ORDER ADOPTING RULES

I. INTRODUCTION

On June 10, 1999, the Department of Telecommunications and Energy ("Department") proposed regulations implementing G.L. c. 93, §§ 108-113 and G.L. c. 159, § 12E, the Commonwealth's slamming statute. That law, enacted on December 10, 1998, protects consumers from slamming (i.e., the unauthorized switching of their local or long distance telecommunications carrier). The slamming law requires the Department to promulgate regulations implementing certain provisions of the statute and also accords the Department discretion to establish procedures to curb slamming.

Under the slamming law, carriers are required to obtain either a letter of agency ("LOA") from a customer or the tape recording of a call between a third party verification ("TPV") agent and the customer, verifying certain information.[(1)] The Department is directed to "promulgate rules and regulations setting forth such further requirements for the conduct of third party verification calls and recordings to protect against incorrect, inaccurate or falsified verification." G.L. c. 93, § 109(c)(4). The law also contains a provision establishing a process for Department consideration of consumer slamming complaints.[(2)] Under this section, the Department is given discretion to create an informal dispute resolution mechanism for these complaints. G.L. c. 93, § 110(k).

The Department is required by the statute to "track instances" in which a carrier slams, as well as to compile monthly records of companies or their agents engaged in slamming.[(3)] The Department is directed further to produce annual reports of slamming activity in the Commonwealth and make such reports available to the Joint Committee on Government Relations and to the Attorney General. Id. The statute directs the Department to promulgate rules and regulations implementing these requirements. G.L. c. 93, § 113(e).

The entities that provide TPV services must register with the Department, pursuant to G.L. c. 159, § 12E. This last section of the slamming law provides that these companies be physically separate and financially independent from the telecommunications carrier. Moreover, the TPV companies cannot be directly or indirectly controlled or managed by the carrier and their compensation cannot be based upon the number of confirmed sales. The Department is directed to create an application form for TPV companies that makes clear that these companies comply with the separation provisions contained in this section. G.L. c. 159,

§ 12E(b).

The Department received initial comments concerning the proposed rules from the following: the Attorney General; AT&T Communications of New England, Inc.

("AT&T"); Bell Atlantic-Massachusetts ("Bell Atlantic"); Choice One Communications L.L.C. ("Choice One"); Focal Communications Corporation ("Focal"); Massachusetts Office of Dispute Resolution ("MODR"); MCI WorldCom, Inc. ("MCI"); RCN Telecom Services of Massachusetts, Inc. ("RCN"); RNK, Inc. ("RNK"); and Telecommunications Resellers Association ("TRA"). After receipt of the initial comments, the Department held a public hearing on July 7, 1999. On July 8, 1999, Senator Michael W. Morrissey, Co-Chair of the Committee on Government Regulations, filed a letter of support for the proposed regulations. Reply comments were filed by the Attorney General; AT&T; Bell Atlantic; Choice One; MediaOne Telecommunications of Massachusetts, Inc. ("MediaOne"); RCN; RNK; and Sprint Communications Company L.P. ("Sprint").

II. FINAL REGULATIONS

This Order adopts the final rules implementing provisions of the slamming law. These rules, found in new section 220 C.M.R. §§ 13.00 et seq., are designed to enhance the protections for consumers under the statute while satisfying the Department's obligation under the statute to promulgate regulations. Overall, the commenters were supportive of the Department's proposed rules. The commenters, however, objected to a number of provisions and offered suggestions for changes. The Department modified several of its proposals in response to suggestions from the commenters.

