

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

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| In the Matter of |) | |
| |) | |
| Implementation of the Subscriber Carrier |) | |
| Selection Changes Provisions of the |) | CC Docket No. 94-129 |
| Telecommunications Act of 1996 |) | |
| |) | |
| Choice One Communications of New York |) | |
| Inc. |) | |
| |) | |
| Emergency Petition for Expedited Waiver |) | |

ORDER

Adopted: May 3, 2001

Released: May 4, 2001

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 Choice One Communications of New York, Inc. (Choice One) 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, 15 FCC Rcd 8158 (2000); *stay lifted*, *MCI World Com v. FCC*, No. 99-1125 (D.C. Cir. June 27, 2000); Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996 (2000); *amended*, Order, FCC 01-67 (rel. Feb. 22, 2001); *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 We grant this limited waiver to the extent necessary to enable Choice One to become the preferred carrier of certain consumers currently presubscribed to CTSI, Inc. (CTSI), 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. Choice One seeks a waiver of our verification rules to allow Choice One to be designated the preferred local and long distance carrier for certain customers of CTSI without first obtaining each customer's authorization and verification. Because we conclude that, under the circumstances presented, it is in the public interest to do so, we grant Choice One 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.⁷ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.⁸

³ On April 26, 2001, Choice One Communications of New York, Inc. filed an Emergency Petition for Expedited Waiver of the Commission's carrier change rules to enable Choice One to acquire certain business customers of CTSI, Inc. (Waiver Petition.)

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*, 14 FCC Rcd at 1593,1594, 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 or electronically signed authorization that meets the requirements of § 64.1130; (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. § 64.1120(c).

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).

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 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 Choice One 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 Choice One to transfer to its own customer base the affected CTSI customers. According to the Waiver Petition, Choice One and CTSI have entered into an agreement whereby Choice One has agreed to provide local and long distance telephone services to the New York and Ohio business customers of CTSI.¹² Choice One requests expedited treatment of its Waiver Petition so that Choice One may close its transactions with CTSI by May 14, 2001. In support of its request, Choice One states that it intends to offer the affected CTSI customers the same services, at the same or comparable rates.¹³ Choice One explains that, because CTSI offers a flat rate service, and Choice One offers a per minute service, CTSI customers that have higher-than-anticipated usage patterns, or certain services (*i.e.*, vertical features) not technically permissible under Choice One's offerings, may experience rate fluctuations.¹⁴ According to the Waiver Petition, Choice One and CTSI will offer these customers financial credits¹⁵ and will provide them with the same contract terms for up to 90 days. Choice One asserts that these measures will ensure that Choice One's rates are initially less than or equal to CTSI's current rates.¹⁶

6. We conclude that special circumstances exist to justify a waiver. Without this waiver, the service of some former CTSI customers might temporarily be interrupted when CTSI ceases providing presubscribed service to customers who fail to respond in a timely fashion to requests for preferred carrier change authorizations; some of those customers might also pay

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

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 Waiver Petition at 2, n.5.

¹⁴ Waiver Petition at 2, n.5.

¹⁵ Choice One notes that CTSI customers with lower-than-average or average usage will reap significant savings, while customers with higher-than-average usage will receive financial credits and other offerings to ensure that rates are initially equal to or better than their current rates. Specifically, a CTSI customer with higher-than-average usage will receive a credit of \$125.05 for the first line and \$50.05 for each additional line to offset certain charges. *See* Waiver Petition at 3, n.6.

¹⁶ Waiver Petition at 2, n.5.

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 Choice One 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 Choice One has agreed to notify the affected customers as described below. According to the Waiver Petition, Choice One will undertake a two-step process to notify the affected customers of the transfer.¹⁷ To maximize administrative efficiencies and eliminate customer confusion, Choice One and CTSI have already sent a letter informing CTSI customers of the proposed transfer and assuring them that no charges or rate increases will be imposed as a result of the transfer.¹⁸ This notification letter also advised the affected customers that they may select a different preferred carrier, should they desire to do so. In addition, the affected customers were given a toll-free number to call with any questions they may have about the transfer.¹⁹

8. According to Choice One, once the proposed transfer has been completed, Choice One will notify these customers of that event and reiterate the foregoing information, assurances, and advice.²⁰ In addition, Choice One asserts that it will investigate and resolve any outstanding customer complaints regarding services provided by CTSI.²¹ We conclude that these conditions will adequately protect the rights of the CTSI customers.

9. For the foregoing reasons, we grant Choice One 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 the provision of customer notification and the handling of 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,

¹⁷ Petitioners filed sample notification letters. *See* Waiver Petition, Exhibits A and B (Notification Letters). On April 27, 2001, Choice One filed a revised post-notification letter. On May 3, 2001, Choice One filed a revised pre-notification letter.

¹⁸ *See supra* n.15. *See also* Waiver Petition at 2-3.

¹⁹ *See* Notification Letters.

²⁰ Waiver Petition at 3-4.

²¹ Waiver Petition at 4.

0.291, 1.3, the waiver request filed by Choice One Communications of New York, Inc. on April 26, 2001, and supplemented on April 27, 2001 and May 3, 2001, 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