

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion,)	
to consider revisions to the procedures designed to)	
prohibit switching an end user of a telecommunica-)	Case No. U-11900
tions provider to another provider without the)	
authorization of the end user.)	
_____)	

At the July 28, 1999 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
 Hon. David A. Svanda, Commissioner
 Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On April 23, 1999, the Commission issued an order in Case No. U-11900 (the April 23 order) revising its anti-slamming procedures in an effort to make them better correspond to those established by the Federal Communications Commission (FCC). The April 23 order also addressed several problems that arose regarding the practical application of the Commission's previously adopted procedures.

Several of the parties to Case No. U-11900 have, both in separate and joint petitions, requested that the Commission rehear, reconsider, clarify, or stay various aspects of the April 23 order. These parties include: the Telecommunications Resellers Association and the Competitive Telecommunications Association (collectively, the TRA); AT&T Communications of Michigan, Inc. (AT&T); MCI Telecommunications Corporation (MCI); Qwest Communications Corporation (Qwest); Sprint Communications

Company, L.P. (Sprint); Frontier Corporation; the Telecommunications Association of Michigan (TAM); GTE Communications Corporation and GTE North Incorporated (GTE); and Ameritech Michigan. Numerous replies to those petitions were also submitted by the parties, concluding with those filed on June 14, 1999 by AT&T, MCI, and Qwest.

Rule 403 of the Commission's Rules of Practice and Procedure, 1992 AACRS, R 460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

I.

BACKGROUND

Following the expansion of competition in the telecommunications industry, Michigan has seen the rapid introduction of new services, entry of new providers, and development of new technologies. This competition has likewise provided customers with an ever-broadening range of prices, terms, and conditions of service from which to choose. However, it has also given rise to unscrupulous actions by a few service providers. One such action, which has reached epidemic proportions and caused extensive harm and frustration to customers throughout the country, is commonly referred to as slamming.¹

¹"Slamming" refers to switching one or more of an end use customer's telecommunications services from one provider to another without that customer's permission.

In an effort to protect Michigan's citizens from this harmful practice, the Legislature passed and the Governor signed into law Public Acts 259 and 260 of 1998, which amended the Michigan Telecommunications Act, 1991 PA 179, as previously amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq., (the Act). These recent amendments expressly prohibited a telecommunications provider from switching a customer to another service provider without that customer's authorization. In addition, the amendments granted the Commission unusually broad authority to issue orders establishing and enforcing all procedures deemed necessary to eliminate slamming. Among other things, they provided the Commission with the power to (1) impose fines of up to \$50,000 per occurrence for any violations of those procedures, (2) demand the payment of all damages necessary to make whole both the slammed customer and the customer's authorized service provider, and (3) revoke the license of any provider that fails to comply with the Commission's directives regarding slamming.

The Commission therefore issued an order on September 23, 1998 in Case No. U-11757 in which it established the initial set of anti-slamming procedures to be followed by all service providers operating in Michigan. The adoption of those procedures was timed to correspond to the effective date of Public Acts 259 and 260. This occurred despite the recognition by all parties that the FCC would shortly be revising its own anti-slamming procedures and that at least some of the changes eventually adopted by the FCC would have to be reflected in the Commission's procedures.

On December 17, 1998, the FCC issued an order in CC Docket No. 94-129 (the FCC's December 17 order) broadening the scope of its anti-slamming rules, imposing more stringent verification requirements regarding customers' requests to change service providers, and establishing penalty provisions designed to take the economic incentive out of slamming. According to that order, which was

issued pursuant to Section 258 of the federal Telecommunications Act of 1996 (FTA), 47 USC 258, the FCC's revised rules constitute the minimum standards that must be adhered to by each state that adopts its own anti-slamming procedures. Moreover, Section 505(2) of the Act demands that, at least with regard to "the verification procedures for the switching of an end user's telecommunications provider," Michigan's procedures must comply with the FCC's directive. MCL 484.2505(2); MSA 22.1469(505)(2).

In response to the directive set forth in the FCC's December 17 order and the requirements imposed by Section 505(2) of the Act, the Commission initiated an investigation in the present case on February 2, 1999, in which interested parties were invited to file proposals concerning revisions to the Commission's initial anti-slamming procedures that they believed were necessitated by the FCC's new rules. The Commission further offered the parties an opportunity to address, in the context of their proposals, whether the Commission's then-existing procedures should be revised to impose any of nine specific requirements ranging from establishing a jointly-funded customer education program to allowing a customer to suspend its primary interexchange carrier (PIC) or local exchange carrier (LEC) protection² by employing the same procedure used to initiate that protection.

Following extensive review of the parties' proposals and responses, the Commission adopted the revised anti-slamming procedures attached as Exhibit A to the April 23 order. It is with regard to those procedures that the parties currently seek rehearing, clarification, or other relief.

