STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: VERIZON-RHODE ISLAND'S REQUEST FOR PARTIAL RELIEF FROM THE ALTERNATIVE REGULATION PLAN APPROVED IN ORDER NO. 17417	:	DOCKET NO. 3445A

REPORT AND ORDER

I. PLEADINGS

On March 7, 2005, Verizon-Rhode Island ("VZ-RI") filed a request for relief from or partial waiver of certain provisions in Paragraph P of the Alternative Regulation Plan ("ARP") approved and incorporated by the Rhode Island Public Utilities Commission ("Commission") in Order No. 17417. VZ-RI indicated it filed the request pursuant to Commission Procedural Rule 1.10 within Docket No. 3445. VZ-RI noted that Section P of the ARP indicates that VZ-RI must have filed its proposed rate increases of up to $1.00 per line for primary residence basic exchange for the third year of the ARP by July 1, 2004. Also, according to Section P, the Division of Public Utilities and Carriers ("Division") would have had until September 1, 2004 to file a recommendation and the Commission would have been requested to issue a written order with respect to the rate increase no later than December 31, 2004. Section P of the ARP only allowed rate increases that were implemented not more frequently than annually. VZ-RI explained that since the Commission's Order approving the ARP was not issued until March 31, 2003, VZ-RI's first and second $1.00 increases in residence basic exchange rates did not become effective until May 1, 2003 and May 1, 2004, respectively. Since Section P of the ARP indicated a January 1st effective date for each of the residence basic exchange increases and that rate increases would not be more frequent than annual, VZ-

RI made no plans to increase rates for January 1, 2005 and therefore, made no filing on July 1, 2004. VZ-RI had received a second rate increase on May 1, 2004, less than twelve months prior to January 1, 2005. Accordingly, VZ-RI requested a waiver of the July 1, 2004 notification date so that VZ-RI could submit a tariff filing proposing the final $1 increase available under the APR. VZ-RI noted that no ratepayers had been harmed by VZ-RI's delay in seeking the increase and that VZ-RI's tariff filing would provide a 60-day review period.[1]

On March 14, 2005, counsel for the Division filed an objection to VZ-RI's filing of March 7, 2005 claiming substantial procedural irregularities. Counsel for the Division argued that VZ-RI's request would constitute a relief from order under Commission Procedural Rule 1.28(b). However, he noted that the Order was entered more than one year prior to the filing, also noting that such a request cannot be filed more than one year after the order was entered.[2] Counsel for the Division further opined that Commission Procedural Rule 1.28(c) would not be appropriate because an "independent action would be equally unavailing to Verizon in the pending matter".[3] In addition, counsel for the Division maintained that VZ-RI's filing did not comply with Commission Procedural Rule 1.10(a) or 1.10(b) because VZ-RI's petition did not identify any statute or other authority delegated to the Commission upon which relief can be granted and did not request the issuance, amendment, waiver or repeal of a rule.[4] Furthermore, counsel for the Division indicated that VZ-RI's filing could not be considered in Docket No. 3445 because the docket was closed pursuant to Commission Procedural Rule 1.20(m) and

[1] VZ-RI's filing of 3/7/05.
[2] Division's objection of 3/14/05, pp. 1-2.
[3] Id. at p. 2, fn. 1.
[4] Id. at p. 2.

therefore, the Division was entitled to 30 days to object to VZ-RI's filing instead of 10 days pursuant to Commission Procedural Rule 1.15.[5] Once again, Counsel for the Division argued that Commission Procedural Rule 1.28(c) is not applicable because fraud on the Commission is not at issue, and that Commission Procedural Rule 1.10(a) and (b) fail to provide the Commission with authority to consider VZ-RI's filing. Accordingly, counsel for the Division argued that the Commission should reject VZ-RI's filing and requested oral argument.[6]

On March 16, 2005, VZ-RI replied to the objection indicating that the Division's objection elevates form over substance and presents the irrational conclusion that the Commission is divested of the power to modify VZ-RI's ARP anytime after the first year anniversary of the plan's approval. VZ-RI stated that since it is requesting the opportunity to seek a rate increase, the Commission has statutory authority to consider and approve the request pursuant to Commission Procedural Rule 1.10(a). Specifically, VZ-RI cited the Commission's power to "regulate and make orders governing the conduct" of communications companies pursuant to R.I.G.L. Section 39-1-1 and the Commission's ability to review proposed rate changes pursuant to R.I.G.L. 39-3-11. Furthermore, VZ-RI indicated that the Commission has the authority to manage regulatory plans and in fact, in the Settlement Agreement approved in Order No. 17417, expressly preserved the Commission's "rights to review, and where required, modify rates".[7]

[5] Id. at pp. 2-3.
[6] Id. at pp. 3-4.
[7] VZ-RI's reply of 3/16/05, pp. 1-2.

As for the Division's assertion that Docket No. 3445 was closed, VZ-RI noted that the 10 day objection time period provided by Commission Procedural Rule 1.15 is applicable to any application to the Commission to take action "after commencement of a proceeding." Also, VZ-RI noted that the Commission has maintained Docket No. 3445 as open because VZ-RI has filed Service Quality Reports and Competitive Profile Reports in Docket No. 3445 since the ARP was approved. In addition, VZ-RI emphasized that on August 15, 2003, the Commission approved a request filed in Docket No. 3445 to amend Order No. 17417 to allow semi-annual rather than quarterly filings of the Competitive Profile Reports without objection from any party.[8] Even if Docket No. 3445 was closed, VZ-RI requested that Docket No. 3445 be re-opened solely for the purpose of considering VZ-RI's petition or that a new docket be opened giving the parties 20 days to respond as allowed under R.I. Civil Procedure Rule 12(a)(1)(A) since there is not a Commission rule defining the time in which to respond to a petition.[9]

As for the Division's argument regarding Commission Procedural Rule 1.28, VZ-RI noted that its request for relief relates to the ARP which is currently in effect and therefore the one-year limitation in Commission Procedural Rule 1.28(b) does not preclude relief in these circumstances. Furthermore, VZ-RI noted that Commission Procedural Rule 1.28(c) specifically "does not limit the power of the Commission to entertain an independent action to relieve a party from an order." Thus, VZ-RI indicated that this request can be considered an independent action unaffected by the one-year time limit of Commission Rule 1.28.[10]

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[8] Id. at p. 2.
[9] Id. at p. 2, fn. 2.
[10] Id. at pp. 2-3.

