

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 )
)
Southwestern Bell Telephone Company )
)
Emergency Petition for Waiver )
)

ORDER

Adopted: June 15, 2001

Released: June 18, 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 Southwestern Bell Telephone Company (SWBT) a limited waiver of the authorization and verification requirements

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.

of the Commission's rules and *Carrier Change Orders*.<sup>3</sup> We grant this limited waiver to the extent necessary to enable SWBT to become the preferred carrier of certain consumers currently presubscribed to OpTel, Inc., TVMAX Telecommunications, Inc., and Optel Telecomm, Inc. (collectively, Optel) in the greater metropolitan area of Dallas-Fort Worth, Texas, 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."<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. SWBT seeks an emergency waiver of our verification rules to allow SWBT to be designated the preferred local carrier for certain customers of Optel 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 SWBT 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.<sup>7</sup> As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.<sup>8</sup>

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<sup>3</sup> On June 6, 2001, SWBT, Inc. filed an Emergency Petition for Waiver of the Commission's carrier change rules to enable SWBT to acquire certain customers of Optel. (Waiver Petition).

<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*, 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).

<sup>6</sup> 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).

<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).

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

5. We find that SWBT 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 SWBT to transfer to its own customer base the affected Optel customers. According to the Waiver Petition, on October 28, 1999, Optel filed for protection under Chapter 11 of Title 11 of the U.S. Code in the U.S. Bankruptcy Court for the District of Delaware. Optel plans to discontinue service. SWBT and Optel have entered into an agreement, conditioned on FCC approval, pursuant to which approximately 4,000 of Optel's local exchange customers in portions of the greater metropolitan area of Dallas-Fort Worth, Texas, will be transferred to SWBT if they do not select another carrier. Optel has obtained an order of the Court approving Optel's right to consummate the transaction.<sup>12</sup>

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

7. We find that SWBT 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 local service, and because SWBT has agreed to notify the affected customers as described below. According to the Waiver Petition and subsequent filing, SWBT will undertake a two-step process to notify the affected customers of the transfer.<sup>13</sup> To maximize administrative efficiencies and eliminate customer confusion, SWBT and Optel will notify affected customers of the transfer at least 30 days prior to the scheduled transfer date.<sup>14</sup> This notification letter also advises the

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

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

<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> SWBT filed sample notification letters. See Waiver Petition, Exhibit A. On June 11, 2001, SWBT filed revised pre- and post-notification letters. See SWBT, Supplemental Petition for Waiver, June 11, 2001 (Supplemental Filing).

<sup>14</sup> See Waiver Petition at 2; Supplemental Filing at 2. We note that SWBT has stated that the pre-transfer notification letters will be sent out between June 11, 2001 and June 21, 2001, and that no customers will be transferred with less than 30 days notice. This time frame is consistent with the pre-transfer notification period (continued....)

affected customers that they may select a different preferred carrier, should they desire to do so. In addition, the affected customers will receive a toll-free number to call with any questions they may have about the transfer.<sup>15</sup>

8. Once the proposed transfer has been completed, SWBT promises to notify these customers of that event and reiterate the foregoing information, assurances, and advice.<sup>16</sup> In addition, SWBT states that Optel has committed to attempt to revolve any outstanding customer complaints regarding services provided by Optel for a minimum of 30 days after the transfer.<sup>17</sup>

9. For the foregoing reasons, we grant SWBT 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 and Supplemental Filing.

### 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 SWBT, Inc., on May 22, 2001, and supplemented on June 11, 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

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the Commission adopted as part of its new streamlined procedures in *2000 Biennial Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, First Report and Order in CC Docket No. 00-257 and Fourth Report and Order in CC Docket No. 94-129 (released May 15, 2001). The rule containing the new streamlined procedures, 47 C.F.R. § 64.1120(e), will take effect on June 21, 2001.

<sup>15</sup> See Supplemental Filing at 1.

<sup>16</sup> Waiver Petition at 3-4.

<sup>17</sup> See Supplemental Filing at 1.