²PIC and LEC protection programs, which are also called PIC/LEC change protection programs or PIC and LEC freezes, refer to arrangements in which any request to change a participating customer's service provider must be preceded by receipt of proof of a customer's authorization to make the change.

II.

DISCUSSION

The parties' requests for relief relate primarily to four issues: (1) whether a formal rulemaking was required; (2) whether due process was lacking; (3) whether a recent federal court ruling regarding the FCC's anti-slamming rules necessitates revisions to the procedures adopted in the April 23 order; and (4) whether the Commission erred regarding its treatment of PIC and LEC protection programs. Each of these issues is addressed below.

The Need for a Formal Rulemaking

Several parties, including AT&T and MCI, contend that the amended procedures adopted by the April 23 order constitute "rules" that can only be promulgated through strict adherence to the requirements set forth in the Administrative Procedures Act of 1969 (APA), MCL 24.201 et seq.; MSA 3.560(101) et seq. As a result, these parties assert, the Commission was statutorily obligated to (1) forward to the Legislative Service Bureau (LSB), for publication in the Michigan Register, a copy of the proposed rules together with a notice of hearing and a small business economic impact statement, (2) provide for published notice of hearing in at least three newspapers of general circulation in different parts of the state, (3) conduct a public hearing in conformance with the dictates of the APA, (4) provide copies of the proposed rules to the Joint Committee on Administrative Rules (JCAR) and the Governor's office, (5) receive from the LSB approval of the proposed rules as to form, classification, arrangement, and numbering, (6) provide JCAR with up to two months to consider the proposed rules, and (7) file in the Office of the Secretary of State three copies of the rules along with all necessary certificates of approval.

Because it failed to accomplish all of those tasks, the parties claim, “the Commission must grant rehearing to correct these deficiencies.” AT&T’s petition for rehearing, p. 18.

The Commission does not find these arguments persuasive. Unlike many situations in which the Commission’s actions are based on its general regulatory authority, the Legislature expressly provided a means of adopting (on an expedited basis) any anti-slamming procedures that the Commission finds necessary. This is reflected in the language of Public Act 260 of 1998 which, rather than merely authorizing the Commission to promulgate rules concerning this issue, mandated that:

The commission shall issue orders to ensure that an end user of a telecommunications provider is not switched to another provider without the end user’s oral authorization, written confirmation, confirmation through an independent third party, or other verification procedures subject to commission approval, confirming the end user’s intent to make a switch and that the end user has approved the specific details of the switch. The order issued under this section shall require that all providers comply with the regulations established by the federal communications commission on verification procedures for the switching of an end user’s telecommunications provider.

MCL 484.2505(2); MSA 22.1469(505)(2). The Legislature’s decision to allow the Commission to use orders to address the problem of slamming, rather than relying on the more cumbersome rulemaking process, is consistent with the legislative intent to eradicate slamming as quickly as possible.

The Commission therefore concludes that adopting its anti-slamming procedures by order, rather than through a formal rulemaking process, is consistent with, and required by, Section 505(2) of the Act. Thus, it finds that these parties’ requests for rehearing should be denied.

Alleged Lack of Due Process

In addition to revising existing procedures concerning the acceptable ways to verify a customer’s request to change service providers, the penalties to be imposed for making an unauthorized PIC or LEC

change, and the procedures to follow when implementing PIC and LEC protection programs, the April 23 order discussed numerous problems regarding the practical application of the initial anti-slamming procedures adopted in Case No. U-11757. Several of those problems surfaced following the Commission's issuance, on February 26, 1999, of show cause orders in 13 slamming complaint cases.³

For example, in some of those cases the Commission was unable to locate an agent to accept service of the customers' complaints or to accept receipt of the Commission's show cause orders. In others, it determined that the service provider had already gone bankrupt or otherwise elected to terminate its operations. Moreover, the Commission discovered that because switchless resellers use the carrier identification codes (CICs) of the facilities-based interexchange carriers (IXCs) from whom they purchase service, it is often impossible to determine who the offending parties (and thus the potential respondents in slamming complaint cases) actually are. The Commission also discovered that a similar problem can occur when an LEC or IXC provides billing services for other carriers.

In light of those and other problems, the April 23 order added four entirely new sections to the Commission's existing anti-slamming procedures. The first, designated as Section 5 of the revised procedures, established a registration process under which each service provider was required to provide (1) its business address and phone number, (2) the names of its officers and principals, (3) the name, address, and phone number of its registered agent, (4) a statement of its financial viability, and (5) verification that neither it nor its officers previously committed fraud on the public. The second, designated as Section 6, prohibited carriers from providing billing or bill collection services to any unregistered service provider and exposed billing agents to joint and several liability for any slamming committed by

³Those show cause orders, set forth in Cases Nos. U-11917 through U-11929, collectively involved 259 claims by customers that their service was switched without authorization.

their underlying service providers. The third, set forth in Section 7 of those procedures, imposed joint and several liability upon a facilities-based IXC whenever (1) the IXC agrees to let a switchless reseller use its CIC and (2) that reseller provides unauthorized service to a customer while using that IXC's CIC. Finally, the fourth, which comprised Section 8 of the revised procedures, required the carrier that executes a PIC or LEC change order to notify the customer of the change in service providers with 10 days after the change takes place.

