

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 )  
 )  
Access Point, Inc. )  
Petition for Waiver )

**ORDER**

**Adopted:** May 2, 2000

**Released:** May 3, 2000

By the Deputy Chief, Common Carrier Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. In its *Carrier Change Orders*,<sup>1</sup> the Commission adopted rules applicable to carriers changing a consumer's preferred carrier.<sup>2</sup> In this Order, we grant Access Point, Inc. (Access Point) a limited waiver of the authorization and verification requirements of the Commission's rules and *Carrier Change Orders*.<sup>3</sup> This waiver will enable Access Point to become the preferred carrier of those consumers currently presubscribed to Efficacy Group, Inc. (Efficacy), without first obtaining the consumers' authorization and verification.

<sup>1</sup> *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*).

<sup>2</sup> 47 C.F.R. §§ 64.1100 - 64.1190.

<sup>3</sup> On March 14, 2000, Access Point, Inc. filed a Petition for Waiver of Commission Rules relating to its acquisition of selected customers of Efficacy Group, Inc. (Waiver Petition). Access Point supplemented its Waiver Petition with a letter on March 31, 2000. See n. 15, *infra*.

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."<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

3. Access Point seeks a waiver of our verification rules to allow it to be designated the preferred long distance carrier for customers of Efficy without first obtaining the customers' authorization and verification. Because we conclude that, under the circumstances presented, it is in the public interest to grant the waiver, we grant Access Point's petition subject to the conditions represented in its filing.

## II. DISCUSSION

4. Generally, the Commission's rules may be waived for good cause shown.<sup>7</sup> As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.<sup>8</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>9</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>10</sup> Waiver of the Commission's rules is therefore appropriate only if special

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<sup>4</sup> 47 U.S.C. § 258.

<sup>5</sup> 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).

<sup>6</sup> Pursuant to these new 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.

<sup>7</sup> 47 C.F.R. § 1.3.

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

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

<sup>10</sup> *WAIT Radio*, 418 F.2d at 1157.

circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.<sup>11</sup>

5. We find that Access Point 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 Access Point to transfer to its own customer base the affected Efficacy customers. In the Waiver Petition, Access Point states that it intends to purchase substantially all of the assets of Efficacy, including customer accounts and accounts receivables, pursuant to an agreement with Efficacy.<sup>12</sup> Access Point will provide intrastate, interstate, and international interexchange service to these customers. 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, and therefore that special circumstances exist to justify a waiver.

6. Because Access Point has indicated its intent to notify customers of the proposed transaction as described below, we find that Access Point has demonstrated that a limited waiver of the Commission's carrier authorization and verification rules is in the public interest. Access Point states that it will undertake a two-step process to notify the affected customers of the transaction. In a first letter, Access Point 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.<sup>13</sup> Access Point states that it will also advise the affected customers that they can choose a different preferred carrier, should they desire to do so.<sup>14</sup> In addition, customers will be given a toll-free number to call with any questions they may have about the transition. According to Access Point, once the proposed sale has been consummated, Access Point will notify these customers of that event and reiterate the foregoing information, assurances, and advice.<sup>15</sup> Access Point has agreed that, if the Commission waives its rules to permit Access Point to provide service to Efficacy's customers, Access Point will work with Efficacy to investigate and resolve any outstanding customer complaints regarding interexchange services provided by Efficacy.<sup>16</sup> We conclude that these conditions will adequately protect the rights of the transferred customers of Efficacy.

7. For the foregoing reasons, we grant Access Point 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 Access Point's provision of customer notification and handling of customer complaints, as described above and further detailed in its Waiver Petition and supplement.

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

<sup>12</sup> Waiver Petition at 2.

<sup>13</sup> Access Point included a notification letter in its Waiver Petition marked as Exhibit 1.

<sup>14</sup> Waiver Petition at 2.

<sup>15</sup> Access Point attached a second notification letter to its supplemental letter. *See* Letter from Harry Malone, Counsel, Swidler Berlin Shereff Friedman, LLP, dated March 31, 2000.

<sup>16</sup> Waiver Petition at 2.

### III. ORDERING CLAUSES

8. 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 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, the waiver request filed by Access Point, Inc. on March 14, 2000, and supplemented on March 31, 2000, IS GRANTED to the extent indicated herein.

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

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey  
Deputy Chief, Common Carrier Bureau