

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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In the Matter of the Investigation of the	)	<u>DOCKET NO.05-999-10</u>
Customer Complaints and Compliance	)	
with FCC Rules, Commission	)	
Administrative Rules and State Statutes	)	
by National Access Long Distance	)	<u>REPORT AND ORDER</u>

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ISSUED: January 10, 2006

SHORT TITLE

**Investigation of Customer Complaints Against National Access Long Distance**

SYNOPSIS

The Commission approves the Settlement Agreement and Motion for Adoption of Settlement Agreement between the Utah Division of Public Utilities, the Utah Division of Consumer Protection and National Access Long Distance (“NALD”) requiring NALD to pay a \$250,000.00 fine to the State of Utah to settle allegations of unauthorized switching of customers’ long distance provider and failure to respond to complaints in a timely manner.

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**APPEARANCES:**

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President

For National Access Long Distance

Patricia E. Schmid  
Assistant Attorney General

" Division of Public Utilities

Jeff Buckner  
Assistant Attorney General

" Division of Consumer Protection

By The Commission:

## **I. PROCEDURAL HISTORY AND BACKGROUND**

During 2003 and 2004, the Division of Public Utilities (“DPU”) received numerous informal “slamming” complaints against National Access Long Distance (“NALD”). “Slamming” is the unauthorized changing of a customer’s long distance provider and is a violation of Utah Code Annotated § 54-8b-18(2). The complaints received by the DPU indicated that Third Party Verifications (“TPV”) provided by NALD did not originate with the long distance customers whose service was switched. The DPU conducted an investigation and, based upon a survey of each customer identified on an 83-page list provided by NALD of all customers who had switched to NALD during 2004, identified 411 Utah customers whose long distance service had been slammed by NALD or its sales agents. The DPU found that for certain TPVs, NALD’s agents had other individuals misrepresent to the verification agent that they were the authorized party for the number being changed. In some cases, the DPU found NALD obtained an invalid verification through false pretenses and misrepresentations to the customer. In addition, the DPU found that in some cases NALD failed to respond to customers’ complaints in a timely fashion.

On December 29, 2005, the DPU, NALD, and the Division of Consumer Protection (“Consumer Protection”) (hereinafter referred to jointly as the “Parties”) filed a Settlement Agreement and Motion for Adoption of Settlement Agreement (“Settlement Agreement”) seeking Commission approval of the settlement of claims by the DPU and Consumer Protection against NALD for NALD’s alleged slamming prior to and including June 26, 2004. The Commission assigned the Settlement Agreement Docket No. 05-999-10.

## **II. SETTLEMENT AGREEMENT**

Without modifying its terms in any way, the following is a brief summary of the Settlement Agreement attached hereto as an Appendix:

### **A. NALD'S STATUS**

The Parties agree NALD is a telecommunications corporation as defined by UCA § 54-8b-2(18) reselling a public telephone communications service as defined by UCA § 54-8b-2(16) and as such provides interstate and intrastate long distance service to Utah consumers.

### **B. FACTS PERTAINING TO SLAMMING ALLEGATIONS AGAINST NALD**

The Parties agree to the facts regarding the DPU's investigation of the slamming allegations against NALD as recited *supra*.

The Parties agree NALD has fully cooperated with the DPU in its investigation and that NALD has resolved the underlying complaints by refunding disputed charges to all customers identified during the DPU's investigation.

### **C. PENALTY TERMS**

NALD agrees to pay the State of Utah a penalty in the amount of \$250,000 to settle the allegations that are the subject of the DPU's investigation.

The Parties agree, and recommend, that \$100,000 of this penalty be waived on the condition that NALD refrain from future slamming activities in Utah, as evidenced by the absence of verified slamming complaints filed by Utah customers against NALD, in connection with its activities in the State after June 26, 2004, for a period of one year from the date of the Commission's order approving the Settlement Agreement.

**D. OTHER PROVISIONS**

In exchange for the payment of the penalty as set forth *supra*, the DPU and Consumer Protection agree they will not pursue any claims against NALD relating to NALD's activities on or prior to June 26, 2004, that gave rise to the DPU's investigation.