Many of the parties object to the April 23 order's addition of these four sections to the Commission's anti-slamming procedures. In so doing, they note that the Commission's initial procedures (which were adopted in Case No. U-11757) addressed none of the issues that were subsequently included in Sections 5 through 8 of the revised procedures. They further note that the February 2, 1999 order in Case No. U-11900 indicated that the Commission's investigation in the present case would be limited to determining (1) if any changes to the initial procedures were necessitated by the FCC's issuance of new anti-slamming rules and (2) whether any of the nine specified proposals identified on page 3 of that order should be added to those procedures. Moreover, they point out that none of the nine proposal identified in the Commission's February 2, 1999 order relate to these four sections. The parties therefore contend that the Commission's decision to adopt Sections 5 through 8 in the context of the April 23 order, without first giving the parties notice and an opportunity to be heard with regard to those new procedures, violates due process.

The parties further contend that had they been given the opportunity, they would have presented more than adequate reasons for the Commission to refrain from adopting Sections 5 through 8. For example, AT&T contends that in light of federal law requiring it to allow switchless resellers to take

service upon the same conditions and terms as any other customer, it has no choice but to let those resellers use its CIC. Thus, AT&T continues, it would be patently unfair for Section 7 of the revised procedures to impose joint and several liability on a facilities-based IXC like itself for any slamming undertaken by those resellers. Similarly, TAM claims that because at least 14 of its members would likely cease providing billing services to IXCs in order to avoid the potential liability arising from Section 6, that provision would hinder competition (by forcing some smaller IXCs out of the market) and confuse customers (by requiring them to pay as many as three separate phone bills each month). Moreover, the TRA argues that although Section 5 states that the Commission can suspend the registration of any carrier that is found to have committed “an unusually large number” of slamming violations, the phrase “unusually large” is not defined. In light of these and other unforeseen problems, the parties argue, both the Commission and the industry could benefit from an open discussion of the merits of Sections 5 through 8.

The parties therefore assert that the Commission should grant rehearing and stay the effect of those four provisions at least until the parties have had an opportunity to provide comments and responses regarding those issues.

The Commission agrees, in part, with those parties’ assertions and finds that an opportunity to fully discuss the issues addressed by Sections 5 through 8 of the revised anti-slaming procedures could prove beneficial. Specifically, it concludes that allowing all interested parties the opportunity to review and comment upon those issues could help identify potential problems and reduce the likelihood of unintended consequences.

The Commission therefore finds that it should stay the effect of Sections 5 through 8, treat those provisions merely as proposed anti-slaming procedures, and direct interested parties to submit

comments regarding whether those provisions should be adopted, rejected, or revised. It further finds that all comments and reply comments regarding those proposals should be filed by August 11 and 25, 1999, respectively.

Effect of Staying the FCC's Liability Rules

Several parties, including MCI, GTE, Sprint, and Frontier, note that the April 23 order replaced much of the Commission's initial slamming liability provisions with language drawn from the FCC's newly-adopted reimbursement and investigation rules. They go on to note that those FCC rules, set forth at 47 CFR §§ 64.1100(c), 64.1100(d), 64.1170, and 64.1180, subsequently have been stayed by the U.S. Court of Appeals. See, MCI WorldCom v FCC, ___ US App DC ___ (Docket No. 99-1125, May 18, 1999). The parties therefore assert that the Commission's related provisions, found at Sections 3(d), 3(e), 3.1, and 3.2 of the revised anti-slamming procedures, should likewise be stayed pending resolution of the issues involving the FCC's liability rules.

The Commission agrees in part with these assertions. Specifically, it finds that because Section 3.1 (establishing specific reimbursement procedures) and Section 3.2 (setting forth step-by-step investigation procedures) were drawn entirely from the FCC's rules and are, for the most part, not essential to the operation of the Commission's other anti-slamming procedures, they should be stayed pending resolution of the federal court proceedings. The same is true with respect to Section 3(d), which draws heavily from the language found in 47 CFR §§ 64.1100(c) and 64.1100(d).