A. Definitions of "Customer", "Letter of Agency", and "Slamming"

The Department received comments on the proposed definitions of "customer", "letter of agency", and "slamming." In addition, one commenter sought clarification as to the applicability of the slamming rules to intraLATA toll calls.[(4)] AT&T, Bell Atlantic, MediaOne, and Sprint argue that the Department's definition of "customer" would allow only the customer of record to be authorized to make a change in carrier or service and that this limitation is too narrow (AT&T Comments at 2; Bell Atlantic Reply Comments at 2; MediaOne Reply Comments at 2; Sprint Reply Comments at 2). These carriers, along with RCN, urge the Department to broaden the definition of "customer" by permitting any authorized decision-maker in the same household to make a carrier change (RCN Reply Comments at 1-2). The Department declines to modify its proposed definition, which is identical to the statute's definition of "customer" and agrees with the Attorney General that any modification to this term could be construed as inconsistent with the slamming law (Attorney General Reply Comments at 3).[(5)]

AT&T argues that the Department should make clear that check LOAs are permitted (AT&T Comments at 5-6). The Federal Communications Commission ("FCC") permits check LOAs, in which a subscriber authorizes a carrier change by endorsing a carrier-provided check, if the check confirms certain information.[(6)] The definition of "letter of agency" in the statute requires LOAs to meet the requirements of both state law and the FCC's rules. We find that as long as check LOAs meet the content and form requirements of the FCC's rules, specifically 47 C.F.R. 64.1160(d)-(e), check LOAs may be used in the Commonwealth. While the Department finds it unnecessary to modify its proposed definition of "letter of agency" to make the permissibility of check LOAs explicit, should

a complaint arise from a check LOA, the Department will ask the carrier that initiated the change to provide the Department with a copy of both sides of the canceled check.

MCI argues that the definition of "slamming" should be modified to read, "the willful, intentional and unauthorized change" in a customer's phone service (MCI Comments at 3-4). The Attorney General disagrees with MCI's proposal and argues that the statute does not provide an exception for negligence. According to the Attorney General, to include such an exception would invite "sloppy verification procedures" (Attorney General Reply Comments at 4-5). We agree with the Attorney General and find that MCI's proposal would be inconsistent with the statute, which provides that a carrier change is considered "authorized" only if the new carrier provides confirmation in the form of a signed LOA or oral confirmation obtained by a registered TPV company. See G.L. c. 93, § 109(a). There is no exception in the statute for negligence.

RNK requests the Department to clarify that the rules apply to intraLATA toll calls (RNK Comments at 1-2). The Department's proposed rules provide that the rules shall apply to "all telephone interexchange carriers and local exchange carriers, and their agents doing business in Massachusetts . . ." The Department finalizes this language, contained in the Scope section,[(7)] as well as the proposed definitions for "IXC" and "LEC."[(8)] IntraLATA toll providers are included in the law and the rules, and the Department finds that changes to the proposed rules are not necessary to make this clear.

B. Verification

To reduce the possibility of incorrect, inaccurate, or false verifications performed by TPV agents, the Department in its proposed regulations directed the TPV agent to obtain independently verifiable information, which shall serve as the appropriate confirmation data, such as the customer's date of birth or last four digits of the customer's social security number (§ 13.03(1)). MCI argues that for privacy-sensitive customers, a customer's refusal to provide verification information along with his or her permission to process the change without that information should be sufficient to meet the "appropriate verification data" requirement (MCI Comments at 4). The Department disagrees with MCI; a customer's permission to forego providing "appropriate verification data" is not sufficient to confirm an authorized carrier change. The Department's proposal provides a potential customer with several options to provide independently verifiable personal information. Moreover, a privacy-sensitive customer may always request an LOA, which does not require verification data from the customer.

With few exceptions, to be authorized to make a carrier change under the final rules, the customer must be at least 18 years of age and, for a residence, the customer of record is assumed to have this authority if the customer meets the minimum age requirement

(§ 13.03(2)). A number of commenters argued that the age requirement should be eliminated because there may be situations in which a minor should be permitted to have this authority (e.g., the minor is emancipated; the minor is acting on behalf of a disabled parent).[(9)] We find that the final rules should allow a carrier to demonstrate that a minor

has authority to change carriers or service and, therefore, we revise the proposed language contained in § 13.03(2).