The Parties agree the Settlement Agreement represents a compromise of disputed claims and positions.

**III. APPLICABLE LEGAL STANDARD**

Settlement of matters before the Commission is encouraged at any stage of proceedings.<sup>1</sup> The Commission may approve a stipulation or settlement after considering the interests of the public and other affected persons if it finds the stipulation or settlement in the public interest.<sup>2</sup>

Since there appears to be no meritorious opposition to the Settlement Agreement, and Parties having stated a *prima facie* case in support of the Settlement Agreement, there appears to be no reason to convene an evidentiary hearing on the matter. Accordingly, the Commission, having been fully advised in the premises, enters the following Report, containing Findings of Fact, Conclusions of Law, and the Order based thereon.

**IV. DISCUSSION, FINDINGS, AND CONCLUSIONS**

The Parties to the Settlement Agreement represent the interests of NALD, the public interest generally and Utah consumers. The Parties agree the terms of the Settlement Agreement represent a compromise of disputed claims and positions among the Parties. No

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<sup>1</sup> Utah Code Ann. § 54-7-1. *See also Utah Dept. of Admin. Services v. Public Service Comm'n*, 658 P.2d 601, 613-14 (Utah 1983).

<sup>2</sup> *Id.*

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party has appeared in opposition to the Settlement Agreement. We therefore conclude the Settlement Agreement fosters the policy of encouraging settlement of issues before the Commission.

In accordance with 47 C.F.R. § 64.1110, this Commission has previously notified the Federal Communications Commission (“FCC”) of its intent to enforce FCC slamming rules in resolving Utah customers’ slamming complaints. As defined at UCA § 54-8b-2, NALD is a telecommunications corporation engaged in resale of a public telephone communications service providing intrastate and interstate long distance service to Utah consumers. Therefore, pursuant to UCA § 54-8b-18(17), this matter is properly before the Commission.

In accordance with the provisions of UCA § 54-7-25, were we to find that NALD has engaged in the unauthorized change of customers’ long distance provider as alleged, we could impose a penalty in the amount of \$500 to \$2,000 for each such unauthorized change. Based on the Parties’ agreement that the DPU found 411 such violations, said penalty could range from \$205,500 to \$822,000, not including any amounts justified by the continuing nature of each violation.

Therefore, given the Parties’ agreement that all identified slamming customers have received appropriate refunds, we conclude NALD’s agreement to pay a \$250,000 penalty to settle this matter is reasonable and approval of the same is in the public interest. We further conclude the Parties’ agreement to suspend payment of \$100,000 of this penalty as conditioned in the Settlement Agreement reasonably protects Utah consumers against further slamming activities by NALD and is in the public interest. We therefore conclude that approval of the

Settlement Agreement is in the public interest. However, as we have indicated in previous cases, said approval is not intended to alter any existing Commission policy nor to establish any precedent by the Commission.

Wherefore, based upon the foregoing information, and for good cause appearing, we enter the following

**V. ORDER**

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

1. This matter be, and it is, converted to an informal proceeding pursuant to §63-46b-4(3), UCA 1953, as amended.
2. The Settlement Agreement is approved.
3. NATIONAL ACCESS LONG DISTANCE be, and it is, fined in the amount of TWO HUNDRED FIFTY THOUSAND (\$250,000) DOLLARS, ONE HUNDRED THOUSAND (\$100,000) DOLLARS of which is suspended in accordance with the terms of the Settlement Agreement. The suspension herein ordered shall automatically become permanent one year from the date of this Order unless sooner vacated by Order of the Commission.

This Report and Order constitutes final agency action in these dockets. Pursuant to *Utah Code Annotated* §§ 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or



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rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of *Utah Code Annotated* §§ 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 10<sup>th</sup> day of January, 2006.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard  
Commission Secretary  
G#47112

