**BEFORE THE PUBLIC UTILITIES COMMISSION**
**OF THE STATE OF CALIFORNIA**

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

# OPENING COMMENTS OF THE UTILITY REFORM NETWORK, NATIONAL CONSUMER LAW CENTER AND CONSUMERS UNION ON DRAFT DECISION OF COMMISSION WOOD


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**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

### CASES



### STATUTES



### OTHER AUTHORITIES

**REGULATIONS**

## I. INTRODUCTION

On July 24, 2003, the Public Utilities Commission ("Commission") issued a Draft Decision ("Draft Decision") and proposed General Order in this "Bill of Rights" proceeding.[1] These comments are submitted on behalf of Consumers Union, ("CU"), National Consumer Law Center ("NCLC"), and The Utility Reform Network ("TURN") (collectively, "Consumer Groups").[2] Consumer Groups strongly support the proposed Bill of Rights and implementing rules. Consumer Groups by no means achieved everything they sought in this proceeding, but they also see the adoption of the Bill of Rights as an important step forward that will provide better service for consumers and enhance competition in the telecommunications market. Consumer Groups urge the Commission to approve the Draft Decision expeditiously, incorporating our limited recommendations for refining and clarifying the proposed rules.[3]

The Bill of Rights and related rules[4] represent the Commission's efforts to develop new regulations for a telecommunications industry that has changed, figuratively speaking, almost at the speed of electrons over the past few decades. In less than a generation, consumers have moved from dealing exclusively with "Ma Bell" for all of their telecommunications needs to facing a bewildering array of local exchange companies, long distance carriers, cellular companies, and companies offering pre-paid calling cards. The pricing plans and types of service offerings available change almost weekly. It is essential that telephone regulation keep

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[1] The General Order ("G.O.") is appended to the Draft Decision as Appendix A.

[2] UCAN has filed separate comments in which presents economic justifications supporting the Draft Decision. Consumer Groups support the UCAN submission. UCAN indicates in its submission that it supports Consumer Groups' comments.

[3] Attached as Appendix A is a redlined version of those Conclusions of Law, Findings of Fact and Ordering Paragraphs to which Consumer Groups recommend changes based on these comments. Appendix B contains a redlined version of only those Draft Rules, included in Appendix A to the Draft Decision, to which Consumer Groups recommend proposed changes in these comments.

pace with the status of the industry. Consumer Groups applaud the Commission's efforts to do so.

## II. THE COMMISSION SHOULD NOT FURTHER DELAY A DECISION SIMPLY TO ALLOW CARRIERS MORE TIME TO DEVELOP A NEW COST ANALYSIS

The Commission's efforts to bring its telephone rules and regulations in line with the changing structure of the industry and with current marketing and sales practices have been highly controversial. Some of the carriers have vigorously opposed many of the rules that would implement the Bill of Rights. The wireless carriers in particular have voiced their disagreement with much of what is proposed in the Draft Decision. They also have urged the Commission to subject any new rules to a cost-benefit analysis.[5] Given how vigorously these carriers advance this idea, Consumer Groups deem it important to comment in opposition to the proposal. The alleged need to conduct a cost-benefit analysis is more fully addressed in UCAN's comments. However, Consumer Groups wish to address the feasibility of and affects of such an analysis.

At its most practical level, the effect of allowing the carriers more time to conduct a new cost analysis would be to substantially prolong a proceeding that has already taken three and one-half years. Were carriers to submit an industry-sponsored cost-benefit analysis, other parties would rightly insist on more time to allow for discovery and analysis of the industry's cost data. Each day that this rule making is delayed, hundreds if not thousands of Californians are

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[4] The Bill of Rights appears in Part 1 of the G.O. The G.O. also includes, as Part 2, a set of "Consumer Protection Rules;" as Part 3, "Rules Governing Billing of Non-communications-related Charges;" and, as Part 4, "Rules Governing Slamming Complaints."

[5] On August 1, 2003, several wireless carriers filed a motion to extend the 30-day comment period that was already allowed for an additional five weeks, in large part to conduct a cost analysis. ALJ McVicar summarily denied the motion on August 6.

subjected to confusion, inefficiencies, needless transaction costs and, in many cases, blatantly illegal activities by carriers. Further delay should not be allowed.

This Commission, as a state agency, has long had the statutory obligation "to assess the potential adverse economic impact on California business enterprises" of proposed rules and regulations. Gov't Code § 11346.3(a). To meet this requirement, an agency must base its action on "adequate information concerning the need for, and consequences of, proposed governmental action." *Id.* The Commission, in fulfilling this mandate, "shall consider, but not be limited to, information supplied by interested parties." *Id.* However:

> It is not the intent of this section to impose additional criteria on agencies, above that which exists in current law, in assessing adverse economic impact on business enterprises, but only to assure that the assessment is made early in the process of [adopting] . . . a regulation.

*Id.* No party has argued that the Commission has not met these statutory obligations. The Commission has given all parties numerous opportunities to file comments and reply comments at various phases of the proceeding and to participate in several days of workshops on the rules as proposed in the July 6, 2002 Draft Decision. The Commission has more than adequately carried out its obligations to provide parties the opportunity to comment on the potential impact on industry.

