

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

2001 APR 27 P 4: 35

In the Matter of )  
)  
Implementation of the Subscriber Carrier )  
Selection Changes Provisions of the )  
Telecommunications Act of 1996 )  
)  
ComTech21, LLC )  
)  
Petition for Waiver )  
)

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CC Docket No. 94-129

**ORDER**

**Adopted: April 23, 2001**

**Released: April 24, 2001**

By the Associate Chief, Accounting Policy Division, Common Carrier Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. In its *Carrier Change Orders*,<sup>1</sup> the Commission adopted rules applicable to carriers changing a consumer's preferred carrier.<sup>2</sup> In this Order, we grant ComTech21, LLC (ComTech) a limited waiver of the authorization and verification requirements of the

<sup>1</sup> *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*.

<sup>2</sup> 47 C.F.R. §§ 64.1100 - 64.1190.

Commission's rules and *Carrier Change Orders*.<sup>3</sup> We grant this limited waiver to the extent necessary to enable ComTech to become the preferred carriers of consumers currently presubscribed to NXLD Company d/b/a Nextel Long Distance (NXLD), 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."<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

3. ComTech seek a waiver of our verification rules to allow ComTech to be designated the preferred long distance carrier for certain customers of NXLD 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 ComTech 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.<sup>7</sup> As

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<sup>3</sup> On March 22, 2001, ComTech 21, LLC filed a Petition for Waiver of the Commission's carrier change rules to enable ComTech to acquire the NXLD customer base. (Waiver Petition.) On April 20, 2001, ComTech supplemented its Waiver Petition with additional information regarding the handling of complaints of former NXLD customers. (Supplement).

<sup>4</sup> 47 U.S.C. § 258.

<sup>5</sup> 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).

<sup>6</sup> Pursuant to these procedures, a carrier must: (1) obtain the subscriber's written or electronically signed authorization 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).

<sup>7</sup> 47 C.F.R. § 1.3.

noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.<sup>8</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>9</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>10</sup> 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.<sup>11</sup>

5. We find that ComTech 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 ComTech to transfer to its own customer base the affected NXLD customers. According to the Waiver Petition, ComTech and NXLD have entered into an agreement whereby NXLD intends to transfer approximately 20,000 customers, representing more than 30,000 lines, to ComTech's customer base.<sup>12</sup> Upon completion of the transfer, ComTech will provide interexchange services to the former NXLD customers.<sup>13</sup>

6. We conclude that special circumstances exist to justify a waiver. Without this waiver, the service of some former NXLD customers might temporarily be interrupted when NXLD ceases providing presubscribed service to customers who fail to respond in a timely fashion to requests for preferred carrier change authorizations; some of 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 ComTech 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, and because ComTech has agreed to notify the affected customers as described below. According to the Waiver Petition, ComTech will undertake a two-step process to notify the affected customers of the transfer.<sup>14</sup> The first notification letter will inform the affected customers of the proposed transfer to ComTech and assure them that they will receive the same features, services, and rates that NXLD currently provides.<sup>15</sup> This notification letter will also advise the affected customers that they may select a different preferred carrier, should they desire

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

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

<sup>10</sup> *WAIT Radio*, 418 F.2d at 1157.

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

<sup>12</sup> Waiver Petition at 2.

<sup>13</sup> Waiver Petition at 2.

<sup>14</sup> Petitioners filed sample notification letters. *See* Waiver Petition, Attachment A (Notification Letters).

<sup>15</sup> Waiver Petition at 3.

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.<sup>16</sup>

8. According to ComTech, once the proposed transfer has been completed, ComTech will notify these customers of that event and reiterate the foregoing information, assurances, and advice.<sup>17</sup> ComTech also states that it will reimburse a customer for any preferred interexchange carrier change charges incurred from the local exchange carrier if a customer decides to change his or her preferred carrier within 30 days from the transfer date.<sup>18</sup> In addition, ComTech asserts that it will investigate and resolve any outstanding customer complaints regarding services provided by NXLD.<sup>19</sup> We conclude that these conditions will adequately protect the rights of the NXLD customers.

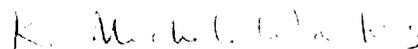
9. For the foregoing reasons, we grant ComTech a waiver of the authorization and verification requirements of our rules for the limited purposes described above. The grant of this waiver is conditioned upon the provision of customer notification and the handling of complaints, as described above and further detailed in the Waiver Petition and Supplement.

### 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 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 ComTech21, LLC on March 22, 2001, and supplemented on April 20, 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  
Associate Chief, Accounting Policy Division  
Common Carrier Bureau

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<sup>16</sup> See Notification Letters.

<sup>17</sup> See Attachment 3.

<sup>18</sup> Waiver Petition at 3.

<sup>19</sup> Supplement at 1.