

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

In the Matter of)	
)	
2000 Biennial Review-Review of Policies and)	
Rules Concerning Unauthorized Changes of)	CC Docket No. 00-257
Consumers' Long Distance Carriers)	
)	
Implementation of the Subscriber Carrier)	
Selection Changes Provisions of the)	CC Docket No. 94-129
Telecommunications Act of 1996)	
)	
BellSouth Telecommunications, Inc.)	
)	
Petition for Waiver)	

ORDER

Adopted: February 5, 2004

Released: February 13, 2004

By the Acting Deputy Chief, Policy Division, Consumer & Governmental Affairs Bureau:

I. INTRODUCTION AND BACKGROUND

1. In its *Streamlining Order*, the Commission instituted streamlined procedures for compliance with the authorization and verification requirements of our rules and of section 258 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, in situations involving the carrier-to-carrier sale or transfer of subscriber bases.¹ In this *Order*, we find it is in the public interest to grant BellSouth Telecommunications, Inc. (BellSouth) a limited waiver of these rules. We grant this waiver to the extent necessary to enable BellSouth, without complying precisely with the Commission's streamlined procedures, to temporarily provide local service to customers of a competitive local exchange carrier (CLEC) that will no longer be providing service.

2. In 1998, the Commission adopted rules to implement section 258 of the 1996 Act, which expanded the Commission's existing authority to deter and punish "slamming," the submission or execution of an unauthorized change in a subscriber's selection of a provider of telecommunications

¹ See *2000 Biennial Review-Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers; Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, First Report and Order in CC Docket No. 00-257 and Fourth Report and Order in CC Docket No. 94-129, ("Streamlining Order"), 16 FCC Rcd 11218 (2001), adopting 47 C.F.R. § 64.1120(e). See also 47 U.S.C. § 258(a); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

service.² Pursuant to section 258 and the Commission's rules, carriers are barred from changing a customer's preferred carrier without first complying with the Commission's procedures.³

3. According to the streamlined procedures adopted by the Commission, carriers need not obtain individual subscriber authorization and verification for carrier changes associated with the carrier-to-carrier sale or transfer of a subscriber base, provided that, not later than 30 days before the planned carrier change, the acquiring carrier notifies the Commission, in writing, of its intention to acquire the subscriber base and certifies that it will comply with the required procedures, including the provision of 30-day advance written notice to all affected subscribers.⁴ These rules are designed to ensure that affected subscribers have adequate information about the carrier change in advance, that they are not financially harmed by the change, and that they will experience a seamless transition of service from their original carrier to the acquiring carrier.⁵ This self-certification process also provides the Commission with information it needs to fulfill its consumer protection obligations.⁶

4. On January 22, BellSouth filed with the Commission a Petition for Waiver (Petition) asking the Commission for a limited waiver of sections 64.1100-1190 of the rules. BellSouth asserts that a waiver is necessary to permit it to comply with orders of the Kentucky Public Service Commission (PSC) that direct BellSouth to provide temporary service while customers of a CLEC (that will no longer be providing service) obtain a new carrier.⁷

II. DISCUSSION

5. Generally, the Commission's rules may be waived for good cause shown.⁸ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.⁹ The Commission

² 47 U.S.C. § 258(a); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, 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 WorldCom 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), Errata, DA No. 00-2163 (rel. Sept. 25, 2000), Erratum, DA No. 00-2192 (rel. Oct. 4, 2000), Order, FCC 01-67 (rel. Feb. 22, 2001); Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking, CC Docket No. 94-129, FCC 03-42, 68 FR 19152 and 19176 (rel. March 17, 2003); Order, CC Docket No. 94-129, FCC 03-116 (rel. May 23, 2003). Prior to the adoption of Section 258, the Commission had taken various steps to address the slamming problem. *See, e.g., 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); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 F.C.C.2d 911, 101 F.C.C.2d 935, *reconsideration denied*, 102 F.C.C.2d 503 (1985).

³ *Id.*

⁴ 47 C.F.R. § 64.1120(e).

