

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

In the Matter of)	
)	
Billed Party Preference for)	
InterLATA 0+ Calls)	
)	CC Docket No. 92-77
T-NETIX, Inc.)	
)	
Petition for Clarification and Waiver)	

ORDER

Adopted: June 14, 2002

Released: June 17, 2002

By the Deputy Chief, Consumer & Governmental Affairs Bureau:

I. INTRODUCTION

1. On February 22, 2002, T-NETIX, Inc. filed a Petition for Clarification and Waiver¹ of certain rules adopted by the Commission in the *Second Reconsideration Order*.² T-NETIX seeks clarification of the meaning of the phrase “total cost of the call” and a waiver, until equipment upgrades are completed in June 2003, of the requirement that it provide actual (rather than maximum) rate quotes for calls from prison inmates. For the reasons discussed below, we grant T-NETIX a temporary waiver of the actual rate quote requirement for inmate calls until June 1, 2003, contingent upon its commitment to complete equipment upgrades in accordance with the schedule it proposes.

II. BACKGROUND

2. The Commission has long been concerned about consumer dissatisfaction with high charges and certain practices of many Operator Service Providers (OSPs) with respect to calls from public phones and other aggregator locations, such as hotels and hospitals. The Commission has sought to ensure that consumers receive sufficient information about the rates for operator services at public “away from home” locations, thereby fostering a more competitive OSP marketplace.³

3. In 1990, Congress addressed OSP practices in the Telephone Operator Consumer

¹ T-NETIX, Inc., Petition for Clarification and Waiver, CC Docket No. 92-77, filed Feb. 22, 2002 (Petition). A Comment regarding the petition was filed by Verizon (Verizon comment), and a letter was filed by Citizens United for the Rehabilitation of Errants (CURE letter).

² *Billed Party Preference for InterLATA 0+ Calls*, CC Docket No. 92-77, Second Order on Reconsideration, 16 FCC Rcd 22314 (2001) (*Second Reconsideration Order*).

³ *Telecommunications Research and Action Center v. Central Corporation, et al.*, Memorandum Opinion and Order, 4 FCC Rcd 2157 (1989).

Services Improvement Act of 1990 (TOCSIA or Section 226 of the Communications Act.),⁴ and in 1991 the Commission adopted implementing rules.⁵ Among other things, these rules required OSPs to provide immediate quotes as to the cost of a call.⁶ Carriers providing service to inmate-only phones at correctional institutions were not subject to these requirements.⁷

4. Despite those rules, many consumers were surprised to find that their use of a trusted carrier's calling card did not protect them from being served and billed by a high-priced OSP. The Commission consequently began an examination of a "billed party preference" mechanism, which would automatically route calls to the OSP pre-selected by a consumer in association with his or her calling card. In 1994, after weighing the costs and benefits of that policy, the Commission sought additional data on that option as well as less costly alternatives.⁸ Subsequent to the enactment of the Telecommunications Act of 1996, the Commission sought further comment on a modified combination of proposals⁹ and in 1998 adopted the *Second Report and Order*.¹⁰ The *Second Report and Order* required, among other things, that providers of operator services for interstate calls initiated by inmates disclose to the party to be billed how such party could obtain rate information for the call without having to make a separate call.¹¹

5. In a petition for reconsideration of the *Second Report and Order*, US West requested that the Commission permit providers of inmate operator services to disclose maximum rates (rather than an actual rate quotation for calls) or, alternatively, to designate a separate number for obtaining rate information.¹² The Commission rejected these requests in the *Second Reconsideration Order*, generally affirming its existing rules and making a number of minor modifications and clarifications.

6. In particular, the Commission revised the text of the rules applicable to providers of inmate operator services to more closely parallel the language of the comparable requirements for OSPs.¹³ Specifically, the Commission stated that a provider of inmate operator services "shall identify itself and disclose, audibly and distinctly to the consumer, at no charge and before connecting any interstate, non-access code operator service call, how to obtain the total cost of the call, including any surcharge or

⁴ Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226).

