosing confidential subscriber information, subject to certain exceptions (e.g., law enforcement authorities may obtain confidential subscriber information pursuant to a search warrant). But state and federal privacy protections are not identical, and many of the parties who commented on our proposed privacy rules noted the possibility that any state regulations in this area might be preempted. Either directly or impliedly, these comments raise the issue of whether California's statutory requirement that telecommunications providers obtain written

permission from residential subscribers before disclosing confidential information to a third party[32] might be preempted by the FCC's CPNI (customer proprietary network information) regulations. Those who are familiar with privacy protection issues in general know that much of the debate typically is over the appropriate method of obtaining customer consent to use confidential data for marketing purposes -- "opt-in" versus "opt-out." ("Opt-in" means that business entities are required to obtain a customer's affirmative consent before disclosing the customer's confidential information to a third party or using it for a different purpose from the one agreed to by the customer; "opt-out" means that customer consent is presumed unless the customer takes action to deny consent.) The opt-in approach is generally considered by consumer advocates to protect consumers' confidential information more effectively, while businesses generally prefer opt-out because it achieves maximum flexibility to use customer information with minimal effort: it places the burden on customers to deny consent, and experience thus far shows that relatively few customers take the necessary steps to opt out.[33] California requires, in effect, an opt-in approach, at least for residential telephone subscribers.[34] Might this statutory requirement be preempted by federal law? The comments received do not attempt to answer

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[32] S*ee* Appendix A: Pub. Util. Code Section 2891

[33] To give a recent example, the opt-out rate for financial services customers pursuant to the Financial Services Modernization (Gramm-Leach-Bliley) Act has been estimated at about five percent. *See* Comments submitted to Federal Trade Commission by Beth Givens and Tena Friery of the Privacy Rights Clearinghouse, *2001: The GLB Odyssey – How Consumers Responded to Financial Privacy Notices and Recommendations for Improving Them*, (Dec. 4, 2001) (available at www.privacyrights.org).

[34] *See* § 2891.

this question, but reveal much uncertainty about the status of the FCC's regulations and confusion about the possibility of preemption.

We reject suggestions by some commenters that we abandon our efforts to issue any rules on privacy because our state regulations might be preempted. In California protection of privacy interests is a matter of great public concern. The right to privacy is expressly protected by the California Constitution, Article 1, Section 1, which, in contrast to the implied right to privacy guaranteed by the federal constitution, applies to the conduct of businesses as well as government.[35] An enormous body of state statutory and decisional law further reflects the importance accorded privacy rights in California. The fact that the Legislature expressly provided that a violation of Section 2891 "is a grounds for a civil suit by the aggrieved residential subscriber against the telephone… corporation and its employees responsible for the violation"[36] underscores the importance accorded privacy interests.

Notwithstanding the availability of this civil remedy, it is our responsibility to ensure that consumer protection rules in this area are adequate and that public utilities comply with the state's privacy requirements.[37] We will

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[35] *See* American Academy of Pediatrics v. Lungren, (1997) 16 Cal.4th 307, 388.

[36] § 2891(e).

[37] Legislative mandates to protect privacy interests of utility customers are found throughout the Public Utilities Code. In addition to Sections 2891-2894.10, which specifically address various aspects of privacy protection for telephone users, *see, e.g.*, Sections 393(f)(7) (protects confidentiality of Electric Service Providers' customer information); 497.5(c)(5) (requiring adequate privacy protection rules as a condition of granting telephone corporations an exemption from the tariff requirement); 761.5 (protecting confidentiality of customer information obtained from centralized credit check system); 7906 (need for telephone corporations to ensure privacy of

Footnote continued on next page

not abdicate our responsibilities in this area. Instead, we will clarify the scope of our authority and fulfill those responsibilities within that framework. To understand the legal framework within which we protect telephone consumers' privacy interests, we must understand the interplay of the applicable federal and state laws. Accordingly, we begin this discussion of our proposed privacy rules by summarizing the legal framework and addressing the issue of potential federal preemption of our state rules.

Legal Framework

Federal Law: 47 USC § 222 and FCC's CPNI Regulations

Section 222 [38] of the Telecommunications Act ("Privacy of Customer Information") protects confidential subscriber information. That statute requires carriers to obtain a subscriber's "approval" before disclosing the subscriber's CPNI to third parties, subject to certain exceptions. CPNI includes information carriers may derive from providing telephone services to a subscriber, for example, records of calls made and received and information about calling patterns. The statute does not specify in what form approval may be obtained; that issue was left to the FCC to determine. The FCC interpreted "approval" to mean informed consent, and after a lengthy rulemaking proceeding, issued regulations requiring that consent be obtained by an opt-in method. [39]

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communications over their networks); *see also* Code of Civil Procedure Section 1985.3(f) (requiring subpoena to obtain personal records maintained by telephone corporations).

[38] *See* Appendix A: 47 U.S.C. § 222.

[39] *See* 47 C.F.R. §§ 64.001-64.2007.

The FCC's regulations, as amended in 1999, require a carrier to obtain a subscriber's affirmative consent before using or disclosing CPNI for any purpose other than initiating, providing, billing, and collecting for the type of service (local exchange, long-distance, or wireless) that carrier provides to that customer. Carriers are allowed to infer permission to use CPNI to provide the services requested and to market services related services, such as custom calling features, but must obtain a customer's express approval to market a different type of service (e.g., a carrier that provided only local exchange service to a subscriber would have to obtain the subscriber's express approval to market long-distance or wireless service to that customer.) This "total service approach" was intended to allow carriers to use CPNI to serve their customers with relative ease and to market related services to existing customers, but not to leverage their existing customer base to gain a competitive advantage in new markets.

U.S. West challenged these regulations, arguing that they violated the company's commercial speech rights protected by the First Amendment and would constitute an unlawful taking of its property in violation of the Fifth Amendment. In a split decision that has been widely criticized by legal scholars, the United States Court of Appeals for the Tenth Circuit struck down the CPNI regulations on First Amendment grounds.[40] The legal effect of

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[40] *U.S. West, Inc.* v. *FCC* (10th Cir. 1999), 189 F.3d 1224, *cert. denied*, 530 U.S. 1213 (2000). The Tenth Circuit did not address the takings claim. (182 F.3d 1224, 1239 fn. 14.)

Judge Briscoe, the dissenting judge, criticized the majority for failing to accord deference to the FCC's reasonable interpretation of "approval," as required by *Chevron U.S.A., Inc.* v. *NRDC* (1984) 467 U.S. 837. The FCC had reasoned that "approval" means "informed consent," and that a customer's failure to respond to a notice does not necessarily constitute informed consent. Judge Briscoe also concluded that U.S. West had failed to raise any argument that warranted First Amendment scrutiny. (Briscoe, J., dissenting, 182 F.3d at 1240-1249.)

the Tenth Circuit decision has been unclear, however. Although the majority opinion purports to invalidate the CPNI regulations (not Section 222), only the opt-in aspect of the regulations was challenged in the lawsuit. Accordingly, the FCC has taken the position that the Tenth Circuit's decision invalidated only the opt-in provisions (in § 64.007(c)), and that the rest of the regulations, including notice requirements, remain in effect.[41] The FCC has initiated further rulemaking proceedings to revisit the issue of opt-in versus opt-out in light of *U.S. West*. (The decision does not preclude the FCC from adopting an opt-out approach again after developing the record further.)[42] In short, for purposes of our rulemaking, (1) there are no federal regulations currently in effect that specify how subscriber consent to use CPNI must be obtained pursuant to Section 222; and (2) like the FCC, we will deem the remainder of the CPNI regulations to be in effect.

California Law: Public Utilities Code §§ 2891-2894.10; 2895-2897

California law requires telecommunications providers subject to state regulation to obtain residential subscribers' *written* consent before disclosing confidential subscriber information "to any other person or corporation."[43] As with its federal counterpart, statutory exceptions to this requirement accommodate the needs of emergency services and law enforcement activities. Sections 2891-2894.10, "[Telephone] Customer Right of Privacy,"

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[41] *See* Clarification Order and Second Further Notice of Proposed Rulemaking, FCC 01-247 (released September 7, 2001), ¶¶ 7, 25.

[42] Id. , ¶¶ 8, 12, 16-21.

[43] § 2891(a)

protect other aspects of telephone users' and subscribers' privacy, including: the confidentiality of unlisted (unpublished) subscribers' information (§ 2891.1); the ability to block display of the caller's number (Caller ID blocking) (§ 2893); and customer access to information regarding telephone solicitations (§ 2894.10). The rules set forth in new G.O. ___ incorporate many of these provisions. In addition, pursuant to our general authority and the specific mandate of the Legislature in the Customer Service Act of 1993, the rules require carriers to provide subscribers and potential subscribers with certain information about their privacy rights that we deem necessary to enable customers to make informed choices about their service options.[44]

Federal Preemption

Although the FCC's CPNI regulations are binding on the states, the states may regulate to protect privacy interests implicated in the provision of intrastate service; only those state regulations that conflict with the FCC's regulations may be preempted. The FCC has declined to declare all state regulations in this area preempted per se; instead, it has announced that it will consider claims of preemption on a case-by-case basis.[45] To provide guidance, the FCC has stated that state regulations requiring more detailed notice to customers about their privacy rights would not necessarily be preempted.[46] The FCC's approach is consistent with the policy of "cooperative federalism"

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[44] *See* §§ 2895-2897.

[45] FCC CPNI Order, FCC 98-27, ¶ 18; *see also* FCC 99-223, ¶¶ 113-114.

[46] FCC 98-27, ¶ 18.

underlying the 1996 Telecommunications Act, which encourages state regulation within the framework of the Act.[47]

Consistent with this understanding of the parameters of our authority, we have endeavored to devise rules that carry out the protective mandates of the California Legislature (including the requirement that carriers obtain written consent from residential subscribers before disclosing their confidential information) while avoiding any conflict with the FCC's CPNI regulations. Again, we emphasize that while federal and state law use different terms and definitions, both require carriers to obtain subscribers' consent before disclosing subscribers' confidential information to third parties. We note also that, as discussed earlier, the FCC is currently re-examining questions related to the opt-in versus opt-out method and, at this time, we can not know the outcome of its further proceedings on this issue.[48]

Provisions of Rule 12

As explained above, we have endeavored to fashion rules that will protect consumers' privacy interests effectively within the framework of state law and the FCC regulations that are currently in effect. Our rules, for example, incorporate the FCC's total service approach. Similarly, our privacy rights notice requirements incorporate those set forth in the FCC's order, although we require that the notices be provided in writing, that they be clear and conspicuous, and

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[47] *See* Weiser, "Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act," 76 N.Y.U. L. Rev. 1692 (Dec. 2001).