⁵ *See Streamlining Order* ¶ 10, 16 FCC Rcd at 11222.

⁶ *Id.*

⁷ Petition for Waiver filed with the Commission by BellSouth on January 22, 2004, in CC Docket No. 00-257.

⁸ 47 C.F.R. § 1.3.

⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹⁰ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹¹ 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.¹² In addition, the Commission specified in the *Streamlining Order* that instances in which it is impossible to comply precisely with the streamlined procedures will be resolved on a case-by-case basis.¹³

6. We find that BellSouth has demonstrated that good cause exists to justify a limited waiver of the Commission's requirements to the extent necessary to enable BellSouth to temporarily provide service to certain customers that will no longer be receiving service from Max-Tel Communications ("Max-Tel) without complying precisely with the Commission's notification rules. According to the Petition, Max-Tel is a CLEC providing local exchange and other services, primarily through resale and unbundled network element platform arrangements with BellSouth. However, BellSouth states that, pursuant to the terms of its agreement with Max-Tel, BellSouth is discontinuing the provision of service to Max-Tel for nonpayment of past due undisputed amounts owed to BellSouth by Max-Tel.¹⁴ The Kentucky PSC has directed BellSouth to provide Max-Tel's end-user customers with continued service for a limited period of time in order to allow the end-users an opportunity to obtain a new local carrier.¹⁵ BellSouth will use an automated voice system to provide affected end-users with notice of Max-Tel's disconnection, as well as BellSouth's limited provision of continuity of service while the end-users transition to new service providers.¹⁶ These end-users will not be permanently transferred to BellSouth.¹⁷ Instead, BellSouth will provide the Max-Tel end-users in Kentucky with temporary service for a limited time so that the customer can select a new carrier.¹⁸ According to the Petition, the carrier the end-user selects, whether it is BellSouth or any other LEC, will be responsible for complying with the Commission's carrier change requirements, including third party verification.¹⁹ If the end-user does not select a carrier, then the end-user's service will be discontinued at the end of the notice period.²⁰ Accordingly, BellSouth states its waiver request applies only to the temporary provision of service for the period of time the end-user has to select a new permanent carrier.²¹

7. Under the Commission's rules, no later than 30 days prior to the transfer, an acquiring carrier must self-certify its compliance with the required procedures to the Commission and must give the

¹⁰ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹¹ *WAIT Radio*, 418 F.2d at 1157.

¹² *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹³ *Streamlining Order* ¶ 20, 16 FCC Rcd at 11226.

¹⁴ Petition at 2.

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ *Id.* at 4.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

affected subscribers notice of, and certain information about, the transfer.²² Given the special circumstances BellSouth has described, compliance with the advance notice requirement could cause BellSouth to be unable to comply with the Kentucky PSC's order, and could potentially result in the loss of local service for Max-Tel customers during the Commission's 30-day notice period. Moreover, BellSouth is not permanently acquiring the affected Max-Tel customers. The only end-users that will obtain BellSouth as their permanent service provider are those that contact BellSouth to request service. BellSouth will in those cases be subject to our full verification rules, including requirements regarding third party verifications. We find that, in the special circumstances of this case, waiver of the streamlined notice requirement, for the limited period when BellSouth would provide service pursuant to the Kentucky order, would serve the public interest.

8. For the foregoing reasons, we grant BellSouth a waiver of the notification requirements of 47 C.F.R. §§ 64.1100-1190 for the limited purposes described above. The grant of this waiver is conditioned upon BellSouth's compliance with the verification requirements of §§ 64.1100-1190, including third party verification, for those affected end-users that ultimately select BellSouth as their service provider.

III. ORDERING CLAUSES

9. 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 0.141, 0.361, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.141, 0.361, 1.3, the waiver request filed by BellSouth Telecommunications, on January 22, 2004, IS GRANTED to the extent indicated herein.

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

FEDERAL COMMUNICATIONS COMMISSION

Nancy A. Stevenson, Acting Deputy Chief, Policy Division
Consumer & Governmental Affairs Bureau

²² 47 C.F.R. §§ 64.1120(e)(1) &(e)(3).