We also modify § 13.03 to address concerns about limitations on persons authorized to make a carrier or service change (AT&T Comments at 1-2; Bell Atlantic Reply Comments at 2; MediaOne Reply Comments at 2; RCN Reply Comments at 1-2; Sprint Reply Comments at 2). The final regulations make clear that authorized persons who are not customers of record may make a carrier selection. Under our final rules, in addition to stating the purpose of the confirmation call, the TPV agent shall provide his or her name[(10)] and ask whether the person spoken to is the customer of record. If the person responds in the negative, the TPV agent must ask whether the person is authorized to change the primary IXC or LEC carrier or service. If the person responds in the affirmative, the verification may continue. Having a record of this exchange between the TPV agent and the customer should provide the Department with sufficient information to verify whether a carrier change was authorized.

A number of commenters objected to the proposed section § 13.03(3), concerning the information that a TPV agent must give a customer at the beginning of a call. Our proposed rules required the TPV agent to provide the name and address (city and state) of the TPV company and, if requested by the customer, a toll-free number of the TPV company. The Department agrees with a number of commenters that this amount of information would be confusing for the customer and modifies our rule accordingly (AT&T Comments at 3; Bell Atlantic Comments at 3-4; MediaOne Reply Comments at 2-3; MCI Comments at 5).

In the final rules, the Department also eliminates the proposed requirement that the TPV agent confirm the customer's existing carrier (proposed § 13.04(4)). The Department is persuaded by comments that the TPV agent and the new carrier do not have access to this information (AT&T Comments at 3; Bell Atlantic Comments at 4-5; MediaOne Reply Comments at 7; MCI Comments at 5-6). Finally, the Department finalizes its proposal that unless the new carrier obtained an LOA from the customer or a waiver from the Department of the tape recording requirement, the failure to maintain the tape recordings shall be evidence that, if unrebutted, would establish that consent from the customer was not obtained (§ 13.03(5)).

C. Follow-up Mailing

As proposed, the Department's regulations would require the carrier that initiated a change to provide a follow-up mailing to the customer, unless an LOA was obtained. Several carriers oppose this requirement, arguing that it is overly burdensome to customize the follow-up mailing to include the information required by the proposed regulations and would be costly to carriers (AT&T Comments at 4-5; Sprint Reply Comments at 3). Bell Atlantic and RCN argue that the follow-up mailing requirement duplicates the FCC's Truth-in-Billing rules (Bell Atlantic Comments at 5-6; RCN Reply Comments at 2-3). TRA argues that the Department exceeded the scope of its authority in proposing this rule, which it contends only allows the Department to establish additional

requirements for the "conduct of third party verification calls and recordings to protect against incorrect, inaccurate or falsified verification" (TRA Comments at 3-10, citing G.L. c. 93, § 109(c)(4)).

We agree with the carriers that the follow-up mailing would be redundant to FCC rules and that the customization necessary to comply with the proposed regulations would be overly burdensome and costly. Therefore, the Department modifies the proposed rules to require the billing entity to use the procedures set forth in 47 C.F.R. 64.2001(a) of the FCC's Truth-in-Billing rules for all primary IXC and LEC carrier and service changes, unless an LOA was obtained by the customer. The FCC's Truth-in-Billing rules require the billing entity to provide clear and conspicuous notification of any change in service provider, including notification to the customer that a new provider[(11)] has begun providing service. This "clear and conspicuous" notification means that the notice would be apparent to a "reasonable" consumer. According to the FCC's rules, this notification should describe the nature of the relationship with the customer, including a description of whether the new service provider is the presubscribed LEC or IXC. See 47 CFR 64.2001(a).

The proposed rules require carriers to provide the required evidence set forth in G.L.

c. 93, § 109 of the statute for "each and every type of service sold or provides an LOA or TPV that the Department believes was obtained by mistake, misunderstanding, misrepresentation, false and deceptive business practices or by any other unfair or unlawful means."[(12)] MCI requests the Department to clarify that the regulations apply only to those services over which the Department has jurisdiction (MCI Reply Comments at 6). The Department finds that this change is not necessary. Second, MCI argues that the terms "mistake" and "misunderstanding" should be deleted because a carrier should not be held responsible for slamming if, for example, a customer mistakenly transposes the digits in his or her phone number (id.). Again, the Department declines to adopt MCI's suggestion. As described above, absent additional guidance from the Legislature making clear that carriers committing negligent acts should not be subject to the provisions of this law, the Department adopts the rule as proposed.

