

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Implementation of the Subscriber Carrier
Selection Changes Provisions of the
Telecommunications Act of 1996
ACS Systems, Inc.
LD Exchange.com, Inc.
Joint Petition for Waiver
CC Docket No. 94-129

ORDER

Adopted: August 29, 2000

Released: August 30, 2000

By the Associate Chief, Accounting Policy Division, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In its Carrier Change Orders, the Commission adopted rules applicable to carriers changing a consumer's preferred carrier. In this Order, we grant ACS Systems, Inc. (ACS) and LD Exchange.com, Inc. (LDX) a limited waiver of the authorization and verification requirements of the Commission's rules and Carrier Change Orders. We grant this limited

1 Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94-129, Further Notice of Proposed Rule Making and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 10674 (1997), Second Report and Order and Further Notice of Proposed Rule Making, 14 FCC Rcd 1508 (1998) (Section 258 Order); stayed in part, MCI WorldCom v. FCC, No. 99-1125 (D.C. Cir. May 18, 1999); First Order on Reconsideration, FCC 00-135 (released May 3, 2000), 65 Fed. Reg. 47678 (August 3, 2000); stay lifted, MCI WorldCom v. FCC, No. 99-1125 (D.C. Cir. June 27, 2000); Third Report and Order and Second Order on Reconsideration, FCC 00-255 (released August 15, 2000); reconsideration pending; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94-129, Report and Order, 10 FCC Rcd 9560 (1995), stayed in part, 11 FCC Rcd 856 (1995); Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, 7 FCC Rcd 1038 (1992), reconsideration denied, 8 FCC Rcd 3215 (1993) (PIC Change Recon. Order); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 F.C.C.2d 911 (Allocation Order), 101 F.C.C.2d 935 (Waiver Order), reconsideration denied, 102 F.C.C.2d 503 (1985) (Reconsideration Order) (the Reconsideration Order denied reconsideration of both the Allocation Order and the Waiver Order). We refer to these orders collectively as the Carrier Change Orders.

2 47 C.F.R. §§ 64.1100 - 64.1190.

3 On July 3, ACS and LDX filed a Joint Petition for Limited Waiver of Commission's Rules relating to LDX's acquisition of the interexchange customer base of ACS (Waiver Petition).

waiver to the extent necessary to enable LDX to become the preferred carrier of the consumers currently presubscribed to ACS, without first obtaining the consumers' authorization and verification.

2. Section 258 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, makes it unlawful for any telecommunications carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such procedures as the Commission shall prescribe."⁴ The goal of section 258 is to eliminate the practice of "slamming," the unauthorized change of a subscriber's preferred carrier. Pursuant to section 258, carriers are absolutely barred from changing a customer's preferred local or long distance carrier without first complying with the Commission's verification procedures.⁵ In the *Section 258 Order*, the Commission revised its procedures to ensure that carriers obtain the requisite authority prior to changing a customer's preferred carrier. The Commission requires that carriers follow one of the Commission's prescribed verification procedures before submitting carrier changes on behalf of consumers.⁶

3. ACS and LDX seek a waiver of our verification rules to allow LDX to be designated the preferred long distance carrier for the customers of ACS without first obtaining each customer's authorization and verification. Because we conclude that, under the circumstances presented, it is in the public interest to grant the waiver, we grant ACS and LDX a waiver, subject to the conditions represented in their filing.

II. DISCUSSION

4. Generally, the Commission's rules may be waived for good cause shown.⁷ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.⁸ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on

⁴ 47 U.S.C. § 258.

⁵ The Commission's rules and orders clearly contemplate that a switchless reseller may be a customer's preferred carrier. Therefore, changes to a customer's preferred carrier that do not involve a change in the customer's underlying facilities-based carrier are nonetheless subject to the Commission's authorization and verification rules. *See Section 258 Order* at paras. 145-146; *WATS International Corp. v. Group Long Distance (USA), Inc.*, 12 FCC Rcd 1743, 1752 (1997) (citing *PIC Change Recon. Order*, 8 FCC Rcd at 3218).

