STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

July 24, 2003 Agenda ID #2513

TO: PARTIES OF RECORD IN RULEMAKING 00-02-004

This is the draft decision of Commissioner Carl Wood. It will be on the Commission's agenda at the regular meeting of September 18, 2003. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's Rules of Practice and Procedure. These rules are accessible on the Commission's website at http://www.cpuc.ca.gov. Pursuant to Rule 77.7(b), comments and replies to comments are governed by Rules 77.2 through 77.5. In this case, the Assigned Commissioner has determined that opening comments are due not later than August 25, 2003 and shall not exceed 25 pages; replies to comments are due not later than September 4, 2003 and shall not exceed five pages.

Comments and replies to comments must be served separately on the Assigned Commissioner and assigned Administrative Law Judge (ALJ), and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service. In addition, parties are encouraged, but not required, to send an electronic copy of their comments and replies to the assigned ALJ by e-mail to: jcm@cpuc.ca.gov.

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:tcg

123973

Attachment

Decision **DRAFT DECISION OF COMMISSIONER WOOD** (Mailed 7/24/2003)

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

TABLE OF CONTENTS

Title	Page

TABLE OF CONTENTS
(Continued)

Title **Page**

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. 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. 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.

This proceeding remains open to consider whether the Commission should implement a telecommunications consumer education program, and if so, how it should be structured; whether to curtail the Commission-sanctioned limitation of liability; and whether additional rules requiring that communications directed at consumers and subscribers be in languages other than English are needed.

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 unable to 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.

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 this rulemaking proceeding as a proper vehicle for the Commission to do so. After considering some 31 sets of comments and replies, 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.

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

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

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

complaints. We received 24 sets of comments and replies on those proposed rules.

On June 6, 2002, Assigned Commissioner Wood issued a draft decision and a proposed general order, "Rules Governing Telecommunications Consumer Protection," for public comment. Thirty-two sets of comments were filed, followed by four days of workshops during which industry and consumer representatives thoroughly vetted the draft decision and general order. At the conclusion of the workshops, Commissioner Wood agreed to suspend the proceeding schedule to allow carrier and consumer representatives to convene an informal working group to suggest rule changes both sides could agree to. After the working group submitted its report, the parties were afforded two more opportunities to submit comments and reply comments before the final draft decision was issued; 24 groups did so, producing an additional 29 sets of comments or replies. Parties had yet another opportunity for input when this draft decision and general order were circulated for public comment as required by Public Utilities Code Section 311(g)(1).

After considering extensive party and public input, the Commission is adopting G.O. ___, Rules Governing Telecommunications Consumer Protection, Appendix A to this order. New G.O. ___ includes four parts: Parts 1 and 2 comprise the final version of the telecommunications consumers' Bill of Rights and rules to protect those rights first proposed in R.00-02-004; Part 3 is the set of Rules Governing Billing for Non-communications-Related Charges we issued in D.01-07-030, with only minor changes; and Part 4 is Rules Governing Slamming Complaints.

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

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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.

Footnote continued on next page

Commission to apply its Section 2896 policies to *all* providers of 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

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(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.

[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.

> 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 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.

At its July 2002 Summer Meeting, the Board of Directors of the National Association of Regulatory Utility Commissioners passed a resolution urging that a consumer bill of rights be developed for the protection of all residential and small business telecommunications consumers, regardless of their provider of such services. That resolution included an almost-verbatim recitation of the same seven rights we adopt today, and went on to urge both the FCC and the individual state commissions to consider adopting comprehensive and effective rules to implement them.[6]

In their initial comments on the staff's proposed rules, 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-

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

[6] *Resolution on Telecommunications Bill of Rights*, sponsored by the Committee on Consumer Affairs and adopted by the NARUC Board of Directors on July 31, 2002.

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.

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.[7] Carrier advocates, on the other hand, were far more likely to view privacy in terms of the

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[7] "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).

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.

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 initially 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, endorsed 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.[8] 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.[9] We are often called on to interpret and apply Section 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*. In their opening and reply comments on the June 2002 draft decision, the wireless carriers took issue with the proposed wording of our *Right to Non-Discrimination*, arguing, "The law does not provide… that all customers be treated equally." They would restate the right as, "Every customer has the right to be free of

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[8] 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."

[9] § 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, 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.

unreasonable discrimination, prejudice or disadvantage with respect to similarly situated customers," ostensibly to conform it more closely with Section 453. Other commenters expressed no such concerns. After re-examining Section 453, we note that nowhere does it state or imply that there could exist a *reasonable* level of discrimination, a *reasonable* level of prejudice, or a *reasonable* level of disadvantage that could be acceptable as between similarly situated customers. We have retained the draft wording.

The suggestion to add the *Right to Safety* first appearing in the June 2002 draft 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. Most commenters accepted adding *Safety* as it was described in the June 2002 draft, the wireless carriers again being the exception. Wireless carriers would have us limit this right by relating it solely to employee identification and 911 service, but we have not done so. While it is true that the *Right to Safety* finds expression only in Part 2, Rules 14 and 15, consumers have that right in more than just those two areas even though we have not attempted to define additional rules today to address every other possible area.

Industry commenters urged the Commission close the Part 1 Bill of Rights with a disclaimer that the rights are not themselves enforceable, but rather serve as a policy statement or preamble to the consumer protection rules that follow. Consumer groups were split on the topic, the consumer arm of the collaborative working group arguing that such a statement would unreasonably foreclose what might otherwise be perfectly reasonable enforcement actions, while some other prominent consumer representatives (including one who was also a working group participant) would add a comment stating, "This Bill of Rights shall serve the same purpose as a statement of legislative intent." We accept the carriers' suggestion as embodied in the consumers' more limited wording, and have added the comment.

Part 2: Consumer Protection Rules

We begin with some overall observations on the input we received through parties' many rounds of comments and replies since the initial proposed consumer protection rules were 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. 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 consumer advocates 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 future. Service quality was 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. We recently issued Order Instituting Rulemaking (R.) 02-12-004 with the express purpose of establishing service quality measures and reporting requirements which complement our consumer protection rules.

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[10] 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 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 R.95-04-043 and Order Instituting Investigation (I.) 95-04-044, our rulemaking and investigation into competition for local exchange service, when

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[10] 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.

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.*, 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.[11] 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 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

[11] 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.

> 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 previously-enacted portions of our forthcoming General Order 96-B, Rules Governing

Advice Letters and Information-only Filings.[12] The primary areas of overlap are in Rule 1(a), which requires Internet tariff publication, and Rule 8, Tariff Changes, Contract Changes, Notices and Transfers. As described later below, those previously-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

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 we have drawn rules more consumer-protective than those of 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 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.

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[12] The Commission has a proceeding open, 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.

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 required to be certificated or registered, that provide telecommunications-related products or services and are subject to the Commission's jurisdiction pursuant to the Public Utilities Code.[13] Carriers pointed to a number of areas where our staff qualified its initially 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. 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.

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

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[13] § 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.

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[14] 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.[15] 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 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

[14] 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.

[15] 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.

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, and that was the figure proposed in the June, 2002 draft decision. In subsequent comments, carriers suggested small businesses be defined as those having three or fewer lines. Carriers credit that definition to a 1999 FCC decision, but the FCC did not intend it as a threshold for applying consumer protection measures. We believe three lines is too low for that purpose; in fact, we commonly see advertisements nowadays for "family plans" offering more than three access lines in one account. Carriers, small business representatives and consumers did agree that the definition should also incorporate a maximum number of T-1 lines:[16] some carriers would exclude from the definition of small businesses all businesses which subscribe to T-1 service, while consumer and small business representatives would exclude only those with more than two T-1 lines. We are adopting the latter, along with a suggestion that small businesses should be defined by a billed account, so that when a bill is aggregated among a number of locations, the criteria are applied cumulatively. 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, provided that the customer or applicant also has no more than two T-1 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:

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[16] T-1 lines provide the capacity equivalent of 24 switched voice-grade access lines.