[48] Even if we were of the opinion that a provision of the California Public Utilities Code might be preempted by federal law, we are required to uphold and enforce all of the laws we are charged with enforcing unless and until a law is declared invalid or unenforceable by an appellate court. (Cal. Const. Art. III, § 3.5.)

that they include additional information about consumers' privacy rights that we consider essential to meaningful notice.

Clarifying changes to the first draft of the rules have been made in response to comments, and definitions have been revised and added. In addition, the rules have been reorganized and revised so that they more clearly reflect basic fair information principles. These principles are:

- Maintain accountability (in this case, carriers are accountable for appropriate handling of the confidential information they collect and would designate individuals within the organization responsible for carrying out the company's information handling policies);
- Ensure openness (carriers would inform customers of their policies regarding confidential information);
- Identify the purpose for which confidential information is collected;
- Obtain the subscriber's informed consent before disclosing confidential information;
- Limit the collection, use, disclosure and retention of confidential information;
- Maintain accurate information;
- Allow subscribers access to their confidential information (thereby enabling subscriber to update and correct information); and
- Employ appropriate safeguards.[49]

[49] On the historical development of fair information principles, *see* Privacy Rights Clearinghouse, "A Review of Fair Information Principles: The Foundation of Privacy Public Policy," (1997). Descriptions of fair information practices can be found at the websites of the newly created California Office of Privacy Protection (in the Department of Consumer Affairs) (www.privacyprotection.ca.gov) and the Office of the Privacy Commissioner of Canada (www.privcom.gc.gov).

The revised rules, which are guided by these principles in addition to the specific mandates contained in the Public Utilities Code, would permit a subscriber concerned, for example, about the risk of misuse of his or her social security number to contact the service provider, find out whether the subscriber's social security number is on file, and if so, request that it be removed from the provider's records. Subscribers could also verify that the information in their customer records is accurate, and have it updated or corrected if necessary.

Compliance Timeframe

We expect that it will be necessary for carriers to evaluate their current information handling practices, and some will need to adjust them and train staff in order to comply with the new privacy rules. We have allowed carriers until January 1, 2003 to come into full compliance with new G.O. ___, including Rule 12. This adjustment period does not excuse any carrier from compliance with any currently applicable requirements, including provisions of the Public Utilities Code, tariff rules, and prior Commission decisions and orders.

Rule 13: Consumer Affairs Branch Requests for Information

Rule 13 is intended to enable Consumer Affairs Branch to obtain information it needs to process informal consumer complaints and inquiries. This goes primarily to assuring consumers' *Right to Accurate Bills and Redress,* but may also help protect the other rights when consumers bring their questions or allegations to CAB. A very similar requirement is in effect today for non-tariffed interexchange carriers.[50]

[50] D.98-08-031, Appendix A, Rule 6.

The staff's initial proposal was a single rule requiring carriers to provide documents or information within 10 days of a request by the Commission or its staff. Most carriers objected to a firm 10-day requirement, arguing instead for a more flexible response period to accommodate those occasions when requested materials may be voluminous, in deep storage, or at a distant carrier location. This may indeed be a legitimate concern and we have revised the wording to recognize CAB's ability to make exceptions where warranted.

One carrier apparently interpreted Rule 13 as requiring it to expand its use or retention of paper records. No such inference is to be drawn from either the proposed rule or the redrafted rule. At least three industry commenters claimed to be prevented by state and federal law from releasing some types of information to the Commission absent a subpoena or customer consent. As our advocacy division points out in reply comments, Rule 13 is well within the authority already available to Commission staff. Among the Public Utilities Code sections the carriers cite, Sections 313, 314(a), 2891, 2891.1 and 2894, none bars carriers from providing information to CAB staff acting within the scope of their duties to examine the legitimacy of a consumer complaint.

New Rule 13(a) requires every carrier to designate one or more representatives CAB can contact in handling customer inquiries and complaints.

Rule 13(b) is essentially the staff's proposed Rule 13, but narrowed to encompass CAB requests only. The Commission and its staff have long since established their legal authority, methods and channels for obtaining records and information from the carriers and have no need of another rule for that purpose. Carriers should understand that Rule 13(b) is intended to facilitate CAB's efforts on behalf of consumers, not to serve as grounds to resist Commission and staff data requests. To make that point, Rule 13(b) is now narrowed to apply only to CAB requests, and new Rule 13(c) emphasizes that these rules are not the

Commission or its staff's exclusive authority for obtaining information or compliance.

Rule 14: Employee Identification

This rule drew perhaps the least controversy of any in parties' comments. No party objected to it. Several suggested the first sentence regarding identification cards be harmonized with Section 708 which sets forth essentially the same requirement. As several commenters pointed out, this rule is important to safeguarding the public's *Right to Safety*.

The wording in Rule 14(a) now adheres much more closely to Section 708 than before. Two refinements have been added as well. First, "employee" has been added to the Definitions section to include employees, contract employees, contractor employees, agents, and carrier representatives of any and all types. Members of the public should feel confident of the identification of *every* person who attempts to enter their premises to conduct the carrier's business. Second, to "customers and subscribers" has been added "applicants for service."

The second sentence of staff's proposed Rule 14, a requirement that employees identify themselves in telephone conversations, is now Rule 14(b). In some cases, applicants and subscribers may have occasion to speak with carrier representatives in person as well on the telephone, and the rule now encompasses that possibility. Rule 14(b) also adds an explanation of its purpose to assist readers in understanding and applying it.

Rule 15: Emergency 911 Service

In suggesting the Commission add a *Right to Safety* to its Bill of Rights, several commenters gave the requirement for access to 911 service as a prime example. Rule 15 is modeled after Section 2883, which requires carriers provide residential telephone connections with access to 911 services, even if they have

been disconnected for nonpayment. Section 2883 explicitly does not include wireless carriers. Section 2992, on the other hand, requires something very similar of wireless carriers. As drafted by staff, proposed Rule 15 covered both wireline and wireless and did not limit its applicability to residential telephones. About one-half of the industry commenters sought to have the rule more closely conformed to Section 2883. We have done that by restating it in words more similar to those of Section 2883, at the same time integrating into it requirements from Section 2992. But, as explained in this order and in the new general order, our intent is that these rules apply where possible to both residential and small business services. In fact, wireless carriers, as they have been quick to point out, do not typically distinguish between residential and business. Access to 911 service is important to both, and that is how Rule 15 as redrafted is to be interpreted. One other minor change was made to eliminate another possible source of ambiguity: Whether it is true or not that, as one commenter stated, wireless carriers don't provide "access services," we intend wireless carriers to be covered.[51] That term has been changed here to make it clear that the rule applies to carriers who provide end-user access to the public switched telephone network.

Consumer representatives generally agreed with Rule 15 as proposed. One suggested that we tighten the rule by eliminating the qualifier, "to the extent permitted by facilities." No carrier, the reasoning went, should have been certificated in the first place if it couldn't provide ubiquitous 911 access.

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[51] As noted earlier, at least one CMRS carrier has requested the Commission grant it carrier of last resort status, and characterizes its wireless service as "indistinguishable from the basic, required services provided by [California's two largest ILECs]."

However, the rule as drafted conforms to Section 2883 in that respect and represents a very practical standard. We have retained the qualifier.

A carrier asked that we clarify whether we intend Rule 15 to be consistent with the existing rules for reseller CLCs. We do. In D.95-07-054, Appendix B, our Consumer Protection and Consumer Information Rules for CLCs, Rule 10.C. requires continued 911 access to residential services even after disconnection for nonpayment. In D.95-12-056, we further interpreted Section 2883's applicability to CLCs by requiring them to provide 911 service (which we referred to there as "warm line" service) to residential customers disconnected for nonpayment for as long as the CLC maintains an arrangement for resale service to the end user's premises. When the resale arrangement is terminated, the obligation to provide 911 access reverts to the underlying facilities-based carrier. Consistent with our definition of the overall applicability of these new rules, Rule 15 is extended to encompass small business as well as residential lines.

Part 3: Rules Governing Billing for Non-communications-Related Charges

Cramming, the submission or inclusion of unauthorized, misleading, or deceptive charges for products or services on subscribers' telephone bills, has become a serious problem in California in recent years. In an effort to address the problem, the Legislature enacted Sections 2889.9 and 2890, which contain provisions designed to deter cramming, and authorized the Commission to adopt rules needed to accomplish the consumer protection purpose of those statutes.

On July 12, 2001 we issued D.01-07-030 adopting a set of interim rules governing the inclusion of non-communications-related charges on telephone bills. We stated that those rules, possibly with some modifications, would be incorporated into and superseded by the new general order we adopt in this

decision. The D.01-07-030 rules, now no longer interim, are Part 3, Rules Governing Billing for Non-communications-Related Charges, of new General Order ___.

In the D.01-07-030 interim rules, we indicated in Section J, Penalties, our intent not to preclude district attorneys, the Attorney General, or other law enforcement agencies from obtaining injunctive relief, civil penalties, and other relief permitted by law against a billing telephone company, billing agent, or vendor that violates the rules. We have made a minor revision in Part 3, Section J, to make it clear that we intend that same provision apply to violations of state law. The only other changes are minor, non-substantive changes to promote consistency with the remainder of the general order. As we noted in D.01-07-030, after the Part 3 rules have been in effect for approximately 18 months we may revisit this topic to assess how effective our rules have been in protecting consumers, and consider at that time whether changes are needed.