**APPENDIX : SETTLEMENT AGREEMENT**

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Investigation of the Customer Complaints and Compliance with FCC Rules, Commission Administrative Rules and State Statutes by National Access Long Distance	SETTLEMENT AGREEMENT AND MOTION FOR ADOPTION OF SETTLEMENT AGREEMENT  Docket No. _____
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The Utah Division of Public Utilities (“Division”) investigated National Access Long Distance (“NALD”) concerning unauthorized switching of customers’ long distance providers and failure to respond to complaints in a timely manner. As a result of this investigation and settlement discussions between the Division, the Utah Division of Consumer Protection (“Consumer Protection”) and NALD, settlement was reached and the Division, Consumer Protection, and NALD move that the Utah Public Service Commission (“Commission”) approve the settlement set forth below. In support of the settlement and motion to approve the settlement, the Division, Consumer Protection, and NALD state as follows:

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1. NALD is a telecommunications corporation as defined in Utah Code § 54-8b-2(18) reselling a public telephone communications service as defined in Utah Code § 54-8b-2(16) and as such provides interstate and intrastate long distance service to Utah consumers.
2. Pursuant to Utah Code § 54-8b-18(17), the Commission is granted authority to enforce provisions relating to an unauthorized change in customers' telecommunication service provider for interstate and intrastate telecommunication service.
3. Pursuant to Commission Administrative Rule R746-240-7, the Division has the authority to investigate informal consumer complaints against telecommunications corporations operating in Utah and to attempt to resolve them. The rule requires telecommunications corporations to attempt to resolve informal complaints, absent unusual circumstances, within five business days. The rule further states, " In no circumstance shall the telecommunications corporation fail to respond to the informal complaint within five business days." Finally, the rule requires, "The telecommunications corporation shall make reasonable efforts to complete any investigation and resolve the dispute within 30 calendar days."
4. Rules adopted by the Federal Communications Commission ("FCC") impose liability upon a telecommunications corporation for any unauthorized change in a subscriber's preferred carrier, whether

intentional or inadvertent. See FCC 98-334 at p. 26, section 4, paragraph 50. An unauthorized change in a customer's long distance provider is commonly referred to as "slamming."

5. Utah Code § 54-8b-18(2) provides that: "No telecommunications corporation or its agent shall make any change or authorize a different telecommunications corporation to make any change in the provider of any public telecommunications service to a subscriber unless it complies at a minimum, with Subsections (2)(a) through (e)." The referenced subsections describe the information which must be provided to subscribers and the requirements for obtaining the subscriber's authorization and third party verification for the change in their long distance provider. Utah Code § 54-8b-18(16) states, "Any telecommunications corporation, its agents, or a third-party verifier who violates this section of rules adopted to implement this section shall be subject to the provisions of Sections 54-7-23 through 54-7-29."
6. On September 12, 2000, the Commission notified the FCC that the Commission "opted" to enforce FCC slamming rules in resolving Utah consumers' slamming complaints in accordance with FCC regulations, 47 C.F.R. § 64.1110. Pursuant to Utah Code § 54-7-25, "any public utility that violates or fails to comply with this title or any rule or order issued under this title, in a case in which a penalty is not otherwise provided for

that public utility, is subject to a penalty of not less than \$500 nor more than \$2000 for each offense.” The statute also states that, “In the case of a continuing violation [by a public utility], each day’s continuance of the violation shall be a separate and distinct offense.” Under Utah Code § 54-2-1(15)(a) a telephone corporation is a public utility.

7. In 2003 and 2004, the Division received numerous informal slamming complaints against NALD. In these complaints, the customers stated that the Third Party Verification (“TVP”) provided by NALD was not from the actual customer. The Division conducted an investigation, and determined that the customers’ complaints were valid.
8. The Division also documented that in some instances NALD failed to respond to customers’ complaints in a timely fashion.
9. In furtherance of its investigation, the Division requested information from NALD concerning all customers who had switched to NALD during 2004. This 83-page list was then used by the Division to create a survey document (“Survey”) which was mailed to each customer on the list. Survey responses indicated a widespread pattern of unauthorized changes in long distance carriers by NALD. In total, the Division identified 411 Utah customers whose long distance service was slammed by NALD or its sales agents.
10. Particularly egregious in this case is the Division’s discovery that in certain

disputed TPV's, NALD's agents had another individual misrepresent to the verification agent that they were the authorized party for the numbers being changed, or in, a handful of cases, obtained an invalid verification through false pretences and misrepresentations to the customer in question.

