

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

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| In the Matter of |) | |
| |) | |
| Advantage Telecommunications Corp. |) | IC No. 02-S67942 |
| |) | |
| Complaint Regarding |) | |
| Unauthorized Change of |) | |
| Subscriber's Telecommunications Carrier |) | |

ORDER ON RECONSIDERATION

Adopted: February 27, 2004

Released: March 10, 2004

By the Deputy Chief, Consumer & Governmental Affairs Bureau:

1. In this Order, we reconsider DA 02-1327 (June Order) released on June 7, 2002. In the June Order, we found that Advantage Telecommunications Corp. (Advantage) changed Complainant's telecommunications service provider without obtaining authorization and verification from Complainant in violation of the Commission's rules.¹ On reconsideration, we affirm that Advantage's actions did result in an unauthorized change in Complainant's telecommunications service provider, but we modify the June Order to the extent indicated herein.

2. In December 1998, the Commission released the *Section 258 Order* in which it adopted rules to implement Section 258 of the Communications Act of 1934 (Act), as amended by the Telecommunications Act of 1996 (1996 Act).² Section 258 prohibits the practice of

¹ See 47 C.F.R. §§ 64.1100 – 64.1190.

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 Rule Making, 18 FCC Rcd 5099 (2003); Order, 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).

“slamming,” the submission or execution of an unauthorized change in a subscriber’s selection of a provider of telephone exchange service or telephone toll service.³ In the *Section 258 Order*, the Commission adopted aggressive new rules designed to take the profit out of slamming, broadened the scope of the slamming rules to encompass all carriers, and modified its existing requirements for the authorization and verification of preferred carrier changes. The rules require, among other things, that a carrier receive individual subscriber consent before a carrier change may occur.⁴ Pursuant to Section 258, carriers are absolutely barred from changing a customer's preferred local or long distance carrier without first complying with one of the Commission's verification procedures.⁵ Specifically, a carrier must: (1) obtain the subscriber's written or electronically signed authorization in a format that meets the requirements of Section 64.1130 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.⁶

3. The Commission also has adopted liability rules. These rules require the carrier to absolve the subscriber where the subscriber has not paid his or her bill. In that context, if the subscriber has not already paid charges to the unauthorized carrier, the subscriber is absolved of liability for charges imposed by the unauthorized carrier for service provided during the first 30 days after the unauthorized change.⁷ Where the subscriber has paid charges to the unauthorized carrier, the Commission’s rules require that the unauthorized carrier pay 150% of those charges to the authorized carrier, and the authorized carrier shall refund or credit to the subscriber 50% of all charges paid by the subscriber to the unauthorized carrier.⁸

4. We received Complainant’s complaint on February 6, 2002, alleging that Complainant’s intraLATA toll and long distance service provider had been changed from Sprint Communications Company L.P. (Sprint) to Advantage without Complainant’s authorization. Pursuant to Sections 1.719 and 64.1150 of our rules,⁹ we notified Advantage of the complaint and Advantage responded on June 24, 2002.¹⁰ Advantage stated that Complainant’s service was

³ 47 U.S.C. § 258(a).

⁴ See 47 C.F.R. § 64.1120.

⁵ 47 U.S.C. § 258(a).

⁶ See 47 C.F.R. § 64.1120(c). Section 64.1130 details the requirements for letter of agency form and content for written or electronically signed authorizations. 47 C.F.R. § 64.1130.

⁷ See 47 C.F.R. §§ 64.1140, 64.1160. Any charges imposed by the unauthorized carrier on the subscriber for service provided after this 30-day period shall be paid by the subscriber to the authorized carrier at the rates the subscriber was paying to the authorized carrier at the time of the unauthorized change. *Id.*

⁸ See 47 C.F.R. §§ 64.1140, 64.1170.

⁹ 47 C.F.R. § 1.719 (Commission procedure for informal complaints filed pursuant to Section 258 of the Act); 47 C.F.R. § 64.1150 (procedures for resolution of unauthorized changes in preferred carrier).

¹⁰ Advantage Response to Informal Complaint No. IC-02-S67942, April 24, 2002.

changed due to an error in data entry. We found that that Advantage failed to produce clear and convincing evidence that Complainant authorized a carrier change.¹¹ Advantage now files a petition for reconsideration.

5. In its petition, Advantage argues that it changed Complainant's service provider due to a data entry error and not due to "malfeasance," and that therefore the Commission should reconsider Advantage's liability.¹² Our carrier change rules require that a carrier submit proof of authorization and verification by the subscriber.¹³ Failure by the carrier to provide such proof will be presumed to be clear and convincing evidence of a violation.¹⁴ Advantage admits that it does not have such proof and therefore it is in violation of our rules.¹⁵

6. Advantage also asserts that it only billed the consumer \$226.53 and therefore, if the Commission denies its petition on the merits, the maximum it should have to pay to the authorized carrier is 150% of 226.53. We agree with advantage that Advantage only needs to pay the authorized carrier 150% of 226.53, and therefore we grant this aspect of the petition.

7. Lastly, Advantage argues that any amount it has refunded directly to the consumer should be credited against its liability. Advantage argues that the FCC directed it to do so in its Notice of Informal Complaint (Notice). Specifically, Advantage points to the language in our notice that states,

Pursuant to § 64.1150(c) of the Commission's rules, you are hereby directed to remove promptly from each Complainant's bill(s) all charges assessed Complainant(s) within the first thirty (30) days after the change in each Complainant's telephone service pending a determination by the Commission of whether an unauthorized change, as defined in § 64.1100(e) of the Commission's rules, 47 C.F.R. § 64.1100(e), has occurred.

This section of the Notice, however, does not order Advantage to refund any money to the consumer. Consistent with Section 64.1150 of the Commission's rules, the notice instructs the carrier to remove charges from the bill until a determination can be made as to whether an unauthorized change occurred.¹⁶ The Commission's unauthorized carrier change liability rules

¹¹ See 47 C.F.R. § 64.1150 (d).

¹² See *Petition for Reconsideration of U.S. Telecom Long Distance, Inc.* (filed August 4, 2003) at p. 2 (Petition).

¹³ See 47 C.F.R. § 64.1120 (a)(1).

¹⁴ See 47 C.F.R. § 64.1150 (d).

¹⁵ See *Petition* at p. 2. Advantage states that the switch was "due to a data entry error."

¹⁶ See 47 C.F.R. § 64.1150 (c).

do not require an unauthorized carrier to directly reimburse a consumer. As 47 C.F.R. § 64.1170 states, if a customer pays an unauthorized carrier, the unauthorized carrier must reimburse the authorized carrier (who was deprived of revenue from the Complainant due to the slam).¹⁷ The authorized carrier then uses a portion of this money to reimburse the slammed consumer that has paid money to the unauthorized carrier.¹⁸ As the Commission found in the *Third Order on Reconsideration*, “the fact that a carrier has chosen to appease a customer does not alter its statutory liability . . . to the authorized carrier.”¹⁹

8. Accordingly, IT IS ORDERED that, pursuant to Section 258 of the Communications Act of 1934, as amended, 47 U.S.C. § 258, and Sections 0.141, 0.361 and 1.719 of the Commission’s rules, 47 C.F.R. §§ 0.141, 0.361, 1.719, the petition for reconsideration is DENIED in part and GRANTED in part.

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

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁷ See 47 C.F.R. § 64.1170.

¹⁸ See *id.*

¹⁹ See *Third Order on Reconsideration* at ¶ 81. We note that in its petition, Advantage is effectively asking us to reconsider rules. This is properly done during the course of a rulemaking proceeding, and not in the present context.