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 earlier proposed. 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 considerable attention, as described below.

In response to customer input through the public participation hearings and correspondence and the many rounds of party comments, we have made a number of changes in Rule 1 from the version staff first presented with the rulemaking order. 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 staff's proposed 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 eventually post on the web the key rates, terms and conditions of each offering under which they provide or offer to provide California intrastate service to individual subscribers or small businesses.

Carriers would limit Rule 1(b) to listing information applicable to currently available plans. But, as the carriers themselves acknowledge, their non-tariffed offerings change frequently; deleting active plans from the electronic listings when they are no longer available to new subscribers would save very little while denying a significant proportion of all subscribers access to their most ready source of information. Consumer representatives opposed the carriers' changes, and instead suggested adding to Rule 1(b) additional language that would make it more detailed and prescriptive; we have retained much of the earlier wording because it is simple yet definitive.

This latest version of Rule 1(b) does make two significant changes in reaction to the comments. Where the June 2002 draft decision required carriers to post *all* rates, terms and conditions for *all* active plans, this version recognizes the effort involved in going back and posting them for legacy plans (plans available only to those already enrolled in them) during the initial Internet site set up. Instead, carriers will be required to post the *key* (as defined) rates, terms and conditions for only those plans they are offering when the site is set up, and thereafter not to remove them for as long as there are subscribers to whom they still apply. Thus, the only legacy plans that will be required will be those that were initially posted as active plans and then closed to new subscribers *after* the site was set up.

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. Carriers objected to defining them as them solicitations, but could not explain why we should establish lower standards of disclosure for their web postings than applying that term invokes.

We have accepted carriers' suggestion that they be allowed at least 180 days to bring their web sites into compliance with Rule 1(b). Finally, consumer representatives suggest that we require carriers meeting the Rule 1(b) threshold to post on their web sites, or link from their web sites, the Commission's new consumer protection rules. That requirement was already included as Ordering Paragraph 9 in the Assigned Commissioner's June 2002 draft decision and has been retained in this decision.

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. Comments to the contrary notwithstanding, understanding the service and the bill requires that subscribers and would-be subscribers be able to obtain upon request the rates, and the terms and conditions that apply. We have also retained the June 2002 draft decision's proposed Rule 1(d)(1) requirement for a carrier to divulge its legal name upon request; the working group gave no reason for recommending it be deleted, and the information could prove necessary to a consumer in pursuing legal remedies.

The three special conditions applicable to Rules 1(c) and 1(d) introduced in the June 2002 draft have been redesignated as Rule 1(e), and the sections following it renumbered. 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. Rule 1(e)(1) requires that telephone lines used to take subscriber inquiry, complaint and dispute calls 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.[17]

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. With today's interactive customer databases, current customer-specific information should be available immediately to a service representative answering a call. The parties' comments indicate that some information is not immediately available, and some is not available at all. 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.

Our Rule 1(e)(2) requires one day lead times to send most prepackaged, non-customer-specific information, and real-time responses to most customer-

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[17] The Commission has also recently opened a proceeding, R.02-12-004, into the service quality standards for all telecommunications carriers and revisions to G.O.133-B.

specific inquiries; those are not unreasonable expectations for the public to hold. Carriers who currently do not meet the Rule 1(e)(2) 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. After those hearings we saw several formal complaints charging that the lists of prefixes that could be reached as local calls had disappeared from the white pages.[18] The problem became more acute with

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[18] *See* D.02-08-069 in Case 01-03-028 et al.

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 told customers to call the operator for that information, but we heard discouraging reports that when they did, the operator might not be able to help. Local service providers pointed to Internet service providers who in turn pointed back at the carrier, and by the time their first bill arrived, customers who got it wrong were 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.[19] In our Universal Service Proceeding, we defined basic exchange residential service to include a free white pages telephone directory.[20] 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 Rule 1(f) 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.[21] The fourth is from Section 2894.10.

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[19] D.90-08-066.

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

[21] § 2889.6 directs the Commission to require local exchange carriers to include in their directories information concerning emergency situations which may affect the

Footnote continued on next page

Because most of the remaining requirements were derived from an ILEC directory, most of this information is currently included in at least some white pages editions. One notable exception at the time of the June 2002 draft was, of course, the local prefix information which had recently disappeared, as so many irate customers reminded us. Under D.02-08-069, it is now being restored for the largest ILEC's directories. It would be impractical to produce an exhaustive list of necessary white pages consumer information, but Rule 1(g), which requires prior Commission approval to remove customer disclosure information, makes that unnecessary. We have not adopted all of the changes to Rule 1(f) the working group suggests in its report, because the wording they suggest, when read literally, could be used to eviscerate the rule. The most important change from the June 2002 draft decision is that it now better accommodates basic service providers who do not publish the directories they distribute to their subscribers.

Staff's proposed Rule 1(c), which now has become Rule 1(h), 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

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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.

Rule 1(h) 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. Carriers expressed concern with banning incorporation by reference to tariffs, and consumer representatives agreed that limited tariff references should be permissible provided carriers provide ready access to the tariff sections referenced; we have accommodated that change. We have not accepted other carrier-suggested changes because they could have allowed contracts to consist of an essentially unlimited number of complex, interlocking references to materials the subscriber may never have been aware of or had access to.

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 our definition of solicitation, 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 staff proposal issued with the rulemaking order are its recognition that not all solicitations are definable in terms of typographic size; its stronger reliance on concepts such as clarity, understandability and legibility that are meaningful regardless of the medium; its explicit statement that solicitations must be truthful and not misleading; and its deferral of in-language requirements to a subsequent phase of the proceeding. Rule 2(g) was included in the June 2002 draft to ensure that customers are not abused by misleading advertising or disingenuous use of the filed rate doctrine to deflect their legitimate claims. As revised, it now allows a customer to terminate any misrepresented service without penalty and receive a refund or credit for the loss up to the time they were informed of the true situation. 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 and legible, with the key rates, terms and conditions displayed in the equivalent of at least 10-point or larger type. This rule in part echoes the requirements of Section 2890(b).[22] 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 or larger type" 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[23] in connection with provisions in

[22] §2890(b) was § 2890(c) before July 1, 2001.

[23] *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 provided in writing or in written form (*e.g.*, a disclosure, a notice, or a confirmation), the requirement may be satisfied through the use of electronic media if both parties to the communication have agreed to do so, and if not, a tangible, hardcopy document is required. 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. In response to carrier comments on the June 2002 draft, we have added a comment to clarify that agreements or contracts may be accompanied by other materials provided they are easily distinguishable and separable, meet the requirements of Section 2890(b), and the accompanying materials do not misstate or purport to restrict or enlarge the rights or obligations of any party to the agreement or contract. 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. A significant proportion of California’s consumers to whom affordability matters most may not be sufficiently sophisticated, or may not read 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(b) also requires, "Written or oral solicitation materials used to obtain an order for a product or service shall be in the same language as the written order." Rule 2(c) as proposed in the June 2002 draft carried a similar requirement that called for agreements, contracts, bills and notices to be available in each language employed by the carrier in solicitations directed at consumers. Carriers responded through the many rounds of comments and at the workshops by pointing out that the more in-language requirements carriers face, the more likely they (particularly the smaller carriers) were to pull back from directing information about their services and products at non-English speaking audiences. Although others suggested possible solutions, this remains a topic of particular concern to us. Rather than finalize a rule on in-language requirements now, we will address the topic further in the next phase of this proceeding. That is not to say that there will be no protections in place in the meantime, however: Section 2890(b) will continue to govern in this area while we decide whether enhancements in the form of additional rules are needed.