Part 4: Rules Governing Slamming Complaints

Background

Slamming, the unauthorized change of a telephone customer's preferred carrier, has been a problem for consumers ever since it became possible for telephone customers to choose among competing providers. It has been equally vexing for the state and federal regulators responsible for protecting them. The Commission last year completed a consolidated investigation and rulemaking proceeding[52] into slamming and, after workshops and several rounds of

[52] R.97-08-001, Rulemaking on the Commission's Own Motion to Consider Adoption of Rules Applicable to Interexchange Carriers for the Transfer of Customers Including Establishing Penalties for Unauthorized Transfer; and I.97-08-002, Investigation on the Commission's Own Motion to Consider Adoption of Rules Applicable to Interexchange

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comments, issued D.00-03-020, Final Opinion on Rules Designed to Deter Slamming, Cramming, and Sliding.[53] D.00-03-020 addressed certain limited aspects of slamming including record keeping, letters of agency, third-party verification, and removing the economic incentive for slamming. On the latter topic, our staff had recommended that we require carriers to refund all charges paid by customers who allege that they were slammed. In response, we observed,

> In a recent proceeding, the FCC has adopted a rule similar to that proposed by Staff. On December 17, 1998, the FCC adopted its Second Report and Order and Further Notice of Proposed Rulemaking in its docket, CC No. 94-129, which is addressing unauthorized changes to consumers' long distance carriers. The FCC decision addresses many of the issues that have been presented in this proceeding in addition to removing the economic incentive for slamming.
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> On May 18, 1999, the United States Court of Appeals for the District of Columbia Circuit issued a decision partially staying the FCC slamming rules. Those rules remain pending before the court.

On June 27, 2000 the court lifted its partial stay, and the FCC subsequently issued its amended rules for handling preferred carrier changes, including remedies for slamming. We refer here to those rules[54] as the FCC slamming rules, or simply the federal rules.

Carriers for the Transfer of Customers Including Establishing Penalties for Unauthorized Transfer.

[53] Later modified by D.00-11-015.

[54] 47 CFR 64.1100 *et seq.*

In addition to slamming allegations, the FCC rules cover carrier change order verification, letters of agency for changing carriers, preferred carrier freezes, and state administration of the unauthorized carrier change rules and remedies. It is this last topic we address here and in our new G.O. ___, Part 4, rules.

The FCC slamming rules give each state the option to act as the adjudicator of slamming complaints, both interstate and intrastate, and California has opted to do so.[55] Under 47 CFR 64.1110, each state which opts to take on that responsibility must notify the FCC of the procedures it will use to adjudicate individual slamming complaints. Our staff prepared an initial set of proposed slamming complaint handling rules late last year, and in January, 2001, the assigned Commissioner issued a ruling in this proceeding sending them out for comments and reply comments. After considering the parties' input and making modifications where warranted, the Commission is now adopting them as the Rules Governing Slamming Complaints included in G.O. ___, Part 4.

The FCC Slamming Rules

The FCC prefers that subscribers who believe they have been slammed go first to the state commissions in states that have elected to handle slamming complaints. However, subscribers also have the option of filing a complaint with the FCC for slamming involving interstate service. The FCC will use the federal rules for complaints coming to them, and state commissions handling slamming complaints may administer the FCC rules using their own procedures. Because

[55] On January 4, 2001 the Commission directed the President of the Commission to notify the FCC that it was electing to take primary responsibility for adjudicating slamming complaints registered by California consumers. The President did so by letter to the FCC on January 5, 2001.

the FCC rules are complex, we set forth here only a simplified overview to help understand their major elements.

When a subscriber first reports having been slammed, the alleged unauthorized carrier must remove any unpaid charges for the first 30 days from the bill. If the carrier contests the allegation and loses after the subscriber files a complaint, it must also remit to the authorized carrier 150% of any payments it has received from the subscriber. From that amount, the authorized carrier reimburses the subscriber 50% and retains the remaining 100%. The subscriber may also ask the authorized carrier to recalculate the bill using its own rates and attempt to recover from the alleged slammer on the subscriber's behalf any incremental amount in excess of the 50%. Any unpaid subscriber charges beyond the 30-day absolution period are to be recalculated and paid to the authorized carrier at the authorized carrier's rates.

If the carrier decides to contest the allegation, it must still reverse all unpaid charges for the first 30 days and inform the customer of his or her right to file a complaint and the procedures for filing. If the customer fails to file a complaint within 30 days after both the notice has been given and the charges reversed, the carrier may re-bill the customer.

The alleged unauthorized carrier may also decide not to contest the allegation, and instead grant the subscriber what the subscriber would have obtained had he or she filed a complaint and prevailed (i.e., absolution for unpaid charges during the first 30 days, and 50% reimbursement or re-billing at the preferred carrier's rate for the period beyond 30 days and charges the subscriber has already paid). In that case, the subscriber need not file a complaint to be made whole unless he or she is dissatisfied with the outcome.

If the subscriber does file a complaint, the agency[56] will notify the allegedly unauthorized carrier and require it to remove all unpaid charges for the first 30 days if it has not already done so. The allegedly unauthorized carrier then has 30 days to provide clear and convincing evidence that the carrier switch was valid and properly authorized. The agency will make a determination based on evidence submitted by the carrier and the subscriber, provided that, if the carrier fails to respond or to furnish proof of verification, it will be presumed to have slammed the subscriber.

The CPUC Slamming Rules

The Rules Governing Slamming Complaints we adopt today closely parallel the federal slamming rules in most respects for slams involving intraLATA, interLATA and interstate toll carriers. We have retained our current slamming rule for unauthorized changes of subscribers' local exchange carriers because it offers a greater level of protection. The full text of our new rules may be found in Part 4 of new G.O. ___, Appendix B to this order, so we will limit this discussion to highlighting some of the key elements and how they compare with the FCC slamming rules.

For IntraLATA, InterLATA and Interstate Toll Carriers

Both the FCC rules and our procedures allow the unauthorized carrier to either accept or challenge a slamming charge, and grant the subscriber the same 30-day complaint filing window during which the unauthorized carrier may not re-bill, a 30-day absolution period for unpaid charges, and partial refunds or credits for other charges.

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[56] The agency may be either the FCC or the state commission, depending on which is administering the slamming rules.

Our rules require the executing carrier to return the subscriber to his or her preferred carrier at the unauthorized carrier's expense in every instance of alleged slamming, and to refund or credit back to the subscriber any earlier charge to make the allegedly unauthorized switch. The FCC rules are silent on when and how the subscriber is returned to the authorized carrier, although they do require that once the FCC has made a determination that a slam has occurred, the unauthorized carrier must reimburse the subscriber for any charge to switch back to the authorized carrier.

When the subscriber is switched back to his or her preferred carrier, both sets of rules require the preferred carrier to re-enroll the subscriber in his or her previous calling plan.

When the alleged unauthorized carrier challenges the allegation and the subscriber then files an informal complaint, the matter will be decided by our Consumer Affairs Branch. If CAB decides against the subscriber, the subscriber may appeal to the Consumer Affairs Manager, and may file a formal complaint at any time.

When the subscriber has already paid charges to the alleged unauthorized carrier, our rules require the unauthorized carrier to refund or credit 50% of the amount paid[57] to the subscriber within 3 days. An unauthorized carrier which challenges an allegation and eventually loses after the subscriber files a complaint is in addition liable to the authorized carrier for 100% of the charges the subscriber has paid, plus any expenses the authorized

[57] This 50% is a proxy for the reimbursement the subscriber might have received had his billings been recalculated based on the authorized carrier's rates. Both the FCC and Commission rules allow the subscriber to request reimbursement based on recalculation rather than the 50% proxy.

carrier incurs in billing and collecting from the unauthorized carrier. The FCC rules, in contrast, do not require the 50% reimbursement up front. Instead, they make the unauthorized carrier liable to the authorized carrier for the entire 150% *after* the subscriber has prevailed in a complaint, plus the same billing and collecting expenses. Under the federal rules, only if and when it is able to collect 150% from the unauthorized carrier must the authorized carrier reimburse the subscriber 50%, and it would then retain the other 100%. This is the most significant difference between the two sets of rules: we require a 50% direct pre-complaint reimbursement from the unauthorized carrier to the subscriber, while the FCC requires routing the same 50% reimbursement post-complaint from the unauthorized carrier through the authorized carrier to the subscriber. If the authorized carrier is unable (or disinclined) to collect from the slammer, under the federal rules the subscriber gets no reimbursement for amounts already paid.

The Commission's rules also prohibit the executing carrier from using these contacts with slammed subscribers as opportunities to promote or sell its own products or services. The federal rules do not.

Lastly, our rules state explicitly that they are in addition to any other remedy available by law. The FCC made a similar statement in its implementing order, but did not include that provision in the text of its rules.

For Local Exchange Carriers

When CLCs first became eligible for certification, we adopted a set of Consumer Protection and Consumer Information Rules for CLCs as Appendix B to D.95-07-054. Rule 11B, Unauthorized Service Termination and Transfer ("Slamming"), from those CLC rules sets forth carriers' and subscribers' rights and responsibilities where the alleged slam is of a subscriber's local exchange carrier. That current rule applies to slams of and by both LECs and CLCs. It

does not limit slammed subscribers to absolution for the first 30 days of unpaid charges and 50% reimbursement for other charges as the federal rules do. Instead, it requires the slammer to restore the subscriber to the authorized carrier without charge and to refund *all* billings for the unauthorized service period. We have brought Rule 11B into these Part 4 rules intact as Section D, Unauthorized Local Exchange Carrier Changes.

The Parties' Comments

Fourteen groups representing 29 named entities, some of which were in turn associations of many more members, took the opportunity to file comments or replies to comments in response to the draft rules. Three contributors represented consumers, one represented small business, and the remaining ten represented carriers of all types.

Carrier representatives generally opposed and consumer representatives generally supported the Commission's California-specific rules. There were exceptions among both groups with respect to particular provisions.