Section 47 of AB 1756, 2003 Stat. ch. 228, which adds Section 321.1 to the Public Utilities Code, does not substantially alter the Commission's pre-existing obligations, despite its recent passage and direct applicability to the Commission. Like Gov't Code § 11346.3, AB 1756 requires the Commission "to assess the economic effects or consequences" of new rules and regulations. Also like § 11346.3, it does not require the Commission to utilize resources not previously used or to change any existing commission structures:

> It is the intent of the Legislature that . . . this [assessment of new regulations] be accomplished using existing resources and within existing commission structures.

Pub. Util. Code § 321.1. To emphasize that this recent amendment to the law is not meant to substantially alter the Commission's current mechanisms for considering regulations, the Legislature explicitly rejected a proposal that had been circulating to require the Commission to establish a separate, internal regulatory review office:

> The commission shall **not** establish a separate office or department for the purpose of evaluating economic development consequences of commission activities.

*Id.* (Emphasis added).

Consumer Groups also urge the Commission to consider the substantial costs and risks of cost-benefit analysis itself. If, contrary to the laws just cited, the Commission decided that it needed a cost-benefit analysis in this case, it should conduct that study itself, to insure balance. Yet the Commission clearly does not have the resources to conduct the type of detailed cost-benefit analysis the carriers propose. An industry-sponsored cost-benefit analysis would not only delay this proceeding, but be inherently biased and, equally troubling to Consumer Groups, completely unreviewable.[6] The cellular carriers who propose to complete the study are not subject to cost-of-service regulation, and any cost estimates they provide would therefore be impossible for any party to rebut, especially without the expenditure of significant resources of both time and money.

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[6] An earlier study conducted for the industry by Debra Aron took five months to complete and, on its face, was based on data that only industry members may access. No outside party could have easily reviewed the data sources or analyzed the methodology of the study. In order to insure a less one-sided and biased approach to cost-benefit analysis ("CBA") of environmental regulations, the Environmental Protection Agency has spent tens of millions on CBA. Matthew D. Adler & Eric A. Posner, "Rethinking Cost-Benefit Analysis," 109 Yale L. J. 165, 167 (Nov. 1999). However, the Commission has no such unbiased option available to it.

In addition, Consumers Groups do not expect an industry-sponsored cost-benefit analysis to adequately reflect the benefits of these rules to consumers.[7] Relying too heavily on the tools of the economist particularly skews decisions when agencies are considering rules that promote the public welfare.[8] The problem is that the benefits of many regulations, such as those proposed here, are "not normally bought and sold on markets" and, therefore, cannot be "monetized."[9] However, it is relatively easy for the regulated industry to develop inflated estimates of costs.[10] The Commission should avoid taking an approach that would be so clearly biased in favor of industry.

Consumer Groups urge the Commission not to allow any carriers additional time to conduct cost-benefit analysis, nor should the Commission on its own delay adoption of the Bill of Rights and rules based on untested carrier allegations that these rules simply are too costly.

## III. THE COMMISSION PROPERLY CHOOSES TO PROTECT CONSUMERS OF ALL TYPES OF TELECOMMUNICATIONS SERVICES

The Commission is correctly seen by telecommunications carriers, consumers and other regulators around the country as being in the forefront of developing new regulations for the rapidly-changing telecommunications industry. The Commission should not be deterred from this task by arguments, most strongly voiced by the wireless industry, that California should not

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[7] *See, e.g.,* Testimony of Prof. Lisa Heinzerling before the House Government Reform Committee (March 11, 2003), at http://www.progressiveregulation.org/commentary/heinzerling.pdf; Testimony of Daniel Swartz, Executive Director of the Children's Environmental Health Network, before the House Government Reform Committee (March 11, 2003), at http://www.cehn.org/cehn/testimonycb.html (discussing the difficulty of monetizing the benefits of health, safety and welfare regulations).

[8] *See, e.g.,* Steven Kelman, "Cost-Benefit Analysis: An Ethical Critique," AEI Journal on Government and Society Regulation (Jan./Feb. 1981), at 33 – 40.

[9] *Id.*

[10] Choosing one flagrant example of industry overestimating costs, the air conditioning industry in the late 1980s estimated that complying with an increased energy efficiency standard would increase costs by $780 per air conditioning unit. Unit costs actually declined after the new standard was adopted, due to economies of scale and technological improvements. *See* 67 Fed. Reg. 36368, 36369, col. 1, 36389, col. 3 (May 23, 2002).

be the only state to impose the same consumer protection regulations on all telecommunications carriers. Perhaps the carriers fear that other states will follow California's lead, with the result that what the Commission does here will set a national standard. Through the National Association of Regulatory Utility Commissioners, commissioners from around the country have already supported the adoption of a Telecommunications Bill of Rights.[11] It is clear that other states will follow California's lead, rather than developing inconsistent, state-by-state approaches. Further, California is often called the sixth largest economy in the world.[12] No carrier can afford to ignore standards set by California, especially if other states follow suit, as appears likely. There is little risk that carriers will decide to forego doing business in California, rather than comply with the proposed rules.

California has more than once led the way in regulating an industry. It was one of the first states, for example, to adopt appliance efficiency standards, imposing requirements on manufacturers that ultimately formed the basis for national standards.[13] Examples in other areas of environmental regulation and consumer protection abound. The Commission should not shirk from making California a leader in protecting the rights of telecommunications consumers.