Lastly, VZ-RI noted that Section L of the ARP specifically allows VZ-RI to petition the Commission to modify any of the terms or conditions of the ARP in order to seek a less structured form of regulation or deregulation of its operations based upon changes in market conditions. VZ-RI explained that competition in residential and business local exchange markets has grown significantly since July 1, 2004 justifying the waiver of the July 1, 2004 filing date.[11]

On March 17, 2005, the Office of the Attorney General filed an objection to VZ-RI's petition repeating many of the arguments by the Division's counsel. The Attorney General argued that Commission Procedural Rule 1.10 does not apply to Commission orders but only relief from or pursuant to specific statutes, rules or regulations. The Attorney General emphasized that Commission Procedural Rule 1.10 does not allow a party to seek relief from a substantive portion of a settlement due to its own neglect, and argued that the exclusive administrative means for seeking relief from a final order is Commission Procedural Rule 1.28. Also, the Attorney General asserted that VZ-RI is not seeking clarification of any statute, rule or Commission order but is rather asking the Commission to interpret a settlement drafted by VZ-RI.[12] Furthermore, the Attorney General stated that VZ-RI is essentially requesting permission to alter a material term of a settlement to the detriment of ratepayers. The Attorney General explained that Section P of the ARP gives the Division 62 days to review VZ-RI's rate request and another 122 days for the Commission to issue an order, but that VZ-RI is offering only a 60 day review period and nothing in consideration for this waiver. Also, the Attorney General argues that VZ-RI's failure to file a request on July 1, 2004 assured ratepayers that there

[11] Id at p. 3.
[12] A.G's objection of 3/17/05, pp. 1-4.

would not be a rate increase in 2005. In addition, VZ-RI has made no showing of excusable neglect.[13]

The Attorney General indicated that VZ-RI's request is a collateral attack on the administrative proceeding in Docket No. 3445. Also, the Attorney General argued that Docket No. 3445 is closed and that Commission Procedural Rule 1.15 is not applicable. The Attorney General argued that VZ-RI's interpretation of Commission Procedural Rule 1.15 undermines administrative finality. Furthermore, the Attorney General noted that the two previous rate increases allowed by the ARP were considered under new dockets. In addition, the Attorney General argued that compliance filings being made in Docket No. 3445 are irrelevant and do not affect a party's ability to object to an attempt to force a substantive alteration to a party's interests in a closed case. Lastly, the Attorney General opined that relief under Commission Procedural Rule 1.28(c) requires a showing of fraud upon the Commission. The Attorney General respectfully requested oral argument on VZ-RI's petition.[14]

II. HEARING

At the request of the Attorney General, after ten days notice, the Commission conducted a public hearing to hear oral arguments on VZ-RI's petition. The Commission conducted the hearing on March 28, 2005 at its offices at 89 Jefferson Boulevard in Warwick, Rhode Island. The following appearances were entered:

FOR VZ-RI:	Alexander Moore, Esq.
FOR DIVISION:	Leo Wold, Esq. Special Assistant Attorney General
FOR ATTORNEY GENERAL:	William Lueker, Esq.

[13] Id. at pp. 7-12.
[14] Id. at pp. 7-12.

Special Assistant Attorney General

FOR COMMISSION: Steven Frias, Esq.
Executive Counsel

At oral argument, Mr. Moore stated that VZ-RI did not file for a third increase on July 1, 2004 because it had just received an increase two months before and from a business point of view, VZ-RI could not have decided whether an additional dollar increase would be appropriate for 2005. He pointed out there would be no harm to any party if the waiver is granted and that VZ-RI's customers always had the risk of a third rate increase on January 1, 2005.[15] Mr. Moore argued that there is no restriction on the Commission considering a rate increase, and specifically argued that a modification is appropriate under Section L of the ARP because VZ-RI's residential market share is less than 70 percent and Rhode Island is the most competitive state in the country.[16] In conclusion, Mr. Moore argued that under R.I.G.L. Sections 39-3-1 and 39-3-11, the Commission has the power to regulate the conduct of VZ-RI and to review proposed rate changes. He stated that essentially, VZ-RI is seeking to pursue the right to ask for a rate increase which the Commission has the statutory authority to consider. He argued that the request satisfies the pleading requirements of Rule 1.10.[17]

Mr. Wold stated that an independent action under Commission Procedural Rule 1.28(c) should be treated like an independent action under Civil Procedural Rule 60(b) and therefore, VZ-RI's relief can not be granted because VZ-RI can not show excusable neglect. He also requested the opportunity to brief this issue.[18] Mr. Wold stated that the third VZ-RI rate increase "was not just going to be a minimal filing. This was going to

[15] Id. at p. 6.
[16] Id. at pp. 7-9.
[17] Id. at p. 10.
[18] Id. at pp. 12-13, 17-19, 22, and 35.

present to the Commission why Verizon felt they were entitled to another increase."[19] Mr. Wold also argued that Docket No. 3445 must be closed or there would be no final Commission order to appeal to the Rhode Island Supreme Court.[20] Mr. Wold also maintained that if the Commission grants VZ-RI's waiver petition then a utility will never settle with the Division because the utility "will, in poker parlance, simply hold three aces." Also, Mr. Wold suggested that all utilities will come before the Commission seeking relief from its orders.[21] Mr. Wold acknowledged that in his research of cases related to independent actions he did not come "across a case that incorporated a rate plan."[22] In addition, Mr. Wold interpreted Paragraph L as requiring "a rate plan" and that Paragraph L basically requires "a new filing with the Commission and the Division recommends to suspend that filing, then the Division gets the full seven months."[23]

Mr. Lueker stated that VZ-RI is asking for a waiver of the Commission Procedural Rules and he argued an agency is bound by its own procedural rules.[24] Mr. Lueker argued that VZ-RI's request for a waiver can not be considered under Rule 1.10 but only Rule 1.28 and therefore VZ-RI needs to show clean hands. He also argued that the July 1, 2004 deadline was substantive and a not minor procedural issue.[25] As for Section L of the ARP, Mr. Lueker stated that "Section L addresses the situation" when a request is made "to have some filing requirements changed" such as "instead of filing quarterly" VZ-RI "only had to file semi-annually."[26] Lastly, Mr. Lueker acknowledged that VZ-RI can "go file for rate increases like any other utility and we'd go through the