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 the key rates, terms and conditions for 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. ___. Staff's initial Rule 2(d) would have required carriers to honor marketing materials that misrepresented rates, terms or conditions of service. That provision was separately stated as new Rule 2(g) in the June 2002 draft, and is further refined in these final rules. Rule 2(d), however, also accommodates the possibility of inadvertent error so long as the carrier makes a timely, 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 previously 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"). Rule 2(g), first separated from Rule 2(d) in the June 2002 draft, now requires carriers who misrepresent their rates, terms or conditions to make whole a subscriber who was affected by a misrepresentation. Once the subscriber has been informed of the true rates, terms and conditions, he or she must be reimbursed through service credits or refunds for losses up to that time, be allowed to cancel without penalty any agreement or contract for the product or service and be reimbursed for any service initiation charges or fees, and be allowed to enroll in a different plan if he or she wishes to do so. 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 and Changes

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 the rates, terms and conditions for each service ordered.

Together, these notifications are the essence of the *Right to Disclosure.* Requiring that orders be confirmed (electronically or otherwise), and giving customers a penalty-free 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 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 revisions to clarify or tighten the wording, and some of those changes are reflected in the combined new rule. Rule 3 as presented in the June 2002 draft accepted in major part a consumer group coalition's suggested realignment of staff's proposal for confirming orders, and as now adopted incorporates additional changes suggested by consumers and carriers. Rules 3(c) and 3(d) recognize that different degrees of disclosure are warranted in order confirmations for tariffed services and orders for non-tariffed services, and Rule 3(e) allows customers to cancel orders for services of either type 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. In preparing the June 2002 draft, 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 meaning 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 or change service upon request in any form. The intent is to make it clear that carriers may implement new or changed service at a customer's request 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 staff's proposed Rules 3(b) and 3(c) have been reframed in new Rules 3(c), 3(d) and 3(e). 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.

Staff's 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 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 subscriber's bill unless and until the subscriber has been fully informed and has given express written authorization to do so.[24] Thus, proposed Rule 4(a)(5) was superseded by the Part 3 rules and is no longer needed here.

Rule 3(b)(5) was first proposed in the June 2002 draft 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.

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.

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

Carriers are understandably eager to maximize their revenues, and increasing sales through aggressive marketing is unquestionably one way to do that. Where carriers are providing essential services, however, they also have a responsibility under Section 2896 to provide consumers with sufficient information to make informed choices among those services. Rule 3(b)(8) requires carriers to provide customers initiating service or adding additional lines with information about their least expensive service(s) that would meet those customers' needs. We know of no other reliable way to ensure consumers who need those services are not inappropriately misdirected away from them. Rewording the rule to require informing the customer of the plan with the lowest monthly charge, or the lowest unit charge, as some suggested in comments on the June 2002 draft, is susceptible to gaming by, *e.g.*, a carrier describing a plan with no monthly charge but extremely high usage charges, or vice versa. Carriers commented that they cannot be expected to know which of their services might meet a given customer's needs, but that is in fact what they endeavor to determine each time they discuss new services with a prospective customer. Carriers making a good faith effort at disclosure as Section 2896 requires will have no problem complying with the rule.

Staff's proposed Rules 3(b) and 3(c) as initially presented were potentially overlapping, one calling for carriers to confirm service orders within seven days in writing, and the other to inform the customer of the service's rates, terms and conditions, also within seven days. Those provisions are now subsumed into new Rules 3(c) and 3(d) for tariffed and non-tariffed services respectively. Orders for both tariffed and non-tariffed services require written confirmation (which may be, *e.g.*, mailed, e-mailed, faxed, or given to the subscriber at the point of sale) by the carrier within seven days after the order is accepted.[25]

No commenters opposed the concept of making rates, terms and conditions available to subscribers, but there were considerable differences as to how, or whether, to write a rule ensuring that was done. In their comments on the June 2002 draft, most consumer-oriented commenters favored having the rules define the "important," "essential," or "key" rates terms and conditions, and in some cases differentiated among those terms. Some carrier representatives favored a less detailed variation of that model, while others rejected any attempt at prescription. Those who objected argued that it would be impossible to identify a set of rates, terms and conditions that are most important to subscribers across all possible services and static as the industry evolves, that confirmations could become unwieldy if carriers were not given complete flexibility to determine what rates, terms and conditions were likely to be important to subscribers, or that carriers should be allowed to disclose how the information might be obtained rather than delivering it proactively. We adopt here a middle approach that defines the characteristics of what we see as key rates, terms and conditions, gives examples, and leaves it to individual carriers to fill in where there may be others equally important.

For non-tariffed services, the subscriber will need a copy of the service contract with all of its rates, terms and conditions. Because the key rates, terms and conditions important to full disclosure may be difficult to discern in long,

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

complex contracts (and customers are not being required to sign those contracts), Rule 3(d) requires they be highlighted in some way (perhaps, *e.g.*, printed in larger or contrasting type, underlined, bolded, enclosed within text boxes, or some combination of those or other methods) so that the subscriber is less likely to overlook them.[26] Alternatively, the carrier may send with the contract (but not as part of the contract) a separate document setting forth the key rates, terms and conditions in an easily understood summary. Corresponding Rule 3(c) for tariffed services does not require that the carrier include in its confirmation the entire set of applicable rates, terms and conditions because, as both carriers and consumer representatives pointed out in their comments on the June 2002 draft, those rates, terms and conditions are likely to be very extensive and potentially spread through multiple tariff schedules. Rather, Rule 3(c) only requires carriers to include the key rates, terms and conditions for each tariffed service ordered.

Several commenters suggested the rules include a right to cancel agreements or contracts for services that do not meet consumers' expectations, and the Assigned Commissioner proposed a rule to that effect in the June 2002 draft. We have adopted that provision in Rule 3(e). Carriers have up to seven days to send service order confirmations; subscribers may receive those confirmations immediately if they are provided at the point of sale, or a week or more later if mailed. It may be from weeks to more than a month before a subscriber receives the first full billing statement for a new or changed service,

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[26] Proposed Rule 3(f) in the June 2002 draft required that a subscriber, in addition to signing the contract, separately sign or initial the contract in the immediate proximity of the notice of any early termination fees, charges or penalties to indicate awareness of and agreement to them. That requirement has been dropped in favor of the highlighting called for in Rule 3(d).

and perhaps days additional before he or she examines it for unexpected or previously undisclosed charges. And in many cases it may take equally long or longer to learn whether the service itself matches what was represented. Rule 3(e) accommodates these lead times by allowing subscribers 30 days to cancel without penalties any tariffed service or contract for non-tariffed service when the Rule 3(c) or Rule 3(d) confirmation materials are provided to the subscriber in person at the point of sale, and 45 days after when they are provided later. The rule does not relieve the subscriber from payment for any actual use made of the service before canceling, for any tariffed service connection fees, or for work done on the customer's premises (such as wiring or equipment installation) before the subscriber canceled 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. That being the case, very few customers will find anything so objectionable about the confirmations and contracts they receive or their telecommunications service 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, and these rules accommodate it. To make service enrollment and changes without signatures work, carriers will have to communicate clearly with those seeking their services, be flexible when the inevitable miscommunication occurs, or both. We think they can and will, and the carriers' risks from customer cancellations will be minimal.

Rule 3(f) (formerly numbered 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 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(g) 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(h) was added in the June 2002 draft: 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.[27] 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.

Rule 3(i) 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 in the staff report, while another large LEC labeled it burdensome because of the labor and mailing

[27] 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).

expense involved. When consumers are denied utility service, they need to know why if they are to correct the problem, 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) in the June 2002 draft (Rule 3(j) as revised here) proposed to require carriers to offer a four-hour appointment window when a subscriber must be present for an installation or repair. Not surprisingly, consumer representatives were generally supportive and carriers generally opposed. The staff-proposed initial 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; that has been clarified here in Rule 3(j) to mean the carrier's representative must arrive and commence work within the promised interval. We have also accepted (with some modification) carriers' and consumer representatives' suggestions by not requiring the $25 credit [28] when the appointment is not kept because the carrier's representative was denied access to the premises, because of force majeure, or when the carrier has informed the subscriber by 5:00 p.m. two business day before that the appointment has been canceled or rescheduled. One consumer advocacy group suggested the credit be $25 per access line, but gave no support for that change. Another used this rule to suggest a new right to service guarantee under which 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

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[28] We have also clarified that $25 is the *minimum* credit amount. Carriers are not limited to offering that amount if they wish to do so, *e.g.*, to dissuade customers from pressing a claim under Civil Code Section 1722(c).