The Department also makes a modification to proposed section § 13.04(1) to make clear that, consistent with the FCC's verification rules, carriers are permitted to use electronic authorizations as one of three means of verifying a carrier change. We agree with the comments of AT&T, Bell Atlantic, and MCI that the rules should expressly permit this form of verification (AT&T Comments at 5; Bell Atlantic Reply Comments at 2, MCI Reply Comments at 5).

D. Tape Recording Waiver

In general, the commenters did not oppose the proposed rule covering the waiver of the tape recording requirement. The Department finalizes its proposed rule in § 13.03(6), without modification, which provides that the requesting carrier must demonstrate that its verification system complies with the Department standard set forth in AT&T

Communications of New England, Inc., D.T.E. 98-94 (1998), in order to obtain a waiver of the tape recording requirement pursuant to G.L. c. 93, § 109(c)(5).[(13)] In addition, the carrier must provide the Department with its slamming history in every jurisdiction in which the carrier offers telecommunication services. This record shall cover the twelve months immediately preceding the carrier's waiver request and this slamming history shall contain enough information to enable the Department to determine the number of complaints of unauthorized changes attributed to that carrier by the state authority in each jurisdiction of operation. This slamming history will be a factor in the Department's decision of whether to grant the carrier's waiver request. Moreover, the Department may revoke a carrier's waiver of the tape recording requirement at any time. The Department declines to adopt TRA's suggestion that the Department rescind a waiver only after a showing of good cause (TRA Comments at

10-11). The Department finds that granting a TPV recording waiver is discretionary.

E. Carrier Liability

Focal seeks clarification that, with respect to § 13.04(1), an underlying telecommunications provider would not be liable for a slam as a result of an action of a reseller (Focal Comments at 2). Focal argues that the underlying provider has no direct contact with the end-user and, therefore, has no practical means of verifying a carrier change (id.). The Attorney General recommends that the Department not rule on this issue without further inquiry into the contractual relationship between resellers and underlying facilities-based carriers (Attorney General Reply Comments at 3-4). The Department agrees with the Attorney General and declines to modify our proposal at this time. Facilities-based carriers should address this liability issue in their contracts or tariffs with resellers. Similar to Focal's concern, RNK recommends that the Department protect carriers from the acts of TPV companies and other third parties by making clear that the party causing the slam is responsible for any resulting penalty (RNK Comments at 2). The Attorney General opposes RNK's request, arguing that the initiating carrier has the opportunity and ultimate responsibility to review the TPV recordings to ensure that verifications meet the statutory requirements (Attorney General Reply Comments at 4). The Department finds that the statute does not provide the Department with the authority to protect a carrier from the actions of the TPV companies that are acting as the carrier's agents. In addition, the Department agrees with the Attorney General that carriers are in a position to protect themselves against the poor performance of a TPV company through well-defined contracts (see id.).

F. Informal Dispute Resolution; Civil Penalties

The proposed rules establish an informal dispute resolution process that may be followed at the consumer's election (§ 13.05). After considering comments from the Attorney General and several carriers, the Department modifies its proposed informal procedure to bring the process closer to that proposed by the Attorney General. The Department agrees that the Attorney General's proposal provides the Department with greater flexibility to resolve slamming complaints quickly and effectively, and requires greater participation

by both the customer and the carrier, which should ease demands on the Department's resources.

The informal process we adopt is summarized as follows: the customer may file a slamming complaint with the Department and elect the informal dispute procedures. After making this election, the customer and the carrier that initiated the change may negotiate mutually acceptable terms upon which the complaint can be resolved. The terms of this mutually acceptable resolution to the complaint shall be signed by both parties and filed with the Department's Consumer Division. If mutually acceptable terms are not identified within 90 days from the customer's election to use this informal process or if the Department determines that the filed, negotiated resolution is unacceptable, the complaint shall be processed in accordance with the formal process set forth in the statute.