[19] Id. at p. 15.
[20] Id. at p. 20.
[21] Id. at pp. 21-22.
[22] Id. at p. 23.
[23] Id. at pp. 23-24.
[24] Id. at p. 25.
[25] Id. at pp. 26-27.
[26] Id. at p. 28.

whole process, but that VZ-RI "can't now come in for a rate increase under that order or under the settlement agreement that was adopted." Instead, VZ-RI will "have to file for a rate increase and seek it in the old-fashioned way."[27]

In rebuttal, Mr. Moore stated that VZ-RI is really asking for relief from the ARP, which is currently in effect, and that Mr. Wold is incorrect in asserting that the Commission divests itself of jurisdiction to modify its own plan a year after the plan becomes effective.[28] He also indicated that there is no requirement in Section L of the ARP for a full-blown rate proceeding and he reiterated that VZ-RI will still give the Division 60 days to review the increase.[29]

In rebuttal, Mr. Wold stated that Paragraph L of the ARP indicates that "to get a rate increase", VZ-RI would "have to comply with Rhode Island General Laws that says how you go about getting a rate increase."[30] In his rebuttal, Mr. Lueker stated that "Verizon's right to seek a 2005 rate increase under the plan or under the order that adopted the plan, died." Also, he argued that the ratepayers' right not to receive a rate increase in 2005 is vested.[31]

In response to questioning, Mr. Moore stated that by filing later for an increase, VZ-RI's customers were not harmed and VZ-RI should not be penalized because the plan did not start on January 1, 2003. Also, he stated that VZ-RI's customers have no vested rights because all terms in the ARP were contingent upon changed market conditions.[32]

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[27] Id. at pp. 28-29.
[28] Id. at p. 30.
[29] Id. at pp. 31-32.
[30] Id. at p.32.
[31] Id. at p. 36.
[32] Id. at pp. 37-39.

At an open meeting on March 28, 2005, the Commission reviewed the pleadings and the arguments. The Commission determined that VZ-RI's request is appropriate and will be granted under Rule 1.10 because of Title 39 and Section L of the ARP and that Verizon-Rhode Island may file for a one dollar increase in residential basic exchange rates for 2005 pursuant to Rhode Island General Laws, specifically R.I.G.L. 39-3-11.

COMMISSION FINDINGS

I. General Approach

The litigiousness over how this petition should be handled procedurally makes one sympathetic to Sir Thomas More's conception of utopia as one with "no lawyers".[33] However, before entering this procedural labyrinth like Theseus,[34] the Commission must not lose the sight of the actual purpose of its existence and meaning behind its proceedings. The Commission was established by the General Assembly to set "just and reasonable rates" for utilities.[35] It has the "authority to supervise, regulate and make orders governing the conduct of companies offering to the public in intrastate...communications."[36] In fact, the Commission "is charged with the duty of rendering independent decisions affecting the public interest."[37] For that grand purpose, the Commission provides "full, fair and adequate administrative procedures and remedies."[38] Thus, the Commission must "adopt reasonable rules and regulations governing the procedure to be followed in any matter".[39] In other words, the Commission's Procedural Rules are merely the means to the end of setting just and

[33] Sir Thomas More, Utopia, Book II: Of Their Slaves and Marriages (1516), p. 61.
[34] Plutarch, The Lives of the Noble Grecians and Romans, p. 11. Theseus escaped the labyrinth and killed the bull-headed creature, the Minotaur and later founded Athens, the intellectual capital of ancient Greece.
[35] R.I.G.L. Section 39-1-1(b).
[36] R.I.G.L. Section 39-1-1(c).
[37] R.I.G.L. Section 39-1-11.
[38] R.I.G.L. Section 39-1-1(c) .
[39] R.I.G.L. Section 39-1-11.

reasonable rates. Similarly, Yale Law School Dean Charles Clark once noted that the "rules of procedure tend to assume a too obtrusive place in the attentions of judges and lawyers—unless indeed, they are continually restricted to their proper and subordinate role." He went on to explain that the Federal Rules of Civil Procedure provides for the "subordination of civil procedure to the ends of substantive justice."[40] Thus, the Commission must interpret its Procedural Rules so as to satisfy its statutory requirement to set "just and reasonable rates" by providing "full, fair and adequate administrative procedures and remedies."[41]

The Commission notes that its interpretation of its own statutory authority is granted "deference" by the Rhode Island Supreme Court "even when the agency's interpretation is not the only permissible interpretation."[42] Also, it is an established principle of administrative law that "when the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."[43] In fact, a regulatory agency "is entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary."[44] With this great deference comes great responsibility. Because pursuant to R.I.G.L. Section 39-1-38, the Commission's statutory provisions in Title 39 "shall be interpreted and construed liberally in the aid of its declared purpose", the Commission should likewise interpret and construe its Procedural Rules liberally so as to provide "full, fair, and adequate administrative procedures and remedies" as required by R.I.G.L. Section 39-1-1(c). In

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[40] Charles E. Clark, "The Handmaid of Justice", 23 Washington University Law Quarterly, 297 (1938). Dean Charles Clark was the Reporter of the Advisory Committee that developed the Federal Rules of Civil Procedure. Id. at p. 299.
[41] R.I.G.L. Section 39-1-1(b)(c).
[42] Pawtucket Power Associates v. City of Pawtucket, 622 A.2d 452, 456-457 (R.I. 1993).
[43] Udall v. Tallman, 380 U.S. 1, 16 (1965).
[44] American Farm Lines v. Black Ball Freight Services, 387 U.S. 532, 538 (1970)

other words, the Commission's Procedural Rules should be liberally construed to ensure adequate remedies are available for all interested parties and that all parties receive adequate due process.[45] Likewise Dean Charles Clark stated that the Federal Rules of Civil Procedure exemplified the trend "in favor of less binding and strict rules...with a large measure of discretion accorded to the trial judge."[46]

