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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Implementation of the Subscriber Carrier)	
Selection Changes Provisions of the)	CC Docket No. 94-129
Telecommunications Act of 1996)	
)	
Touch America, Inc.)	
Qwest Communications International, Inc.)	
Petition for Waiver)	

ORDER

Adopted: May 18, 2000

Released: May 19, 2000

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In its *Carrier Change Orders*,¹ the Commission adopted rules applicable to carriers changing a consumer's preferred carrier.² In this Order, we grant Touch America, Inc. (Touch America) and Qwest Communications International, Inc. (Qwest) a limited waiver of the authorization and verification requirements of the Commission's rules and *Carrier Change Orders*.³ Touch America and Qwest seek this waiver in order to transfer customers to effectuate

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, FCC 00-135 (released May 3, 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 March 17, 2000, Touch America and Qwest filed a Petition for Waiver (Waiver Petition). On April 12, 2000, Touch America and Qwest filed a Supplement to their Waiver Petition (Supplemental Waiver Petition), which replaced the original Waiver Petition and included two attachments. On May 3, 2000, Touch America filed a Second Supplement to its Waiver Petition (Second Supplement) that replaced Exhibits 1 and 2 of the Supplemental Waiver Petition.

a divestiture plan.⁴ Our ruling on this waiver does not prejudice in any way the Commission's ultimate determination as to whether the divestiture of Qwest's interLATA assets and services in the U S WEST region results in a merger, between Qwest and U S WEST, that complies with section 271. We grant this limited waiver to the extent necessary to enable Touch America to become the preferred carrier of certain consumers currently presubscribed to Qwest or one of its subsidiaries without first obtaining the consumers' authorization or verification.

2. Section 258 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Communications Act), 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."⁵ 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.⁶ In the *Section 258 Order*, the Commission revised its procedures to ensure that carriers obtain the requisite authority prior to changing a customer's carrier. The Commission requires that carriers follow one of the Commission's prescribed verification procedures before submitting carrier changes on behalf of consumers.

3. Touch America and Qwest seek a waiver of our verification rules to allow Touch America to be designated the preferred long distance carrier for certain customers of Qwest and its subsidiaries without first obtaining each customer's authorization and verification. Because we conclude that, under the circumstances presented, it is in the public interest to grant the waiver, we grant Touch America and Qwest a waiver, subject to the conditions represented in their filings.

⁴ See *Qwest Communications International, Inc. and U S WEST, Inc., Applications for Transfer of Control*, Memorandum Opinion and Order, CC Docket No. 99-272, FCC 00-91 (rel. March 10, 2000) (*Qwest/ U S WEST Merger Order*); Public Notice, CC Docket No. 99-272, DA 00-874 (rel. April 14, 2000). In the *Qwest/ U S WEST Merger Order*, the Commission approved the proposed merger between Qwest and U S WEST subject to the condition that the merger could not be consummated until the issuance by the Commission of a subsequent order stating that the proposed divestiture (of Qwest's interLATA assets and services within the U S WEST region) results in a merger that complies with section 271. *Qwest/ U S WEST Merger Order* at para. 64.

⁵ 47 U.S.C. § 258.

⁶ 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* at 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).

⁷ Pursuant to these procedures, carriers 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. § 64.1150.

II. DISCUSSION

4. 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 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.