The proposed Bill of Rights is particularly important for consumers because it would bring cellular carriers under the regulatory umbrella. Cellular service cries out for regulatory attention. Consumers are not able to judge the quality of cellular service in their local areas until they actually purchase a phone. They cannot learn whether they will experience dropped calls or

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[11] *Resolution on Telecommunications Bill of Rights*, adopted by NARUC Board of Directors, July 31, 2002.

[12] Ranked behind the U.S., Japan, Germany, France and the United Kingdom.

[13] *See NRDC v. Herrington*, 768 F.2d 1355, 1431 (D.C. Cir. 1985)(California had "the most stringent state standards in the nation"); *see also*, Northeast Energy Efficiency Partnerships, "Executive Summary," *Energy Efficiency Standards: A Low-Cost, High Leverage Policy for Northeast States* (2002)("California first initiated energy efficiency standards in the early 1970s . . . . During the 1980s, other states . . . joined the movement . . . . Congressional enactment of the National Appliance Energy Conservation Act of 1987 . . . was the result of an explicit bargain among state governments, efficiency and environmental advocates and product manufacturers.")

poor reception until they are already committed to a particular carrier, at which point most residential users would pay stiff termination fees if they chose to cancel their service.[14] Wireless customers are less satisfied with their service the more they use their phones. Customers who use the least per month are more satisfied with service than customers who use their cell phones regularly.[15] According to a national survey of more that 3,000 customers, the majority of higher-volume callers were less than "very satisfied" with their service.[16] The Commission is well-justified in asserting regulatory authority over cellular carriers.

On the wireline side, the market is far from truly competitive. The incumbent local exchange carriers ("ILECs") continue to control 95% of the market.[17] There is no competition for residential customers in many areas of the state, and little meaningful competition anywhere in the state. The quality of comparative information for consumers is poor.

Even if the wireless carriers' self-serving arguments about competition were accepted, competition is not a justification to forego reasonable regulations. Often in markets with several competitors offering different product options, there is a "market failure" that regulators must address. For example, the lending industry is among the most competitive in the country. There are literally thousands of lenders, including banks, credit unions, and mortgage companies. They aggressively compete with each other through print and electronic media. Because of required disclosures (eg. the "Schumer Box" on credit cards, 12 CFR § 226.5a) consumers (borrowers) can now more easily get all the information they need about interest rates and thus more easily

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[14] For example, the Verizon Wireless "America's Choice" plan currently carries a $175 early termination fee. A terminating customer must also have to purchase a new phone when switching to a new carrier. *See http://www.verizonwireless.com/b2c/index.jsp*.

[15] AARP Public Policy Institute, "Understanding Consumer Concern About the Quality of Wireless Telephone Service," Data Digest Number 89 (June 2003).

[16] *Id.*

[17] California Public Utilities Commission, The Status of Telecommunications Competition, Second Report for the Year 2002 (2003).

compare offers, often without even leaving their homes. Many lender transactions are extensively regulated under the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq., the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601 et seq. and other laws. The purpose of these laws was to protect borrowers and enhance competition by providing the means to more easily compare lenders' terms, conditions and other features before signing a contract. For most consumers these disclosures have resulted in a lending market that is more competitive today because consumers have access to better information about credit cards and loans, forcing lenders to make better offers in order to win business.[18]

Disclosure requirements and other marketplace "rules of the road" are necessary in even the most "competitive" markets to correct market failures and enhance competitive choices for consumers. The sales of most products and services—such as food, appliances, airline seats, financial services, stocks and bonds, health care and more—are governed by consumer protection and disclosure regulations. These regulations give consumers better information about price and service quality and allow them to easily move from one competitor to another, making markets more competitive and thus more efficient. Whether or not the Commission considers the telecommunications industry presently competitive, the proposed regulations are fair, reasonable and necessary and should be adopted.

## IV. THE COMMISSION SHOULD PROMPTLY ADDRESS ISSUES DEFERRED TO A LATER PHASE OF THIS PROCEEDING

The Commission has deferred to a later phase of this proceeding two issues that are extremely important to Consumer Groups: in-language requirements (Draft Decision, at 40) and

[18] However, the lending market is less competitive for lower income consumers, who often have fewer choices and pay higher borrowing costs than consumers in the "standard" market.

consumer education (Draft Decision, at 135, "Interim Order" ¶ 11). As to these issues, "Rulemaking 00-02-004 shall remain open" for further consideration." *Id.*

Consumer Groups urge the Commission to address these issues at the earliest possible date. In earlier phases of this proceeding, one or more of the Consumer Groups took strong positions in favor of Commission action. Regarding in-language requirements, NCLC, TURN and UCAN filed joint comments strongly supporting the Commission's authority for ordering that notices and other documents be provided in languages other than English.[19] NCLC and TURN also filed separate comments urging the Commission to implement an aggressive consumer education program in connection with the adoption of the Bill of Rights. Consumers Union in California and other states has taken strong stands in support of "in language" requirements and consumer education programs related to essential services.[20]

California has a significant percentage of its citizens for whom English is not the primary language.[21] Further, some companies target their sales towards linguistic and other minorities. While there can be benefits to companies paying attention to linguistic minority communities in their sales and marketing efforts, there is the risk of marketing abuses and the likelihood that

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[19] *See* "Comments of The Utility Reform Network, Utility Consumers' Action Network, and National Consumer Law Center Pursuant to Administrative Law Judge's Ruling" (Oct. 31, 2002) and "Consumers' Proposed Changes to the Telecommunications Bill of Rights Rules" (Oct. 22, 2002).