II. Procedural Rule 1.10-Title 39

VZ-RI filed its petition pursuant to Commission Procedural Rule 1.10(a), which under the subheading of "General" allows for "Petitions for relief under any statute or other authority delegated to the Commission". This is a "catch-all" provision encompassing a diverse universe of potential requests for relief by a party. The phrase "relief under any statute" encompasses a multitude of statutes under Title 39 granting the Commission jurisdiction over utilities' rates and services. In fact, the Rhode Island Supreme Court has specifically recognized that "Title 39 is replete with examples of the broad reach of the Commission's authority."[47]

VZ-RI's request of a waiver of the July 1, 2004 deadline is essentially permission to seek rate relief in the form of a $1 increase in 2005. This request for rate relief would be made pursuant to R.I.G.L. Section 39-3-11 which provides for periodic review of a utility's rates by the Commission. In addition, VZ-RI's request of a waiver will give VZ-RI the opportunity to demonstrate whether its current residential basic exchange rates are

[45] This general approach to liberally construe the Commission's Procedural Rules is not required or necessary in such instances as when a violation of a rule can be cured by the party or if the application of a rule does not directly affect a party's substantive rights. For instance, the Commission could strictly interpret a procedural rule and reject a water utility's rate filing because the utility can revise its rate filing to bring it into compliance with the Commission orders and Procedural Rules. Also, the Commission could deny the request of a party to edit a hearing transcript after the allotted time period so as to eliminate a witness alleged misstatement because it would not directly affect a party's substantive rights.

[46] Charles E. Clark, "The Handmaid of Justice", 23 Washington University Law Quarterly, 297, 308 (1938).

[47] In Re Island High Speed Ferry, 746 A.2d 1240, 1244 (R.I. 2000).

still just and reasonable under R.I.G.L. Section 39-1-1(b) and 39-2-1. Thus, VZ-RI's request for a waiver is made pursuant to R.I.G.L. Section 39-1-1, 39-2-1 and 39-3-11 because without this waiver, VZ-RI could be denied the ability to exercise its statutory rights to seek rate relief. Because absent a waiver of the July 1, 2004 deadline VZ-RI's statutory rights would be rendered meaningless, the procedural precondition is inherently and implicitly linked with the statutory provisions of Title 39.[48]

Apparently, under counsel for the Division's interpretation of Commission Procedural Rule 1.10(a), VZ-RI essentially needed to cite a statute under Title 39 which specifically granted a utility the authority to request waivers of technical deadlines in settlement agreements with the Division that are approved by the Commission. It is unreasonable to presume the General Assembly would have crafted such a technical provision when it provided the Commission, pursuant to R.I.G.L. Section 39-1-38, with "powers specified in this chapter, all additional, implied and incidental power which may be proper or necessary to effectuate their purposes." In any case, R.I.G.L. Section 39-1-

[48] It is interesting to note that counsel for the Attorney General acknowledged that VZ-RI could file a rate increase pursuant to R.I.G.L. Section 39-3-11 regardless of the ARP. It appears to the Commission that by granting this waiver the Commission is merely making it clear that the ARP does not preclude VZ-RI from seeking an increase in residential basic exchange rates for 2005 by filing pursuant to R.I.G.L. Section 39-3-11. Thus, VZ-RI's petition 1.10 can also be considered a request for declaratory relief under Commission Procedural Rule 1.10(c) that the ARP does not preclude VZ-RI from seeking a rate increase pursuant to R.I.G.L. Section 39-3-11. With that assumption, the Commission would also grant VZ-RI's relief. As will be discussed in this Order, the purpose of the July 1, 2004 deadline was to insure that a third residential basic exchange rate increase could not go into effect prior to January 1, 2005 and to provide adequate time for the Division and the Commission to review the rate request. Allowing VZ-RI can file pursuant to R.I.G.L. 39-3-11, regardless of the ARP, will still allow the Division time to review VZ-RI's filing and the Commission could still suspend the rate filing and review it for up to six months. Denying VZ-RI the ability to seek a rate increase could cause financial harm to VZ-RI since it would be denied the opportunity to seek additional revenues from a higher residential basic exchange rate in 2005 so as to maintain its economic viability in light of its decline in residential market share from 86.1 percent to 66.3 percent since the ARP was approved. Lastly and most importantly, the ARP clearly contemplated the possibility of a rate increase in residential basic exchange rates in 2005. Making a filing pursuant to R.I.G.L. Section 39-3-11, merely gives VZ-RI the opportunity to pursue this option. However, if a utility was under a multi year rate freeze, it would be very difficult to foresee a circumstance that would cause the Commission to allow a utility to seek a rate increase under R.I.G.L. Section 39-3-11 because these type of utilities do not face direct competition and a rate freeze inherently excludes the possibility of a rate increase in its distribution revenues.

1(c) states that the Commission has the "authority to supervise, regulate and make orders governing the conduct" of utilities. Surely, the statutory authority to make orders governing the "conduct" of a utility is broad enough in light of the liberal construction required under R.I.G.L. Section 39-1-38 to encompass VZ-RI's act of requesting for a waiver of a technical deadline in a regulatory plan so that VZ-RI can seek a rate increase.

III. Procedural Rule 1.10-Delegated Authority & the Settlement

Even if the statutes in Title 39 did not encompass VZ-RI's request for a waiver of the July 1, 2004 deadline, the phrase "other authority delegated to the Commission" would incorporate any technical deadline in a regulatory plan established by the Commission when it approved a settlement agreement through an order. The Commission has the authority to establish regulatory plans or set the form of regulation for any utility. The ARP is a form of regulation for VZ-RI that was adopted by the Commission through a settlement between VZ-RI and the Division. Since the ARP was adopted by the Commission through the authority delegated to it by the General Assembly to set rates and maintain service quality, the ability to entertain a request to waive a technical deadline in the ARP is inherent in the Commission's initial authority to adopt the ARP. In fact, the Commission's Order approving the ARP made it clear that "paragraphs 5 and 8" of the settlement and "Section L" of the ARP "all give the Commission the flexibility to re-open the Settlement under appropriate circumstances."[49] Paragraph 8 of the Settlement states that Commission, pursuant to Title 39, can "review" and "modify rates" at any time.[50] The Commission already interpreted this Paragraph 8 of the Settlement to allow for "numerous scenarios that cause the Commission to utilize