Nevertheless, the parties' arguments are not persuasive with regard to their request to stay Section 3(e) of the Commission's revised procedures, which states as follows:

In addition to any liability incurred under Section 3(d), above, by a telecommunications provider that is found to have violated the verification requirements of Section 505 of the Act, the procedures set forth in Sections 1, 2, 2.1, or 3(a) above, an order issued by the Commission under Section 505, or the provisions of Section 258(a) of the FTA, the Commission may take further action including, but not limited to, 1 or more of the following:

- (1) Order the person to pay a fine for the first offense of not less than \$10,000 nor more than \$20,000. For any subsequent offense, the Commission shall order the person to pay a fine of not less than \$25,000 nor more than \$40,000. If the Commission finds that the second or any subsequent offenses were knowingly made in violation of Section 505 of the Act, these procedures, a Commission order issued under Section 505, or the provisions of Section 258(a) of the FTA, the Commission shall order the person to pay a fine of not more than \$50,000. Each unauthorized or unverified change in a customer's telecommunications service provider or providers shall be a separate offense under this subsection.
- (2) If the person is licensed under the Act, revoke the license if the Commission finds a pattern of violations of Section 505 of the Act.
- (3) Issue cease and desist orders.

See, Exhibit A attached to the April 23 order, Section 3(e). The language quoted above is not taken from either the FTA or the FCC's anti-slamming rules. Rather, it was taken (with slight modification) from Section 3(d) of the Commission's initial anti-slamming procedures approved in Case No. U-11757. Moreover, it is based entirely on the authority granted to the Commission by Act 259 of 1998 and set forth in Section 506(2) of the Act.

The Commission therefore finds that the liability provisions set forth in Section 3(e) of its revised anti-slamming procedures should not be stayed. Instead, the Commission concludes, the wording should merely be revised to reflect the language initially adopted in Case No. U-11757, which was in effect until superseded by the revised procedures set forth in the April 23 order. The end result of these changes can be found in Section 3 of the updated procedures, attached to this order as Exhibit A.⁴

⁴When undertaken in conjunction with the Commission's decision to stay revised Section 3(d), the necessary revisions include removing all mention of "Section 258(a) of the FTA" from revised

Issues Regarding PIC and LEC Protection

On several occasions over the past three years, the Commission has addressed the use of PIC and LEC protection programs. Beginning with its August 1, 1996 order in Case No. U-11038 and culminating with the April 23 order in the present case, the Commission has attempted to establish a system under which those programs could be used to protect customers from slamming while precluding their use for anticompetitive purposes.

The most recent result was the system set forth in Section 4 of the Commission's revised anti-slamming procedures. Among other things, that system (1) requires each LEC to offer all of its customers the option of signing up for PIC and LEC protection;⁵ (2) imposes certain restrictions on an LEC's attempts to solicit customer participation in its PIC and LEC protection programs; (3) prohibits an LEC from processing a customer's request for PIC or LEC protection until the request is first verified through use of either a letter of agency (LOA), third party verification (TPV), or electronic authorization; (4)

Section 3, renumbering each subsection beyond Section 3(c), and reinserting language to the effect that, pursuant to Section 506(2) of the Act, the Commission "shall order remedies and penalties to protect and make whole end users and other persons who have suffered damages as a result of the violation." The parties should be advised that the Commission views this "make whole" language as granting it authority to, among other things, (1) order unauthorized service providers to bear all costs of switching customers back to their authorized carriers and (2) require authorized carriers to reinstate each slammed customer in all premium programs in which the customer had been enrolled (as well as restore all premiums to which the customer would have been entitled had the customer not been slammed).

⁵In applying the Commission's revised anti-slamming procedures, some LECs mistakenly assumed that the use of the word "or" in the Commission's directive that "An LEC shall offer, and a customer may request enrollment in, a PIC or LEC protection program . . .," granted LECs the option of offering either type of protection, rather than requiring them to offer both. See, Section 4(a) of the procedures attached as Exhibit A to the April 23 order; emphasis added. However, that assumption is incorrect. The use of the word "or" was intended only to recognize that a separate request must be submitted by the customer and processed by the LEC for each type of service to which the customer seeks to apply PIC or LEC protection.

obligates the LEC to retain proof of verification of each subscriber's request for PIC or LEC protection for as long as that protection is being provided; (5) requires that, following receipt of a change order for a customer with PIC or LEC protection, the executing LEC must request and receive proof of verification before making the change; (6) precludes an LEC from applying its PIC and LEC protection programs in a manner that discriminates against customers taking service from carriers other than that LEC; (7) allows customers to suspend their PIC or LEC protection only through the use of either an LOA or a three-way call; and (8) requires all LECs using the Customer Account Record Exchange (CARE) system⁶ to indicate, as part of their regular electronic postings, which customer lines are enrolled in their PIC and LEC protection programs.