⁵ *Policies and Rules Concerning Operator Service Providers*, Report and Order, 6 FCC Rcd 2744 (1991).

⁶ *Id.* at 2757.

⁷ *Id.* at 2752.

⁸ *Billed Party Preference for InterLATA 0+ Calls*, Further Notice of Proposed Rulemaking, 9 FCC Rcd 3320 (1996).

⁹ *Billed Party Preference for InterLATA 0+ Calls*, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 7274 (1996).

¹⁰ *Billed Party Preference for InterLATA 0+ Calls*, Second Report and Order and Order on Reconsideration, 13 FCC Rcd 6122 (1998) (*Second Report and Order*).

¹¹ *Id.* at 6157; 47 C.F.R. §64.710(a)(1) and (b)(1).

¹² Petition for Clarification or Waiver or, in the Alternative, for Clarification and Reconsideration of US West, Inc., CC Docket No. 92-77, filed Apr. 9, 1998.

¹³ *Second Reconsideration Order*, 16 FCC Rcd at 22326.

premises-imposed-fee.”¹⁴ The rules state that the phrase "total cost of the call," means “both the variable (duration-based) charges for the call and the total per call charges, exclusive of taxes, that the carrier, or its billing agent, may collect from the consumer for the call.”¹⁵ The rules further state that this includes any per call surcharge imposed by the correctional institution, unless it is subject to regulation itself as a common carrier for imposing such surcharges, if the contract between the carrier and the correctional institution prohibits both resale and the use of pre-paid calling card arrangements.¹⁶

7. In rejecting US West’s request to provide only maximum rate quotes on inmate calls or, in the alternative, to provide rate quotes from a separate phone number, the Commission found each option likely to diminish competition. With no direct evidence to suggest a need to delay the immediate effectiveness of the rate disclosure rules for prisons, the Commission ordered the new rules to go into effect 30 days after publication in the Federal Register. T-NETIX now explains, however, that its equipment in some prisons it serves is not currently capable of providing the required rate quotes, and that even a highly accelerated upgrade schedule for achieving full compliance will not be completed until June 2003.¹⁷

8. T-NETIX offers three main reasons for the Commission to support its temporary waiver. First, it states that full compliance with section 64.710 is technically infeasible for approximately one-third of the prison sites that T-NETIX currently serves. According to T-NETIX, it began upgrading its network in June 1999 with equipment capable of providing precise rate quotations and that, as of February 2002, it had upgraded approximately two thirds of its facilities, leaving 431 more outstanding. These 431 sites represent approximately 20,000 of the more than 51,000 access lines that T-NETIX serves.¹⁸ Because it is the sole service provider in each of these facilities, T-NETIX notes that denying its waiver request could seriously disrupt telephone service to the inmates in these facilities.¹⁹ Second, T-NETIX quantifies its capital costs for the upgraded equipment at \$11,034,867 plus an additional \$2,585,138 for training, installation, and purchase of ancillary equipment, for a total cost of \$13,620,005. It notes that this amount is more than four times its net income. It states that it originally planned to complete this upgrade in 2005, but it has accelerated that schedule to double its planned expenditures so as to finish by June 2003.²⁰ Third, T-NETIX cites prior examples of Commission waivers for both individual companies and entire industry segments when technical feasibility considerations made immediate compliance with new rules unreasonably burdensome and impractical.²¹

¹⁴ 47 C.F.R. § 64.710.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ T-NETIX contacted the Commission on Jan. 29, 2002 with regard to this problem and requested a meeting to explain that it intended to seek a waiver. In a meeting on Feb. 1, 2002, it sought guidance as to the type of information the Commission would require in order to evaluate the waiver request most expeditiously.

¹⁸ Petition at 10.

¹⁹ Verizon also supports this contention. Verizon comment at 1.

²⁰ Petition at 10.