The most frequent comment from industry representatives was that the Commission may not implement one provision or another in the proposed rules because it is preempted from devising any rules that vary from the federal rules. Further, they argue, even if California has the authority to enact and enforce its own rules differing from the FCC's, it should wait for some period of time to see how the federal rules work first. We disagree on both counts. In establishing the federal rules, the FCC granted states which elect to handle slamming complaints great latitude in fashioning their own procedures: "We note that nothing in this Order prohibits states from taking more stringent enforcement actions against carriers not inconsistent with Section 258 of the [Communications Act of 1934, as

amended by the Telecommunications Act of 1996]."[58] In that First Order on Reconsideration, the FCC went on to explain that its determination to entrust primary slamming enforcement to the states was based on its belief that the states are close to the problem, experienced in addressing it, and have demonstrated that past state-devised slamming handling rules have been effective:

> We agree with [the National Association of Utility Regulatory Commissioners] that the states are particularly well-equipped to handle complaints because they are close to the consumers and familiar with carrier trends in their region. As NARUC describes, establishing the state commissions as the primary administrators of slamming liability issues will ensure that "consumers have realistic access to the full panoply of relief options available under both state and federal law…." Moreover, state commissions have extensive experience in handling and resolving consumer complaints against carriers, particularly those involving slamming. In fact, the General Accounting Office has reported that all state commissions have procedures in place for handling slamming complaints, and that those procedures have been effective in resolving such complaints.[59]

Thus, the FCC has expressed its confidence in the states' ability to fashion effective slamming rules and permits them to do so, so long as those state rules are not inconsistent with Section 258 of the federal Telecommunications Act.

Carriers also objected to the Commission's requiring the unauthorized carrier upon learning of the allegation to reimburse the subscriber 50% of any charges already paid. The FCC requires routing the same 50% reimbursement

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[58] CC Docket No. 94-129, First Order on Reconsideration, Corrected Version (released May 3, 2000), at footnote 20.

[59] CC Docket No. 94-129, First Order on Reconsideration, Corrected Version, at Paragraph 25, footnotes omitted.

from the unauthorized carrier through the authorized carrier to the subscriber. Our rules require the reimbursement be made when the unauthorized carrier learns of the allegation, whereas the federal rules call for the subscriber to file a complaint and the agency to issue an order before requiring the refund. Carriers again claim California is preempted from adopting this differing provision, and again we disagree because the FCC has said more stringent state provisions are permitted. In this instance, we believe there are good reasons for requiring partial reimbursement up front. When discussing the 30-day absolution period, the FCC stated,

> Absolution minimizes slamming carriers' physical control over slamming revenues, and thereby minimizes the incentive to slam customers. The [FCC] has seen several cases in which slamming carriers went out of business or declared bankruptcy after the [FCC] or state enforcement agencies detected their illegal activities. Such evasion has made it difficult to provide restitution to injured consumers. Accordingly, it is important to deprive a slamming carrier of slamming revenues in the first instance.[60]

That same rationale applies to slamming revenues a subscriber may already have paid. There are many possible reasons the subscriber may have paid the slammer's charges before complaining to us: confusion caused by an excessively complex bill, ignorance of the redress procedure, intimidation at the thought of losing service or being sent to collection, inability to reach a carrier's service representatives, and so forth. Under our rules, the alleged slammer will hold one-half of the subscriber's charges and the subscriber will hold the other half until the allegation is resolved. Neither is denied due process: the subscriber

[60] CC Docket No. 94-129, First Order on Reconsideration, Corrected Version (released May 3, 2000), at Paragraph 20.

may file a complaint with the Commission, in which case our CAB will review the evidence and make a determination; and if the subscriber has not done so within 30 days, the carrier may re-bill the subscriber for the other half of its charges. In the end, the result is the same under both sets of rules, the only difference being that our rules allow each party to hold half the funds pending a determination.

We have also accepted a suggestion that when a carrier which executes the provider change (typically the LEC) is also the billing telephone company for the allegedly unauthorized carrier, it should convey the refund or credit to the subscriber and has 3 days to do so. This refinement fits well with our requirement that the allegedly unauthorized carrier return 50% of amounts already paid, and with the FCC's and our requirement to remove any unpaid charges for the first 30 days pending resolution.

Two carriers suggested we clarify the unauthorized carrier's responsibility to reimburse the authorized carrier for expenses incurred in billing and collecting from the unauthorized carrier. This is consistent with the FCC rules and we have done so.

The federal rules require that when a subscriber notifies an executing carrier that he or she has been slammed, the executing carrier must notify both the authorized and allegedly unauthorized carriers of the incident and identify both carriers. A commenting carrier suggested the executing carrier should also share any information about the transaction it may have. We have made that change.

A consumer group suggested we require carriers to report their slamming statistics quarterly as a monitoring tool. In response, a carrier pointed out that the FCC already requires carriers to file biannual slamming reports. We have

adopted the carrier's suggestion and adjusted our rule to call instead for copies of those FCC reports.

In addition to these substantive changes, the parties suggested numerous lesser revisions consistent with the federal rules and our proposed rules. We have accepted them where appropriate. Other suggestions, and some of our own earlier proposals, do not appear in the final version because after consideration we found them unnecessary or inadvisable.

Detariffing

It came as no surprise to see staff's recommendation to detariff all competitive services draw as much response as any other issue in this rulemaking. It was also not surprising that carriers are generally against the idea. What made this topic different was the greater crossover of views. The largest ILEC supports detariffing competitive services, while consumer representatives and government agencies were split on the issue.

Carriers and others cited a number of reasons for retaining tariffs. The first reason is legal. Some interpret the Public Utilities Code to grant the Commission authority to permit, but not require, detariffing. Section 495.7 does grant the Commission authority to partially or completely exempt telecommunications services other than basic exchange service from the tariffing requirements of Sections 454, 489, 491 and 495. To do so, it must find that the provider lacks significant market power for that service, or that competitive services are available and consumer protection and enforcement mechanisms are sufficient to minimize the risks from unfair competition and anticompetitive behavior.

Commenters' second reason for retaining tariffs is their efficiency. Supporters find tariffs to provide an efficient, cost-effective way to establish rates, terms and conditions of service. They allow carriers to establish a legal

relationship with customers more quickly than do contracts. No administrative rules, the argument goes, could embody all of a carrier's legal obligations the way tariffs do. Carriers also worry that the process of detariffing existing services would put them in a position of having to require every current customer to execute a contract before service could continue.

Next, supporters point to tariffs for their ability to ensure the provision of service on a non-discriminatory basis. Detariffing would not relieve the Commission of its duty to enforce anti-discrimination requirements of Section 453. Service agreements are a poor substitute, they believe, because each is specifically tailored to one customer's needs and thereby necessarily treats that customer differently from others.

Lastly, tariffs provide a ready means for resolving customer disputes. Without tariffs as a foundation, the Commission would have to review thousands of individual contracts in resolving complaints. Mandatory detariffing would compromise the Commission's jurisdiction to pursue carriers who violated consumer protection policies that would otherwise have been tariffed. Absent tariffs, disputes would become breach of contract suits in court, bringing into play the common law rules of contract for each individual carrier / customer relationship.

Some of these arguments have merit; others are exaggerated or contrived and self-serving.

Supporters of staff's proposal to detariff competitive services tended to be less strident in their advocacy. They see tariffs not so much as an inherently consumer-hostile mechanism as an otherwise-legitimate regulatory method turned to harm through neglect and misuse. That may explain why some consumer advocates would retire them, while others would reform and return them to their original consumer-protective role.

Carriers are fond of characterizing tariffs that have been accepted for filing as "approved by the PUC." While this may provide cover when problems arise, the reality is that the volume of carrier tariff filings is so large as to make a thorough review of each completely infeasible. As staff acknowledges, "Because the Commission does not regulate the rates of competitive services, the continued filing of tariffs for competitive services and Commission review of such tariffs has largely become perfunctory." Tariff rules are written by the carriers for the carriers, receive little or no staff review before going into effect, and thereafter are enforced as legally binding requirements. Staff notes, "For the Commission to formally change a tariff rule in effect is a contentious and time consuming endeavor, especially considering the number of individual utilities and their individual tariffs." Moreover, tariff filing and maintenance drains staff resources that could be better used in enforcement and elsewhere.

With the stage thus set, tariffs intended to aid consumers are instead turned against them through application of the filed rate doctrine[61] before both

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[61] A carrier may be protected from later court claim of unlawful charges and billing provided the carrier has billed in accordance with its filed tariffs, or at least with its federal filed tariffs. (See AT&T Corp. v. Central Office Tel., Inc., 524 U.S. 214 (1998).) This general rule, known as the federal filed rate (or filed tariff) doctrine, bars federal and state law claims attacking the rates and terms contained in a federal filed tariff, although it does not preclude carrier liability for illegal acts such as fraud, misrepresentation, and slamming committed in connection with federally tariffed services. (See Brown v. MCI Worldcom Network Servs., Inc., 2002 U.S. App. Lexis 714 (9th Cir. Jan. 17, 2002) (slip op.); Lovejoy v. AT&T Corp., 92 Cal. App. 4th 85, 100 (2001).) The federal filed rate doctrine, moreover, applies only to federally tariffed services. The scope of the California state filed rate doctrine is much narrower. (See Pink Dot, Inc. v. Teleport Group, 89 Cal. App.4th 407 (2001) (state filed rate doctrine does not bar action for fraud and misrepresentation); Cellular Plus, Inc. v. Superior Court, 14 Cal. App. 4th 1224 (1993) (state filed rate doctrine not a bar to a price-fixing action under the Cartwright Act even though the rates in question were included in tariffs filed with the CPUC); see also Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d

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the Commission and the courts. This is where consumer advocates who support detariffing converge with those who would retain tariffs. Both agree that the filed rate doctrine as it is frequently invoked today undermines consumers' legitimate business expectations because carriers can unilaterally abrogate their written contract prices and terms by simply changing their tariffs, with consumers either unaware or powerless to protect themselves. At least two commenters suggested the Commission use Section 532[62] to override the filed rate doctrine when carrier fraud or deception is involved. We agree -- it would be just and reasonable to establish the sort of exception permitted by Section 532, in cases where carriers have misrepresented their rates, terms or conditions for competitive services. Under our new Rule 2(g) in Part 2, no carrier should be able to rely on its filed tariffs for protection against the consequences of its own unlawful or deceptive conduct.

Staff's proposal to detariff competitive services goes hand in hand with establishing these consumer protection rules. First establish the rules, then use them to safeguard consumers' rights as tariff protections drop away. As many have noted, we need to be particularly cautious at the second stage because once tariffs are gone, consumers are at risk until the rules prove effective. Some

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979, 993 (9th Cir. 2000) ("California has held, in contrast to federal law, that no filed rate doctrine exists as a bar [to a state antitrust action]." (citing Cellular Plus, supra).)