11. NALD has fully cooperated with the Division in the investigation of the underlying complaints.
12. The Division has confirmed that NALD has resolved the underlying complaints, and refunded disputed charges to all customers identified during the Division's investigation.
13. The Division and NALD have agreed to procedures to resolve future complaints, if any, more expeditiously in the future.
14. NALD has agreed to pay to the State of Utah a fine in the amount of \$250,000 to settle this case. NALD, the Division and Consumer Protection agree, and recommend, that \$100,000 of this fine be waived on the condition that NALD refrain from future slamming activities in Utah. NALD, the Division, and Consumer Protection agree that the absence of verified slamming complaints against NALD for its activities after June 26, 2004 by Utah customers for the period of one year from the date of the Commission's order approving this Settlement Agreement will evidence compliance with this waiver condition. If a verified slamming complaint by

a Utah customer is made during this one-year period for activities by NALD after June 26, 2004, the Division shall alert NALD, and NALD shall promptly remit the \$100,000 to the State of Utah.

15. In exchange for the payment as set forth above in paragraph 14, the Division and Consumer Protection each agree that it will not pursue any claims against NALD relating to the activities for the period prior to and on June 26, 2004 giving rise to this settlement.
16. This Settlement Agreement is a compromise of disputed claims and positions.
17. Nothing in this Settlement Agreement or in the Order approving it shall be:  
(a) cited or construed as precedent for or indicative of NALD's or the Division's, or Consumer Protection's position on an issue resolved pursuant to this Settlement Agreement; or (b) asserted or construed to mean that NALD, the Division, or Consumer Protection has agreed with, acknowledged the validity of or adopted the other party's legal or factual assertions in this or any other proceeding, including those before the Commission, the state courts of Utah or of any other state, the federal courts of the United States, or the Federal Communications Commission. This Settlement Agreement shall not be used by any party in any other proceeding, by way of illustration or as evidence in support of its advocacy.

18. NALD, the Division, and Consumer Protection each reserve the right to withdraw from and decline to support this Settlement Agreement and the right to advocate or support positions different than those set forth in this Settlement Agreement in the event the Commission rejects all or any material portion of the Settlement Agreement or requires any different or additional material conditions. If NALD, the Division, or Consumer Protection withdraws from or declines to support this Settlement Agreement as permitted herein, this Settlement Agreement shall be deemed null and void, and no party shall be bound or prejudiced by the terms of this Settlement Agreement, and each party shall be entitled to seek reconsideration of the Commission's decision making such material changes to this Settlement Agreement and take such other steps as it deems appropriate.
19. NALD, the Division, and Consumer Protection agree that that no term or provision of this Settlement Agreement shall be construed against or in favor of any party on the basis that a particular party was the drafter of any or all of this Settlement Agreement.
20. This Settlement Agreement constitutes the parties' entire agreement on all matters set forth herein and supersedes any and all prior oral and written understandings or agreements on such matters that previously existed or occurred in this proceeding. No such prior understanding or agreement or



related representation shall be relied upon by any of the parties.

21. NALD, the Division, and Consumer Protection shall take all actions necessary and appropriate to enable them to carry out this Settlement Agreement, including, supporting the approval by the Commission of the Settlement Agreement and not supporting, directly or indirectly, any petition for review, rehearing or reconsideration of the Order or any appeal of or challenge to the Order. Neither NALD, the Division, nor Consumer Protection shall take any position in this docket that is inconsistent in any manner with any term or provision of this Settlement Agreement.

NALD, the Division, and Consumer Protection agree that this Settlement Agreement and Motion may be executed in counterparts, and by facsimile, and will become effective upon execution of such counterparts.

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WHEREFORE, NALD, the Division, and Consumer Protection request the  
Commission grant this motion, and approve this settlement.

Dated this \_\_\_\_\_ day of December 2005.

/s/ \_\_\_\_\_  
J. Eric Ross  
President  
NALD

DIVISION OF PUBLIC UTILITIES

/s/ \_\_\_\_\_  
Patricia E. Schmid  
Assistant Attorney General

DIVISION OF CONSUMER PROTECTION

/s/ \_\_\_\_\_  
Jeff Buckner  
Assistant Attorney General