[49] Order No. 17417, p. 56.
[50] Id. at Appendix A, Settlement Para. 8.

its statutory authority to re-open the Settlement."[51] The Commission has elaborated on its power to modify a settlement when it declared that it retains the "authority to modify a rate settlement after its approval, independent of any request by a party and without the consent of all the parties."[52] In other words, the "Commission's authority is not at issue, but merely whether and how it is to be exercised."[53]

Counsel for the Division appears to argue that the Commission can not and should not consider waiving the technical deadline in the ARP because it is a product of a settlement. In ratemaking, there is no sanctity bestowed on settlement agreements. In the past, the Commission has explained that "the settlement agreement process" outlined in Commission Procedural Rule 1.24 is "one means" or "approach" to "establish just and reasonable rates".[54] If a settlement or a regulatory plan needs to be modified in order to promote the public interest or to maintain just and reasonable rates, Title 39 gives the Commission broad authority to do so. Furthermore, the power and authority to modify a settlement is not limited to situations which benefit the ratepayers. The ratemaking process is "a balancing of the investor and the consumer interests."[55] In fact, the Commission serves the public interest and establishes just and reasonable rates by

[51] Id. at p. 56. Since the Commission has such broad power to re-open the Settlement and modify rates, it seems rather strange that any rights are "vested" under that same settlement. Although the term "vested" is utilized in pension law, it is certainly uncommon in ratemaking. In fact, the Rhode Island Supreme Court has recognized that shareholders do not have a vested right to retain excess earnings for prior fiscal years regardless of the general bar on retroactive ratemaking. Narragansett Electric Co. v. Burke, 505 A.2d 1147, 1148-1149 (R.I. 1986).
[52] Order No. 17644, p. 27. This finding was made in a case in which the Navy filed a petition to reduce its rate in violation of a prior settlement. However, neither the Division or the Attorney General objected to the Navy's motion for relief or denied the Commission's ability to modify the earlier settlement.
[53] Id.
[54] Order Nos. 17644, p. 27 and 17524, p. 71.
[55] Newport Elec. v. PUC, 624 A.2d 1098, 1101 (R.I. 1993).

making "such orders as it deems necessary to protect consumers and ensure the economic viability of the utility."[56]

Although the Commission is not bound by prior determinations,[57] it does "provide an explanation for such departures" from past regulatory policy.[58] In this instance, the modification would be a waiver of a technical deadline in the ARP. The ARP approved in Order No. 17417 clearly contemplated the opportunity for VZ-RI to request a $1 residential basic exchange rate increase in 2005. The issue is whether VZ-RI, in order to seek rate relief anytime in 2005, must be required to have filed a request for rate relief by July 1, 2004. This is a hyper-technical requirement and is not substantive in nature. This waiver is not whether VZ-RI receives a rate increase but whether VZ-RI can have the opportunity to request a rate increase. Since this waiver is technical in nature and does not modify current rates the threshold required to alter the ARP or modify a settlement is lower than outlined in Order No. 17644 in which the Navy's rate was lowered.[59] The Commission can waive a technical provision in a settlement if the technical provision would cause disappropriate harm to a party and the purpose behind the provision is no longer needed or can be satisfied in a comparable manner.[60] The purpose of the technical provision requiring a July 1, 2004 deadline was to insure that a third residential basic exchange rate increase could not go into effect prior to January 1, 2005 and to provide

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[56] In Re Island High Speed Ferry, 746 A.2d 1240, 1246 (R.I. 2000).
[57] New England Tel. Co. v. PUC, 118 R.I. 570, 592 fn. 9 (1977).
[58] New England Tel. Co. v. PUC, 446 A.2d 1376, 1389 (R.I. 1982).
[59] The Commission has used Federal Civil Procedure Rule 60(b)(5) for "illustrative purposes" when determining if a substantive provision in a settlement should be modified by the Commission. See Order No. 17644, p. 28. Even if the July 1, 2004 deadline in the ARP was considered a substantive provision of the settlement, the significant decline in residential market share could be considered a significant change in factual conditions since the issuance of Order No. 17417 and therefore, relief could be granted under that standard as well.
[60] See Order No. 17971 pp. 25-26. In this Order, the Commission did not enforce a provision of a settlement because it would cause a disproportionate harm to a party in the loss of $2 million in earnings, and the purpose for the provision, maintaining service quality, was essentially satisfied.

adequate time for the Division and the Commission to review the rate request, specifically two months for the Division and at least four months for the Commission. The waiver of this technical provision would still allow the Division two months to review VZ-RI's filing and the Commission could still suspend the rate filing and review it for six months.[61] Also, the rate increase can not go into effect prior to January 1, 2005, and in fact could not go into effect until at least June 2005, providing ratepayers with at least 6 months more time with no rate increase than was bargained for by the Division on behalf of those ratepayers. Furthermore, denial of this waiver could cause disproportionate harm to VZ-RI since it would be denied the opportunity to seek additional revenues from a higher residential basic exchange rate in 2005. The ARP contemplated the possibility of a rate increase in the third year and the Division knew there was a possibility of a third rate increase for ratepayers when the Commission approved the Settlement in Order No. 17417.

A waiver of this technical deadline "will not require other significant modifications to the settlement" and its "impact on all concerned parties would be fair and balanced."[62] In fact, the waiver of this technical deadline will actually make the ARP more consistent with the subsequent performance of the parties after the settlement was

[61] Since the rate increase would be made pursuant to R.I.G.L. Section 39-3-11, the Commission can suspend the rate increase for six months and if necessary conduct a hearing. Of course, the "hearing and investigation shall be conducted as expeditiously as may be practicable, and with a minimum of delay." R.I.G.L. Section 39-3-11(a). In fact, the Commission has and will continue to interpret its statutes and procedural rules liberally for the purpose of furthering competitive markets. The Commission is quite aware of the warning of Dean Charles Clark, who cautioned that: "Even good rules may become a nuisance when lawyers discover how to use them as instruments of delay. The element of flexibility and adaptability to newly developing needs is therefore important." Charles E. Clark, "The Handmaid of Justice", 23 Washington University Law Quarterly, 297, 304 (1938).