[20] CU and other consumer groups in Texas successfully advocated for a law that requires for both telecommunications and electric service disclosure of key price, terms and conditions of and customer education materials in English, Spanish and other languages as determined by the Commission (Tex. Util. Code §§ 17.003, 17.004). Regulations implementing these provisions also contain a requirement proposed by CU and other consumer groups that any carrier marketing in a language other than Spanish or English also make the required disclosure available in that language (16 Tex. Admin. Code § 26.26). According to the 2000 U. S. Census, 31.2% of Texas households speak a language other than English at home. For several companies, marketing in Spanish and other languages has increased since these rules took effect. For example, see Reliant's site, www.reliant.com/espanol.

[21] The 2000 Census, Table P20 ("Household Language by Linguistic Isolation") counts 11.5 million total households in California, of which 2.6 million speak Spanish as their primary language; 1.0 million who list Asian or Pacific languages as the primary language; and .8 million who consider some other non-English language as the primary language. Thus, English is the primary language in only 60% of California households. Fully 10% of the

many of these customers will not fully understand contract terms and conditions. The Draft Decision, at 40, notes the twin concerns of the need for non-English speakers to receive materials in their own language and the potential that onerous in-language requirements might cause companies "to pull back from directing information about their services and products at non-English speaking audiences." The Draft Decision also highlights the fact that companies are under a statutory obligation to provide materials in languages other than English in certain circumstances, Pub. Util. Code § 2890(b). But as the Commission appreciates, Section 2890(b) is limited only to solicitation materials and does not address the increasing number of complaints by non-English speaking customers about being required to sign English language contracts that diverge from the oral representations made by salespersons.

Consumer Groups would have preferred that the Commission adopt in-language rules during the current phase of the proceeding. They strongly encourage the Commission to promptly address this issue in the next phase of this proceeding.

Regarding the other deferred issue of great concern to consumer Groups, consumer education is critical to achieving virtually all of the goals expressed in the Bill of Rights. Consumers will not even know that there is a Bill of Rights without some efforts at consumer education. In terms of the specific components of the Bill of Rights, it is hard to imagine how consumers will be able to exercise "Choice" without extensive education or to "participate in public policy proceedings [and] . . . be informed of their rights" in the absence of a vigorous consumer education program. The Commission is proposing a major change to the regulatory landscape, and it should make sure that there is an adequate consumer education program in

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households are "linguistically isolated," which, according to the Census Bureau, means a household in which no member over the age of 14 speaks English very well.

place as shortly after the rules are adopted as possible. Company programs alone will not be sufficient, because:

> the emphasis of carriers' disclosure efforts will always be persuasion, not education. True education to enable consumers to help themselves by making better choices must be independent of the sales motive, and that is best undertaken by consumer-oriented educators, not by the carriers.

*Draft Decision, at 118*. Again, Consumer Groups would have far preferred that the Commission not defer a decision on the types of consumer education programs that will be needed to successfully implement the Bill of Rights and consumer protection rules. Consumer Groups urge the Commission to move quickly to order the implementation of a consumer education program.

## V. THE COMMISSION SHOULD INSURE THAT BASIC PROTECTIONS FOR "PLAIN OLD TELEPHONE SERVICE" ARE INCLUDED IN THE GENERAL ORDER

The Draft Decision evidences an overall desideratum that basic consumer protection rules should be incorporated into the General Order rather than being buried in obscure tariffs or appearing only in individual company decisions. For example, the Draft Decision, at 18, notes that previous IEC consumer protection rules "are superseded by our new G.O." and, at 20, that "the consumer protection rules we adopt today . . . supersed[e] any previously-filed CMRS provider tariff rules."

While the Draft Decision does include basic rules governing deposits (Rule 5) and service termination (Rule 9), some of the more basic protections that exist in many states are missing, such as the requirement that a carrier representative make personal contact with a subscriber before terminating service, specific criteria regulating use of credit scoring to collect a

deposit, and limits on requiring the payment of a debt that was incurred by someone other than the applicant for service. As a more detailed example, Consumer Groups urge the Commission to adopt minimal protections against termination for low-income customers experiencing a serious illness. Two dozen states (including the District of Columbia) offer seriously ill telephone consumers some level of protection against termination, especially for customers who are experiencing a financial hardship.[22] Because these are new issues that are not currently addressed in the Draft Decision, Consumer Groups do not insist that the Commission must address these issues in this Final Decision. However, these issues are glaring omissions in an otherwise strong and comprehensive set of consumer protection rules and therefore should be addressed as soon as possible.[23]

## VI. THE DRAFT RULES NEED ONLY MINOR REVISIONS TO PROVIDE A COMPREHENSIVE AND EFFECTIVE MEANS OF CONSUMER PROTECTION

Consumer Groups support the Draft Rules, but suggest minor changes to relfect the record, effectuate commission intent, and provide more clarity for both consumers and industry.

