

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

In the Matter of )
)
2000 Biennial Review-Review of Policies and )
Rules Concerning Unauthorized Changes of ) CC Docket No. 00-257
Consumers' Long Distance Carriers )
)
Implementation of the Subscriber Carrier )
Selection Changes Provisions of the ) CC Docket No. 94-129
Telecommunications Act of 1996 )
)
Midwestern Telecommunications, Inc. )
)
Petition for Waiver )

ORDER

Adopted: October 4, 2002

Released: October 7, 2002

By the Deputy Chief, Consumer & Governmental Affairs Bureau:

I. INTRODUCTION AND BACKGROUND

1. In its Streamlining Order, the Commission instituted streamlined procedures for compliance with the authorization and verification requirements of our rules and of section 258 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, in situations involving the carrier-to-carrier sale or transfer of subscriber bases.1 In this Order, we find it is in the public interest to grant Midwestern Telecommunications, Inc. (Midwestern) a limited waiver of these rules. We grant this waiver to the extent necessary to enable Midwestern, without complying precisely with the Commission's streamlined procedures, to become the presubscribed provider of local service to customers of a reseller of local exchange service that has defaulted on monies owed to its underlying carrier.

2. In 1998, the Commission adopted rules to implement section 258 of the 1996 Act, which expanded the Commission's existing authority to deter and punish "slamming," the submission or execution of an unauthorized change in a subscriber's selection of a provider of telecommunications

1 See 2000 Biennial Review-Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers; Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, First Report and Order in CC Docket No. 00-257 and Fourth Report and Order in CC Docket No. 94-129, ("Streamlining Order"), 16 FCC Rcd 11218 (2001), adopting 47 C.F.R. § 64.1120(e). See also 47 U.S.C. § 258(a); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

service.<sup>2</sup> Pursuant to section 258 and the Commission's rules, carriers are barred from changing a customer's preferred carrier without first complying with the Commission's procedures.<sup>3</sup>

3. According to the streamlined procedures adopted by the Commission, carriers need not obtain individual subscriber authorization and verification for carrier changes associated with the carrier-to-carrier sale or transfer of a subscriber base, provided that, not later than 30 days before the planned carrier change, the acquiring carrier notifies the Commission, in writing, of its intention to acquire the subscriber base and certifies that it will comply with the required procedures, including the provision of 30-day advance written notice to all affected subscribers.<sup>4</sup> These rules are designed to ensure that affected subscribers have adequate information about the carrier change in advance, that they are not financially harmed by the change, and that they will experience a seamless transition of service from their original carrier to the acquiring carrier.<sup>5</sup> This self-certification process also provides the Commission with information it needs to fulfill its consumer protection obligations.<sup>6</sup>

4. On September 10, 2002, Midwestern filed with the Commission an expedited Petition for Waiver asking the Commission to waive the 30-day advance notice requirements of sections 64.1120(e)(1) and (e)(3) of the rules to permit the transfer of local customers from Five Star Phone Center (Five Star) a reseller of local exchange service, to Midwestern.<sup>7</sup> Midwestern filed an amended Petition for Waiver (Petition) containing additional facts on September 23, 2002.<sup>8</sup>

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<sup>2</sup> 47 U.S.C. § 258(a); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, 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 15996 (2000), Errata, DA No. 00-2163 (rel. Sept. 25, 2000), Erratum, DA No. 00-2192 (rel. Oct. 4, 2000), Order, FCC 01-67 (rel. Feb. 22, 2001); *reconsideration pending*. Prior to the adoption of Section 258, the Commission had taken various steps to address the slamming problem. *See, e.g., 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); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 F.C.C.2d 911, 101 F.C.C.2d 935, *reconsideration denied*, 102 F.C.C.2d 503 (1985).

<sup>3</sup> *Id.*

<sup>4</sup> 47 C.F.R. § 64.1120(e).

<sup>5</sup> *See Streamlining Order* ¶ 10, 16 FCC Rcd at 11222.

<sup>6</sup> *Id.*

<sup>7</sup> Petition for Waiver – Expedited Action Requested, filed with the Commission by Midwestern Telecommunications, Inc. on September 10, 2002, and amended and re-filed on September 23, 2002 (seeking waiver of 30-day notice requirements of 47 C.F.R. §§ 64.1120(e)(1) & (e)(3)).