[62] § 532: "[N]o public utility shall charge, or receive a different compensation … for any service rendered or to be rendered than the rates… and charges applicable thereto as specified in its schedules on file and in effect at the time…. *The commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility*." [Emphasis added].

commenters suggested a transition period during which both the rules and tariffs are in effect. We intend to adopt that suggestion.

Detariffing competitive services as staff proposes is an excellent goal. Once the rules are in effect, we expect them to bring about significant improvement. But achieving their full potential will require other steps that we have not yet taken: steps to educate consumers about their rights and the rules, steps to monitor carriers' practices as they implement the rules, and steps to enforce compliance when the rules are violated. With so much at stake, the prudent course is to put the new rules into effect *without* cutting away the tariff safety net. For now, that is what we will do.

Limitation of Liability

Once carriers' competitive services are detariffed, under Section 495.7(h)[63] providers would no longer be afforded a Commission-sanctioned limitation of liability for those services. This would have both disadvantages and advantages. Among the disadvantages, it might encourage litigation; put upward pressure on competitive service rates; and put additional stress on marginal competitive providers, perhaps even causing some to exit from the market. Staff and some commenters point out that the largest customers stand to benefit most from discontinuing the limitation on liability because they tend to take more complex and expensive services and have better access to the court system to pursue damage awards. Smaller customers, who in the aggregate provide the bulk of the competitive providers' revenue, face significant barriers in pursuing their

[63] § 495.7(h): "Any telecommunications service exempted from the tariffing requirements of Sections 454, 489, 491, and 495 shall not be subject to the limitation on damages that applies to tariffed telecommunications services."

court remedies. Another drawback is that competitive local reseller carriers could in some cases be subject to liability for problems caused by underlying facilities-based carriers.

However, the advantages of eliminating the limitation of liability for competitive services outweigh the disadvantages. The Commission's limitation of liability provision has historically been intended to protect both carriers and their ratepayers from excessive liability risks and thus ensure the availability and affordability of utility services. This is less relevant in today's more competitive market environment where there are multiple providers and rates are not necessarily based on cost of service. Eliminating the Commission-sanctioned limitation on liability would motivate carriers to exercise greater care in providing service;[64] stop shifting consequences of utility negligence to injured parties and society at large; allow greater consumer access to legal remedies; align the system for competitive telecommunications services with the general practice for addressing commercial liability; remove an incentive for IECs to choose tariffs over detariffing; and generally reduce distortions caused by liability limitations in an increasingly competitive marketplace.

On balance, we believe a Commission-sanctioned limitation of liability for competitive services is no longer in the public interest. With rates now decoupled from costs of service, the primary historic benefit of limited liability – lower rates – has largely evaporated, and there is little justification for treating

[64] As one of the largest ILECs acknowledged while attempting to make a different point: "There is no doubt that, in the absence of limitation of liability protections, there would be an economic incentive to provide a higher quality of service to customers who could incur significant damages as the result of a service outage and who have the means to file a lawsuit."

competitive service providers differently from, *e.g.*, Internet service providers, cable companies, or any other non-Commission regulated competitive business. Competitive carriers who want to control their liability risks may still do so in other ways. They may, for example, carry liability insurance, maintain high service levels, and / or include commercially reasonable limitations in their customer contracts.

Non-competitive services, in contrast, will retain the Commission-sanctioned limitation of liability and its attendant lower costs, which benefit ratepayers. Even without a Commission-sanctioned limitation of liability, carriers will be free to follow standard commercial practices by establishing contractual limitations for their non-tariffed services. Consumers, who have very limited recourse today when they seek damages, would be able to pursue their claims in court, including in small claims court where appropriate.

As we have indicated, we will not detariff all fully competitive services at this time. However, after weighing parties' comments and the staff's analysis, we have decided to configure our limitation of liability rule largely as though we had. A Commission-sanctioned limitation will apply to those services not designated as competitive services in the Definitions section, *i.e.*, to all GRC-LEC tariffed services, and the NRF-LECs' Category I tariffed services. We stress that the distinction between limited liability and no limited liability is to be made on a service-by-service rather than a carrier by carrier basis. Thus, NRF-LECs will have their liability limited for claims arising from non-competitive tariffed services, but not for claims arising from competitive services.

Following this policy, we would prefer the CMRS carriers' services, being fully competitive and entirely free from rate regulation, have no Commission-

sanctioned limitation of liability. CMRS providers, however, argue that federal law[65] grants them the same limitation of liability as LECs. Our staff and some other parties differ on this point, reading P.L. 106-81 as pertaining to CMRS liability arising from the provision of 911 services only.[66] However, even if P.L. 106-81 is relevant here, it does not define which of the differing liability levels for LECs is to be the reference. Under our policy, LECs will have no Commission-sanctioned limitation for their Category II and Category III services which most closely parallel the CMRS carriers' service offerings. Is this to be P.L. 106-81's CMRS-to-LEC equivalency standard? This is a determination we need not make. Nothing in the law, federal or state, requires the Commission to affirmatively assert a limitation of liability for CMRS carriers' services. If such a limitation is to be, it will arise from P.L. 106-81's operation on the limitation afforded to LECs, not from a finding by this Commission that such a limitation is warranted for CMRS. The courts, not the Commission, adjudicate claims for damages. Now that we have established our limitation of liability policy for LECs, if and when claims for damages arise against CMRS providers, it will be the courts that the CMRS carriers will have to persuade.

Our new policy addresses a major concern staff expressed in its report:

> In compliance with PU Code 495.7, the Commission, by D.98-08-031 established procedures to detariff services based upon an IEC carrier's request. The result is divergent application of the limitation

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[65] Wireless Communications and Safety Act of 1999, P.L. 106-81, which enacted 47 USCS § 615a.

[66] § 495.7, which would otherwise dictate that CMRS carriers, being exempted from tariff filing requirements, may not have a Commission-sanctioned limitation, does not apply to CMRS per § 495.7(i).

> of liability within a class of carrier for which the Commission no longer establishes rates, based solely upon filing of tariffs. Thus, an incentive exists for IECs to continue to file tariffs with the Commission in order to maintain the limitation of liability.

Since tariffed, competitive services will no longer enjoy a Commission-sanctioned limitation of liability, the incentive to file tariffs to obtain liability protection will disappear.

The effect of our new policy is that limitation of liability provisions in carriers' tariffs for non-competitive services will remain in effect. Non-tariffed services, which pursuant to Part 2, Rule 3(d) may be offered only on a contract basis, henceforth will have no Commission-sanctioned limitation of liability. Carriers may include reasonable commercial limitation of liability provisions for non-tariffed competitive services in their contracts with consumers. To the extent that carriers have limitation of liability provisions for competitive services in their tariffs, they will now be required to conform those tariffs to this order.

Several commenters representing carriers requested we hold evidentiary hearings on limitation of liability, saying they would introduce evidence to prove the very great impact loss of a Commission-sanctioned limitation would have on carriers. Their argument is based on increased liability causing increased risk of litigation, which would generate higher legal costs, damages and other costs, potentially leading to higher rates and for some carriers, inability to remain in business. We have recognized both the advantages and disadvantages of eliminating limitation of liability and have taken these potential impacts into account. Removal of the Commission-sanctioned limitation will be limited to competitive services, so the loss of some carriers would be taken up by others. Even if we were to assume that removal of the Commission-sanctioned limitation of liability for competitive services would increase the carriers' exposure to

lawsuits, damage awards and legal and other costs, and those increased costs were to be borne through some combination of higher rates and lower profits, and even if we were further to assume the result to be that some carriers would be less viable (perhaps even to the extent of exiting), it would not change the outcome here. All businesses face risks, including risks of litigation. Most incorporate the resulting costs into their rates and profits (or losses) rather than externalizing them as is currently the case for the regulated competitive carriers. That is the nature of competition. Thus, even assuming the carriers were able to prove the effects they claim, it would not affect our conclusion. The evidentiary hearings carriers request would serve no purpose and are not needed.

Education and Enforcement

In inviting comments from the parties, the rulemaking order in this proceeding asked a series of ten questions. One of those was, "What alternative approaches to telecommunications consumer protection should the Commission consider beyond those recommended in the staff Report?" The two themes most often proposed in response were consumer education and stronger enforcement.

Education

Parties addressed education from two perspectives: information provided by carriers about their specific product and service offerings; and information provided by government and public service-oriented groups to help consumers choose among diverse offerings from many providers. The former we have covered under Parts 1 and 2 above in discussing consumers' *Right to Disclosure* and the rules that help enforce that right. As helpful as full disclosure is, however, both carriers and consumer groups acknowledged that the emphasis of the carriers' disclosure efforts will always be persuasion, not education. True education to enable consumers to help themselves by making better choices must

be independent from the sales motive, and that is best undertaken by consumer-oriented educators, not by the carriers. Parties offered a number of suggestions for improving education from this latter, consumer-oriented perspective.

Several consumer groups would have the Commission take a more active role in gathering service and rates data and publishing it in useful, easily understood formats for consumers. This would include, *e.g.*, carrier-specific complaint statistics, service measures, rate comparison matrices, and listings of carriers by carrier class and geographic service area. Others would have the Commission be in addition or instead a facilitator, providing funding and working with and through consumer advocacy groups, community based organizations, and consumer-industry panels to educate consumers.[67]

While consumer education (apart from disclosure) was not the primary focus of this rulemaking, the rulemaking order did recognize education as an important underpinning for consumer protection. The staff report referred to this as one of outcomes from the Commission's 1998 Consumer Protection Roundtable:

> The Commission should foster a marketplace in which consumers are empowered and have confidence. This can be achieved through establishing rules, educating consumers, and helping consumers understand pricing of services.

The parties' comments and recommendations on education have given us both ideas and impetus, to the point that we are convinced that an immediate effort directed at consumer education is needed. In the rulemaking order, the Commission noted that consumer protection calls for more than simply

[67] The Commission has taken on such a facilitator role in the past by, *e.g.*, setting up the Telecommunications Education Trust.

establishing rules of conduct for carriers to follow. It requires consumers be knowledgeable of their rights and what recourse they have when their rights are violated. In fact, the order specifically sought input as to "what alternative approaches to telecommunications consumer protection … the Commission [might] consider beyond those recommended in the staff report." Many stakeholders, both consumer-oriented groups and carriers, responded by suggesting that the Commission initiate an education program to accompany the new rules.