MCI, Ameritech Michigan, GTE, and TAM base several of their requests for rehearing or reconsideration on issues relating to this PIC and LEC protection system. However, three of those requests merely repeat arguments set forth in the proposals and responses submitted earlier in this case. These include a request by MCI to impose a six-month moratorium on the implementation of intraLATA PIC protection, a request by TAM to refrain from requiring LECs to demand proof of verification following receipt of a change order involving a customer that has PIC or LEC protection, and a request by MCI to expand the number of ways by which customers are allowed to suspend their PIC or LEC protection. Because those requests (as well as their supporting arguments) were fully considered and addressed in the April 23 order, the Commission finds that they must again be rejected.

In addition to the three requests discussed above, these parties raise four related issues. The first involves a claim by Ameritech Michigan and TAM that it was improper for the Commission to require the

⁶The CARE system is an electronic network over which most of Michigan's LECs exchange information about customer accounts with other service providers.

LECs to offer PIC and LEC protection. Specifically, Ameritech Michigan asserts that because new state and federal anti-slamming provisions will take the profit out of slamming, there is no need for either PIC or LEC protection. Similarly, TAM asserts that because little competition exists for basic local exchange service in various parts of Michigan, LEC protection programs would be largely unnecessary in those areas. These parties therefore contend that all decisions regarding whether to make PIC and LEC protection available to their customers should be left to the discretion of each individual LEC. Thus, they conclude, the Commission should amend Section 4(a) of its revised anti-slamming procedures to make the provision of PIC and LEC programs optional rather than mandatory.

Notwithstanding those parties' assertions to the contrary, the Commission finds that requiring all LECs to make PIC and LEC protection available to their customers is both necessary and proper. Although it agrees with Ameritech Michigan that the procedures adopted in the April 23 order should make slamming a much less attractive endeavor, the Commission is not so naive as to believe that those procedures will immediately and completely end this unscrupulous practice. Moreover, simply because a customer lives in an area where competition for his or her various telecommunications services may be less intense than in a neighboring territory does not reduce the level of harm or frustration that would arise from being slammed. Finally, because the FCC's anti-slamming rules merely constitute the minimum standards to which the Commission must adhere, and because making it mandatory for LECs to offer PIC and LEC protection exceeds those standards, the Commission concludes that it should reject the request by Ameritech Michigan and TAM to amend Section 4(a) of its revised anti-slamming procedures.

The second issue concerns the requirement, set forth in Section 4(e)(3)(iii) of the Commission's revised anti-slamming procedures, that LECs retain records verifying a customer's authorization to

implement LEC or PIC protection for as long as that protection is provided. Ameritech Michigan contends that, as a practical matter, this will result in LECs retaining those verification records indefinitely. According to Ameritech Michigan, this is because LECs' existing record retention systems are not "sophisticated enough to automatically delete or dispose of an individual customer's verification records" when the customer's PIC or LEC protection is removed. Ameritech Michigan's petition, p. 20. Moreover, it argues, little benefit will arise from that requirement. Ameritech Michigan therefore requests that the Commission grant reconsideration of this issue and either abolish the document retention requirement or amend it to cover some "fixed calendar period, such as two years." Id.

The Commission again finds that Ameritech Michigan's request should be rejected. Ameritech Michigan has a history of subverting PIC protection and using it in an anticompetitive manner. This history of improper or offensive actions, described in detail on pages 11 through 14 of the Commission's September 23, 1998 order in Case No. U-11757, includes such things as (1) disseminating deceptive and misleading bill inserts soliciting customers' participation in its PIC protection program, (2) refusing to abide by Commission-mandated procedures for suspending PIC protection, (3) using its customers' attempts to terminate their PIC protection as an opportunity to persuade them to purchase other Ameritech Michigan services or to dissuade them from switching service providers, and (4) unilaterally deciding to terminate the PIC protection previously provided to thousands of its customers instead of abiding by Commission orders to provide that protection in a competitively neutral manner. In light of this pattern of abuse, the Commission remains convinced that the system of checks and balances built into the PIC and LEC protection structure set forth in Section 4 of the revised procedures should not be disturbed. The Commission therefore concludes that it should reject Ameritech Michigan's request to

either abolish or weaken the record retention requirements contained in Section 4(e)(3)(iii) of those procedures.⁷

The third issue arises from TAM's claim that the CARE system is not currently designed to allow LECs to post, on a continuous basis, a list of all customer lines that are being provided with either PIC or LEC protection. Before this can occur, TAM asserts, an agreement must be reached among the various service providers regarding "what field(s) would be used and what data would be inputted into such field(s)." TAM's petition, p. 13. It goes on to state that even after an agreement is reached, additional time would be needed for LECs to input the necessary data. Finally, TAM notes that service providers rely on different media for exchanging data used by the CARE system. Specifically, it continues, some of the smaller LECs periodically mail their data to IXC's on magnetic tapes. Based on TAM's belief that this should not be considered an "electronic posting" pursuant to Section 4(i) of the Commission's revised procedures, it seeks modification of those procedures "to make clear that LECs which mail magnetic tapes to provide data are not subject to Section 4(i)." *Id.*

The Commission finds that TAM's proposals to delay implementation of Section 4(i) and to exempt certain LECs from its provisions should both be rejected. Over three months have passed since the Commission adopted its revised anti-slamming procedures in the April 23 order. This provided adequate time for service providers to decide what fields to use and what data to input in order to satisfy the provisions of this section. Moreover, those provisions specifically apply to "any LEC that uses the . . .