5. We find that Touch America and Qwest have demonstrated that good cause exists to justify a limited waiver of the Commission's authorization and verification requirements to the extent necessary to enable Touch America to transfer to its own customer base the affected customers of Qwest and its subsidiaries. Touch America, Qwest, and Qwest's subsidiaries are providers of long distance service. Touch America and Qwest seek this waiver in order to facilitate Qwest's divestiture of certain long distance service assets that will, in turn, permit Qwest to complete its pending merger with U S WEST.¹² Upon the merger's closing, Qwest will transfer the long distance assets it owns in the 14-state U S WEST region to Touch America in order to comply with section 271 of the Communications Act.¹³ To accomplish this divestiture, Qwest has formed a new, wholly-owned subsidiary, TeleDistance Holdings, Inc. (TD Holdings), which is the sole stockholder of TeleDistance, Inc. (TeleDistance). Qwest intends to transfer the U S WEST-region customer bases of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., and Phoenix Network, Inc. (Qwest Subsidiaries) to TeleDistance. Qwest will then sell the stock of TD Holdings to Touch America, thereby transferring control of TeleDistance and its customer base to Touch America.¹⁴ Thereafter, Touch America will provide long distance services to the TeleDistance customer base under the Touch America name.¹⁵

⁸ 47 C.F.R. § 1.3.

⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*).

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

¹¹ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹² See *Qwest/ U S WEST Merger Order*.

¹³ 47 U.S.C. § 271.

¹⁴ Supplemental Waiver Petition at 2.

¹⁵ *Id.*

6. We conclude that special circumstances exist to justify the requested waiver. Touch America and Qwest argue that the purpose of the Commission's verification rules would not be served by requiring them to obtain prior authorization and verification in order to switch the affected customers of Qwest and its subsidiaries to Touch America. Touch America and Qwest state that, given the size of the customer bases involved, they might not be able to obtain such authorization and verification from each subscriber prior to the transfer, and that, if the transfer occurred without a waiver, some customers might temporarily lose service or be charged substantially higher rates than those Touch America will charge.¹⁶ 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 service to the transferred customers.

7. We find that Touch America and Qwest have demonstrated that a limited waiver of the authorization and verification rules is in the public interest because it will prevent consumers from temporarily losing service or paying significantly higher rates, and because the parties have agreed to notify the affected customers as described below. Touch America states that it will undertake a two-step process to notify the affected customers of the transaction.¹⁷ In a first letter, Touch America will inform customers of the proposed transaction and assure them that no charges or rate increases will be imposed as a result of the transaction. Touch America states that it will also advise the affected customers that they can choose a different preferred carrier, should they desire to do so.¹⁸ In addition, the letter will provide a toll-free number for customers to call with any questions they may have about the transition. According to Touch America, once the transfer has been accomplished, it will notify customers of that event and reiterate the foregoing information, assurances, and advice.¹⁹ Finally, Qwest has promised to investigate and resolve any outstanding customer complaints that may have been made against Qwest or its subsidiaries prior to the transfer date, and Touch America has promised to address all customer inquiries and complaints after the change in long distance service providers.²⁰ We conclude that these conditions will adequately protect the rights of the transferred customers of Qwest and its subsidiaries.

8. For the foregoing reasons, we grant Touch America and Qwest 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 the provision by Touch America and Qwest of customer notification and handling of customer complaints, as described above and further detailed in their Supplemental Waiver Petition and Second Supplement.

¹⁶ *Id.* at 4-5.

¹⁷ Touch America and Qwest included two sample notification letters in its Supplemental Waiver Petition.

¹⁸ See Supplemental Waiver Petition at 2-3; see also Second Supplement, Exhibit 1, Sample Customer Notification Letter (pre-transaction).

¹⁹ See Supplemental Waiver Petition at 3; see also Second Supplement, Exhibit 2, Sample Customer Notification Letter (post-transaction).

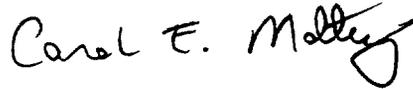
²⁰ Supplemental Waiver Petition at 5.

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that, 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 waiver request filed by Touch America, Inc. and Qwest Communications International, Inc. on March 17, 2000, and supplemented on April 12, 2000 and May 3, 2000, IS GRANTED subject to the conditions, and to the extent, indicated herein.

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

FEDERAL COMMUNICATIONS COMMISSION



Carol E. Matthey
Deputy Chief, Common Carrier Bureau