STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: EMERGENCY PETITION FOR DECLARATORY RELIEF DIRECTING VERIZON TO PROVISION CERTAIN UNES AND UNE COMBINATIONS	: : : :	DOCKET NO. 3668

REPORT AND ORDER

I. PETITION

On March 7, 2005, Broadview Network, Inc., Broadview NP Acquisition Corp., Info Highway Communications, and DSCI Corporation ("Petitioners") filed a petition for emergency declaratory relief to prevent Verizon-Rhode Island ("VZ-RI") from breaching its interconnection agreements ("ICAs") with the Petitioners for prematurely refusing to provision certain unbundled network elements ("UNEs") and UNE combinations. Specifically, VZ-RI has informed all competitive local exchange carriers ("CLECs") that VZ-RI will reject Unbundled Network Element Platform ("UNE-P") orders due on and after March 11, 2005 as well as orders for dedicated DSI and DS3 transport, and DSI and DS3 high capacity loops within certain wire centers as indicated by the FCC's Triennial Review Remand Order ("TRRO").[1]

The Petitioners argued that the rights of CLECs to obtain UNEs pursuant to section 251 of the Telecommunications Act of 1996 ("Telco Act") is governed by ICAs negotiated and arbitrated pursuant to section 252 of the Telco Act. In addition, the Petitioners emphasized that VZ-RI can only modify its obligation to provision UNEs to CLECs by amending its ICAs. The Petitioner indicated that VZ-RI has not negotiated in good faith with the CLECs to implement the TRRO. The Petitioners opined that VZ-RI's

[1] Emergency Petition for Declaratory Relief, pp. 1-4.

obligation to provision UNEs and UNE combinations is based not only on Section 251 of the Telco Act but also upon applicable law, which includes the Bell Atlantic-GTE merger conditions, Section 271 of the Telco Act, and state law. Furthermore, the Petitioners stressed that VZ-RI should continue to provision all UNEs and UNE combinations until it has changed its ICAs by effectuating the changes in law resulting from the TRRO. In addition, the Petitioners maintained that VZ-RI must make unbundled loops, transport and local switching available to CLECs pursuant to Section 271 of the Telco Act. In conclusion, the Petitioners requested that the Commission order VZ-RI to continue provisioning UNEs and UNE combinations under the rates and terms of its ICAs and comply with the change of law provisions of its ICAs with regard to implementing the TRRO.[2]

II. VZ-RI's OPPOSITION

On March 11, 2005, VZ-RI filed an opposition to the Petitioners' request for emergency declaratory relief. VZ-RI indicated that the Petitioner failed to demonstrate they are likely to suffer any irreparable harm. VZ-RI stated that, after March 11, 2005, CLECs can obtain switching for new orders through commercial agreements or resale. Also, after March 11, 2005, VZ-RI explained that for a loop or transport, in non-UNE eligible wire centers, CLECs can obtain the loop or transport by certifying under the TRRO its availability after a diligent inquiry, and for high capacity loops or dedicated transport, CLECs may order special access service. Thus, VZ-RI argued the only harm

[2] Id., pp. 4-12. On March 10, 2005, the Petitioners submitted a letter indicating that the state regulatory commissions in Illinois, Michigan, Georgia and Alabama had granted petitions to require Regional Bell Operating Companies ("RBOCs") to continue offering UNEs and UNE combinations under the CLECs' current ICAs.

to CLECs is paying more for service than they now pay at TELRIC rates and these money damages alone cannot constitute irreparable harm.[3]

VZ-RI argued that the FCC's TRRO clearly prohibits new orders for discontinued UNEs as of March 11, 2005. VZ-RI explained that the FCC ordered this clear deadline because of the D.C. Circuit Court's decision to vacate the FCC's UNE rules adopted in the FCC's Triennial Review Order ("TRO"). Accordingly, VZ-RI maintained that unlike the TRO, the prohibition on new orders for discontinued UNEs was not left to implementation through the change-of-law provisions of ICAs.[4]

In regard to the Petitioners' ICAs, VZ-RI noted that two of the four Petitioners, Broadview Networks and Broadview NP Acquisition Corp, have ICAs specifically citing the D.C. Circuit's recent decision and the FCC's UNE rules as the basis of VZ-RI's UNE obligations. Also, the ICAs for all four Petitioners state that VZ-RI must provide UNEs only to the extent required by applicable law, which according to VZ-RI, in these circumstances, is the FCC's TRRO. In addition, VZ-RI argued that state regulatory commissions cannot stay the effect of the FCC's TRRO because of preemption. Lastly, in regards to Section 271 of the Telco Act, VZ-RI stressed that the interpretation and enforcement of Section 271 is the exclusive province of the FCC.[5]

At an open meeting on March 24, 2005, the Commission reviewed the pleadings and denied the Petitioners request for emergency declaratory relief requiring VZ-RI to provision certain UNEs and UNE combinations.