⁷On a related issue, Ameritech Michigan requests permission to simply reactivate the PIC protection that it provided to thousands of customers prior to issuance of the Commission's May 11, 1998 order in Case No. U-11550. Because it would allow Ameritech Michigan to circumvent the Commission's current requirements regarding the solicitation and verification of customer requests for PIC or LEC protection, that request must be denied.

CARE system, or a similar electronic data transfer system, to exchange information with other service providers.” Exhibit A attached to the April 23 order, Section 4(i). Subsumed in this language is the implication that if an LEC makes particular use of that system for one purpose, it can and should make comparable use of the system for another (in this case, identifying which customers are enrolled in its PIC or LEC protection programs). Thus, LECs that use magnetic tapes to exchange data with IXCs should not be exempt from the requirements of Section 4(i). Instead, the Commission concludes, they should include on those tapes all information necessary to identify which customers have PIC or LEC protection at the time that the tape is created and distributed.

The fourth and final issue concerning PIC and LEC protection involves requests by GTE and Ameritech Michigan to stay or defer the effective date of the revised anti-slamming provisions dealing with PIC and LEC protection. According to GTE, delaying the effective date until at least June 28, 1999 is necessary to allow adequate time to develop processes and procedures for use by its customer service representatives when dealing with requests for LEC protection. As for Ameritech Michigan, it contends that it will take until at least September 1999 and mid 2000, respectively, to develop the systems necessary to provide PIC and LEC protection in a manner that satisfies all state and federal requirements.

The Commission finds that it should reject these requests. Because June 28, 1999 has already passed, GTE’s argument is moot. Moreover, none of the parties--including Ameritech Michigan and GTE--offers specific examples of what tasks must be completed before they can implement PIC and LEC protection, how long it will take them to complete each task, or how their resulting PIC and LEC protection programs will differ (if at all) from previously established PIC protection programs. For these reasons, the Commission concludes that each LEC operating in Michigan must immediately begin offering

PIC and LEC protection to all customers who request it. Any LEC that fails to do so within 20 days of this order's issuance is subject to fines and other penalties as authorized by the Act.

Miscellaneous Issues

In addition to the requests addressed above, three parties seek rehearing, reconsideration, or clarification regarding the use of three-way calls as a means of verifying a customer's request to change service providers. Specifically, Ameritech Michigan, GTE, and TAM argue that by including three-way calls within the list of authorized verification methods, Michigan's anti-slamming procedures conflict with those adopted by the FCC. They go on to assert that, compared to other verification methods, three-way calls are overly susceptible to fraud or trickery. These parties therefore contend that the Commission should rehear or reconsider this issue for the purpose of striking Section 1(d) of its anti-slamming procedures. In the alternative, TAM asks the Commission to clarify Section 1(d) by specifically stating that although three-way calls may be used to verify a request to change a customer's intrastate telecommunications service, they do not constitute a valid means for verifying changes in interstate service.

The Commission concludes that it should reject the request to strike Section 1(d). It reaches this conclusion for three reasons.

First, the decision to allow the use of three-way calls as a means of verifying customer change orders is not of recent vintage. Rather, the Commission's August 1, 1996 order in Case No. U-11038, its May 11, 1998 order in Case No. U-11550, and its September 23, 1998 order in Case No. U-11757 all authorized the use of three-way calls. The last of those three orders went so far as to include within the Commission's initial set of anti-slamming procedures language nearly identical to that found in Section 1(d) of the revised procedures. Moreover, after addressing the issue at length, the April 23 order

likewise rejected requests by a number of LECs to exclude three-way calls from the list of acceptable verification options. See, April 23 order, pp. 5-7. As a result, the current rehearing request concerning Section 1(d) constitutes nothing more than an invitation to needlessly relitigate a well-settled issue.

Second, these parties are incorrect in asserting that the Commission's allowance for three-way calls conflicts with the FCC's anti-slamming rules. The FCC has specifically said that although a state must accept the three verification procedures set forth in the revised federal anti-slamming rules (namely, LOA, electronic authorization, and TPV), the state "may accept additional verification procedures for changes to intrastate service if such state concludes that such action is necessary based on its local experiences." The FCC's December 17 order, p. 55. Moreover, as noted on page 5 of the April 23 order, numerous markets throughout the state remain closed to true competition due, in large part, to anticompetitive actions by Michigan's incumbent LECs. Because this lack of full and fair competition justifies providing an additional means of verifying change orders, the use of three-way calls for this purpose does not conflict with the FCC's rules.