<sup>8</sup> *Id.*

## II. DISCUSSION

5. Generally, the Commission's rules may be waived for good cause shown.<sup>9</sup> As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.<sup>10</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>11</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>12</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>13</sup> In addition, the Commission specified in the *Streamlining Order* that instances in which it is impossible to comply precisely with the streamlined procedures will be resolved on a case-by-case basis.<sup>14</sup>

6. We find that Midwestern has demonstrated that good cause exists to justify a limited waiver of the Commission's requirements to the extent necessary to enable Midwestern to transfer to its own customer base the affected Five Star customers. According to the Petition, Five Star resold local exchange service to customers located in and around Chicago, IL. Midwestern states that Five Star is in default on monies owed to its underlying carrier, SBC/Ameritech, and that SBC/Ameritech announced that Five Star customers would be disconnected on September 13, 2002, if Five Star did not make payment to SBC/Ameritech before that date.<sup>15</sup> Midwestern states that, on September 4, 2002, Five Star approached Midwestern and offered to sell its customer base to Midwestern provided that the sale would be consummated before September 10, 2002.<sup>16</sup>

7. Under the Commission's rules, no later than 30 days prior to the transfer, an acquiring carrier must self-certify its compliance with the required procedures to the Commission and must give the affected subscribers notice of, and certain information about, the transfer.<sup>17</sup> Given the special circumstances Midwestern has described, compliance with the 30-day advance notice requirement could potentially result in the loss of local service for Five Star customers during the 30-day period. As noted above, the streamlined procedures were designed to permit affected subscribers to experience a "seamless transition of service from the original carrier to the acquiring carrier."<sup>18</sup> We find that, in the special circumstances of this case, waiver of the 30-day notice requirement would better serve this goal and would therefore serve the public interest.

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<sup>9</sup> 47 C.F.R. § 1.3.

<sup>10</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

<sup>11</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>12</sup> *WAIT Radio*, 418 F.2d at 1157.

<sup>13</sup> *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

<sup>14</sup> *Streamlining Order* ¶ 20, 16 FCC Rcd at 11226.

<sup>15</sup> Petition at 1-2.

<sup>16</sup> *Id.*

<sup>17</sup> 47 C.F.R. §§ 64.1120(e)(1) & (e)(3).

<sup>18</sup> *Streamlining Order* at ¶ 10, 16 FCC Rcd at 11222.

8. In addition, Midwestern states that it will offer the affected customers rates, terms and conditions identical to those that the customers received from Five Star.<sup>19</sup> Midwestern also states that, within ten business days of the closing date of the sale of the customer base, it will send each affected customer a letter containing the information required by section 64.1120(e), including a toll-free number that the customer may use to call for answers to questions regarding the transfer, or to switch to a different local exchange carrier.<sup>20</sup> In the special circumstances presented in this case, we find it unlikely that the affected customers will suffer harm from receiving less than 30 days notice of the transfer. This is particularly true when, as is the case here, affected customers will not experience a change in service or rates as a result of the transfer. In any event, we conclude that any such harms would be outweighed by the benefits of a seamless transfer of service, along with the fact that Midwestern will provide service at rates, terms and conditions identical to those the customers received prior to the transfer. We also note that the Wireline Competition Bureau has granted Midwestern an STA (Special Temporary Authority) pending final action on Midwestern's application for transfer of control. Such action is separate and distinct from the action taken in the instant *Order*.

9. For the foregoing reasons, we grant Midwestern a waiver of the 30-day advance notification requirements of 47 C.F.R. §§ 64.1120(e)(1) and (e)(3) for the limited purposes described above. The grant of this waiver is conditioned upon Midwestern's provision of customer notification and certification to the Commission that complies with all requirements of section 64.1120(e) except the 30-day periods waived herein.

### 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 0.141, 0.361, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.141, 0.361, 1.3, the waiver request filed by Midwestern Telecommunications, Inc., on September 23, 2002, IS GRANTED to the extent indicated herein.

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

FEDERAL COMMUNICATIONS COMMISSION

Margaret M. Egler, Deputy Chief  
Consumer & Governmental Affairs Bureau

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<sup>19</sup> Petition at 4.

<sup>20</sup> *Id.* at 3-4.