[3] VZ-RI's Opposition, pp. 8-9.
[4] Id., pp. 9-16.
[5] Id., pp. 16-24.

COMMISSION FINDINGS

The CLECs in this case have labeled their petition an emergency. The Petitioners are essentially seeking a temporary restraining order on VZ-RI to prevent it from following the FCC's TRRO. Under R.I. Civil Procedure Rule 65, a party seeking a temporary restraining order must demonstrate "immediate and irreparable injury." In this case, VZ-RI will continue to provision to CLECs their current switching arrangements as well as their current transport and loops at wire centers which no longer meet the thresholds of the FCC's TRRO, albeit at the higher transitional rates.[6] Furthermore, for new switching arrangements or new transport or loops which do not meet the FCC's new criteria, the CLECs can obtain access to these network facilities by entering into a commercial agreement with VZ-RI or by ordering through resale or special access services, although at rates higher than TELRIC. This is not an argument of providing wholesale services or disrupting the services of current customers, but of CLECs paying more for wholesale services in order for them to service their current customers and obtain new customers. The damages VZ-RI could inflict on these CLECs would be monetary in nature and "monetary damages will ordinarily not invite injunctive relief."[7] A business entity needing to pay some more money for a wholesale service is not an emergency. On the contrary, it is a common, everyday business occurrence.

Notwithstanding that the Petitioners have failed to demonstrate immediate and irreparable harm, the Commission will review the legal merits of this petition. The Petitioners cleverly worded request is that VZ-RI continues provisioning UNEs under the terms of their ICAs. This is a reasonable request but the CLECs' interpretation of their

[6] See e.g. FCC Rules 51.319 (a)(4)(iii), 51.319 (d)(2)(iii), and 51.319 (e)(2)(iii)(C).
[7] In re State Employees Union, 587 A.2d 919, 926 (1991).

ICAs is not. Two of the four ICAs, in question, specifically state that the ICA "does not include adoption of any provision imposing an unbundling obligation on Verizon that no longer applies to Verizon under … the decision of the U.S. Court of Appeals for the D.C. Circuit in the Opinion and Order in United States Telecom Association v. Federal Communications Commission, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II") or that is otherwise not required by both 47 U.S.C. Section 251 (c) (3) and 47 C.F.R. Part 51." The FCC's TRRO made it clear that VZ-RI is no longer required to provide certain UNEs under Section 251 of the Telco Act, and the FCC's UNE Rules are encompassed in 47 C.F.R. Part 51. Furthermore, all four ICAs in question require "compliance with applicable law", which is defined as "all effective laws, government regulations and government orders." The FCC's TRRO and new UNE rules are applicable law in telecommunications.

As for state law, the FCC has clearly indicated that in regard to UNE obligations it would be "unlikely" that a state commission decision which contradicts the FCC's UNE Rules "would fail to conflict" with federal law and would, therefore, be preempted.[8] This Commission has already declared it "should not attempt to exercise its authority if it is likely to be preempted."[9] Under these circumstances, there is no valid state law requirement in Rhode Island which requires VZ-RI to provide switching, or transport and loops at non-UNE eligible wire centers at TELRIC rates.

In regards to other federal legal obligations, the Commission has already indicated that determinations related to Section 271 of the Telco Act "should be made by the

[8] TRO para. 195.
[9] Order No. 18017.