Third, the Commission does not find persuasive claims to the effect that three-way calls are less reliable than other verification options. These calls involve a direct contact between the customer and the LEC. As a result, the LEC (through its agent involved in the three-way call) is in a good position to verify the customer's identity and to ensure that the customer affirmatively states a desire to change service providers.

The Commission therefore concludes that all requests to rehear or reconsider this issue should be rejected. Nevertheless, the Commission finds that it should grant TAM's request for clarification. As noted in the April 23 order, "all verification methodologies beyond the three specifically adopted by the

FCC . . . apply only to local and intrastate telecommunications service, and not to interstate service.”

April 23 order, p. 7, n. 4. As a result, Section 1(d) applies solely to requests to change a customer’s intrastate service.

Yet another request for rehearing was submitted by Ameritech Michigan. This request involves the Commission’s conclusion that it might be wise to create an independent third-party administrator to verify and process all change orders submitted on behalf of customers in Michigan. Ameritech Michigan argues, among other things, that rehearing is warranted because the parties have been given no opportunity to comment on this issue.

The Commission finds Ameritech Michigan’s argument to be misplaced. The April 23 order provides ample opportunity to receive input regarding implementation of a third-party administrator. Specifically, it states that during the 12 months following that order’s issuance, the Commission Staff and all interested parties should “enter into intensive discussions regarding the precise scope of activities, method of implementation, and means of funding an independent third-party administrator system.”⁸ April 23 order, p. 29. The order further states that “if insufficient progress is being made as a result of the parties’ discussions,” the Commission will initiate a contested case proceeding in which the parties may address (and the Commission will resolve) all remaining issues. *Id.* The Commission therefore concludes that this request for rehearing should be rejected.

⁸The Commission recognizes that Ameritech Michigan or other parties may seek to raise, as part of these discussions, the possibility that a third-party administrator system should not be established. The Commission remains convinced that the best way to avoid conflicts of interest and to ensure that customer change orders are processed in an accurate and neutral manner is through the use of a third-party administrator. Thus, although it will permit the parties to address that issue, the Commission continues to expect the great majority of the discussions to focus on technical issues concerning the system’s day-to-day operation.

Finally, the Commission's February 2, 1999 order in Case No. U-11757 includes a misstatement. Specifically, the Commission noted in that order that because slamming complaints generally involve small sums of money and because Section 203a of the Act mandates mediation of all disputes concerning \$1,000 or less, most parties could avoid litigating formal complaints regarding slamming. See, February 2, 1999 order in Case No. U-11757, pp. 4-5. However, the Commission's statement overlooked the fact that the minimum fine required by Section 3 of its anti-slamming procedures is \$10,000. As a result, every slamming complaint involves a dispute in excess of \$1,000.

The Commission therefore finds that, to eliminate any confusion, interested parties should be placed on notice that mediation is not mandatory for slamming complaints. Instead, the correct application of Section 203a to a slamming complaint results in a situation in which mediation is solely "at the option of the complainant." See, MCL 484.2203a; MSA 22.1469(203a).

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACCS, R 460.17101 et seq.
- b. The petitions to rehear, reconsider, clarify, and stay the April 23 order should be granted in part and denied in part.
- c. Application of Sections 5 through 8 of the revised anti-slamming procedures adopted by the April 23 order should be stayed.

d. Interested parties should file with the Commission, by August 11 and 25, 1999, respectively, comments and reply comments regarding whether the procedures contained in Sections 5 through 8 should be rejected, revised, or retained as written.

e. Sections 3.1 and 3.2 of Michigan's anti-slamming procedures should be stayed, and Section 3 should be revised and applied as described in this order, pending resolution by the U.S. Court of Appeals of issues regarding the FCC's slamming liability rules.

f. TAM's request for clarification regarding the exclusive application of Section 1(d) to change orders involving intrastate service should be granted.

g. Except for the modifications and clarifications made in today's order, all relief requested in the petitions, applications, and motions addressed in this order should be denied.

THEREFORE, IT IS ORDERED that:

A. The petitions to rehear, reconsider, clarify, and stay the Commission's April 23, 1999 order are granted in part and denied in part.

B. Application of Sections 5 through 8 of the revised anti-slamming procedures adopted by the Commission's April 23, 1999 order is stayed.

C. Interested parties shall file with the Commission, by August 11 and 25, 1999, respectively, comments and reply comments regarding whether the procedures contained in Sections 5 through 8 of Michigan's anti-slamming procedures should be rejected, revised, or retained as written.

