

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

In the Matter of)	
)	
Birch Communications)	IC Nos. 12-S3354933
)	12-S3382328
Complaints Regarding)	
Unauthorized Change of)	
Subscriber's Telecommunications Carrier)	

ORDER

Adopted: August 27, 2013

Released: August 28, 2013

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

1. In this Order, we consider the complaints¹ alleging that Birch Communications (Birch) changed Complainants' telecommunications service providers without obtaining authorization and verification from Complainants in violation of the Commission's rules.² We conclude that Birch's actions did result in unauthorized changes in Complainants' telecommunications service providers and we grant Complainants' complaints.

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).³ Section 258 prohibits the practice of "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.⁴ In the *Section 258 Order*,

¹ See Appendix.

² See 47 C.F.R. §§ 64.1100 – 64.1190.

³ 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, 18 FCC Rcd 10997 (2003); Fourth Report and Order, 23 FCC Rcd 493 (2008). 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).

⁴ 47 U.S.C. § 258(a).

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.⁵ 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.⁶ 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; (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.⁷

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.⁸ 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.⁹ Carriers should note that our actions in this order do not preclude the Commission from taking additional action, if warranted, pursuant to Section 503 of the Act.¹⁰

4. We received Complainants' complaints alleging that Complainants' telecommunications service providers had been changed without Complainants' authorization.¹¹ Pursuant to Sections 1.719 and 64.1150 of our rules,¹² we notified Birch of the complaints and Birch responded.¹³ Birch states that authorization was received and confirmed through third party verification (TPV) in each case. The Commission's rules require that the verification elicit,

⁵ See 47 C.F.R. § 64.1120.

⁶ 47 U.S.C. § 258(a).

⁷ 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.

⁸ 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.*

⁹ See 47 C.F.R. §§ 64.1140, 64.1170.

¹⁰ See 47 U.S.C. § 503.

¹¹ See Appendix.

¹² 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).

¹³ See Appendix.

amongst other things, confirmation that the person on the call is “authorized to make the carrier change.”¹⁴ We have reviewed the TPVs that Birch submitted with its responses. In each case, the verifier stated to the person on the call, “To confirm you are over 18 and the authorized decision maker for these telephone numbers, at the tone please, state your date of birth and press the pound key.” An affirmative response does not establish whether the person was authorized to make the carrier change.¹⁵ As we emphasized in the *Fourth Report and Order*, “any description of the carrier change transaction... must not be misleading” and verifiers should convey explicitly that “the consumers will have authorized a *carrier* change, and not for instance an upgrade in existing service.”¹⁶ We find that Birch’s actions were in violation of our carrier change rules, and we discuss Birch’s liability below.¹⁷

5. Pursuant to Section 64.1170(b) our rules, Birch must forward to the authorized carriers an amount equal to 150% of all charges paid by the subscriber to Birch.¹⁸ Birch must forward to the authorized carriers the amounts, along with copies of any telephone bills issued from the company to the Complainants.¹⁹ Within ten days of receipt of this amount, the authorized carriers shall provide a refund or credit to Complainants in the amount of 50% of all charges paid by Complainants to Birch. Complainants have the option of asking the authorized carriers to re-rate Birch’s charges based on the authorized carriers rates and, on behalf of Complainants, seek from Birch any re-rated amount exceeding 50% of all charges paid by the Complainants to Birch. The authorized carriers must also send a notice to the Commission, referencing this Order, stating that it has given a refund or credit to Complainants.²⁰ If the authorized carriers have not received the reimbursement required from Birch within 45 days of the release of this Order, the authorized carriers must notify the Commission and Complainants accordingly. The authorized carriers also must notify the Complainant of his or her right to pursue a claim against Birch for a refund of all charges paid to Birch.²¹

¹⁴ See 47 C.F. R. § 64.1120(c)(3)(iii).

¹⁵ Cf. *Consumer Telecom, Inc.*, Order on Reconsideration, 27 FCC Rcd 5340 (CGB 2012) (“the verifier’s question, ‘Do you have authority to make changes to your long distance service?’ did not confirm that the person was authorizing a change that would result in receiving service *from a different carrier*”).

¹⁶ See *Fourth Report and Order*, 23 FCC Rcd 493 (2008)(emphasis added); see also 47 C.F.R. § 64.1120(c)(3)(iii).

¹⁷ If either Complainant is unsatisfied with the resolution of this complaint, such Complainant may file a formal complaint with the Commission pursuant to Section 1.721 of the Commission’s rules, 47 C.F.R. § 1.721. Such filing will be deemed to relate back to the filing date of such Complainant’s informal complaint so long as the formal complaint is filed within 45 days from the date this order is mailed or delivered electronically to such Complainant. See 47 C.F.R. § 1.719.

¹⁸ 47 C.F.R. § 64.1170(b).

¹⁹ *Id.*

²⁰ See 47 C.F.R. § 64.1170(c).

²¹ See 47 C.F.R. § 64.1170(e).

6. 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 complaints filed against Birch Communications ARE GRANTED.

7. IT IS FURTHER ORDERED that, pursuant to section 64.1170(d) of the Commission's rules, 47 C.F.R. § 64.1170(d), Complainants are entitled to absolution for the charges incurred during the first thirty days after the unauthorized change occurred and neither the Birch nor the authorized carriers may pursue any collection against Complainants for those charges.

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

FEDERAL COMMUNICATIONS COMMISSION

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

APPENDIX

<u>INFORMAL COMPLAINT NUMBER</u>	<u>DATE OF COMPLAINT</u>	<u>DATE OF RESPONSE</u>	<u>AUTHORIZED CARRIER</u>
12-S3354933	March 19, 2012	April 18, 2012	AT&T
12-S3382328	April 30, 2012	May 24, 2012	AT&T