

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
Time Warner Telecom Inc.
Petition for Waiver
CC Docket No. 94-129

ORDER

Adopted: October 26, 2000

Released: October 27, 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 Time Warner Telecom Inc. (Time Warner) a limited waiver of the authorization and verification requirements of the Commission's rules and Carrier Change Orders. We grant this limited waiver to the extent

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 September 27, 2000, Time Warner filed an Emergency Petition for Limited Waiver (Waiver Petition) relating to Time Warner's acquisition of certain customers from GST Telecommunications, Inc. and the following affiliated companies: GST Action Telecom, Inc., GST Call America, Inc., GST Net, Inc., ICON (continued....)

necessary to enable Time Warner to become the preferred carrier of consumers currently presubscribed to GST Telecommunications, Inc. and affiliated companies⁴ 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."⁵ 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.⁶ 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.⁷

3. Time Warner seeks a waiver of our verification rules to allow Time Warner to be designated the preferred intrastate, interstate, and international carrier for customers of GST without first obtaining each customer's authorization and verification.⁸ Because we conclude that, under the circumstances presented, it is in the public interest to grant the waiver, we grant Time Warner a waiver, subject to the conditions represented in its filings.

Communications Corp., International Telemanagement Group, Inc. d/b/a Call America, NACT Telecommunications, Inc., Totalnet Communications, Inc., GST Telecom Pacific, Inc., and GST Telecom, Inc. (collectively, GST).

⁴ See n. 3, *supra*.

⁵ 47 U.S.C. § 258.

⁶ 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).

⁷ 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.

⁸ In February 1997, Time Warner received section 214 authorization to provide international telecommunications service. Between 1990 and 1998, each of the GST subsidiaries noted above received section 214 authorization to provide international telecommunications service. In a separate filing, Time Warner and GST jointly applied to the Commission for consent to the assignment of all section 214 authorizations held by GST to Time Warner. See Waiver Petition at 2-3.

II. DISCUSSION

4. Generally, the Commission's rules may be waived for good cause shown.⁹ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.¹⁰ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹¹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹² 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.¹³

5. We find that Time Warner has demonstrated that good cause exists to justify a limited waiver of the Commission's authorization and verification requirements to the extent necessary to enable Time Warner to transfer to its own customer base the affected GST customers. In the Waiver Petition, Time Warner states that, on May 17, 2000, GST filed for protection under Chapter 11 of the U.S. Bankruptcy Code. Pursuant to a bankruptcy sale, Time Warner entered into a definitive asset purchase agreement with GST in which Time Warner agreed to acquire substantially all of the assets of GST, including GST's customer accounts and accounts receivable. The Bankruptcy Court approved this purchase agreement on September 21, 2000.¹⁴ Upon discontinuance of service by GST, Time Warner will provide intrastate, interstate, and international services to the former customers of GST.

6. We conclude that special circumstances exist to justify a waiver. Without this waiver, some former GST customers might temporarily lose service when GST ceases to provide presubscribed service; some customers might also pay potentially higher rates after discontinuance of 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.

7. We find that Time Warner has 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, and because Time Warner has agreed to notify the affected customers as described below. Time Warner states that it will undertake a two-step process to notify the affected customers of the transaction. In a first letter, Time Warner will inform customers of the proposed transaction and assure them that no charges or rate increases will be assessed in

⁹ 47 C.F.R. § 1.3.

¹⁰ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

¹¹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹² *WAIT Radio*, 418 F.2d at 1157.

¹³ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹⁴ Waiver Petition at 3.

connection with the transfer from GST to Time Warner.¹⁵ Time Warner states that it will also advise the affected customers that they are free to choose a different preferred carrier, should they desire to do so. In addition, customers will be given a toll-free number to call with any questions they may have about the transition.¹⁶ According to Time Warner, once the proposed sale has been consummated, Time Warner will notify these customers of that event and reiterate the foregoing information, assurances, and advice.¹⁷ In addition, Time Warner states that it will cooperate with the Commission to investigate and resolve any outstanding complaints of affected customers regarding services provided by GST.¹⁸ We conclude that these conditions will adequately protect the rights of the transferred customers of GST.

8. We note that GST, the carrier selling its customer base in this instance, has a history of delinquency in its contributions to the Universal Service Fund. Carriers pay into the Fund in order to provide financial support for various programs, including the High Cost, Schools and Libraries, and Rural Health Care programs. These programs were established by the Commission under Section 254 of the Communications Act of 1934, as amended, and are administered by the Universal Service Administration Company, in order to ensure the delivery of affordable telecommunications service to all Americans.¹⁹ While we recognize the undue burden that delinquent carriers like GST put on the Universal Service Fund, we believe that transferring GST's customer base to Time Warner, a responsible carrier contributing to the Fund as required under the Commission's rules, would be in the public interest.

9. For the foregoing reasons, we grant Time Warner 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 Time Warner'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

¹⁵ Time Warner filed sample notification letters. *See* Waiver Petition, Exhibits A and B. (Notification Letters).

¹⁶ Waiver Petition at 4.

¹⁷ *See* Notification Letters.

¹⁸ Waiver Petition at 4-6.

¹⁹ *See, e.g., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997), as corrected by *Federal-State Joint Board on Universal Service, Errata*, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *affirmed, reversed, and remanded in part sub nom. Texas Office of Public Utility Counsel, v. FCC*, 183 F.3d 393 (5th Cir. 1999) *motion for stay granted in part* (Sept. 28, 1999), *petitions for rehearing and rehearing en banc denied* (Sept. 28, 1999) (*Universal Service Order*).

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 emergency waiver request filed by Time Warner Telecom Inc. on September 27, 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 Chief, Accounting Policy Division,
Common Carrier Bureau