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

2004 APR 14 A 4: 28

In the Matter of)
)
Implementation of the Subscriber Carrier)
Selection Changes Provisions of the)
Telecommunications Act of 1996)
)
Manhattan Telecommunications Corporation)
d/b/a Metropolitan Telecommunications a/k/a)
MetTel)

CC Docket No. 94-129 RECEIVED

Emergency Petition for Limited Waiver

ORDER

Adopted: April 11, 2001

Released: April 12, 2001

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 Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications a/k/a MetTel (MetTel) a limited waiver of the authorization and verification requirements of the Commission's rules and

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 World Com 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); *amended*, Order, FCC 01-67 (rel. Feb. 22, 2001); *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.

*Carrier Change Orders.*³ We grant this limited waiver to the extent necessary to enable MetTel to become the preferred carrier of consumers currently presubscribed to North American Telecommunications Corporation (NATELCO), 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. MetTel seeks a waiver of our verification rules to allow MetTel to be designated the preferred local and intraLATA toll carrier for NATELCO customers without first obtaining each customer's authorization and verification. Because we conclude that, under the circumstances presented, it is in the public interest to do so, we grant MetTel 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

³ On April 4, 2001, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications a/k/a MetTel filed an Emergency Petition for Limited Waiver of the Commission's carrier change rules to permit it to acquire a portion of the North American Telecommunications Corporation customer base. (Waiver Petition).

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*, 14 FCC Rcd at 1593, 1594, 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 or electronically signed authorization in a form that meets the requirements of §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. See 47 C.F.R. § 64.1120(c).

⁷ 47 C.F.R. § 1.3.

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 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 MetTel 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 MetTel to transfer to its own customer base the affected NATELCO customers. According to the Waiver Petition, on February 23, 2001, NATELCO filed for bankruptcy protection under Chapter 11 in the United States Bankruptcy Court for the Southern District of New York.¹² Pursuant to a bankruptcy sale, MetTel entered into an Asset Purchase Agreement with NATELCO in which MetTel agreed to acquire a portion of the NATELCO customer base, namely payphone access lines, including the customer accounts and accounts receivable. Following the Bankruptcy Court's approval of the Asset Purchase Agreement, which is expected between April 15 and April 20, 2001, NATELCO will continue providing local and intraLATA toll service to these customers for a short period of time.¹³ MetTel seeks to transfer the affected customers to its customer base the day after the Bankruptcy Court approves the Asset Purchase Agreement, in order to prevent the affected customers from experiencing any disruption in service. Ultimately, MetTel will provide local and intraLATA toll service to the former NATELCO customers.¹⁴

6. We conclude that special circumstances exist to justify a waiver. Without this waiver, the service of some former NATELCO customers might temporarily be interrupted when NATELCO ceases providing presubscribed service to customers who fail to respond in a timely fashion to requests for preferred carrier change authorizations; 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 MetTel has demonstrated that a limited waiver of the authorization

⁸ *WAIT 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).

¹⁰ *WAIT Radio*, 418 F.2d at 1157.

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

¹² Waiver Petition at 2-3.

¹³ Waiver Petition at 3.

¹⁴ Waiver Petition at 3.

and verification rules is in the public interest because it will prevent consumers from temporarily losing service, and because MetTel has agreed to notify the affected customers as described below. According to the Waiver Petition, MetTel will undertake a two-step process to notify the affected customers of the transfer.¹⁵ The first notification letter will inform the affected customers of the proposed transfer to MetTel and assure them that they will receive the same features, services, and rates that NATELCO currently provides.¹⁶ This notification letter will also advise the affected customers that they may select a different preferred carrier, should they desire to do so. In addition, the affected customers will be given a toll-free number to call with any questions they may have about the transfer.¹⁷

8. According to MetTel, once the proposed transfer has been completed, MetTel will notify these customers of that event and reiterate the foregoing information, assurances, and advice.¹⁸ In addition, MetTel states that it will take responsibility to investigate, respond, and attempt to cure any outstanding customer complaints regarding services provided by NATELCO.¹⁹ We conclude that these conditions will adequately protect the rights of the NATELCO customers.

9. For the foregoing reasons, we grant MetTel 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 of customer notification and the handling of complaints, as described above and further detailed in the Waiver Petition.

III. ORDERING CLAUSES

10. 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

¹⁵ MetTel filed sample notification letters. *See* Waiver Petition, Exhibits A and B (Notification Letters).

¹⁶ Waiver Petition at 4.

¹⁷ *See* Notification Letters.

¹⁸ *See* Waiver Petition at 4; Exhibit B.

¹⁹ Waiver Petition at 4.

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 emergency waiver request filed by Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications a/k/a MetTel on April 4, 2001 IS GRANTED to the extent indicated herein.

11. 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
Common Carrier Bureau