

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
One Call Communications, Inc. d/b/a Opticom
Petition for Waiver
CC Docket No. 94-129

ORDER

Adopted: May 1, 2000

Released: May 2, 2000

By the Deputy Chief, 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 One Call Communications, Inc. d/b/a Opticom (One Call) a limited waiver of the authorization and verification requirements of the Commission's rules and Carrier Change Orders. This waiver will enable One Call to become the preferred carrier of those consumers currently presubscribed to Cleartel Communications, Inc. (Cleartel) without first obtaining the consumers' authorization and verification.

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), 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).

2 47 C.F.R. §§ 64.1100 - 64.1190.

3 On February 28, 2000, One Call filed a Petition for Emergency Waiver and Request for Expedited Treatment (Waiver Petition). On March 10, 2000, One Call filed a Supplement to the Waiver Petition (Supplement), which included a replacement page for the original Waiver Petition and an additional Exhibit C.

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 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. One Call seeks a waiver of our verification rules to allow it to be designated the preferred long distance carrier for customers of Cleartel without first obtaining each customer’s authorization and verification. Bell Atlantic and BellSouth oppose One Call’s Waiver Petition, citing One Call’s alleged failure to pay per-call compensation to Bell Atlantic and BellSouth for calls made from Bell Atlantic and BellSouth payphones.⁷ Because we conclude that, under the circumstances presented, it is in the public interest to grant the waiver, we grant One Call a waiver subject to the conditions represented in its filing.

II. DISCUSSION

4. Generally, the Commission’s rules may be waived for good cause shown.⁸ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.⁹

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, carriers 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 On March 9, 2000, Bell Atlantic filed a petition in opposition to One Call’s Waiver Petition (Bell Atlantic Opposition). On March 15, 2000, BellSouth submitted a written *ex parte* in support of the Bell Atlantic Opposition. (BellSouth *Ex Parte*) On March 16, 2000, One Call filed a reply to the Bell Atlantic Opposition, supporting One Call’s Waiver Petition. (One Call Reply to Bell Atlantic) On March 22, 2000, BellSouth filed an *Erratum* to its March 15 written *ex parte*. Also on March 22, 2000, One Call submitted a reply to the BellSouth written *ex parte*. (One Call Reply to BellSouth)

⁸ 47 C.F.R. § 1.3.

⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*).

The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹⁰ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹¹ 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.¹²

5. We find that One Call 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 One Call to transfer to its own customer base the consumers who have authorized Cleartel as their preferred carrier. One Call intends to purchase the assets of Cleartel's 0+ and 1+ business, including Cleartel's customer accounts and agreements.¹³ One Call is an operator service provider for both public and private payphones.¹⁴ Cleartel is engaged in the business of providing 0+ operator services and 1+ domestic and international long distance telephone services for payphones, hospitality suites, residences, and businesses.

6. On January 19, 2000, One Call and Cleartel entered into a Purchase Agreement pursuant to which Cleartel agreed to create Cleartel Marketing, LLC (Cleartel Marketing), a wholly owned limited liability company organized under the laws of the state of Delaware. Under the Purchase Agreement, Cleartel agreed to transfer its 0+ and 1+ customer contracts and agreements to Cleartel Marketing and, thereafter, sell all of its interest in Cleartel Marketing to One Call.¹⁵ After the sale, Cleartel will no longer provide 0+ and 1+ domestic service. Pursuant to the Agreement of Merger entered into between One Call and Cleartel Marketing on January 20, 2000, Cleartel Marketing will merge with and into One Call, with One Call as the surviving entity that owns the customer contracts held by Cleartel Marketing. Cleartel Marketing then will cease to exist and Cleartel's Carrier Identification Code (CIC) will be routed to One Call. One Call is in the process of making all necessary arrangements through the local exchange carriers and obtaining all necessary approvals for this rerouting.

7. One Call states that it will attempt to obtain prior authorization and verification from Cleartel's customers before the transfer of the Cleartel customer base to One Call takes place. Because One Call may be unable to obtain all of the necessary authorizations and verifications prior to the transfer, One Call has filed this waiver request. We conclude that a waiver of the Commission's carrier change rules and orders is necessary to provide a seamless

¹⁰ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

¹¹ *WAIT Radio*, 418 F.2d at 1157.

¹² *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹³ Waiver Petition at 3.

¹⁴ Operator service providers include all carriers that routinely accept interstate collect calls, credit card calls, and/or third party-billing calls from aggregator locations. *Policies and Rules Concerning Operator Service Providers*, 6 FCC Rcd 2744, 2755 (1991).

¹⁵ One Call is not acquiring Cleartel itself or Cleartel's FCC licenses. Waiver Petition at 2 n.2.

transition with no disruption of service to the transferred customers, and therefore that special circumstances exist to justify the waiver.¹⁶ We are not persuaded by the arguments of Bell Atlantic and BellSouth that One Call's alleged failure to pay them per-call payphone compensation is a basis for denying One Call's Waiver Petition.¹⁷ The per-call compensation disputes raised by Bell Atlantic and BellSouth are not directly related to our determination on this request for waiver, and our decision here does not preclude Bell Atlantic and BellSouth from pursuing resolution of their claims in the appropriate forum.¹⁸

8. Because One Call has indicated its intent to notify customers of the proposed transaction as described below, we find that One Call has demonstrated that a limited waiver of the Commission's authorization and verification rules is in the public interest. One Call states that it will undertake a two-step process to notify the affected customers of the transaction.¹⁹ In a first letter, One Call will inform customers of the proposed transaction and assure them that no charges or rate increases will be imposed as a result of the transaction. One Call states that it will advise the customers that they are free to change carriers, and that, if they decide to do so within thirty days, One Call will reimburse them for the change charge.²⁰ In addition, the letter will provide a toll-free number for customers to call with any questions they may have about the transition. According to One Call, once the transfer has been effected, it will notify customers of that event and reiterate the foregoing information, assurances, and advice.²¹ Finally, One Call has promised to work with Cleartel to investigate and resolve any outstanding customer complaints that may have been filed against Cleartel.²² We conclude that these conditions will adequately protect the rights of the transferred customers of Cleartel.

9. We note that Cleartel, 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 Communication 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.²³ While we recognize the undue

¹⁶ Waiver Petition at 3-5; Supplement at 4.

¹⁷ Bell Atlantic Opposition; BellSouth *Ex Parte*.

¹⁸ One Call Reply to Bell Atlantic at 2; One Call Reply to BellSouth at 2.

¹⁹ One Call included two notification letters in its Waiver Petition and Supplement, marked as Exhibits B and C.

²⁰ *See* notification letter, Waiver Petition, Exhibit B; Supplement at 4.

²¹ *See* notification letter, Supplement, Attachment C.

²² Supplement at 4.

²³ *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*

burden that delinquent carriers like Cleartel put on the Universal Service Fund, we believe that transferring Cleartel's customer base to One Call, a responsible carrier contributing to the Fund as required under the Commission's rules, would be in the public interest.

III. CONCLUSION AND ORDERING CLAUSES

10. For the foregoing reasons, we grant One Call 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 One Call's provision of customer notification and handling of customer complaints as described above and further detailed in its Waiver Petition and Supplement thereto.

11. 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 0.111, 0.311, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.3, the waiver request filed by One Call Communications, Inc. d/b/a Opticom on February 28, 2000, and supplemented on March 10, 2000, IS GRANTED to the extent indicated herein.

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

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey
Deputy Chief, Common Carrier Bureau

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*).