1. *Draft Rule 2(d) requires clarification*

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[22] *See, e.g.*, 4 Colo. Code Regs § 723-2-9.3.7 (termination delayed 30 days, with medical certificate); Conn. Agencies Regs § 16-3-101, C.3 (indefinite postponement of termination, if seriously ill customer keeps up with payment plan on arrearage and pays current bills); D.C. Muni. Regs tit. 15, § 311.1 (termination postponed 21 days if customer provides serious illness certificate and enters into payment plan on arrearage); Ga. Comp. R & Regs r. 515-12-1.28 (serious illness protection for up to 30 days); Mass. Regs Code tit. 25, § 25.03 (serious illness protection initially 30 days; may be renewed indefinitely; customer must be experiencing "financial hardship"). *See, generally*, National Consumer Law Center, Access to Utility Service (2002 Supp.), Appx. A (other states with some form of serious illness protections include Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Michigan, Missouri, Nevada, New Hampshire, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Washington, and Wyoming.).

[23] Consumer groups of course do not oppose the Commission addressing these issues in the Final Decision.

In both Opening and Reply Comments on the June 2002 Draft Decision, TURN, NCLC and UCAN (then denominated the "Consumer Coalition") expressed support for the Commission's decision to impose strong disclosure requirements for advertising. As the Consumer Coalition pointed out in their October 31, 2002 Reply Comments ("Reply Comments") and as reflected in the Draft Decision, it is critical during the transition to a competitive telecommunications marketplace that "the Commission must take all reasonable steps to protect consumers from misleading or deceptive practices." Reply Comments, at 5; Draft Decision, at 37 ("consumers' experiences to date with competition-driven marketing practices have been less than satisfactory"). However, the Draft Rule 2(d) will have to be revised to help the Commission accomplish its goal of protecting consumers from potentially deceptive advertising.

The current Rule 2(d) requires carriers to clearly, conspicuously and accurately disclose all "key rates, terms and conditions" in solicitations. However, the proposed definition of "key rates, terms and conditions" is vague, potentially being both underinclusive ("key rates, terms and conditions" would "generally include, but not be limited to" long list of items) and overinclusive (the long list of items must be disclosed only "when applicable"). The Draft Rule leaves much up to the discretion of the carrier and may result in needless controversy, widely different views of what must be disclosed, and, ultimately, litigation. The comment corresponding to the definition of "key rates, terms and conditions" lends further confusion by relying on a "typical user" standard and use of phrases like "under most circumstances" that highlight the case-by-case rules determinations carriers will have to make. The uncertainty in the definition of "key rates, terms and conditions" carriers over directly into Rule 2(d), creating an ambiguous disclosure requirement that carriers could easily exploit.

In their respective comments on the previous set of proposed rules, the Consumer Coalition and the Attorney General's office offered very similar proposals to each other on advertising disclosure, and each took a different approach than the current Draft Rules. The previous Consumer Coalition/Attorney General proposals have three basic elements,

- Solicitations must be truthful and not misleading;
- Solicitations must disclose any rate, term or conditions that would otherwise make the advertisement misleading (Attorney General) or that would influence a customer decision to purchase or not to purchase the service (Consumer Coalition);
- Once a carrier either voluntarily, or pursuant to the above criteria, discloses a particular rate, term or condition, it must do so in a clear, conspicuous and accurate manner and must also disclose all related rates, terms or conditions that qualify or limit the original term or condition.

The Consumer Coalition also proposed a specific and complete list of terms that was very short and that must be disclosed in all electronic media solicitations. While these earlier proposals do not solely rely on concrete and exhaustive lists, neither do they leave the decision as to which terms will be disclosed up to the individual carrier. The three points listed above provide a specific standard that provides clear criteria to apply in deciding what to disclose. The standard is flexible enough, however, that can be applied to many different types of advertising, types of services and types of carriers. This standard minimizes vague language, qualifiers and the potential for misinterpretation. When applied in good faith, it will require carriers to provide full disclosure in its solicitations.

The Consumer Coalition recommended draft language for Rule 2(d) that would implement the three basic elements of marketing disclosure above. Here, Consumer Groups urge the Commission to rethink its proposed Rule 2(d) and instead adopt the 2(d) language included in Appendix B, or, at a minimum, provide a more detailed explanation in the Final Decision of

Rule 2(d). Consumer Groups also have more general concerns about the definition of "key rates, terms and conditions" as it applies to other sections of the Draft Rules. In their earlier comments (October 22, 2002), the Consumer Coalition had recommended two specific and non-discretionary lists of "Important" and "Essential" terms which then carried over into several rules. Conceptually, the Consumer Groups continue to believe that any definition of "key rates, terms and conditions" (or any similar term) should be much more specific and leave less room for differing interpretations. Consumer Groups reserve their right on reply to offer further comments on this issue, after reviewing the comments filed by other parties.

2. *Draft Rule 8(b) needs more precise discussion of "informed consent"*

Rule 8(b) limits the types of changes that a carrier can make during the term of a contract without first receiving the "informed consent" of the consumer. As the Draft Decision recounts, the phenomenon of carriers making unilateral and detrimental changes to the terms and conditions of a "term" contract in mid-stream exemplifies all too well why these consumer protections are necessary. In their comments, carriers demonstrate an extreme view of their right to change terms and conditions once consumers sign up for service, under the guise of maintaining "flexibility" for the carrier. Draft Decision at 74. The notion that one party, usually the one with bargaining power, can unilaterally change the contract to the detriment of the other party makes a mockery of good business practices and fair dealing. Therefore, Rule 8(b) serves an extremely important purpose and Consumer Groups strongly support this proposal.