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(j) is somewhat more limited. Subscribers' time has value to them, carriers need to recognize that value, and this rule gives them an incentive to do so. 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 parallels in part that in the Civil Code in that it requires the customer be offered the four-hour window when the appointment is made, and in that it makes some, albeit more limited, exceptions. At the same time, however, our $25 minimum credit is much lower than the $600 cap on damages allowed in the Civil Code. 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 Protection and Safety 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, and that 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.[29] In 2002, AB2244 was enacted, making modest revisions to Bus. & Prof. Code § 17538.9.

Rule 4 is in most ways identical to the current 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

[29] Vendors that 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 that simply sell cards and do not buy blocks of calling time from certificated carriers and package it for resale as prepaid calling card services.

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 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. Bus. & Prof. Code § 17538.9(b)(6) 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 services. We have modified that exception in our corresponding Rule 4(f)(1) because to do otherwise could both harm consumers and grant a competitive advantage to some prepaid calling service 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, nor did the comments provide such a reason.

Because the initial staff report attached to the rulemaking order did not deal with prepaid calling cards and services, the parties' first opportunity to comment on them came in response to the Assigned Commissioner's June 2002 draft decision, and thereafter through our workshops, the working group and its report, and two subsequent rounds of comments. Consumer groups have been generally supportive of including Rule 4, and the industry less so. Both generally agree, however, that if there is to be a prepaid calling cards and services rule it should be closely modeled on the current version of Bus. & Prof. Code § 17538.9. Both have also suggested specific deviations, some of which we mention in the following paragraphs.

We have not adopted a joint wireline and wireless industry suggestion that we include in Rule 4 an introductory statement that would effectively convert the rule into an advisory reference to the Business and Professions Code section. To the contrary, we intend Rule 4 to be a Commission-enforced customer protection measure in its own right.

The wireline and wireless industries would have us echo the language of Bus. & Prof. Code § 17538.9(b)(3) in our Rule 4(c), thus applying that rule directly to vendors for their point of sale displays. Because the Commission lacks jurisdiction over non-carrier vendors, we have adopted the consumer groups' alternative wording that accomplishes the same measure of consumer protection by ensuring that carriers, over whom we do have jurisdiction, require their vendors to provide lawful point of sale display information.

Most of the parties' remaining comments have been accommodated by our conforming Rule 4 to the current version of Bus. & Prof. Code § 17538.9 enacted by AB2244.

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 Bus. & Prof. Code § 17538.9. 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 in the staff report, 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. The June 2002 draft decision included in revised Rule 5 several new provisions drawn from the comments of both consumer representatives and carriers.

The most significant change from the initial staff proposal 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 we limit the size of those deposits they may collect to establish basic service, but not for other services.

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. In later comments, an ILEC objected that it would have to make major changes to its billing system if the deposit it could collect for basic service were limited and it had to begin requiring separate deposits for non-basic services. After considering the comments, we still believe that our limiting the deposit amount a carrier may demand as a condition of providing basic service is a fair and reasonable approach to balancing the interests of basic service providers and their would-be subscribers.

Some carriers objected that our 5% simple annual interest rate on deposits is excessive. It is true that carriers hold small sums for short periods when deposits are viewed at the customer level, but when aggregated at the corporate level they represent significant, relatively stable pools of capital available to carriers to use over long time periods. While we could establish a floating monthly interest rate to be applied to deposits, our 5% rate is fair to carriers and subscribers alike, and much simpler for subscribers to understand and carriers to administer.[30]

Rule 5 has other changes as well. The June 2002 draft decision introduced a provision in Rule 5(a) that a carrier may not require 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. Consumer representatives support the rule; carriers do not. Carriers argue that requiring one consolidated deposit is more convenient for customers, and that billing carriers *do* often purchase the receivables of others and would be unlikely to continue doing so if they were exposed to additional uncollectibles risks. We have now clarified the intent of the rule by adding to it the same wording that was used in the June 2002 draft decision text: "A carrier may not require *for its own benefit* a deposit for services provided by others." This wording addresses the carriers' concerns by allowing, *e.g.*, an ILEC to collect a deposit on behalf of an IEC for which it bills, so long as the deposit is determined by and collected on behalf of the IEC.

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[30] For comparison, note the 1.5% *monthly* interest rate Rule 7(a) allows (and many carriers charge) for late payments.

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 and received, 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 were rewritten in major part in the June 2002 draft, 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.[31] 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 the states to adopt and enforce their own truth-in-billing requirements so long as they are consistent with the FCC's.[32] 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. The working group report suggested deleting this provision from Rule 6(a), but gave no reason for doing so. Absent that provision, there would be nothing to keep carriers from, *e.g.*,

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[31] At least one CLC (Cox California Telcom II, LLC) is already a carrier of last resort, and another (MCI Metro Access Transmission Services, U-5253-C) is seeking that designation. One CMRS carrier (WWC License, LLC, U-3025-C) submitted a letter requesting the Commission designate it as a carrier of last resort for providing basic service, but was directed instead to file an application.

[32] 47 CFR 64.2400(c).

printing a subscriber's telephone bill and a Part 3-exempt run-on second bill for non-communications-related services immediately following using the same look and feel, and including both bills in the same envelope with a lead sheet indistinguishable from the telephone bill directing the subscriber to pay the total to the carrier. While we could devise yet more rules attempting to foreclose all possible abusive practices, this is not what we intended when we issued D.01-07-030 establishing the rules in Part 3.

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. In the initial comments, several carriers objected to the staff's proposal here, but no carrier explained how it was exempted from Section 2890 which also requires a billing telephone company to clearly identify each entity that generates a charge appearing on a subscriber's bill. CMRS carriers pointed out that their subscribers typically recognize them under trade names that differ from their FCC-certificated names, and ask the rule be modified accordingly. The naming requirements in Rule 6(b) were established by D.00-03-020 as modified by D.00-11-015 and we do not intend to relitigate that issue in this proceeding. We do recognize this as a legitimate concern, however, and have accommodated it by adding a comment which allows carriers to place a trade name on the bill in addition to, but not instead of, the name required under this rule. The FCC likewise allows carriers to use trade names.[33] We have not accepted a consumer recommendation to mandate including any fictitious business names the carrier uses, and its U-number.

Rule 6(c) requires grouping charges by carrier, consistent with Truth-in-Billing and Section 2890(d).

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,

> [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. [34]

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-

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[33] CC Docket No. 98-170, Order on Reconsideration, (released March 29, 2000), at Paragraph 10.

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

around or customer-activated charge. Carriers object to drawing their subscribers' attention to new recurring charges added to their bills, but this is as fully essential as calling their attention to new providers.

Several carriers initially 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(d)(2)(A) already requires. The wording of Rule 6(e) as proposed in the June 2002 draft decision combined the requirements of Section 2890 and Truth-in-Billing. The working group report recommended rewording that reflects Section 2890 almost verbatim but deletes Truth-in-Billing's requirement that the description be sufficiently clear and specific that customers can assess whether they are being correctly charged. Other consumer representatives recommended slightly different wording. To eliminate any doubt about what is intended and whether it is consistent with state and federal law, Rule 6(e) now includes the language of Section 2890(d)(2)(A), and verbatim the FCC's language from Truth-in-Billing for the second part of the rule.

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 now explain the distinction and clearly and conspicuously identify on the bill which charges must be paid to retain basic service. There was general consensus and little comment regarding this rule.

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' initial 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 in the June 2002 draft and retained here, Rule 6(g) makes it abundantly clear that carriers are required to list only government-mandated taxes and fees in the bill 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. In their comments on the June 2002 draft decision, carriers once again object to this straightforward practice and suggest revised wording which would allow them to combine their own discretionary fees and surcharges in with true taxes. Carriers also wrongly characterize the rule as requiring them to include their discretionary surcharges in an entirely new section of their bills; it does not do that, nor does it have that practical effect. It merely requires they not be placed in the section reserved for true taxes.