We agree. During the course of this proceeding, we have seen that there are good reasons for the Commission to consider a telecommunications consumer education program.

First, our experience at last year's public participation hearings and the large volume of mail we received in response to public notices demonstrated the frustration many consumers feel in dealing with carriers. For low income customers and those whose preferred language is not English, the problem is particularly acute, a view supported in the comments we received from organizations which represent them.

Second, defining consumers' rights and rules to enforce those rights is a recent concept in the context of telecommunications consumer protection. Rights and rules can only be fully effective when consumers know about them, the protections they offer, and what recourse and remedies are available. That will not happen without a special effort on the Commission's part.

Also, the new rights and rules will apply across all carrier classes: local exchange, wireless and long distance carriers. The consumer's relationship with local telephone companies has been defined through a century of experience. But that relationship is changing as local telephone service providers increasingly rely on selling optional services to enhance profits. Dealing with

wireless and long distance carriers is a more recent and less-understood matter for consumers, made all the more challenging by the sometimes-bewildering variety and complexity of rate plans most wireless and long distance providers offer. Education is key here as well.

The Legislature has expressed its intent in Section 2896(d) that carriers provide, among other things, "information concerning the regulatory process and how customers can participate in that process, including the process of resolving complaints." Further, through Section 2897 it directed the Commission to apply those Section 2896 policies to all providers of telecommunications services in California and invited the Commission to supplement them as necessary. Educating telecommunications consumers about their Commission-enforced rights and rules certainly fits within the framework of Sections 2896 and 2897.

In early September, 2001 assigned Commissioner Wood issued a ruling inviting parties to the proceeding and others to submit comments and suggestions for a telecommunications consumer education program. That ruling asked those who comment to present as full a range of options as possible on all aspects: What would an effective consumer education program look like and what should it cover? Who should carry it out, and over what time frame? How should it be funded? What practical problems might the Commission and participants face, and how could they be overcome? What legal considerations should the Commission be aware of? Based on the high level of interest the parties have demonstrated to date, their responses no doubt provide some excellent suggestions, and we will keep the proceeding open to consider them in a subsequent decision.

Meanwhile, education begins with informing consumers of their rights and these rules as quickly as possible. The rules in new G.O. ___ are by necessity

somewhat technically worded to ensure carriers understand and comply with what is expected of them. Our Consumer Services Division will be preparing a simple, consumer-oriented summary of the new rights and rules that as part of a subsequent order in this proceeding we will direct the carriers to distribute to their subscribers. More immediately, the G.O. ___ rules will be posted on the Commission's web site. We will order links be pointed to them from the carriers' Internet sites, and under Part 2, Rule 6(k) the notice we require on each bill will invite consumers to view their rights and the rules on the Commission's web site. When the consumer-oriented rights and rules summary is ready, it too will be web-posted and linked from carriers' web sites.

Enforcement

The second alternative measure parties mentioned for improving consumer protection was enforcement. Although parties on both sides endorsed stronger enforcement, consumer representatives wanted it *in addition to* the proposed consumer protection rules, while carriers almost universally urged the Commission to emphasize enforcement *instead of* new rules.

For the most part, carriers did not suggest specific measures we could use to boost enforcement effectiveness; consumer representatives did. One consumer group submitted the most extensive proposal, a series of five new Commission procedural rules proposed as new Rule 16, Enforcement in Part 2. Those included: (a) declaring the Commission would exercise concurrent jurisdiction over Business and Professions Code Sections 17200 *et seq.* and 17500 *et seq.*[68]; (b)

[68] Bus. & Prof. Code § 17200 broadly defines and prohibits as unfair competition "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising…." Bus. & Prof. Code § 17500 *et seq.* prohibit false advertising.

requiring carriers to produce documents and witnesses when subpoenaed in a California administrative or judicial proceeding; (c) allowing the assigned Commissioner or ALJ at the outset of a complaint case to waive the Section 1701.2(d) requirement to complete adjudication cases within twelve months; (d) allowing pre-judgment attachment or bonds be required of defendants in Commission proceedings; and (e) requiring defendants to conduct customer surveys to show whether customers were indeed misled where a *prima facie* showing of misleading advertising has been made in a Commission proceeding. When other consumer parties expressed uncertainty as to whether the Commission has authority to enforce the Business and Professions Code, the consumer group revised its Rule 16 proposal to instead import the *standards* of Bus. & Prof. Code Sections 17200 et seq. and 17500 et seq. (the Unfair Competition Law) by defining charges imposed on telephone users by means of deceptive marketing as unjust or unreasonable charges or services under Public Utilities Code Section 451. Carriers opposed all of these proposals as beyond the scope of the rulemaking proceeding and not within the Commission's jurisdiction to enact.

The staff report referenced the Commission's authority to impose penalties under Public Utilities Code Section 2107 *et seq.* as part of its enforcement efforts. Consumer parties concurred and, in addition, would support civil actions against carriers when their activities violate consumers' rights. The Commission, they believe, should make clear that the courts have concurrent jurisdiction to remedy consumer fraud and other violations of the law by carriers subject to the Commission's jurisdiction. They point to the courts as being particularly well equipped through a substantial body of case law to adjudicate complaints alleging false or misleading advertising. A related recommendation would have the Commission "make it absolutely clear that the proposed rules are not

intended to affect the ability of law enforcement officers to enforce civil and criminal statutes to protect the public."

Our new rules, which are based upon the Commission's authority under the Constitution and the Public Utilities Code (particularly Sections 701, 1702, 2885.6, 2889.3, 2889.5, 2896-97, and 2889.9-2894.10), are not, in fact, intended to insulate public utilities from liability under other statutory schemes such as the Unfair Competition Law. The Public Utilities Code provides that public utilities subject to the Commission's jurisdiction remain subject to other statutory schemes as well, whether those laws are enforced by the Commission or by the courts. Section 243 provides:

> This part [Sections 201-2282.5] shall not release or waive any right of action by the State, the commission, or any person or corporation for any right, penalty, or forfeiture which may have arisen or accrued or may hereafter arise or accrue under any law of this State.

Penalties under this part of the Public Utilities Code do not displace penalties that may be imposed under other statutory schemes.[69] The Commission, moreover, has a duty to see "that the provisions of the Constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed…."[70]

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[69] Section 2105: "All penalties accruing under this part shall be cumulative, and a suit for recovery of one penalty shall not be a bar to or affect the recovery of any other penalty or forfeiture or be a bar to any criminal prosecution against any public utility… or any other corporation or person, or to the exercise by the commission of its power to punish for contempt."

[70] Section 2101.

Actions under the Unfair Competition Law "shall be prosecuted exclusively in a court of competent jurisdiction."[71] The Attorney General, district attorneys, and certain other law enforcement officers are authorized to prosecute such actions on behalf of the public, but the Commission is not. Thus, the authority to prosecute actions under the Unfair Competition Law on behalf of the public is clearly vested in other law enforcement agencies, and jurisdiction to impose penalties under that law lies exclusively in the superior courts.[72] District attorneys prosecute most of the consumer fraud actions brought on behalf of the public, and the Commission is required to provide them with complaint and investigation data concerning entities that they are investigating regarding possible consumer fraud.[73] Remedies under the Unfair Competition law are cumulative and in addition to remedies that may be imposed under other laws.[74] It is clear, therefore, that the Commission's consumer protection rules, and any action it may take to enforce them, do not deprive the courts of jurisdiction to entertain actions against regulated utilities brought by law enforcement officers under the Unfair Competition Law.[75]

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[71] Bus. & Prof. Code Section 17204.

[72] *Id.*, *see also* Bus. & Prof. Code Section 17535.

[73] Govt. Code Section 26509.

[74] Bus. & Prof. Code Sections 17205, 17534.5.

[75] The superior courts may not, however, grant relief that would "reverse, correct, or annul any order or decision of the commission… or to enjoin, restrain, or interfere with the commission in the performance of its official duties." (Section 1759.) The extent to which this language limits the superior courts' jurisdiction to entertain actions brought by law enforcement under the Unfair Competition Law is before the California Supreme Court in *People ex rel. Orloff v. Pacific Bell,* No. S099131.

We agree, therefore, with those parties who state that the Commission and the courts have concurrent jurisdiction over consumer protection matters, in the sense that public utilities are subject to standards and requirements enforced by the Commission *and* to consumer protection laws enforced by the courts. A business practice that violates the Public Utilities Code and our consumer protection rules – deceptive marketing, for example, or cramming or slamming – will likely also constitute an unfair and unlawful business practice under the Unfair Competition Law, and subject the offending utility to possible court-imposed sanctions under that law.[76] Accordingly, we have added the following statement under Applicability in Part 2:

> The Commission intends to continue its policy of cooperating with law enforcement authorities to enforce consumer protection laws that prohibit misleading advertising and other unfair business practices. These rules do not preclude any civil action that may be available by law. The remedies the Commission may impose for violations of these rules are not intended to displace other remedies that may be imposed by the courts for violation of consumer protection laws.

We have also acted on a suggestion regarding the filed rate doctrine,[77] which we agree should not be used to immunize carriers from liability for deceptive marketing and other unlawful conduct. The Commission does not permit carriers to limit their liability for willful misconduct, fraudulent misconduct, or violations of the law, and requires them to say so in any limitation of liability provisions included in tariffs. California courts have not

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[76] *See* Day v. AT&T (1998) 63 Cal.App. 4th 325.

[77] *See* discussion of the filed rate doctrine in *Detariffing* above.

allowed carriers to circumvent this Commission policy by omitting this important qualifier from their tariffs and then invoking the filed rate doctrine.[78] In this rulemaking proceeding, although we modify our policy governing limitation of liability in other respects, we reaffirm the principle that tariffs, and any limitation of liability provisions included in tariffs, are not designed to immunize carriers from liability for willful or fraudulent misconduct and violations of the law. Accordingly, Rule 2(g) in Part 2 now provides, "Where a carrier has misrepresented its rates, terms or conditions for a competitive product or service, or presented those rates, terms or conditions of service in a manner likely to mislead consumers, the carrier must honor consumer requests to provide the product or service under the rates, terms and conditions that were offered to and accepted by the consumer."