However, Consumer Groups have a recommendation to clarify and better implement the Commission's stated intent. As drafted, Rule 8(d) requires carriers to obtain a customer's "informed consent" before making a material change to the contract that would result in higher

rates or more restrictive terms. However the Draft Rules do not sufficiently define what should constitute informed consent and leave too much to the discretion of the carriers. The Draft Decision also offers little explanation except to say the carrier must obtain informed consent "in whatever form." *Draft Decision at 75*. The medical community has struggled with a concrete interpretation of the term "informed consent" for decades. The telecommunications industry and its regulators have not. It is safe to say there is no body of law to interpret this term as it applies to telecommunications contracts.

Consumer Groups recognize the Draft Decision's attempts to give carriers some flexibility in how they apply this rule, but the current language is too vague. Under this current Draft Rule, a carrier could argue that is sufficient to e-mail a consumer notice of the change, or send a junk mail look-alike notice of the change, in either case asking the consumer to contact the carrier if the consumer does not agree to the change. The carrier could argue that there was informed consent if it does not hear back from the consumer. That would turn the consumer protection intent of these Rules on its head.

The Draft Rule should be changed to specify that carriers must obtain "verifiable, documented, and informed consent" so that if there is a dispute, the consumer's consent to the change can be proven. The Comment below Draft Rule 8(b) should be expanded to provide examples of what may be considered "verifiable" and "documented" such as voice recordings, electronic signatures, fax signatures, etc., although some level of flexibility should be left to the carrier.

Consumer Groups also recommend that the Comment clarify that imposition of "regulatory" fees and other discretionary charges (*e.g.* LNP fees) triggers the informed consent requirement. This clearly would be a "material" change that may "result in higher rates or

charges" and one that the consumer should be allowed to refuse as a mid-term change. The recent practice of attempting to shoehorn in voluntary cost-recovery efforts with government-mandated taxes and fees must be strictly regulated.

The Draft Rule should also be amended so as to require carriers who are making material changes to contracts and who have some sort of "exit" or "termination" penalty provision in that contract to inform customers that they have the option of : 1) continuing the contract without the requested carrier-initiated change or, 2) the option to terminate the contract. The notice should also make clear that such refusal to accept the change and terminate the contract will not trigger the penalty. Any customer who declines to accept the change must also be subsequently advised that service can be cancelled without the triggering any cancellation penalties.

One may assume that obtaining documented consent would be in the carrier's best interest and that carriers would adopt this practice without being required. However, the requirement should be explicit so consumers understand what is required of them. This Rule will also inform the consumer that the documentation exists to allow them to prove consent or lack thereof in case of a dispute with the carrier.

It should also be made clear to carriers that the verifiable and documented proof must show not only to that the consumer consented but also that such consent was "informed," i.e., that the nature of the change was clear and the consequences understandable. The means by which the carrier communicates the change is important. The Rule currently requires that the change be communicated to the subscriber in writing (as defined). Consumer Groups support that requirement and suggests that the comment be further expanded to suggest carriers maintain that correspondence for the length of the contract (electronic or otherwise), so that if there is ever

a question as to whether the consumer accepted specific changes, the documentation can be referenced.

3. *A carrier's use of collateral material must be limited and clarified*

The Draft Rules should be revised to make it clear that collateral material and summary documents have no force of law and should not be relied upon as the only means to convey key terms and conditions. Draft Rule 1(h) clearly limits a carrier's ability to incorporate material by reference in either a tariff or contract. As the Draft Decision states, the goal is to avoid "contracts [that] . . . consist of an essentially unlimited number of complex, interlocking references to materials the subscriber may never have been aware of or had access to." Draft Decision at 36. Consumer Groups agree with this goal and strongly support Rule 1(h).

However, subsequent sections appear to weaken the strong protection against incorporation by reference contained in 1(h). For example, the Comments section of Rule 2(b) allows for agreements or contracts to "be accompanied by other materials" and Rule 3(d) requires that key rates, terms and conditions be highlighted . . . "either in the contract *or* in an accompanying summary document." These rules leave too much discretion to the carriers so as to make Rule 1(h) almost meaningless.

The use of marketing and sales material by non-tariff carriers is particularly problematic for consumers. While comprehensive, informative, and easy to read materials that clearly explain a customer's service options can be very helpful to consumers, a glossy, high-level sales pitch that is short on the important details just serves to misinform potential buyers. The Consumer Groups suggest minor changes to the Comment in both Rule 2(b) and Rule 3(d) to make the Commission's intent more clear.

The Draft Rule 2(b) Comment is very careful to specify that any accompanying materials to the contract must not misstate or purport to restrict or enlarge the rights or obligations of any party to the agreement or contract. This mitigates the potential for mischief. However, the Comment must also make it clear that the contract or agreement must not make reference to any accompanying material in compliance with Draft Rule 1(h) and Draft Rule 3(d). In other words, the contract cannot leave out key rates, terms and conditions and instead point to a summary document for reference to those terms.

The reference to summary documents in Draft Rule 3 is more problematic and can be used by carriers to eviscerate both Rule 1(h) and the requirement to highlight key terms and conditions in Draft Rule 3(d). Clearly there is merit in requiring carriers to highlight key rates, terms and conditions in a contract to allow customers to more easily understand the service. However, customers will not be helped by allowing carriers to bury those key rates, terms and conditions in the contract and only make them clear and conspicuous in a summary document. There is real danger that, due to industry use of mall kiosks, telemarketing and third party agents, the summary document may or may not be provided at an appropriate time (despite the requirement that the document "accompany" the contract).