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 initial comments. "Mailing date" has been dropped because it is not critical to consumer protection, and mass-mailing practices can sometimes make it difficult to pinpoint the exact date. 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. In response to comments on the June 2002 draft decision, we have further refined the rule to incorporate all of the changes suggested by the working group and endorsed by the carriers.

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(a) intended to allow consumers who choose to do so to block non-presubscribed carriers' charges from their bills. At carriers' suggestion, we have added wording to clarify that the rule applies only to carriers that do allow non-presubscribed carriers to place charges on the bills, and to exclude collect and third party billed calls. 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 the staff's initial proposal to include Commission and FCC contact information on their bills.

Section 2890(d)(2)(B) already requires telephone bills to include the Commission's telephone number. The obvious purpose of including the Commission's contact information 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. The June 2002 draft decision revised Rule 6(k) 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) also requires notifying 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 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 in their 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.

The June 2002 draft decision revised proposed Rule 7(a) to conform it to the results of an earlier Commission investigation into telephone company late payment charges and to current practice, and made several changes for clarification. Staff's proposed Rule 7(a) had 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 was approximately the same as the 15 days currently in effect for CLCs and IECs. It was suggested in initial comments that the 16 days be revised to match the ILECs' current 22 day period; no party addressed that suggestion in the initial 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[35] established the 22-day minimum interval for all ILECs, and ordered customer bills under $20 exempted from late payment charges. The June 2002 draft revised Rule 7(a) accordingly. Consumers subsequently endorsed, and the wireline carrier group accepted, the 22-day minimum[36]; wireless carriers sought to reduce it to 15 days; and at least one consumer representative argued that late penalties should never be allowed because carriers can instead disconnect service for untimely payment. Carriers also pointed out that draft Rule 7(a) used wording inconsistent with the fact and draft decision statement that bills are due and payable when they are presented. Also, if a subscriber were slow in disputing charges, draft Rule 7(a) could be misinterpreted to place the carrier in violation for too quickly imposing

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

[36] Consumer groups, however, would also have the 22-day clock reset to zero on the date a carrier finds against a consumer in a bill dispute.

an otherwise timely late penalty. Today's Rule 7(a) has been reworded to address those concerns.[37]

Consumer representatives were concerned that under staff's original Rule 7(a), a carrier might unfairly apply late penalties where payments were received on time but held for posting until after the due date; and carriers thought it unrealistic to expect them to post payments in all cases on the same day they are received. The June 2002 draft decision resolved the problem with a minor wording change to require carriers to credit payments with an *effective date* of the business day they are received, regardless of when they were actually posted. Payments arriving on a weekend or holiday would be credited the following business day. The wireline group accepted the change with some minor rewording; the wireless group's comments subsequently ignored that "effective date" language to insist that for late payment penalty purposes they be allowed to consider the payment received the business day *after* it is actually received, or, if the subscriber has not included the appropriate remittance materials with the payment, the tenth business day after the carrier has the payment and all of the information necessary to properly credit it. The wireless carriers would have us tip the balance too far against consumers: Under their proposal, a carrier could assess late payment penalties against a subscriber despite having constructive receipt of payment in full within days of mailing out the bill.

Rule 7(b) also follows the staff proposal, with one significant modification. Section 737 imposes a three-year statute of limitations for utility claims against a

[37] Note that these rules do *not* authorize carriers to impose late payment penalties if they were not previously so authorized.

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 by customer fraud. Here, we also continue our established practice[38] of limiting other carrier backbilling to periods much shorter than the three years in Section 737 as the staff has proposed.[39]

Staff's proposed Rule 7(b) also stated a three-year limitation on customers seeking reparations for utility over-billing, and the June 2002 draft decision cited Section 736 in proposing that limitation as new Rule 7(c). Carrier representatives correctly pointed out in comments that the proposed rule could run afoul of Sections 735 through 737, which establish a considerably more complex set of limitations for customer complaints that differ from the draft decision's proposal. The Commission has jurisdiction directly to enforce Sections 735 through 737 in its proceedings, so we have dropped the June 2002 draft's Rule 7(c) as unnecessary and unhelpful for consumer protection.

Many carriers questioned whether staff's proposed Rule 7(c) (renumbered as Rule 7(d) in the June 2002 draft) 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

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[38] 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.

[39] 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.

protection goes to services considered essential and for which consumers have the fewest choices. Thus Rule 7(c) 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(d) was new in the June 2002 draft decision (where it was numbered as Rule 7(e)). It is well established that a utility may not increase its rates retroactively; a customer must be able to know what the rate or charge will be at the time he or she chooses to use a utility service. Under Rule 7(d), neither may a utility benefit by delaying billing until after a rate increase has occurred, or use a delay or lag in billing to impose a higher rate or charge for a service than would have resulted without the delay or lag. The principle is one of "no surprises." 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 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.[40] No subscriber should be subjected to such expensive unpredictability, nor have to accept it as a condition of receiving service. If carriers find it challenging to generate bills that meet the promises of the service plans they sell, they should either modernize their accounting and billing systems to eliminate what they say may be months-long delays in forwarding billing data, or revisit their marketing practices.

We have slightly modified Rule 7(d) to accommodate wireline carriers' observation that taxes typically must be based on current tax rates, not on tax rates in effect at the time the call was made. Thus, a charge in this month's bill for a service used in an earlier month may well carry with it a higher (or lower) associated tax amount than if it had been billed in that earlier period. We have not included a provision requested by the wireline carriers explicitly absolving billing carriers for violations that may have originated with other carriers or billing clearinghouses; instead, we would expect to examine the circumstances surrounding any such allegations at the time they come before us.

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

[40] Carriers point out the possibility that a subscriber may also benefit from a billing delay under certain circumstances. There is no benefit possible, however, for a customer who makes an effort to stay within his or her monthly calling allowance, as we suspect most do.

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 enforce 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 the rule 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 in this proceeding, the Commission has issued two interim opinions, D.01-07-026 and D.02-01-038, in R.98-07-038, the rulemaking to revise G.O. 96-A, the general order governing informal filings at the Commission. 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 related to proposed Rule 8. Rule 8 was drafted to be entirely consistent with D.02-01-038.

Initial 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 redrawn for the June 2002 draft decision and retained here, Rule 8(a) reflects the notice requirements set forth in D.02-01-038[41] 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.

Staff's proposed Rule 8(c) appeared as Rule 8(b) in the June 2002 draft and applied 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 that requirement 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

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[41] D.02-01-038 was adopted in anticipation of G.O. 96-B. Under G.O. 96-B as last 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.

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 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."

Various carrier representatives introduced a host of additional reasons for gutting or eliminating proposed Rule 8(b), most of those based on either their misunderstanding or misconstrual of its requirement. Carriers, *e.g.*, argued that any such rule would prevent them from lowering a rate or relaxing a restrictive condition without first getting written approval from every affected customer. At the same time, this comment on Rule 8(b) from a carrier group offered support for a basic principle underlying it:

> In making decisions about service initiation and/or modification, consumers are entitled to be informed about the material terms of the services provided. To the extent that the terms are provided in a non-written format – for example, in a telephone call with a service representative – carriers should provide a means for confirming those terms.

Following suggestions from consumers and carriers alike, Rule 8(b) here has been narrowed to cover only *carrier-initiated* contract changes (customer-initiated service changes are the subject of Rule 3). In response to the carriers' objection to the "enforceability" concept, the rule has been restated so that it now parallels Rule 8(a) by requiring the subscriber's consent to make any material change in a written contract that may result in higher rates or charges or more restrictive terms or conditions To make absolutely clear that the carriers' darkest interpretations do not apply, this comment has been added:

> Rule 8(b) does not apply to subscriber-initiated changes. It does not prohibit carriers from making unilateral changes to contracts where the changes result in lower rates or charges and/or less restrictive terms or conditions. It does not prohibit carriers from communicating notice of a change, or receiving confirmation of subscriber acceptance of a change, through electronic media -- See Definitions for "Written; In Writing.