Among their other suggestions, consumer groups included stepping up Commission efforts to investigate and fine violators, publishing the results of Commission enforcement actions, and an easily remembered 800 number for consumers to report complaints and violations to the Commission. Carriers and consumer groups alike cited enforcement as one of the most important justifications for retaining tariffs.

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[78] In *Pink Dot, Inc. v. Teleport Comms.Group* (2001) 89 Cal. App. 4th 407, the Third District Court of Appeal noted that the Commission policy on limitation of liability expressly provided that carriers would remain liable for "willful or fraudulent misconduct and violations of the law." The Commission required carriers to acknowledge this provision in their tariffs. (*See* D.77406, 71 CPUC 229 (1970)). Teleport had omitted this provision from its tariffs, but the court of appeal held that Teleport could not avail itself of the filed rate doctrine to immunize itself from liability to which it was subject pursuant to Commission policy, and that Teleport should have acknowledged as much in its tariffs.

We agree with the many commenters who stressed the importance of enforcement. Effective enforcement requires standards that address current needs and practices in the industry. We have updated and clarified those standards with this new general order, filling gaps in our rules and making changes as warranted. These improved consumer protection rules will facilitate our enforcement efforts. We will continue to work cooperatively with the Attorney General and District Attorneys, whose prosecutions of consumer fraud actions in court complement our own efforts to protect consumers from unfair practices by telecommunications providers.

Comments on Draft Decision

The draft decision of the assigned Commissioner was mailed to the parties on the service list for public review and comment in accordance with Public Utilities Code Section 311(g)(1).

Findings of Fact

1. The ongoing shift to a more competitive telecommunications marketplace increases consumers' vulnerability and challenges the Commission to step up its efforts to protect them. Establishing updated consumer protection rules applicable to all regulated telecommunications utilities should be part of those efforts.

2. Through its statements in the many public participation hearing sessions held throughout California in this proceeding, and through its follow-up letters and e-mail, the public has conveyed its frustration with the present state of consumer protection in the regulated telecommunications industry, and its approval of the Commission's assuming a stronger consumer protection role.

3. To promote consumer protection, all California consumers who interact with telecommunications providers should be afforded the following basic rights

as defined in Part 1 of G.O. ___, Appendix B to this order: Disclosure; Choice; Privacy; Public Participation and Enforcement; Accurate Bills and Redress; Non-Discrimination; and Safety.

4. The Part 2 Consumer Protection Rules will help protect the consumer rights set forth in Part 1.

5. Small businesses suffer many of the same problems as individuals and need the protections the Part 2 rules will provide.

6. Large businesses are less dependent on the kinds of rules we are establishing in Part 2. Even though those rules do not apply to them directly, large businesses will benefit from improvements the rules will generate.

7. For purposes of these rules, it is useful and effective to define small businesses as those having a carrier's service on twenty or fewer telephone access lines.

8. The Part 2 rules were designed taking into consideration the Consumer Protection and Consumer Information Rules for CLCs set forth in D.95-07-054, Appendix B. With implementation of these Part 2 Rules, those CLC rules are no longer needed.

9. The Part 2 rules were not designed to replace the Initial Rules for Local Exchange Service Competition in California set forth in D.95-12-056.

10. The Part 2 rules were designed taking into consideration the Consumer Protection Rules for Detariffed Services set forth in D.98-08-031, Appendix A. With implementation of these Part 2 Rules, those non-tariffed NDIEC rules are no longer needed.

11. The Part 2 rules were designed to meet the need stated in D.96-12-071 for a generic set of consumer protection rules for CMRS providers that would supersede any previously filed CMRS consumer protection tariff rules.

12. The Part 2 rules were designed to be applied to Commission-regulated carriers of all classes, their agents, and other entities providing telecommunications-related products or services which the Public Utilities Code makes subject to the Commission's rules.

13. The rights and rules in G.O. ___ do not conflict with any other Commission general orders.

14. It is not in the public interest to allow any carrier to rely on its filed tariffs for protection against liability for unlawful or deceptive conduct.

15. It is just and reasonable to establish an exception as permitted by Section 532, in cases where carriers have misrepresented their tariffed rates, terms or conditions for competitive services.

16. The Part 4 Rules Governing Slamming Complaints were designed to parallel the FCC's slamming rules in most respects.

17. It is just and reasonable to require an allegedly unauthorized carrier to promptly reimburse subscribers 50% of any charges already paid when a slamming allegation involving their intraLATA, interLATA and interstate toll carriers is made. While this differs from the corresponding provisions in the FCC slamming rules, both methods produce similar results after the slamming allegation has been resolved.

18. The Part 4 rules will help protect consumers' rights.

19. There are currently consumer protection requirements in carriers' tariffs, the Commission's previous decisions, its general orders, state and federal statutes, and FCC orders. While G.O. ___ draws on those sources, it does not supersede them except as explicitly stated in this interim order.

20. It is not in the public interest to allow carriers to weaken or eliminate current consumer protection provisions in their tariffs.

21. It is not in the public interest to foreclose consumers or others from enforcing consumer protections through the courts.

22. It would be prudent to enact new G.O. ___ and monitor its effectiveness for some time before deciding whether to detariff competitive services.

23. The Commission's limitation of liability provision has historically been intended to protect both carriers and their ratepayers from excessive liability risks and thus ensure the availability and affordability of utility services. This is less relevant in today's more competitive market environment where there are multiple providers and rates are not necessarily based on cost of service.

24. Carriers who want to control their liability risks for competitive services may do so in ways that do not rely on a Commission-sanctioned limitation of liability.

25. The advantages of eliminating the Commission-sanctioned limitation of liability for competitive services outweigh the disadvantages.

26. It is in the public interest to eliminate the Commission-sanctioned limitation of liability for competitive telecommunications services, but to retain it for non-competitive services.

27. The Commission finds no justification for CMRS providers to have any limitation of liability beyond the minimum that may be required by law.

28. During the course of this rulemaking proceeding, the Commission distributed the initially-proposed rights and rules which have evolved into Parts 1, 2, 3 and 4 of G.O. ___, Appendix B to this order, and the Commission's proposed policy changes for limitation of liability and detariffing. The respondent utilities and all interested parties have been afforded an opportunity to submit comments and replies to comments on each of those topics.

29. The initiatory order in R.00-02-004 required parties to make offers of proof for any matters for which they believe evidentiary hearings are required, and

failure to do so would waive the parties' right to hearing. The proposal to curtail the Commission-sanctioned limitation of liability was the only matter for which offers of proof were submitted.

30. We have examined the parties' offers of proof and determined that even if we were to assume as true the facts they allege, it would not change the outcome we have reached on limitation of liability.

31. Consumers need to be aware of and understand the rights and rules in G.O. ___ if those rights and rules are to be fully effective in protecting them.

32. Consumer protection is strongest when consumers have multiple avenues of enforcement.

Conclusions of Law

1. Through AB 726, the Telecommunications Customer Service Act of 1993, the Legislature directed the Commission to ensure that carriers of all categories abide by certain basic standards of disclosure and customer service, and acknowledged the need for some of the consumer protection measures we implement in this proceeding.

2. The California Constitution, Article I, Section 1, recognizes privacy as an inalienable right of all people. It applies to actions by businesses as well as by government. The privacy provisions of G.O. ___ are consistent with Californians' constitutional right to privacy.

3. The Consumer Protection and Consumer Information Rules for CLCs set forth in D.95-07-054, Appendix B, should be superseded by G.O. ___.

4. The Consumer Protection Rules for Detariffed Services set forth for non-tariffed NDIECs in D.98-08-031, Appendix A, should be superseded by G.O. ___.

5. Any previously filed CMRS consumer protection tariff rules should be superseded and canceled, consistent with the intent stated in D.96-12-071.

6. Commission-regulated carriers of all classes, their agents, and other entities providing telecommunications-related products or services which the Public Utilities Code makes subject to the Commission's rules should be required to respect the consumer rights and comply with the new rules in G.O. ___, Part 2.

7. G.O. ___, Part 2, should be applied to protect both individuals and small businesses.

8. Section 532 prohibits utilities from charging rates that differ from those in their tariffs, but permits the Commission to establish such exceptions as it considers just and reasonable.

9. The Commission should establish an exception as permitted by Section 532, in cases where carriers have misrepresented their rates, terms or conditions for competitive services.

10. By AB 994, the Legislature cited this rulemaking proceeding as a proper vehicle for the Commission to implement billing safeguards covering non-communications-related charges in telephone bills. After considering the comments and reply comments of the parties, the Commission by D.01-07-030 adopted the Rules Governing Billing for Non-Communications-Related Charges included as Part 3 of G.O. ___.

11. Through its orders in CC Docket No. 94-129, the FCC has given each state the option to act as the adjudicator of slamming complaints, both interstate and intrastate. California has opted to do so.

12. The FCC has given states which elect to handle slamming complaints great latitude in fashioning their own procedures, so long as those procedures are not inconsistent with Section 258 of the Communications Act of 1934 as amended by the Telecommunications Act of 1996.

13. The Rules Governing Slamming Complaints included as Part 4 of G.O. ___ conform to the FCC's requirements of states which opt to act as adjudicators of slamming complaints, and with the Federal Telecommunications Act.

14. Requiring an allegedly unauthorized carrier to promptly reimburse subscribers 50% of any charges already paid when a slamming allegation involving intraLATA, interLATA or interstate toll service is made does not deny an allegedly unauthorized carrier due process of law.

15. Except as set forth in the ordering paragraphs below, this interim order and G.O. ___ do not relieve any carrier from compliance with any existing Commission decision, rule or general order, any state or federal statute, or any other requirement under the law.

16. The rights and rules in G.O. ___ are just and reasonable.

17. The Commission should adopt G.O. ___, Rules Governing Telecommunications Consumer Protection, Appendix B to this interim order.

