

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

In the Matter of)	
)	
Implementation of the Subscriber Carrier)	
Selection Changes Provisions of the)	CC Docket No. 94-129
Telecommunications Act of 1996)	
)	
McLeodUSA Telecommunications)	
Services, Inc.)	
Petition for Waiver)	

ORDER

Adopted: November 22, 2000

Released: November 24, 2000

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

I. INTRODUCTION AND BACKGROUND

1. In its *Carrier Change Orders*,¹ the Commission adopted rules applicable to carriers changing a consumer's preferred carrier.² In this Order, we grant McLeodUSA Telecommunications Services, Inc. (McLeodUSA), a limited waiver of the authorization and

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.

verification requirements of the Commission's rules and *Carrier Change Orders*.³ McLeodUSA seeks this waiver as part of a merger transaction whereby CapRock Communications Company, the parent company of CapRock Telecommunications Corp. (CTC) and IWL Communications, Inc. d/b/a CapRock Services Corp. (IWL), will become a direct subsidiary of McLeodUSA.⁴ Our ruling on this waiver does not prejudice in any way the Commission's ultimate determination as to whether the requested transfers of control will serve the public interest, convenience and necessity.⁵ We grant this limited waiver to the extent necessary to enable McLeodUSA to become the preferred carrier of the consumers currently presubscribed to CTC and IWL, 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."⁶ 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.⁷ 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

³ On October 6, 2000, McLeodUSA filed a Petition relating to its acquisition of the customer bases of CapRock Telecommunications Corp. and IWL Communications, Inc. (Waiver Petition). On November 21, 2000, McLeodUSA filed a supplement to its Waiver Petition (Petition Supplement).

⁴ See CapRock Telecommunications Corp. and IWL Communications, Inc. d/b/a CapRock Services Corp. Seek FCC Consent to Transfer Control to McLeodUSA Inc., Public Notice, DA 00-2515 (rel. Nov. 6, 2000) (Section 214 domestic and international authority); Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Accepted for Filing, Public Notice, WTB Report No. 665, File No. 0000234323 (rel. Oct. 11, 2000) (Part 90: IWL Communications) and Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Accepted for Filing, Public Notice, WTB Report No. 672, File No. 0000237961 (rel. Oct. 18, 2000) (Part 90: Abacus Signal); Application of IWL Communications, Inc., to Transfer Control of 35 Private Land Mobile Radio Call Signs (filed Oct. 5, 2000) (Part 101: Lead Call Sign WNQN346); Satellite Earth Station Applications Accepted for Filing, Public Notice (rel. October 25, 2000) (Part 25: IWL Communications, Inc., File No. SES-T/C-20001006-01902; IWL Communications, Inc., File No. SES-T/C-20001006-01905; SpaceLink Systems, Inc., File No. SES-T/C-20001006-01906).

⁵ See 47 U.S.C. §§ 214, 310(d).

⁶ 47 U.S.C. § 258.

⁷ 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).

prescribed verification procedures before submitting carrier changes on behalf of consumers.⁸

3. McLeodUSA seeks a waiver of our verification rules to allow it to be designated the preferred local and/or long distance carrier for customers of CTC and IWL 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 McLeodUSA a waiver, subject to the conditions represented in its filings.

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 McLeodUSA 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 McLeodUSA to transfer to its own customer base the affected CTC and IWL local and/or long distance customers. In its Waiver Petition, McLeodUSA states that it recently entered into an agreement to merge with CapRock Communications Corp. (CCC) and acquire control of CCC's operating subsidiaries, CTC and IWL.¹⁴ After consummating the merger, McLeodUSA plans to consolidate its operations by transferring to McLeodUSA the local and long distance customer bases of CTC and IWL.¹⁵

6. We conclude that special circumstances exist to justify a waiver. Without this waiver, the service of some former CTC and IWL customers might temporarily be interrupted when those companies cease providing presubscribed service to customers who fail to respond in

⁸ 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.

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.

¹⁵ Waiver Petition at 3.

a timely fashion to requests for preferred carrier change authorization; some 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.

7. We find that McLeodUSA 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 or paying significantly higher rates, and because McLeodUSA has agreed to notify the affected customers as described below. McLeodUSA states that it will undertake a two-step process to notify the affected customers of the transfer. In a first letter, McLeodUSA 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.¹⁶ McLeodUSA states that it will advise the affected customers that they may choose a different preferred carrier, should they desire to do so.¹⁷ In addition, customers will be given a toll-free number to call with any questions they may have about the transition.¹⁸ According to McLeodUSA, once the proposed transfer has been consummated, it will notify these customers of that event and reiterate the foregoing information, assurances, and advice.¹⁹

8. In addition, McLeodUSA has agreed that, if the Commission waives its rules to permit McLeodUSA to provide service to CTC's and IWL's former customers, McLeodUSA will work with the complainants and the Commission to investigate and resolve complaints regarding services provided by CTC or IWL.²⁰ We conclude that these conditions will adequately protect the rights of the transferred customers of CTC and IWL.

9. For the foregoing reasons, we grant McLeodUSA 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 McLeodUSA's provision of customer notification and handling of complaints and upon Commission approval of the transfers of control of licenses and lines from CTC and IWL to McLeodUSA, as described above and further detailed in the Waiver Petition and Petition Supplement.

¹⁶ McLeodUSA filed sample notification letters. *See* Waiver Petition, Exhibit A, and Petition Supplement, Attachment (Notification Letters); Waiver Petition at 5.

¹⁷ Waiver Petition at 4; Notification Letters.

¹⁸ Waiver Petition at 4; Notification Letters.

¹⁹ Waiver Petition at 4-5; Notification Letters.

²⁰ Waiver Petition at 5.

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 waiver request filed by McLeodUSA Telecommunications Services, Inc., on October 6, 2000, and supplemented on November 21, 2000, IS GRANTED subject to the conditions, and 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