And, consistent with our changes elsewhere, we have dropped the requirement for carriers to obtain a confirming signature from the subscriber. Instead, the carrier may make the change by simply obtaining informed consent, in whatever form. Absent informed consent, the subscriber is entitled to require the carrier's continued performance under the contract both of them entered into. Rule 8(b) applies only to changes in rates, charges, 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.

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. Edits have been made to the June 2002 draft version to accommodate non-controversial suggestions put forward by consumer and carrier representatives. 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 are to inform subscribers of those business names (which must be registered pursuant to Bus. & Prof. Code Section 17900 *et seq.* and registered with the Commission's Telecommunications Division). 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. We have not accepted carrier-suggested changes that would weaken this rule by, e.g., allowing oral notice and eliminating the need for customers to have agreed to electronic notice, because these specific notice requirements have already been considered and adopted in D.02-01-038. The Rule 8(e) requirement that was not previously considered in D.02-01-038 is consistent with our other rules: notices 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 initial 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. The June 2002 draft decision did so.

The largest local exchange carrier accepted most of Rules 9 and 10 as staff had proposed them, while the next largest offered more changes; for the most part the June 2002 draft decision agreed with their suggestions and included them in the accompanying draft rules. The other carriers' comments primarily 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 through the definition of "Written; In Writing." They asked that we allow disconnection 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 10(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 in the initial comments, we have added a requirement that payments be applied first to amounts due on 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 this protection. Rule 9(a) still requires notice in writing, although that format is now defined to include electronic writing where appropriate. If carriers find it helpful, convenient or necessary, they are also free to augment, but not replace, their notices in writing with e-mailed, telephoned, personally delivered or any other form of disconnect notices.

One carrier group's comments on the June 2002 draft proposed changes which would allow carriers to eliminate the termination notice and instead rely on standard language routinely distributed to all customers in their bills. Our intent is that termination notices be last-chance warnings given to subscribers whose accounts have gone delinquent and are at imminent risk of losing their service, and not the routine notice of payment due date already required in Rule 6(h)(3).

In response to information provided by the workshop participants and later commenters, we have added two exceptions to the Rule 9(a) termination notice requirement: This rule does not apply to termination of non-tariffed service for having reached either: (1) a usage or spending limit, prepaid or otherwise, that was arranged with the subscriber in advance; or (2) the end of a prepaid period of service known to and anticipated by the subscriber in advance. Those two exceptions allow for carriers' spending cap arrangements with credit-challenged subscribers; and for non-subscription marketing plans which rely on selling telephones or telephone cards with prepaid usage, perhaps rechargeable.

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 we established in D.00-03-020 and D.00-11-015. The notice must now include the telephone number(s) 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. As consumer representatives suggested in their comments on the June 2002 draft, carriers' toll-free lines to handle calls from subscribers being terminated must be adequately staffed.

Rule 9(b) ensures that basic exchange service is not disconnected on any day that carrier service representatives are not available to assist subscribers.

Rule 9(c) safeguards a carrier's right to disconnect a subscriber 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 of last resort to disconnect basic residential or single line business service only for nonpayment of those services. In the June 2002 draft decision, the rule had applied to basic service providers rather than carriers of last resort, a difference carriers subsequently commented on. Rule 9(d) is not intended to break new ground, but rather to reflect the guidelines we issued recently in D.00-03-020 and modified by D.00-11-015, so we have not expanded this rule to incorporate entirely new requirements as carriers and consumers propose. 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) was new in the June 2002 draft: If a subscriber makes a payment that is less than the total amount due, it must be applied first against the balance due on that subscriber's basic service unless the subscriber directs otherwise.

This provision goes hand in hand with the prohibition against cutting off basic service for nonpayment of other services. If the subscriber 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. Since bills are due and payable when they are presented, "balance due on that subscriber's basic service" in Rule 9(e) includes amounts for the most recent period shown on the bill, and not just amounts overdue. A carrier group suggested rewording the rule to first apply the amount paid against *past due* basic service charges and remove the subscriber's discretion as how to apply any remaining amount. We reject that change because it would allow the carrier to divert to other, non-basic charges amounts the subscriber had intended to be applied against the current month's basic service, and leave the subscriber vulnerable to disconnection.

Through mis-communication or otherwise, subscribers 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 obvious benefits, carriers are under no obligation to make alternate payment arrangements and we are not prepared to mandate them here as some consumer groups request. 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, but only if the subscriber so requests. Written confirmation can be by e-mail or other electronic means if the subscriber 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 imposed, and must inform the subscriber of its determination within 30 days. Rule 11(a) in the June 6, 2002 draft followed staff's proposal, but added the 30-day time limit required by Public Utilities Code Section 2890(e)[42] as suggested in a consumer group's comments and edits to implement a carrier's suggestion to clarify that nonpayment alone is not sufficient to trigger the rule's dispute provision. Rule 11(a) now has added language protecting consumers from late penalties, adverse credit reports and/or referral to collection while the carrier's investigation is underway. A carrier's initial comments 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 apply equally to carriers whether they act for themselves or through agents, and in some cases the agents who sold the service may not be the proper carrier representative to handle follow-up billing

[42] § 2890(f) was renumbered to § 2890(e) on July 1, 2001.

problems. In later comments, carriers requested that they be allowed 60 days to respond, or where the charges involved are older than 60 days, an open-ended "reasonable time," but they did not explain how that would meet the 30-day Section 2890(e) requirement. We have also not added a requirement sought by consumer representatives that responses must be provided in writing, or both in writing and verbally.

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, but now makes exceptions for prearranged terminations of the type described under the Rule 9(a) discussion above, and for fraud (Rule 9(c)).

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. We have also incorporated into Rule 11(c) the Rule 11(a) protections against late penalties, adverse credit reports and/or referral to collection while CAB's review is underway. Carriers would have us extend Rule 11(c) to require CAB to forward any undisputed amounts to them, but that is more of an issue of CAB's internal practices that should be determined by the Commission through its management staff rather than set forth in a general order applicable to carriers.

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. In their initial comments, consumer representatives sought to extend staff's rule to ensuring carriers may not abuse their leverage by contractually inhibiting consumers' ability to seek relief in California's courts or agencies; when residential and small business consumers seek do relief, it should be without the chilling effect that contractual, open-ended liability for carriers' 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.

As the carriers' subsequent comments pointed out, the resulting version of Rule 11(d) proposed in the June 2002 draft decision was overly broad in that it inadvertently foreclosed contractual limitations of liability in a way that was inconsistent with the discussion of that topic elsewhere in the draft decision. Consumer groups recognized that as well, and proposed revised wording that much better captures our intent. As the wireline carrier group acknowledges, the carriers' and consumers' post-June 2002 proposals now have more similarities than differences. Rule 11(d) reflects wording proposed jointly by most of the consumer groups, but with revisions to recognize the carriers' view that some subscribers may have billing addresses that do not match their areas of primary service use. We reject the wireline carriers' continuing arguments that they should be allowed to impose on their California customers contracts governed by other than California law.

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[43] 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

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

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.[44] California requires, in effect, an opt-in approach, at least for residential telephone subscribers.[45] Might this statutory requirement be preempted by federal law? The comments received do not attempt to answer 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.[46] An enormous body of state statutory and decisional law further

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[44] 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).

[45] *See* § 2891.

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

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"[47] 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.[48] We will 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.

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[47] § 2891(e).

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

Legal Framework

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

Section 222 [49] 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. [50]

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 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"

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

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

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.[51] The legal effect of 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.[52] 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-in approach again

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[51] *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.)

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

after developing the record further.)[53] 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."[54] 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," 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.[55]

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[53] Id., ¶¶ 8, 12, 16-21.

[54] § 2891(a)

[55] *See* §§ 2895-2897.

