

FCC MAIL ROOM

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

2000 DEC 20 P 4: 19

In the Matter of)
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)
Implementation of the Subscriber Carrier)
Selection Changes Provisions of the)
Telecommunications Act of 1996)
)
)
PaeTec Communications, Inc.)
)
Petition for Waiver)

CC Docket No. 94-129 ED

ORDER

Adopted: December 15, 2000

Released: December 18, 2000

By the Associate Chief, Accounting Policy Division, 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 PaeTec Communications, Inc. (PaeTec), a limited waiver of the authorization and verification requirements of the Commission's rules and *Carrier Change Orders*.³ We grant this limited waiver to the extent necessary to enable PaeTec to become the preferred carrier of certain

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*, 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 15966; *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 November 27, 2000, PaeTec filed a Petition for Waiver (Waiver Petition) relating to PaeTec's transfer of the customer base of its affiliate, East Florida Communications, Inc. (East Florida), to PaeTec.

consumers currently presubscribed to East Florida, without first obtaining the consumers' authorization and verification.

2. Section 258 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 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."⁴ 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.⁵ In the *Section 258 Order*, the Commission revised its procedures to ensure that carriers obtain the requisite authority prior to changing a customer's preferred carrier. The Commission requires that carriers follow one of the Commission's prescribed verification procedures before submitting carrier changes on behalf of consumers.⁶

3. PaeTec seeks a waiver of our verification rules to allow PaeTec to be designated the preferred long distance carrier for customers of East Florida 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 PaeTec a waiver, subject to the conditions represented in its filings.

II. DISCUSSION

4. Generally, the Commission's rules may be waived for good cause shown.⁷ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.⁸ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on

⁴ 47 U.S.C. § 258.

⁵ 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).

⁶ Pursuant to these procedures, a carrier 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. § 64.1120(c).

⁷ 47 C.F.R. § 1.3.

⁸ *WAT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

⁹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

an individual basis.¹⁰ 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.¹¹

5. We find that PaeTec has demonstrated that good cause exists to justify a limited waiver of the Commission's authorization and verification requirements to the extent necessary to enable PaeTec to transfer to its own customer base the affected East Florida customers. East Florida, a direct subsidiary of PaeTec, is a provider of interexchange and alternative local exchange telecommunications services in Florida only and a reseller of international telecommunications services. PaeTec, the direct parent company of East Florida, currently provides the same services to business customers in all states, except for Alaska, Hawaii, and the District of Columbia.¹² In its Waiver Petition, PaeTec states that it intends to consolidate the operations of the two companies by merging East Florida into PaeTec and transferring East Florida's customer base to PaeTec.¹³ Following the consolidation, PaeTec will provide the former East Florida customers with the same telecommunications services subject to the same rates, terms, and conditions as provided by East Florida.¹⁴

6. We conclude that special circumstances exist to justify a waiver. Without this waiver, the service of some former East Florida customers might temporarily be interrupted when East Florida ceases providing presubscribed service to customers who fail to respond in a timely fashion to requests for preferred carrier change authorization; those customers might also pay potentially higher casual calling rates after the discontinuance of presubscribed service. 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 PaeTec has 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 PaeTec has agreed to notify the affected customers as described below. PaeTec states that it will undertake a two-step process to notify the affected customers of the transfer.¹⁵ In a first letter, PaeTec will inform customers of the proposed transfer and assure them that no charges or rate increases will be imposed as a result of the transfer.¹⁶ PaeTec states that it will also advise the affected customers that they can choose a different preferred carrier, should they desire to do so, and that, if they do so within 30

¹⁰ *WAT Radio*, 418 F.2d at 1157.

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

¹² Waiver Petition at 1-3.

¹³ Waiver Petition at 3.

¹⁴ *Id.*

¹⁵ Waiver Petition at 4. PaeTec filed sample notification letters. *See* Waiver Petition, Exhibit B (Notification Letters).

¹⁶ Waiver Petition at 4; Notification Letters.

days of the transfer. PaeTec will reimburse the customer for any carrier change charge imposed by the local exchange carrier.¹⁷ In addition, customers will be given a toll-free number to call with any questions they may have about the transition.¹⁸ According to PaeTec, once the proposed transfer has been consummated, it will notify these customers of that event and reiterate the foregoing information, assurances, and advice.¹⁹ PaeTec has agreed that, if the Commission waives its rules to permit PaeTec to provide service to East Florida's former customers, PaeTec will work with the complainants and the Commission to investigate and resolve complaints regarding services provided by East Florida.²⁰ We conclude that these conditions will adequately protect the rights of the transferred customers of East Florida.

8. For the foregoing reasons, we grant PaeTec 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 PaeTec's provision of customer notification and handling of complaints, as described above and further detailed in the Waiver Petition.

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 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91,

¹⁷ Waiver Petition at 4; Notification Letters.

¹⁸ Notification Letters.

¹⁹ Waiver Petition at 4; Notification Letters.

²⁰ Waiver Petition at 4-5.

0.291. 1.3. the waiver request filed by PaeTec Communications, Inc., on November 27, 2000. IS GRANTED to the extent indicated herein.

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

FEDERAL COMMUNICATIONS COMMISSION

K. Michele Walters

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Associate Chief,
Accounting Policy Division,
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