FCC."[10] The issue of an RBOC's obligations under Section 271 regarding switching has been an issue of contention for some time and since Section 271 is a federal statute, it is inherently logical to have the FCC interpret this statute. Furthermore, there is no pressing need for this Commission to attempt to interpret Section 271 because the CLECs will continue to have access to VZ-RI's network facilities albeit at rates higher than TELRIC for some of these facilities. If these rates are not just and reasonable, the CLECs should petition the FCC immediately for relief. As for VZ's obligation under the FCC's Bell Atlantic/GTE Merger Order, the Commission Arbitrator has determined that the "the sun has set on VZ's obligation to provide UNEs under the Bell Atlantic/GTE Merger Order."[11] At this time, the Commission finds no reason to disagree with the Arbitrator's decision.

Even if VZ-RI is no longer required by law to provision certain UNEs, the issue remains as to whether VZ-RI has complied with the change of law provisions of their ICAs. Generally, compliance with an ICA's change of law provision is necessary to effectuate a change of law. VZ-RI has indicated that it provided the four CLECs with thirty days written notice of the discontinuation of the UNEs as required by the pertinent ICAs.

In any case, the change of law provision of an ICA cannot supersede or render impotent an express and immediate mandate by the FCC. Under the FCC's TRO, the FCC directed all carriers to negotiate and arbitrate all issues arising from the TRO through the Section 252 process of the Telco Act.[12] However, with the cloud of the D.C. Circuit Court's vacatur of the FCC's UNE Rules, the TRRO implemented on March 11,

[10] Id.
[11] Order No. 17802.
[12] TRO para. 701.

2005 new UNE Rules with transition periods for the discontinued UNEs serving the CLEC's embedded customer base.[13] Admittedly, in paragraph 233 of the TRRO, the FCC does reference its expectation that carriers will, through the Section 252 process, "implement our rule changes." However, assuming this provision conflicts with other provisions of the TRRO, it is a well established rule of interpretation that the specific provision prevails over the general provision.[14] In the TRRO, there are numerous specific provisions where the FCC states that the transition for the CLECs' embedded customer base being served by discontinued UNEs is "beginning on the effective date of the Triennial Review Remand Order", which is March 11, 2005.[15]

This Commission must presume that the FCC is logical. It would be illogical to begin a transition period for discontinued UNEs serving the CLECs' embedded customer base on a specific date, but allow CLECs to obtain these same discontinued UNEs for new customers during the transition period. If the FCC had remained silent on a specific date for beginning the transition period for the CLECs' embedded customer base, a different interpretation could have been reached.

At times, the law amounts to no more than the commands of a sovereign.[16] By enacting the Telecommunications Act of 1996, the federal government has made itself, to a large extent, sovereign over local telecommunications competition.[17] The FCC's TRRO is the sovereign's command.[18] The petition is denied.

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[13] TRRO paras. 145, 198 and 227.
[14] R.I.G.L. §43-3-26.
[15] FCC UNE Rules 51.319(a)(4)(iii), 51.319(a)(5)(iii), 51.319(a)(6)(iii), 51.319(d)(2)(iii), 51.319(e)(2)(ii)(C), 51.319(e)(2)(iii)(C), and 51.319(e)(2)(iv)(B).
[16] See John Austin, The Province of Jurisprudence Determined (1832).
[17] AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 378 n.6 (1999).
[18] The Petitioners noted on March 10, 2005 that four state regulatory commissions had granted their request for emergency declaratory relief. Since then, the Alabama, Illinois and Michigan commissions have reversed themselves regarding the CLECs right to receive UNE-P for new customers after March 11, 2005.

Accordingly, it is

(18281) ORDERED:

1. The Petition for Emergency Declaratory Relief filed on March 7, 2005 is hereby denied.

EFFECTIVE IN WARWICK, RHODE ISLAND PURSUANT TO AN OPEN MEETING DECISION ON MARCH 24, 2005. WRITTEN ORDER ISSUED JUNE 16, 2005.

Elia Germani, Chairman

Robert B. Holbrook, Commissioner

See Alabama PSC's Order in Docket 29393 (issued 5/25/05), Illinois C.C.'s Amendatory Orders in Docket 05-0154, 05-0156, and 05-0174 (issued 3/23/05), and Michigan PSC's Order in Case Nos. U-14303, 14305, 14327 and 14463 (issued 3/29/05). As for the Georgia Commission, it had to be reversed by the federal district court of the Atlanta Division of the Northern District of Georgia. See Justice Cooper's Order in No. 1:05-CV-0674-CC (issued 4/5/05).