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.[56] 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.[57] The FCC's approach is consistent with the policy of "cooperative federalism" underlying the 1996 Telecommunications Act, which encourages state regulation within the framework of the Act.[58]

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

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

57 FCC 98-27, ¶ 18.

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

the opt-in versus opt-out method and, at this time, we can not know the outcome of its further proceedings on this issue.[59]

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

In response to comments, the June 2002 draft decision made many clarifying changes to the first draft of the rules proposed by staff. The version we adopt today likewise responds to additional comments and suggestions submitted by the parties since that time. Definitions were revised and added, and the rules reorganized and revised so that they more clearly reflected 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);

[59] 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.)

- 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.[60]

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

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[60] 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).

train staff in order to comply with the new privacy rules. We have allowed carriers 270 days 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.[61]

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 the June 2002 draft revised the wording to recognize CAB's ability to make exceptions where warranted.

In the initial comments, 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

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

customer consent. As our advocacy division pointed out in its initial reply comments, Rule 13 is well within the authority already available to Commission staff. Among the Public Utilities Code sections the carriers cited, 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. This proposal in the June 2002 draft drew little response.

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. To make that point, Rule 13(b) now refers 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. 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; carrier-proposed rewording to the contrary in comments on the June 2002 draft has been rejected.

Rule 14: Employee Identification

Rule 14 drew perhaps the least controversy of any in parties' comments. No party objected to it in the initial comments. 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 staff initially proposed. Two refinements were added in the June 2002 draft decision. First, "employee" was added to the Definitions section to include employees, contract employees, contractor employees, agents, and carrier representatives of any and all types. Wireless carriers were the only ones to object to this, describing the definition's breadth as confusing, unnecessary and inconsistent with the law. We have retained the broad definition in the belief that 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," recognizing that the latter also may receive visits from carrier employees in the course of installing service.

The second sentence of staff's proposed Rule 14, a requirement that employees identify themselves in their telephone conversations with customers, became Rule 14(b) in the June 2002 draft. Carriers objected to any implication in the last part of the draft rule that they would be required to route repeat callers to a specific service representative. Notwithstanding the specific wording used, that was not the intent and we agree with the carriers that the rule is equally effective in identifying employees without it.

Finally, carrier comments and reply comments on the June 2002 draft decision suggested adding a third subsection to Rule 14 to reflect the Section 2889.9 prohibition against misrepresenting oneself as associated or affiliated with a carrier when soliciting a telephone subscriber's business. New Rule 14(c) adopts that Section 2889.9 wording, modified slightly to recognize that the Commission's enforcement extends to carriers as opposed to non-carrier "persons or corporations."

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 2892, 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 initial industry commenters sought to have the rule more closely conformed to Section 2883. The June 2002 draft decision did that by restating it in words more similar to those of Section 2883, at the same time integrating into it requirements from Section 2892. As explained in this order and in the new general order, our intent is that these rules apply where feasible to both residential and small business services. Although this is academic for wireless carriers because, as they have been quick to point out, they do not typically distinguish between residential and business service, it is not academic for wireline. We have acceded to the wireline carriers' request that we not go beyond the residential connection requirement that Section 2883 places on them, and have revised Rule 15 accordingly. 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.[62] That term has been changed here to

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

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

In the initial comments, 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. We decline to revisit that earlier-decided issue here.

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. Those essentially unchanged D.01-07-030 rules were included in the June 2002 draft decision.

In their comments on the June 2002 draft, wireline carriers sought a complete reversal of direction from D.01-07-030 by way of two major changes, along with a number of lesser changes. First, the wireline carriers would eliminate the option established in D.01-07-030 for a consumer to lock his or her bill against non-communications-related charges. Where D.01-07-030 adopted an opt-in standard for such billing, the wireline carriers would delete that and offer neither an opt-in nor an opt-out provision to customers seeking to immunize themselves against non-communications-related cramming. Second, the wireline companies would rely entirely on the vendors who sell products and services, and the billing aggregators who act as middlemen relaying those charges to the billing telephone companies, for all authorizations and recordkeeping. The responsibility for processing subscriber complaints would still fall to billing telephone companies, but they would be able to delegate investigations to vendors or billing aggregators as their agents and would delete the provision that currently makes billing telephone companies responsible for their agents' compliance with the rules. They state their view as, "Anti-cramming safeguards should resemble anti-slamming safeguards, where the responsibility for obtaining, processing, and maintaining customer authorization is at the point of purchase – not at the point of billing." Since the Commission has no jurisdiction to enforce its rules over point-of-purchase vendors, the changes wireline carriers suggest would effectively strip from Part 3 most of its consumer protective value.

Among the other changes suggested, one carrier asked to have additions made to the list of charges defined as being communications-related, and to require that the Commission act within 90 days on any petition to include further additions. The Part 3 definition of non-communications-related charges is modeled on the Legislature's list set forth in former Section 2890(a) (now expired), and is by its own terms not exclusive; expanding the list to cover all possibilities is both impractical and unnecessary. And the Commission already has a mechanism in place under Section 1708.5 that allows petitions to adopt, amend or repeal a regulation, making it also unnecessary to add a separate provision to that effect in Part 3.

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. The June 2002 draft decision proposed 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. The rules set forth in D.01-07-030, otherwise essentially unchanged and no longer interim, are now Part 3, Rules Governing Billing for Non-communications-Related Charges, of new General Order ___.

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 in 2000 completed a consolidated investigation and rulemaking proceeding[63] into slamming and, after workshops and several rounds of comments, issued D.00-03-020, Final Opinion on Rules Designed to Deter Slamming, Cramming, and Sliding.[64] 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

[63] 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 Carriers for the Transfer of Customers Including Establishing Penalties for Unauthorized Transfer.

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

> in this proceeding in addition to removing the economic incentive for slamming.
>
> 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[65] in their current form as the FCC slamming rules, or simply the federal rules.

In addition to slamming allegations, the federal 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.[66] 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 in late-2000, and in January 2001, the Assigned Commissioner issued a ruling in this proceeding sending them out

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[65] 47 CFR 64.1100 *et seq.*

[66] 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.

for comments and reply comments. After considering the parties' input and making modifications, the Assigned Commissioner included them in his first draft decision mailed June 6, 2002. There followed several additional opportunities for parties to provide input through comments, workshops, and working groups, all as described in the Background section above. That additional input has also been considered in the new rules the Commission is now adopting 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 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%[67] and retains the remaining 100%. The subscriber

[67] 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.

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[68] 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

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

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 are closely modeled on the federal slamming rules for slams involving intraLATA, interLATA and interstate toll carriers, so we will limit this discussion to recapping the comments and describing those elements that do not appear in the FCC slamming rules. 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 slamming rules may be found in Part 4 of new G.O. ___, Appendix A to this order

For IntraLATA, InterLATA and Interstate Toll Carriers

Our description above of the federal rules now applies as well to our new Part 4 rules for intraLATA, interLATA and interstate toll slamming allegations. While the slamming rules proposed in the Assigned Commissioner's June 2002 draft decision paralleled the federal rules in many respects, there were some key differences explained in that earlier draft decision. In response to the comments described in a following section, we have reframed Part 4, Sections B, E, F, G, and H to be virtually identical to the wording in the federal rules[69]

A key point for both the federal rules and our rules is that they do not necessarily require subscribers who have been slammed to file a complaint to obtain relief; a subscriber who has not paid for service provided during the first 30 days after the alleged slam occurred is entitled to have the unauthorized

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[69] Sections B, E, F, G, and H correspond to the federal rules found at CFR Title 47, Sections 64.1100, 64.1140, 64.1150, 64.1160 and 64.1170 respectively.

carrier remove the charges for that period. Only *after* the carrier has removed the charges *and* notified the subscriber that it will challenge the allegation must the subscriber file an informal complaint with CAB within 30 days to avoid being re-billed. Likewise, our rules (but not the federal rules) provide that carriers who learn of slamming allegations against them may deter complaints by making mutually-satisfactory arrangements to compensate subscribers and return them to their preferred carriers even if charges have been paid, provided that the alleged unauthorized carrier has first informed the subscriber of the rights afforded under these rules.