Because the Draft Rule already requires that all applicable terms and conditions of service be included in the contract, it would not be too much of a burden on carriers to require them to highlight those key rates, terms and conditions in the contract itself. This would put everything important to the consumer in one document. If the carrier would also like to provide an accompanying summary document that complies with applicable disclosure rules, that would also be helpful, but should not serve as a substitute for a complete and comprehensible contract document.

If the industry believes that these summary documents are vital to the way they initiate service (e.g. use of generic contracts with no specific terms tailored to a particular plan), then some additional rules must be put in place. The "summary" document must be clearly referenced and identified in the contract (e.g. title, date, revision number etc.), must continue to comply with relevant disclosure requirements in Rule 2, and must not only "accompany" the contract but be *affixed* to it.

4. *The discussion of current federal privacy law in the Draft Decision must be updated for the Final Decision*

Consumer Groups support the current draft rules on privacy. Consumer Groups' proposed edits to this Draft Rule focused mainly on readability and clarity. The Commission's conclusions in this area are on very solid legal ground as discussed in Consumer Coalition's and Attorney General's Reply Comments. However, Consumer Groups suggest one change to the Draft Rules to fix what appears to be a typographical error. They also suggest other changes to the Draft Decision to properly reflect the current state of legal affairs on this issue and to support the requirements of Draft Rule 12.

The last sentence of Rule 12(f)(1)(D) must be revised to read, "The notice must inform the subscriber of the right to opt-**out** to use of confidential subscriber information for marketing related services." This change will correctly reflect the current language of Rule 12c, which allows a carrier to use confidential subscriber information to market related products without the subscriber's express written consent, unless the subscriber has indicated that he or she does not wish to receive solicitations about additional products. This is a classic opt-out requirement. Therefore, Rule 12(f)(1)(D) should be revised to clarify that the privacy notice must inform

consumers of their right to opt-out (not opt-in) of use of confidential subscriber information to market related services.

The Draft Decision properly concludes that this Commission should move forward to incorporate strong and comprehensive privacy protections in this General Order. Draft Decision at 87. The Draft Decision then purports to "summarize the legal framework" surrounding federal and state privacy law to support its conclusion. However, the discussion of federal privacy law is incomplete and should be supplemented with subsequent legal developments.

The Draft Decision tells the story of the FCC's attempt to implement its own set of strong privacy rules, but it leaves the reader with a cliffhanger — the FCC struggling to implement the remand decision from *US West v. FCC*. While offering some drama, it omits an important part of this "story." As set forth in several sets of comments, including the Consumer Coalition's, the FCC released its Third Report and Order[24] on use of confidential subscriber information in July 2002. The results of this important development should be incorporated into the Draft Decision.

While the FCC's Third Report and Order does revise its rules to allow increased flexibility for carriers to use confidential information, the Order also gives state commissions wide latitude to enforce their own standards in this area and explicitly refuses to preempt state privacy laws. As discussed in detail in Consumer Coalition's Reply Comments, the FCC's Third Report and Order provides strong support for the opt-in and opt-out requirements in Draft Rule 12 and this discussion should be included in the Final Decision.[25] Due to page limitations,

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[24] *Implementation of the Telecommunications Act of 1996:Telecommunications Carriers Use of Customer Proprietary Network Information and Other Customer Information; and Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, 2000 Biennial Regulatory Review*. Third Report and Order and Third Further Notice of Proposed Rulemaking, CC-Docket Nos. 96-115, 96-149 00-257, FCC 02-214, Adopted July 16, 2002 at ¶70. (*FCC Third Report and Order*)

[25] The Final Decision should also reflect the fact that other state commissions are also continuing to address privacy issues. The Washington Utilities and Transportation Commission adopted a strong set of privacy rules post-FCC Third Report and Order. Those rules are more stringent in some respects than Draft Rule 12 and are currently under

Consumer Groups do not suggest the exact language for the addition, but refer the Commission to the Reply Comments as well as several other parties' comments from October 31, 2002.

5. *The Commission should require carriers to offer alternate payment plans*

Throughout these Draft Rules, the Commission has gone to great lengths to limit the scenarios under which a subscriber's basic service can be terminated for non-payment. As recognized in the Draft Rules, one possible method is to enter into an alternate payment plan with the carrier. The Draft Decision recognizes the "obvious benefits" of alternative payment plans but does not require carriers offering basic service to offer such plans to subscribers and does not explain its rationale for that decision. Draft Decision at 82. The omission is unfortunate. Indeed, the two largest carriers in California currently offer their customers the option of entering into alternate payment plan if the customer is having trouble paying a bill pursuant to tariff obligations.[26] Also, almost two dozen states currently have this requirement under at least some circumstances.[27] As many policy makers and industry representatives have recognized, these plans are generally a win-win situation for both the carrier and the subscriber.

The Draft Decision does not discuss the rationale for rejecting Consumer Group's original proposal except to say "carriers are under no obligation to make alternate payment

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legal review. See, *In the Matter of Adopting and Repealing WAC 480-120-201 through WAC 480-120-216 and WAC 480-120-211 through WAC 480-120-216 Relating to Telecommunications Companies-Customer Information Rules*, Docket No. UT 990146, General Order No. 505, November 7, 2002, appealed, *Verizon Northwest et al., v. Marilyn Showalter, Chairwoman et al*., Civ. Action No. C02-2342R, (W.D. Washington).