[62] Order No. 17644, p. 30. The concept that VZ-RI's ratepayers relied upon and expected no increase for residential basic exchange rates in 2005 because of VZ-RI's failure to make a filing in July 1, 2004 is weak. First, it is highly unlikely ratepayers had any knowledge of this technical deadline of July 1, 2004. Furthermore, in the era of competition a VZ-RI ratepayer can switch to a competitive local exchange carrier ("CLEC") if the rate increase is approved and the ratepayer is displeased.

approved.[63] Counsel for the Division may be troubled that the Commission has waived this technical provision of the ARP. However, the Commission will follow the counsel of Justice Benjamin Cardozo, who once declared that "those who think more of symmetry...of legal rules rather than of practical adaptation to attainment of a just result will be troubled" and "favor...a stricter standard." However, "the courts have balanced such considerations against those of equity and fairness and found the latter to be the weightier."[64]

IV. Procedural Rule 1.10-Delegated Authority & Section L of the ARP

Commission Procedural Rule 1.10(a) allows "petitions for relief under any statute or authority delegated to the Commission." The ARP was approved by the Commission through its ratemaking authority delegated to it from the General Assembly. Section L of the ARP specifically states: "Verizon Rhode Island or the Division may petition the Commission to modify any of the terms or conditions of the Plan...to seek a less structured form of regulation or deregulation of its operations based upon changes in market conditions." Since the word "petition" is utilized in this section of the ARP, which was part of a settlement signed by the counsel for the Division who is familiar with the Commission's Procedural Rules, relief pursuant to Section L of the ARP is available through Commission Procedural Rule 1.10(a).

The next question is whether VZ-RI's request for a waiver of the July 1, 2004 technical deadline could constitute a request for "a less structured form of regulation or deregulation of its operations based upon changes in market conditions." Regulation of a

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[63] The first year rate increase and second year rate increase under the ARP both occurred on May 1st instead of January 1st. Under VZ-RI's proposal, a potential third year rate increase under the ARP could not occur earlier than June 2005.

[64] Jacobs & Young v. Kent, 129 N.E. 889 (N.Y. 1921).

business entity takes many forms. In the realm of public utilities, regulation is in essence determining what services are provided, how much can be charged for the services and when the utility must give notice of any changes in the rates for the services. Requiring a utility to request a rate increase in residential basic exchange, at any point in 2005, by July 1, 2004 is certainly a form of regulation.[65] An entirely non-regulated enterprise can increase its rates with little or no notice. To request a waiver of this July 1, 2004 deadline and only require two months notice for a potential rate change in 2005 would also constitute a less structured form of regulation.[66]

The subsequent question is whether this waiver of a technical provision is "based upon changes in market conditions." Counsel for the Division has essentially argued that VZ-RI is only requesting this waiver in order to avoid the consequences of their negligence in not making a filing on July 1, 2004. Regardless of any alleged negligence, market conditions have clearly changed since the approval of the ARP and have even changed since July 1, 2004. In approving the ARP, the Commission noted that "VZ-RI still has more than 70 percent (86.1 percent) of all local access residential lines" while having "less than 70 percent (66.4 percent) of all local access business lines."[67] Because "market share is the chief tool for assessing the competitive nature of a market", and "courts tend to find market power is lacking" when the "market share of a company is between 40 percent and 70 percent", the Commission "differented" the degree of

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[65] The definition of regulation includes "prior notification of the proposed action in a public record". Barron's Law Dictionary (1991), p. 405. For instance, CLECs are required to provide thirty days notice prior to changing their tariffed rates. Under Rhode Island General Laws, CLECs are public utilities subject to regulation.

[66] In rebuttal to VZ-RI's filing pursuant to Section L, Counsel for the Division argued that Section L of the ARP only applied to substantive filings while counsel for the Attorney General suggested it applied to minor issues. There is a clear misunderstanding among the parties as to the meaning of Section L. In any case, it is the Commission's interpretation of a Settlement which is pertinent. See Order No. 17971, p. 25, and Order No. 17524, pp. 72-73, 163.

[67] Order No. 17417, p. 48.

flexibility granted to VZ-RI on the basis of whether the service is a residential or business service. Accordingly, the Commission placed significantly more restrictions, even more than the Division proposed in its settlement, on residential services than on business services.[68] Based on VZ-RI's most recent competitive profile report filed in Docket No. 3445, it is clear that as December 31, 2004, VZ-RI's market share has declined to 66.3 percent of residential lines, clearly below the 70 percent threshold, and nearly identical to VZ-RI's share of business lines discussed in Order No. 17417.[69] In fact, as of June 30, 2004, VZ-RI share of residential lines was approximately 70 percent.[70] Therefore, it may have become apparent to VZ-RI only after July 1, 2004 that it needed rate relief due to adverse market conditions. A decrease from 86.1 percent to 66.3 percent in share of residential lines constitutes "changes in market conditions" as a basis for seeking "a less structured form of regulation."[71]

The final question is whether VZ-RI has sustained "the burden...to establish the reasonable basis for the modification" as required by Section L of the ARP. In this order, the Commission has already found that the waiver of this technical deadline is a reasonable modification for a variety of reasons. First, a waiver will not harm the Division because it will still have two months to review the request. Second, it will not harm VZ-RI's ratepayers because it merely gives VZ-RI the opportunity to request rate relief. Third, any potential rate increase will not go into effect until June 2005 at the earliest instead of January 1, 2005 as originally anticipated in the ARP. Fourth, VZ-RI's

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[68] Id. at pp. 48-49.
[69] VZ-RI's competitive profile filing of 2/15/05.
[70] The total CLEC market share in Rhode Island's residential market as of June 30, 2004 and December 31, 2004 is deemed public by the presiding Commissioner because the public has a significant interest in understanding the basis for the Commission granting VZ-RI's request.
[71] This finding does not obligate the Commission to give VZ-RI identical flexibility in the residential service market as it currently has in the business service market if the structures of the residential and business markets differ.

customers can switch to a competitor. Fifth, this waiver will not affect substantive portions of the ARP and is consistent with how in reality the ARP has been implemented since its adoption. Sixth, the waiver merely gives VZ-RI the opportunity to request rate relief, which it deems is appropriate to maintain the economic viability of VZ-RI. Seventh, the denial of the waiver of this technical deadline could cause disproportionate harm to VZ-RI.