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.

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 and included a limited provision to that effect in the text of its rules.[70]

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

[70] *See* 47 CFR 64.1170(b).

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 first set of draft slamming rules distributed in January 2001. Three contributors represented consumers, one represented small business, and the remaining ten represented carriers of all types. Approximately ten more sets of comments relating to the proposed slamming rules were received following the Assigned Commissioner's June 2002 draft decision and the August 2002 workshops. Most of the post-draft comments were from the wireline companies, both individually and as part of the wireline working group. All of those comments are grouped here for discussion purposes.

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]."[71] 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 Regulatory Utility 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

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

> procedures in place for handling slamming complaints, and that those procedures have been effective in resolving such complaints.[72]

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. The rules proposed in the Assigned Commissioner's June 2002 draft decision met that test. Nonetheless, the Part 4 rules we adopt today are much closer to the federal rules than the earlier set, thus satisfying the great bulk of the concerns carriers expressed in their comments. The federal rules are so complex that everyone involved – the carriers, our staff, and most importantly, slammed subscribers – will find it challenging to understand and apply them. The modest benefit to be gained by our adopting a second, differing set of slamming rules would not justify the additional complexity they would generate.

A number of commenting carriers found the earlier proposed definition for "subscriber" too narrow, and we agree. The Definitions section of the federal rules initially did not define the term, so the June 2002 draft's proposed rules limited it to the person or persons named on the account. The federal rules, and our rules modeled on them, have now changed to define subscriber more broadly to include the person(s) named on the account, any adult the accountholder has authorized to change telecommunications services or to charge services to the account, and any person lawfully authorized to represent the accountholder.

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

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 the June 2002 draft's 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 initial recommendation to detariff all competitive services draw as much response as any other issue in this rulemaking.[73] 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

[73] The Assigned Commissioner's June 2002 draft decision first proposed the outcome adopted in this section. It drew few comments on detariffing except as related to limitation of liability for detariffed services, discussed in the following section.

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 that service is provided 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 questionable.

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[74] before both

[74] 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,

Footnote continued on next page

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[75] 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.

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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 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).)

[75] § 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].

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 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

The staff's report referenced in the OII proposed that fully competitive services be detariffed, and recognized that, under Section 495.7(h)[76], 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

[76] § 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."

providers, perhaps even causing some to exit from the market. Staff and some commenters pointed 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 court remedies. Another drawback would be that competitive local reseller carriers could in some cases be subject to liability for problems caused by underlying facilities-based carriers.

However, there would also be advantages to eliminating the limitation of liability. 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 could motivate carriers to exercise greater care in providing service;[77] 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

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[77] 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."

generally reduce distortions caused by liability limitations in an increasingly competitive marketplace. Consumer advocates observed in their comments that with rates for many services decoupled from costs of service, the primary historic benefit of limited liability – lower rates – has largely evaporated, and there is little justification for treating 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.

Staff's report stopped short of endorsing an end to the Commission-sanctioned limitation of liability, recommending instead that the Commission review whether it remains appropriate. It did endorse narrowing the limitation to protect carriers from negligence rather than from gross negligence as currently, and increasing the dollar limitations. The Assigned Commissioner's June 2003 draft decision's proposal to eliminate the Commission-sanctioned limitation for competitive services generated both strong support among consumer advocates and strong opposition from carriers. Carriers were particularly concerned that even though they would be allowed to follow standard commercial practices in establishing contractual limitations for their non-tariffed services, they would still be laid bare to claims for their tariffed competitive services, including basic exchange services.[78]

[78] Those services designated as non-competitive in the Definitions section were all GRC-LEC tariffed services, and the NRF-LECs' Category I tariffed services.

We share staff's and the consumer advocates' concern that the Commission-sanctioned limitation of liability for competitive services may no longer be in the public interest, but we also acknowledge that the carriers raise legitimate questions that merit further consideration. Thus we will not narrow the limitation of liability today, but may consider the matter further in the next phase of this proceeding.

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.[79]

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 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

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

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 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 Protection and Safety 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.*[80]; (b) requiring carriers to produce documents and witnesses when subpoenaed in a California administrative or judicial proceeding; (c) allowing the Assigned

[80] 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.

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.[81] 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…."[82]

Actions under the Unfair Competition Law "shall be prosecuted exclusively in a court of competent jurisdiction."[83] The Attorney General, district attorneys, and certain other law enforcement officers are authorized to prosecute

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[81] 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."

[82] Section 2101.

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

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.[84] 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.[85] Remedies under the Unfair Competition Law are cumulative and in addition to remedies that may be imposed under other laws.[86] 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.

Thus, we agree 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-

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

[85] Govt. Code Section 26509.

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

imposed sanctions under that law.[87] 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,[88] 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 allowed carriers to circumvent this Commission policy by omitting this important qualifier from their tariffs and then invoking the filed rate doctrine.[89] In this rulemaking proceeding we reaffirm the principle that tariffs, and any

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

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

[89] 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.

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 requires carriers who misrepresent their rates, terms or conditions to grant relief to a subscriber who was affected by the misrepresentation.

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.

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, and the resulting new consumer protection rules will facilitate our enforcement efforts.

The Commission has ample authority under the Public Utilities Code to enforce its orders: carriers who do not comply with the requirements of new G.O. ___ may be penalized under Section 2107 *et seq.*. At the same time, 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).

Assignment of Proceeding

Carl Wood is the Assigned Commissioner in this proceeding and James McVicar is the assigned Administrative Law Judge.

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 A 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. 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.

8. 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.

9. 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 non-dominant IEC rules are no longer needed.

10. 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.

11. 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.

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

13. 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.

14. 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.

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

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

17. 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.

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

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

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

21. 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 A 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.

22. The initiatory order in R.00-02-004 required parties to make offers of proof with their opening comments 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.

23. 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.

24. 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 non-dominant IECs 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. 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.

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

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

17. Parties and respondents in this proceeding have implicitly waived their right to evidentiary hearing on any issue decided in this interim order.

18. No evidentiary hearings are needed.

19. 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.

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

21. 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.

22. 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; whether to curtail the Commission-sanctioned limitation of liability; and whether earlier-proposed rules requiring that communications directed at consumers and subscribers be in languages other than English are needed.

23. 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 A 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 compliance with G.O. ___ and this interim order not later than 270 days after the date this decision was mailed.

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. Each Commission-regulated telecommunications carrier shall prepare a plan for timely bringing its operations into full compliance with G.O. ___ and this interim order as required by Ordering Paragraph 2. Each such compliance plan shall be prepared following guidance to be issued to carriers by the Commission's Telecommunications Division; and shall be transmitted to the

Telecommunications Division with a letter certifying that the plan is complete and adequate for the purpose ordered, and that it is the carrier's intent to carry it out. Each such plan and transmittal letter shall be verified following the procedure set forth in the Commission's Rules of Practice and Procedure, Rule 2.4, Verification. Those Commission-regulated telecommunications carriers having California intrastate tariffs in effect shall submit their plans and transmittal letters not later than 90 days after the date this decision was mailed. All other carriers shall submit their plans and transmittal letters not later than 120 days after the date this decision was mailed.

7. All Commission-regulated telecommunications carriers having California intrastate tariffs in effect shall evaluate those tariffs for compliance with the requirements of G.O. ___ and the ordering paragraphs of this interim order. Each 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 90 days after this decision was mailed and make effective 270 days after this decision was mailed 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. Each 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 90 days after this decision was mailed serve an information-only compliance letter to the 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 G.O. ___ 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; whether to curtail the Commission-sanctioned limitation of liability; and whether additional rules requiring that communications directed at consumers and subscribers be in languages other than English are needed.

This interim order is effective today.

Dated ____________________________, at San Francisco, California.

APPENDIX A

GENERAL ORDER ___