²¹ Petition at 7-9. T-NETIX notes temporary waivers granted of the Commission’s number portability rules, payphone coding digit requirements, and wireless 911 rules.

9. Citizens United for the Rehabilitation of Errants (CURE), a primary representative of the interests of prison inmates in this proceeding, states that it has reviewed the T-NETIX petition and does not oppose it, so long as it is conditioned on the commitment T-NETIX offers of a “definitive, targeted and expeditious plan to complete the upgrade.”²²

III. DISCUSSION

A. Definition of “Total Cost of the Call”

10. As noted above, in the *Second Reconsideration Order*, when defining the “total cost of the call” subject to disclosure by the inmate ISP, the Commission included as one element the “variable (duration-based) charges.” T-NETIX expresses concern that this phrase could be interpreted as requiring inmate call carriers to prognosticate the duration of calls before they are completed. We agree with T-NETIX that this is not what the Commission intended. Rather, the Commission expected that “variable (duration-based) charges” would be interpreted, as T-NETIX appears to presume, as encompassing the price per unit of time of the call (*e.g.*, ten cents per minute). Although T-NETIX proposes rule revisions to eliminate any possible misunderstanding, we believe that the current language is sufficiently clear on this point, and we therefore decline to modify it.

B. Temporary Waiver of Requirement of Actual Rate Disclosures

11. Generally, the Commission's rules may be waived for good cause shown.²³ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.²⁴ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.²⁵ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁶ 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.²⁷ As T-NETIX observes, the Commission has granted temporary waivers where a Commission-imposed deadline for equipment upgrades causes unnecessary hardship on a party. In addition, the Commission has allowed for reasonable transition periods to owners of payphone facilities based on the Commission's assessment of the costs of upgrades.²⁸

12. In this case, we find that T-NETIX has demonstrated that good cause exists to justify a waiver of the Commission's rules such that T-NETIX will provide maximum rate quotes in lieu of the

²² See CURE letter at 2.

²³ 47 C.F.R. § 1.3.

²⁴ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

²⁵ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁶ *WAIT Radio*, 418 F.2d at 1157.

²⁷ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

²⁸ See *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736, 4740-43 (1991); 47 C.F.R. § 64.704(c).

rate quotations otherwise required by our rules. This waiver shall be applicable only to T-NETIX inmate call systems that are technically incapable of providing the rate disclosure required by our rules, and in no case shall extend beyond June 1, 2003. We conclude that interruption of service until T-NETIX is able to offer precise price quotations would impose unreasonable hardship on those affected. We would also prefer to avoid creating unnecessary financial hardship for T-NETIX, and we note that T-NETIX states that its proposed accelerated schedule already requires it to spend more than four times its annual net income on upgrading its facilities.²⁹ We are comfortable that T-NETIX's accelerated deployment schedule represents a reasonable response to our requirements and will ultimately result in total compliance.

13. We recognize that granting T-NETIX this waiver will deny some consumers the benefit of precise rate quotes until June 2003. However, in the interim, the affected consumers will still gain the protections provided by maximum rate quotes. Although the Commission continues to believe that the increased benefits of precise rate quotes justify additional costs of such a service, we do not find that the possible harm to those temporarily without this service outweighs the harm they might suffer due to service disruptions. On this point, we note that CURE has reviewed the petition and does not oppose it as harmful to its clients. Thus, we conclude that this grant of waiver is in the overall best interests of the affected consumers.

IV. ORDERING CLAUSES

14. Accordingly, pursuant to authority contained in Sections 1, 4, and 226 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 226, and the authority delegated under sections 0.141, 0.361, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.141, 0.361, 1.3, the petition for clarification and waiver by T-NETIX, Inc. on February 22, 2002 IS GRANTED to the extent indicated herein.

15. IT IS FURTHER ORDERED that this *Order* is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Margaret M. Egler, Deputy Chief,
Consumer & Governmental Affairs Bureau

²⁹ Petition at 10.