V. Procedural Rule 1.28

VZ-RI also indicated that its request for a waiver of the July 1, 2004 deadline could be considered pursuant to Commission Procedural Rule 1.28(c). This rule states a motion for relief from an order "shall be made within a reasonable time not more than one (1) year after the order is entered."[72] However, the rule goes on to indicate that "this rule does not limit the power of the Commission to entertain an independent action to relieve a party from an order or to set aside an order for fraud upon the Commission."

Although the Commission has determined that VZ-RI's request is appropriate and should be granted under Rule 1.10 because of Title 39 and Section L of the ARP, the Commission will discuss whether VZ-RI's request could have been considered and granted under Procedural Rule 1.28. As a starting point, the Commission recognizes that Commission Procedure Rule 1.28 is to some extent modeled on Civil Procedure 60 of the

[72] The Commission pauses for a moment to question whether this one-year limitation should be applicable to any on-going multi-year regulatory plan especially one that allows for periodic rate increases instead of a multi-year rate freeze. In any case, the Commission made it abundantly clear it can modify a settlement under appropriate circumstances. Order No. 17644, p. 27. No settlement agreement approved by the Commission or procedural rule adopted by the Commission can divest the Commission from its duty to set just and reasonable rates. If this approach makes it less likely for settlement to be reached, so be it. It is better to litigate and satisfy the public interest than to approve a settlement that compromises a duty to set just and reasonable rates.

federal and state courts.[73] However, this Commission has repeatedly stated it is "not bound by the Superior Court Rules of Civil Procedure" or "bound by strict rules of pleading" but instead only looks "to the Superior Court Rules of Civil Procedure for guidance."[74] Therefore, the Commission will first look to how it and the courts have interpreted Commission Procedural Rule 1.28(c).

In a recent order, the Commission determined that "notwithstanding the one-year rule set forth in Commission Rule 1.28(c), Providence Water may, at any time, file a request with the Commission seeking permission to use all or any portion of such excess [restricted] funds for a purpose other than the funding of future pension contributions."[75] This interpretation and application of Procedural Rule 1.28(c) occurred without any objection from the Division. Clearly, in Order No. 17344, the Commission determined either that it could waive one-year limitation for relief from order in Procedural Rule 1.28 or could reallocate funds set in a prior rate case as an independent action pursuant to Procedural Rule 1.28(c). In addition, the Commission approved Kent County Water Authority's request filed under Procedural Rule 1.28(c) to utilize $425,000 annually for other renewal and replacement projects. The Commission granted this request over the Division's objection regarding the one-year limitation of Procedural Rule 1.28(c). Essentially, Kent County Water Authority wished to "modify" the Capital Improvement Plan ("CIP") originally identified and approved in the docket.[76] The Commission found this request for clarification consistent with its original order issued in the same docket

[73] However, the Rules of Civil Procedure for the federal and state courts specifically allow the granting of relief from a prior order, more than one year since its issuance, under Rule 60(b)(5) if "it is no longer equitable that the judgment should have prospective application." For instance, the U.S. Supreme Court has granted relief under Rule 60(b)(5) more than twelve years after an order was entered. See Agostini v. Felton, 521 U.S. 203 (1997).
[74] See e.g. Order Nos. 11131, 10435 and 10229.
[75] Order No. 17344, p. 25.
[76] Order No. 14919.

arising from the prior rate case. Lastly, the Rhode Island Supreme Court has specifically discussed Commission Procedural Rule 1.28(c), indicating that it may be used as an alternative to a Rule 1.28(b) motion. The Court stated that instead of seeking relief from a Commission order issued in 1995, so as to implement an automated meter reading ("AMR") program, Providence Water Supply Board could have "instituted an independent action to bring the proposal before the PUC."[77] It appears that the issue of administrative finality has not deterred either this Commission or the Rhode Island Supreme Court from finding that Commission Procedural Rule 1.28(c) can be utilized to address issues already determined by the Commission in a prior order.

Counsel for the Division has argued that a showing of fraud is a prerequisite for pursuing an independent action under Commission Procedural Rule 1.28(c). This argument is simply incorrect. First, Commission Procedural Rule 1.28(c) clearly states, "an independent action to relieve a party from an order or to set aside an order for fraud upon the Commission." The word "or" separates the two independent clauses and, therefore, constitutes the different approaches of seeking relief. In common, everyday English, even for lawyers presumably, the word "or" indicates an alternative, not a prerequisite. Second, the Commission and the Rhode Island Supreme Court has never interpreted Commission Procedural Rule 1.28(c) as requiring a showing of fraud. Lastly, the Rhode Island Supreme Court has interpreted Civil Procedure Rule 60(b) which has some parallels to Commission Procedural Rule 1.28(c) as "not" requiring independent actions to make "a showing of fraud upon the court."[78]

[77] Prov. Water Supply Bd. v. PUC, 708 A.2d 537, 543 fn. 6 (R.I. 1998).
[78] Brown v. Cambridge Mutual Fire Insurance, 677 A.2d 909, 910 (R.I. 1996).

It is apparent that VZ-RI's waiver can be considered as an independent action pursuant to Commission Procedural Rule 1.28(c). The question is whether it should be granted. Although the Commission is not bound by a specific interpretation of the Rules of Civil Procedure, the Commission can utilize it for illustrative purposes and to the extent this approach offers a sensible application to the circumstances presented to the Commission. As interpreted by the Rhode Island Supreme Court and federal courts, "an independent action in equity" to obtain relief from a judgment pursuant to Civil Procedure Rule 60(b) has five elements.[79] However, these elements generally appear inapplicable to the waiver request of a technical deadline in a regulatory plan, and more appropriate to a tort judgment. In fact, counsel for the Division acknowledged that Rhode Island Supreme Court has never applied Rule 60(b) in the context of a regulatory plan.[80] Thus, in these circumstances, the Commission could simply use the standard enunciated earlier. Thus, an independent action seeking a waiver of a technical deadline can be granted if enforcement would cause disproportionate harm to a party and the purpose behind the technical provision is no longer needed or can be satisfied in a comparable manner. As previously discussed in detail, VZ-RI's waiver of the July 1, 2004 deadline satisfies this standard. Therefore, if VZ-RI's petition for a waiver had not satisfied Procedural Rule 1.10 and Section L of the ARP, the Commission could have considered it under Rule 1.28.[81]

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[79] Paul v. Fortier, 117 R.I. 284, 287 (1976).