⁶ Pursuant to these procedures, a carrier must: (1) obtain the subscriber's written authorization; (2) obtain confirmation from the subscriber via a toll-free number provided exclusively for the purpose of confirming orders electronically; or (3) utilize an independent third party to verify the subscriber's order. *See* 47 C.F.R. § 64.1150.

⁷ 47 C.F.R. § 1.3.

⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

⁹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

an individual basis.¹⁰ Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.¹¹

5. We find that ACS and LDX have demonstrated that good cause exists to justify a limited waiver of the Commission's authorization and verification requirements to the extent necessary to enable LDX to transfer to its own customer base the affected ACS customers. In the Waiver Petition, ACS and LDX state that they are affiliated entities, both wholly owned by Micro General Corporation (MGC). ACS provides telecommunications services to business customers nationwide, including international and intrastate resale interexchange services. LDX currently provides international resale interexchange service and has pending applications to provide intrastate resale interexchange services.¹²

6. MGC has entered into an agreement with NorthStar Telecom, LLC (NorthStar), whereby NorthStar will acquire all of LDX's stock, along with ACS' telecommunications and Internet-based assets. In order to facilitate this transaction, ACS must transfer to LDX, among other things, all assets associated with its telecommunications operations, including agreements with all of its presubscribed customers. LDX will provide international and intrastate resale interexchange services on a presubscription basis to the former customers of ACS.¹³

7. We conclude that special circumstances exist to justify a waiver. Without this waiver, the service of some former ACS customers might temporarily be interrupted when ACS ceases providing presubscribed service to customers who fail to respond in a timely fashion to requests for preferred carrier change authorization; those customers might also pay potentially higher casual calling rates after the discontinuance of presubscribed service. We conclude that a waiver of the Commission's carrier change rules and orders is necessary to provide a seamless transition with no disruption of service to the transferred customers.

8. We find that ACS and LDX have demonstrated that a limited waiver of the authorization and verification rules is in the public interest because it will prevent consumers from temporarily losing service or paying significantly higher rates, and because ACS and LDX have agreed to notify the affected customers as described below. ACS and LDX state that they will undertake a two-step process to notify the affected customers of the transfer. In a first letter, ACS and LDX will inform customers of the proposed transfer and assure them that no charges or rate increases will be imposed as a result of the transfer.¹⁴ ACS and LDX state that they will also advise the affected customers that they can choose a different preferred carrier, should they desire

¹⁰ *WAIT Radio*, 418 F.2d at 1157.

¹¹ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹² Waiver Petition at 2.

¹³ *Id.*

¹⁴ ACS and LDX filed sample notification letters. *See* Waiver Petition, Exhibits 1 and 2 (Notification Letters); Waiver Petition at 2 n. 2.

to do so.¹⁵ In addition, customers will be given a toll-free number to call with any questions they may have about the transition. According to ACS and LDX, once the proposed transfer has been consummated, ACS and LDX will notify these customers of that event and reiterate the foregoing information, assurances, and advice.¹⁶ ACS and LDX have agreed that, if the Commission waives its rules to permit LDX to provide service to ACS' former customers, ACS and LDX will work with the complainants and the Commission to investigate and resolve any outstanding customer complaints regarding services provided by ACS.¹⁷ We conclude that these conditions will adequately protect the rights of the transferred customers of ACS.

9. For the foregoing reasons, we grant ACS and LDX a waiver of the authorization and verification requirements of our rules for the limited purposes described above. The grant of this waiver is conditioned upon ACS and LDX's provision of customer notification and handling of customer complaints, as described above and further detailed in the Waiver Petition.

III. ORDERING CLAUSES

10. Accordingly, pursuant to authority contained in Sections 1, 4, and 258 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 258, and the authority delegated under sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, the joint waiver request filed by ACS Systems, Inc. and LD Exchange.com on July 3, 2000, IS GRANTED to the extent indicated herein.

11. IT IS FURTHER ORDERED that this Order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

K. Michele Walters
Associate Division Chief,
Accounting Policy Division,
Common Carrier Bureau

¹⁵ Waiver Petition at 2 n.2.

¹⁶ Notification Letters; Waiver Petition at 3-4.

¹⁷ Waiver Petition at 3 n.1.