

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 )
)
Mescalero Apache Telecom. Inc. )
)
Petition for Expedited Waiver )

ORDER

Adopted: February 5, 2001

Released: February 6, 2001

By the Associate Chief, Accounting Policy Division, 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 Mescalero Apache Telecom, Inc. (Mescalero) a limited waiver of the authorization and verification requirements of the Commission's rules and Carrier Change Orders. We grant this limited waiver to the extent

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 15966 (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.

3 On December 4, 2000, Mescalero filed a Petition for Expedited Waiver of the Commission's carrier change rules relating to the transfer from Valor Telecommunications of New Mexico, LLC (Valor) to Mescalero of the local subscriber base of an exchange in New Mexico that contains approximately 950 access lines (Waiver (continued....))

necessary to enable Mescalero to become the preferred carrier of certain consumers currently presubscribed to Valor in the New Mexico exchange serving the Mescalero Apache Reservation and the Ski Apache area, 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. Mescalero seeks a waiver of our verification rules to allow Mescalero to be designated the preferred local carrier for certain customers of Valor 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 Mescalero 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> The Commission may exercise its discretion to waive a rule where the particular facts make strict

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Petition). On February 1, 2001, Mescalero supplemented the Waiver Petition (Supplement) with a draft copy of the pre-transfer customer notification letter that Valor will send to the affected customers.

<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 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. § 64.1120(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).

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 Mescalero 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 Mescalero to transfer to its own customer base the affected Valor customers. In the Waiver Petition, Mescalero states that it seeks to be substituted as the local carrier for a single New Mexico exchange that contains approximately 950 access lines and serves customers on the Mescalero Apache Reservation and the Ski Apache Area. Mescalero will acquire substantially all of Valor's assets used to provide local telecommunications services to those lines, including the affected customer base, and will provide local services on a presubscription basis to Valor's former customers.<sup>12</sup> Mescalero further notes that some of the Valor customers may have to change long distance carriers (intrastate or interstate) if they currently use a carrier not present on Mescalero's switch. Mescalero states that a Mescalero representative will contact those customers to coordinate a carrier change at no charge.<sup>13</sup>

6. We conclude that special circumstances exist to justify a waiver. Without this waiver, some former Valor customers might temporarily lose their presubscribed local service when Valor ceases to provide such service in the affected exchange. 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 Mescalero 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 Mescalero and Valor have agreed to notify the affected customers as described below. Mescalero states that it will undertake a two-step process to notify the affected customers of the transaction, with Valor sending pre-transfer notification letters to the affected customers before March 26, 2001.<sup>14</sup> These initial notification letters will inform the affected customers that, after the transfer of service from Valor to the Mescalero on March 26, 2001, they will receive local telephone service from Mescalero and will also receive a

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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 1-3. The affected customers were originally transferred from GTE Southwest Incorporated (GTE) to Valor on or about June 30, 2000. Valor is serving these customers on a transitional basis pending completion of the transaction among GTE, Valor, and Mescalero. *Id.*

<sup>13</sup> Waiver Petition at 3.

<sup>14</sup> *See* Supplement, Attachment.

toll-free local number to contact Mescalero to discuss new service, repairs, and other matters concerning their telephone service.<sup>15</sup>

8. According to Mescalero, once the proposed sale has been consummated, Mescalero will send the affected customers a post-transfer notification letter notifying them of that event, assuring them that no charges will be imposed as a result of the transaction, and confirming that the rates charged by Mescalero will be the same as, or lower than, those charged by Valor.<sup>16</sup> In the post-transfer notification letter, Mescalero will advise the affected customers that the transfer of their local service may require them to change their intrastate and/or interstate long distance carrier if their current selections are not present on Mescalero's switch. In the letter, Mescalero will also promise that one of its representatives will call each customer in that situation to coordinate a switch to another long distance carrier at no charge.<sup>17</sup> In addition, the letter will provide customers with a toll-free customer contact number to call with any questions they may have about the transition.<sup>18</sup> We conclude that these conditions will adequately protect the rights of Valor's transferred customers.<sup>19</sup>

9. For the foregoing reasons, we grant Mescalero 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 Mescalero's provision of customer notification, as described above and further detailed in the Waiver Petition and Supplement.

### 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 expedited waiver request filed by Mescalero Apache Telecom, Inc. on

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<sup>15</sup> See Supplement, Attachment.

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

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> In addition, we note that Mescalero's post-transfer notification letter states that Mescalero will be responsible for all service issues. See Waiver Petition at 3; Supplement, Attachment.

December 4, 2000, and supplemented on February 1, 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