D. Sections 3.1 and 3.2 of Michigan's anti-slamming procedures are stayed, and Section 3 is revised and shall be applied as described in this order, pending resolution by the U.S. Court of Appeals

of issues regarding the liability provisions of the Federal Communications Commission's anti-slamming rules.

E. The Telecommunications Association of Michigan's request for clarification regarding the exclusive application of Section 1(d) of Michigan's anti-slamming procedures to change orders involving intrastate service is granted.

F. Except for the modifications and clarifications made in today's order, all relief requested in the petitions, applications, and motions addressed in this order is denied.

G. The revised procedures for changing telecommunications service providers, attached as Exhibit A to this order, are approved and shall remain in effect until further order of this Commission.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner, concurring

By its action of July 28, 1999.

/s/ Dorothy Wideman
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner, concurring.

By its action of July 28, 1999.

Its Executive Secretary

In the matter, on the Commission's own motion,)
to consider revisions to the procedures designed to)
prohibit switching an end user of a telecommunica-)
tions provider to another provider without the)
authorization of the end user.)
_____)

Case No. U-11900

Suggested Minute:

“Adopt and issue order dated July 28, 1999 granting in part and denying in part various petitions for rehearing, reconsideration, clarification, and stay of the Commission's April 23, 1999 order adopting revised anti-slamming procedures, as set forth in the order.”

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission’s own motion,)	
to consider revisions to the procedures designed to)	
prohibit switching an end user of a telecommunica-)	Case No. U-11900
tions provider to another provider without the)	
authorization of the end user.)	
_____)	

**CONCURRING OPINION OF
COMMISSIONER ROBERT B. NELSON**

(Submitted on July 28, 1999 concerning order issued on same date.)

I concur with my colleagues today in ordering further comment on various sections of the Commission’s “Procedures for Changing Telecommunications Service Providers.” I agree that adequate notice was not provided before these sections (5-8) were implemented. However, I do want to separately address the issue raised by a number of parties--that these sections should have been adopted in a rulemaking proceeding, pursuant to the Michigan Administrative Procedures Act (1969 PA 306). While I agree that, in most cases, standards of general applicability should be promulgated in rules, the peculiar circumstances surrounding the issuance of the Commission’s procedures dealing with slamming warrant a different course of action.

The procedures adopted by the Commission on September 23, 1998 in Case No. U-11757 and later revised by the order in this docket on April 23, 1999 predate my tenure on the Commission. They were occasioned by the passage of Acts 259 and 260 of the Public Acts of 1998, both of which amend the Michigan Telecommunications Act (“MTA”, Act 179 of 1991). Section 505(2) of Act 260 provides, in part:

“The commission shall issue orders to ensure that an end user of a telecommunications provider is not switched to another provider without the end user’s oral authorization, written confirmation, confirmation through an independent third party, or other verification procedures subject to commission approval . . .” (Emphasis added).

In adopting the above section, the Legislature clearly intended the Commission to address the issue of slamming by issuing orders, not rules. Indeed, the 1995 amendments to the MTA do provide the Commission with rulemaking authority, but they specifically provide that the Commission’s ability to promulgate rules to implement the Act expires on July 1, 1996(Section 213.) Moreover, the Act allows the Commission to adopt other standards of general applicability through its orders (See Section 202(a).)

Although I was not a member of the Commission when the “interim” procedures were issued in September, 1998, I have reviewed the record of that proceeding. As best I can tell, no party challenged the Commission’s ability to issue those procedures by order. Those procedures, like the procedures set forth in Sections 5-8, constitute standards of general applicability. Curiously, certain parties now urging the Commission to commence a rulemaking proceeding for Sections 5 through 8 are quite content to let the Commission’s procedures in Sections 1 through 4 stand. If Sections 5 through 8 are infirm because of the Commission’s decision to forego rulemaking, Sections 1 through 4 are equally infirm.

The fact that the Legislature has precluded the use of new Commission rulemaking arising out of the MTA, the fact that the Legislature has directed the Commission to address the slamming issue, and the fact that this direction has been specifically framed in terms of the issuance of “orders” provide sufficient basis for me to join the majority decision. Even if these facts were not present, I would be inclined to reject the arguments of the proponents of rulemaking in this proceeding since adopting the arguments would lead to a policy in which the decision to invoke rulemaking is dependent on the substance of a particular provision, not on the basis of whether it establishes a standard of general applicability.¹

Accordingly, I concur.

MICHIGAN PUBLIC SERVICE COMMISSION

Commissioner

¹Although administrative agencies have been afforded some discretion in implementing policy goals through either rulemaking or the issuance of orders, the issuance of orders generally results from case-by-case adjudications and does not involve the adoption of identified standards affecting an entire industry. (See Gellhorn, Ernest and Boyer, Barry, Administrative Law and Process (1981).)