In the final rules, the Department may impose a civil penalty on the initiating carrier as a condition of an acceptable informal resolution of a complaint. Several commenters argue that the Department lacks authority to impose civil penalties in the informal process (Bell Atlantic Reply Comments at 3-4; Choice One Comments at 3-4; MediaOne Reply Comments at 4-5; RCN Reply Comments at 4-5). The Attorney General disagrees with this argument, stating that neither federal nor state law prohibits the Department from requesting an IXC or LEC to pay a civil penalty as a condition of Department approval of an informal resolution reached by the parties in a slamming complaint (Attorney General Reply Comments at 2). The Attorney General further notes that the IXC or LEC has the right to refuse to pay the civil penalty and the Department has the right to not approve the proposed informal resolution. Should that occur, the complaint would then be processed in accordance with the formal complaint process set forth in G.L. c. 93, § 110 (id.). The Department agrees with the Attorney General and notes that the Department uses a similar process in our "Dig Safe" rules. See 220 C.M.R.

§§ 99.06-99.11. Thus, informal resolution may provide for the imposition of a civil penalty.

G. Reporting and Recording-Keeping Requirements

Pursuant to the slamming law, the proposed rules include certain reporting requirements for carriers and record-keeping requirements for the Department. We adopt those proposed rules. To comply with the record-keeping requirements contained in the slamming law, the Department will compile monthly records of slamming complaints by company (§ 13.06). To facilitate the tracking requirements, all carriers providing service in Massachusetts are required to provide certain information about themselves, affiliated billing agents, and authorized representatives, as well as to inform the Department of any changes to that information (§ 13.06(1)). The Department is also required to file an annual report with both the Joint Committee on Government Regulations and the Attorney General containing each slamming violation by company (§ 13.06(4)).

H. TPV Registration

The Department adopts the proposed application form for TPV companies, which is contained in Appendix A. The information required by the TPV entities is similar to that required by other companies regulated by the Department.

III. ORDER

Accordingly, after notice, hearing and consideration, it is hereby

ORDERED: That 220 C.M.R. §§ 13.00 et seq. be amended to incorporate the changes contained in this Order, appended hereto, and that such regulations, as revised, be effective upon publication in the Massachusetts Register.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

1. G.L. c. 93, § 109(a).

2. G.L. c. 93, § 110.

3. G.L. c. 93, § 113(a)-(d).

4. A call made within a local access and transport area ("LATA") may result in a toll charge to a customer, but such a call is not considered to be a "long distance" call because it does not cross LATA boundaries. Massachusetts has two LATAs.

5. On page 7, below, the Department addresses the other commenters' concerns about allowing only the customer or record to authorize a change by modifying its rules in

§ 13.03(2), explaining who is authorized to make a carrier or service change, so that authorized persons who are not customers of record may make this decision.

6. This information must include the following: the name and address of the subscriber, each telephone number to be covered by the change order, and an affirmation that the subscriber chooses a new carrier and this new carrier shall act as the subscriber's agent for the change. See 47 C.F.R. 64.1160(d)-(e).

7. See § 13.01(2).

8. See § 13.02.

9. See Tr. at 8; Bell Atlantic Comments at 2-3.

10. To address MediaOne's concerns about its inability to provide a TPV agent name because it uses an automated system to provide verification, the Department qualifies this requirement by stating, "Unless the TPV call is automated . . . the TPV agent must state his or her full name" (MediaOne Reply Comments at 3). See § 13.03(3).

11. The FCC's rules define a "new service provider" as any provider that did not bill for services on the previous billing statement. To clarify the Department's final rule, if a customer changes his or her intraLATA toll provider to his or her current interLATA toll provider, the Department will consider that provider to be a "new service provider" for intraLATA toll services according to the FCC rules.

12. See § 13.04(1).

13. This provision is contained in §13.03(5) of the final rules.