

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

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

CC Docket No. 94-129 /

ORDER

Adopted: June 14, 2001

Released: June 15, 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 Pacific Lightnet, Inc. (Pacific Lightnet) a limited waiver of the authorization and verification requirements of the

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.

Commission's rules and *Carrier Change Orders*.³ We grant this limited waiver to the extent necessary to enable Pacific Lightnet to become the preferred carrier of certain consumers currently presubscribed to GST Telecom Hawaii, Inc. (GST Hawaii), 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. Pacific Lightnet seeks a waiver of our verification rules to allow Pacific Lightnet to be designated the preferred long distance carrier for certain customers of GST Hawaii 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 Pacific Lightnet 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

³ On May 22, 2001, Pacific Lightnet, Inc. filed a Petition for Waiver of the Commission's carrier change rules to enable Pacific Lightnet to acquire certain customers of GST Hawaii, Inc. (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 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.

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

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 Pacific Lightnet 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 Pacific Lightnet to transfer to its own customer base the affected GST Hawaii customers. According to the Waiver Petition, on May 17, 2000, GST Hawaii filed for protection under Chapter 11 of the U.S. Bankruptcy Code in the U.S. District Court for the District of Delaware and plans to discontinue service. Pacific Lightnet and GST Hawaii have entered into an agreement whereby Pacific Lightnet has agreed to acquire substantially all of GST Hawaii's assets and approximately 1,000 customers, representing more than 7,000 lines.¹² Pacific Lightnet states that it intends to offer the affected GST Hawaii customers the same or better services and rates.¹³

6. We conclude that special circumstances exist to justify a waiver. Without this waiver, the service of some former GST Hawaii customers might temporarily be interrupted when GST Hawaii 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 Pacific Lightnet 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 Pacific Lightnet has agreed to notify the affected customers as described below. According to the Waiver Petition and subsequent filing, Pacific Lightnet will undertake a two-step process to notify the affected customers of the transfer.¹⁴ To

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. On March 9, 2001, GST's parent company, GST Telecommunications, Inc., which has also filed for bankruptcy, filed an asset purchase agreement with the Bankruptcy Court seeking the court's approval of the acquisition of all remaining GST Hawaii assets by TM Communications Hawaii LLC ("TM"). The Bankruptcy Court approved the asset purchase agreement on March 22, 2001. Upon closing, all former GST Hawaii assets, including its customer base, will be transferred to TM's nominee, Pacific Lightnet. *Id.* at n.3.

¹³ Waiver Petition at 2.

¹⁴ Pacific Lightnet filed sample notification letters. See Waiver Petition, Exhibit A. On June 11, 2001, Pacific Lightnet filed a revised pre-transfer notification letter. See Supplement to Petition for Waiver, June 11, 2001 (Supplementary Filing).

maximize administrative efficiencies and eliminate customer confusion, Pacific Lightnet is sending a letter during the week of June 11, 2001 to inform GST Hawaii customers of the proposed transfer and to assure them that no charges or rate increases will be imposed as a result of the transfer.¹⁵ This notification letter also advises the affected customers that they may select a different preferred carrier, should they desire to do so. In addition, the affected customers are receiving a toll-free number to call with any questions they may have about the transfer.¹⁶

8. Once the proposed transfer has been completed, Pacific Lightnet promises to notify these customers of that event and reiterate the foregoing information, assurances, and advice.¹⁷ In addition, Pacific Lightnet asserts that it will investigate and resolve any outstanding customer complaints regarding services provided by GST Hawaii.¹⁸

9. For the foregoing reasons, we grant Pacific Lightnet 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 Supplementary Filing.

¹⁵ See Supplementary Filing at 1. We note that Pacific Lightnet, after a discussion with Commission staff, committed to send its pre-transfer notification letters during the week of June 11, 2001 and to transfer GST Hawaii's customers to Pacific Lightnet no earlier than July 10, 2001. As a result, those customers will have had approximately 30 days notice before the transfer, which is consistent with the pre-transfer notification period the Commission adopted as part of its new streamlined procedures in *2000 Biennial Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, First Report and Order in CC Docket No. 00-257 and Fourth Report and Order in CC Docket No. 94-129 (released May 15, 2001). The effective date of the rule containing the new streamlined procedures, 47 C.F.R. § 64.1120(e), will be published in the Federal Register in the near future.

¹⁶ See Supplementary Filing at 1.

¹⁷ Waiver Petition at 3-4.

¹⁸ See Supplementary Filing at 1.

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 Pacific Lightnet, Inc., on May 22, 2001, and supplemented on June 11, 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