[26] SBC California Network and Exchange Access Tariff, Cal P.U.C. Schedule A2, Rule 2.1.6.B.2.b; CA-GTE/Local-General Exchange, Schedule D&R, Rule 11.A.1 and Rule 11.E.

[27] *See, generally* National Consumer Law Center, Access to Utility Service (2002 Supp.), Appx. A, for a summary of telephone consumer protection rules in each of the 50 states. A sample of such rules includes: Conn. Agencies Regs. § 16-3-101 C.8 (partial payment of 20% or more of bill postpones termination; customers in some circumstances entitled to payment plans, generally of up to 3 months); Code Me. R. 65-407, ch. 81, § 6 (customer cannot be terminated if agrees to "reasonable" payment plan; list of factors to be considering in determining "reasonable").

arrangements and we are not prepared to mandate them here." Draft Decision at 82. Consumer Groups would agree that there is more justification to require payment plans for customers of *basic* service than other perhaps less essential services, and would support the narrowing of mandatory alternative plans to only basic service providers.

Generally, these rules give the companies wide discretion in determining what is considered a "reasonable" payment plan. Therefore, these rules place minimal burdens on companies, who define what is "reasonable" in the first instance, and can provide significant protections for payment-troubled customers. These rules particularly benefit low-income customers who are often at risk of losing basic phone service.

6. *Obligations to post information on web sites should not be limited to "key rates, terms and conditions"*

Draft Rule 1b creates a requirement for certain non-tariffed carriers to post "key rates, terms and conditions" on a website. Consumer Groups strongly support the requirement that carriers use "informative and consumer friendly" web sites as one of many tools to distribute information to its customers. *Draft Decision at 28.* The Draft Decision even cites one carrier as agreeing that web sites are an appropriate method of "full disclosure" to the consumer. *Id.* Inexplicably, however, the Draft Rules do not require full disclosure, but only disclosure of key rates, terms and conditions. As discussed above, the definition of key rates, terms and conditions is vague and leaves too much to the carriers' discretion. In this context, if the rule is adopted as drafted it would allow carriers to refrain from posting information on arbitration requirements or limitations of liability, as just two examples. This is an unnecessary limitation that should be corrected. While customers may not rely upon each and every rate, term and condition when initially choosing a particular service provider, the customer should have quick and easy access

to the complete set of terms and conditions if a problem arises and the consumer wishes to determine his or her legal rights. The carrier's web site should be set up to be a valuable information tool for consumers.

The Draft Decision seems to suggest that this change was made to satisfy carrier concerns about posting volumes of information for legacy plans. Draft Decision at 29-30. While that concern may be valid, the proposed fix goes too far. Consumer Groups agree with the proposed rule that limits the legacy plan requirement to only those plans that become legacy plans once the site it up and running. However, the amount of information available about either the legacy plans or current plans should not be reduced. Indeed, customers of legacy plans may have the most need to access to web to look up information about their plans. Once a plan becomes old and dated, it may be difficult to obtain a copy of the contract or other materials that were in existence and may have been relied upon by the consumer. A requirement to post all terms and conditions of a particular plan, including the contract and related documents, seems less onerous than requiring carriers to keep hard-copies of those materials. The Draft Decision recognizes that carriers' web postings will be "prime sources of information for consumers," but it does not justify why the requirement is so limited. Draft Decision at 30. Rule 1(b) should be revised to require carriers to post all rates, terms and conditions of service on their web sites and to then *highlight* those key rates, terms and conditions for both currently available and legacy plans.

7. *The Commission should clarify when carriers must return deposits*

Consumer Groups are recommending a change to Rule 5(d) to avoid potential confusion.. Rule 5(d) requires carriers to return customer deposits under two different scenarios. First, if a customer has had one continuous year of timely payments for basic service, the carrier must

refund the deposit since the customer is deemed to have demonstrated acceptable credit. Second, if a customer cancels service prior to one year of service initiation, the ILEC must return the deposit within 30 days, assuming all outstanding balances are paid. These two scenarios are consistent with current ILEC tariffs.[28]

However, the use of the word "and" in the first sentence leaves it potentially unclear as to whether the carrier is required to return deposits under two *separate* scenarios. Therefore, Consumer Groups suggest a minor change to clarify the intent of the language. The Consumer Coalition made this requested change in previous comments, but it was not incorporated into the Draft Rules. For the sake of clarity, Consumer Groups request that the Final Decision incorporate the change, as it appears in Appendix B of these comments.

## VII. CONCLUSION

For the foregoing reasons, Consumer Groups urge the Commission to adopt a Final Decision with the suggested changes to the Draft Rules.

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Respectfully submitted,

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[28] SBC California Network and Exchange Access Tariff, Cal P.U.C. Schedule A2, Rule2.1.7.B.6.c,
"(3) Upon discontinuance of telephone service, the Utility will refund, with interest, the customer's deposit or the balance in excess of unpaid bills for that service.
(4) After the customer has paid bills for telephone service for twelve consecutive months without having had this service temporarily or permanently discontinued for nonpayment of bills, the Utility will refund the deposit with interest."

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