18. The Commission-sanctioned limitation of liability for competitive telecommunications services should be eliminated.

19. Nothing in the law requires the Commission to affirmatively state a limitation of liability for CMRS providers.

20. The Commission should not state as an exception to its general policy a separate Commission-sanctioned limitation of liability for CMRS providers. Any such limitation of liability, if it exists, would arise by operation of federal law.

21. Parties and respondents in this proceeding have implicitly waived their right to evidentiary hearing on any topic except the proposal to curtail the Commission-sanctioned limitation of liability.

22. Evidentiary hearings on the proposal to curtail the Commission-sanctioned limitation of liability would serve no purpose.

23. No evidentiary hearings are needed.

24. Under Section 2896, the Commission may require carriers to inform and educate customers of their rights, these rules, and the procedures available to them for redress.

25. The Commission is not and should not be the only avenue available to enforce consumers' rights and these rules.

26. The Commission's adoption of G.O. ___ and its associated rights and rules should not preclude any civil action that may be available by law. The Commission intends to continue its policy of cooperating with law enforcement authorities to assist them in their efforts to enforce consumer protection laws against Commission regulated utilities.

27. This proceeding should remain open to consider whether the Commission should implement a telecommunications consumer education program, and if so, how it should be structured.

28. This interim order should be made effective today to afford consumers greater protection as soon as possible.

INTERIM ORDER

IT IS ORDERED that:

1. General Order ___ (G.O. ___), Rules Governing Telecommunications Consumer Protection, Appendix B to this interim order is adopted and shall become effective as of the effective date of this interim order.

2. Commission-regulated telecommunications carriers of all classes shall bring their operations into full conformance with G.O. ___ and this interim order not later than January 1, 2003.

3. The Consumer Protection and Consumer Information Rules for CLCs set forth in D.95-07-054, Appendix B, are superseded by G.O. ___. Each affected

carrier is relieved of its obligation to comply with those D.95-07-054, Appendix B, rules as of the date that carrier achieves full compliance with G.O. ___ as directed in Ordering Paragraph 2 of this interim order.

4. The Consumer Protection Rules for Detariffed Services set forth for non-tariffed non-dominant interexchange carriers in D.98-08-031, Appendix A, are superseded by G.O. ___. Each affected carrier is relieved of its obligation to comply with those D.98-08-031, Appendix A, rules as of the date that carrier achieves full compliance with G.O. ___ as directed in Ordering Paragraph 2 of this interim order.

5. Any previously filed commercial mobile radio service consumer protection tariff rules are superseded and shall be canceled.

6. The Commission-sanctioned limitation of liability is eliminated for competitive telecommunications services provided on and after January 1, 2003.

7. All Commission-regulated telecommunications carriers having California intrastate tariffs in effect shall evaluate those tariffs for compliance with the requirements of new G.O. ___ and conformance with the ordering paragraphs of this interim order. Every carrier having tariff provision(s) inconsistent with G.O. ___, or required to be revised or canceled to conform to the ordering paragraphs of this interim order, shall file not later than November 1, 2002 and make effective on 60 days notice an advice letter in accordance with G.O. 96 Series making only such revisions or cancellations as are necessary to bring its tariffs into compliance with G.O. ___ and this interim order; provided, however, that no carrier shall make any tariff revision reducing the level of any current consumer protection.

8. Every carrier having tariffs on file and not required to submit an advice letter to revise those tariffs under Ordering Paragraph 7 shall not later than November 1, 2002 serve an information-only compliance letter to the

Commission's Telecommunications Division notifying the Commission that it has evaluated its tariffs as ordered herein and found none needing revision. Each such information-only compliance letter shall be verified following the procedure set forth in the Commission's Rules of Practice and Procedure, Rule 2.4, Verification.

9. Every carrier required under G.O. ___, Part 2, Rule 1(a) or 1(b) to have a World Wide Web site on the Internet shall include on that site one or more active links to the G.O. ___ rights and rules on the Commission's web site, and when it is available, to the Commission's summary of those rights and rules. Each such link shall be associated with a clear and conspicuous explanatory caption.

10. The provisions of G.O. ___ are severable. If any provision of the General Order or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

11. Rulemaking 00-02-004 shall remain open to consider whether the Commission should implement a telecommunications consumer education program, and if so, how it should be structured.

This interim order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A
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CALIFORNIA AND FEDERAL PRIVACY STATUTES

California Public Utilities Code § 2891

(a) No telephone or telegraph corporation shall make available to any other person or corporation, without first obtaining the residential subscriber's consent, in writing, any of the following information:

(1) The subscriber's personal calling patterns, including any listing of the telephone or other access numbers called by the subscriber, but excluding the identification to the person called of the person calling and the telephone number from which the call was placed, subject to the restrictions in Section 2893, and also excluding billing information concerning the person calling which federal law or regulation requires a telephone corporation to provide to the person called.

(2) The residential subscriber's credit or other personal financial information, except when the corporation is ordered by the commission to provide this information to any electrical, gas, heat, telephone, telegraph, or water corporation, or centralized credit check system, for the purpose of determining the creditworthiness of new utility subscribers.

(3) The services which the residential subscriber purchases from the corporation or from independent suppliers of information services who use the corporation's telephone or telegraph line to provide service to the residential subscriber.

(4) Demographic information about individual residential subscribers, or aggregate information from which individual identities and characteristics have not been removed.

(b) Any residential subscriber who gives his or her written consent for the release of one or more of the categories of personal information specified in subdivision (a) shall be informed by the telephone or telegraph corporation regarding the identity of each person or corporation to whom the information has been released, upon written request. The corporation shall notify every residential subscriber of the provisions of this subdivision whenever consent is requested pursuant to this subdivision.

(c) Any residential subscriber who has, pursuant to subdivision (b), given written consent for the release of one or more of the categories of personal information specified in subdivision (a) may rescind this consent upon submission of a written notice to the telephone or telegraph corporation. The corporation shall cease to make available any personal information about the subscriber, within 30 days following receipt of notice given pursuant to this subdivision.

(d) This section does not apply to any of the following:

(1) Information provided by residential subscribers for inclusion in the corporation's directory of subscribers.

(2) Information customarily provided by the corporation through directory assistance services.

(3) Postal ZIP Code information.

(4) Information provided under supervision of the commission to a collection agency by the telephone corporation exclusively for the collection of unpaid debts.

(5) Information provided to an emergency service agency responding to a 911 telephone call or any other call communicating an imminent threat to life or property.

(6) Information provided to a law enforcement agency in response to lawful process.

(7) Information which is required by the commission pursuant to its jurisdiction and control over telephone and telegraph corporations.

(8) Information transmitted between telephone or telegraph corporations pursuant to the furnishing of telephone service between or within service areas.

(9) Information required to be provided by the corporation pursuant to rules and orders of the commission or the Federal Communications Commission regarding the provision over telephone lines by parties other than the telephone and telegraph corporations of telephone or information services.

(10) The name and address of the lifeline customers of a telephone corporation provided by that telephone corporation to a public utility for the sole purpose of low-income ratepayer assistance outreach efforts. The telephone corporation receiving the information request pursuant to this paragraph may charge the requesting utility for the cost of the search and release of the requested information. The commission, in its annual low-income ratepayer assistance report, shall assess whether this information has been helpful in the low-income ratepayer assistance outreach efforts.

(e) Every violation is a grounds for a civil suit by the aggrieved residential subscriber against the telephone or telegraph corporation and its employees responsible for the violation.

(f) For purposes of this section, "access number" means a telex, teletex, facsimile, computer modem, or any other code which is used by a residential subscriber of a telephone or telegraph corporation to direct a communication to another subscriber of the same or another telephone or telegraph corporation.

47 U.S.C. § 222

47 U.S.C. § 222 (a) In general. Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

(b) Confidentiality of carrier information. A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

(c) Confidentiality of customer proprietary network information.

(1) Privacy requirements for telecommunications carriers. Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

(2) Disclosure on request by customers. A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.

(3) Aggregate customer information. A telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph (1). A local exchange carrier may use, disclose, or permit access to aggregate customer information other than for purposes described in paragraph (1) only if it provides such aggregate information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.

(d) Exceptions. Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents--

(1) to initiate, render, bill, and collect for telecommunications services;

(2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services;

(3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service; and

(4) to provide call location information concerning the user of a commercial mobile service (as such term is defined in section 332(d) [47 USCS § 332(d)])--

(A) to a public safety answering point, emergency medical service provider or emergency dispatch provider, public safety, fire service, or law enforcement official, or hospital emergency or trauma care facility, in order to respond to the user's call for emergency services;

(B) to inform the user's legal guardian or members of the user's immediate family of the user's location in an emergency situation that involves the risk of death or serious physical harm; or

(C) to providers of information or database management services solely for purposes of assisting in the delivery of emergency services in response to an emergency.

(e) Subscriber list information. Notwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

(f) Authority to use wireless location information. For purposes of subsection (c)(1), without the express prior authorization of the customer, a customer shall not be considered to have approved the use or disclosure of or access to--

(1) call location information concerning the user of a commercial mobile service (as such term is defined in section 332(d) [47 USCS § 332(d)]), other than in accordance with subsection (d)(4); or

(2) automatic crash notification information to any person other than for use in the operation of an automatic crash notification system.

(g) Subscriber listed and unlisted information for emergency services. Notwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides telephone exchange service shall provide information described in subsection (i)(3)(A) (including information pertaining to subscribers whose information is unlisted or unpublished) that is in its possession or control (including information pertaining to subscribers of other carriers) on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions to providers of emergency services, and providers of emergency support services, solely for purposes of delivering or assisting in the delivery of emergency services.

(h) Definitions. As used in this section:

(1) Customer proprietary network information. The term "customer proprietary network information" means--

(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information.

(2) Aggregate information. The term "aggregate customer information" means collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed.

(3) Subscriber list information. The term "subscriber list information" means any information--

(A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and

(B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

(4) Public safety answering point. The term "public safety answering point" means a facility that has been designated to receive emergency calls and route them to emergency service personnel.

(5) Emergency services. The term "emergency services" means 9-1-1 emergency services and emergency notification services.

(6) Emergency notification services. The term "emergency notification services" means services that notify the public of an emergency.

(7) Emergency support services. The term "emergency support services" means information or data base management services used in support of emergency services.

(END OF APPENDIX A)

APPENDIX B

GENERAL ORDER ___