[80] Due to the inapplicability of this case law cited by counsel for the Division, and that the Commission could grant relief under other provisions, the Commission determined that briefs were not needed in the area.

[81] As for the issue of neglect on the part of VZ-RI, VZ-RI's conduct could have been considered excusable due to how in practice the ARP was actually implemented and the further deterioration of VZ-RI's market share subsequent to July 1, 2004.

VI. Miscellaneous

Counsel for the Division made a variety of other procedural objections and arguments related to granting VZ-RI's request for a waiver of the July 1, 2004 deadline, which were "full of sound and fury", but "signify nothing".[82] In regards to the spectre of an avalanche of requests from utilities seeking waivers from orders or other similar forms of relief, this is "much ado about nothing" because the Commission can certainly sort through any of these requests to determine which are meritorious. Furthermore, any meritorious request for such relief is likely to be filed in an ever increasing competitive area of the utility world such as telecommunications, where change and regulatory flexibility is inevitable.[83] As for the objection that VZ-RI's filing should be considered in a new docket, the Commission placed this filing in Docket No. 3445A because although it is a new independent request for relief, it certainly pertains to Docket No. 3445.[84] The objection as to the need for an entirely new docket so that a final order can be issued and administrative finality can be rendered is not applicable. According to the Rhode Island Supreme Court, it appears that any Commission order can be appealed even if it is not final.[85] Thus, the Commission has maintained open dockets, which have encompassed numerous different proceedings and issued many dispositive orders. The Commission's Procedural Rules as to dockets should not be interpreted narrowly but broadly so as to be

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[82] William Shakespeare, Macbeth, Act V, Scene V, verses 27-28 (1623).

[83] Traditionally regulated utilities generally seek relief by filing new rate cases. As for the two utilities under performance based ratemaking ("PBR"), they are prohibited from seeking any change in their regulatory plans even if they do not earn above their authorized return on equity. This form of regulation and the related rate plans, unlike VZ-RI's regulatory plan, do not allow for periodic base rate changes. Furthermore, VZ-RI is subject to competition, unlike water utilities, electric utilities, a gas utility, and a sewer utility.

[84] The Commission has adopted this approach in the past in "the interest of administrative efficiency." Order No. 14807.

[85] Interstate Nav. Co. v. Burke, 465 A.2d 750, 775 (R.I. 1983), Providence Water Supply Board v. PUC, 708, A.2d 537, 542 (1998).

consistent with Commission practice over years if not decades.[86] Lastly, although this is a new independent request for relief, a party is not entitled to a specific time to respond to a petition under the Commission's Procedural Rules. Therefore, the Commission has the discretion to determine the amount of time a party can have to respond such as twenty days under Civil Procedure Rule 12 or ten days as allotted for motions in general.[87] In any case, the parties were aware that they could request additional time beyond ten days to respond to VZ-RI's request and in fact twenty days transpired between the filing and the open meeting. Furthermore, there was an opportunity for a hearing. Thus, there was ample due process.

VII. Conclusion

Counsel for the Division may try to claim that the Commission is merely interpreting its Procedural Rules to waive its requirements in order to consider VZ-RI's request. First, as counsel for the Division should be aware, the Commission can and has waived its Procedural Rules "at any time if justice requires."[88] For instance, the Commission has waived procedural rules, without the Division's objection, related to test year requirements, notice of a rate increase to customers, and the submission of detailed documentation.[89] More importantly, the U.S. Supreme Court has declared "the general principle that it is always within the discretion of a court or an administrative agency to

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[86] The Commission has maintained open dockets and issued many dispositive orders in the area of wholesale gas costs and purchasing plans (Docket No. 3436), wholesale standards for telecommunications services (Docket Nos. 3195 and 3256), and the regulatory plans and successor plans for VZ-RI (Docket No. 3179) and ProvGas (Docket No. 2581). These are just a few examples. Specifically, in Docket No. 3445, the Commission modified VZ-RI's quarterly reporting requirements to semi-annual on August 22, 2003 and upon the Division's recommendation filed in Docket No. 3445 on April 29, 2004 implemented a service quality credit, which had the effect of reducing VZ-RI's rates.

[87] The time allotted to respond to a petition or complaint is not automatically thirty days because it could conflict with Commission Procedural Rules 1.5(f), 1.10(b)(2) and R.I.G.L. Section 39-3-11.

[88] Order No. 11347.

[89] See e.g. Order Nos. 17379, 15092, and 10718.

relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice requires it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party."[90] As discussed in detail, it would be unjust to deny VZ-RI the opportunity to request rate relief simply due to a technical deadline. There is no substantial prejudice to the Division or VZ-RI's ratepayers by the Commission considering and granting VZ-RI's waiver of the July 1, 2004 deadline in ARP. As explained earlier, the Division will still have two months to review VZ-RI's rate request, and the earliest any rate increase could go into effect is June 2005 rather than January 1, 2005 as contemplated by the ARP. Most importantly, VZ-RI's ratepayers could choose to go to a CLEC rather than accept VZ-RI's potential rate increase. Under these circumstances, the Commission's interpretation of its Procedural Rules, even if it constitutes a waiver, is justified because justice requires it and there is no substantial prejudice to a party.

In any case, the Rhode Island Supreme Court has specifically recognized that when "the commission has ruled that the company's rate petition should be heard. Such a determination is entitled to great deference from the court."[91] Although in Roberts, the office of Attorney General filed a motion to dismiss the utility's petition on the basis that the petition "would open the door to re-litigation of issues and evidence presented to the commission at a prior hearing", the Rhode Island Supreme Court declared that the Commission's denial of the Attorney General's motion to dismiss "is not tantamount to approval of a rate application, rather it simply permits the parties to come forward to

[90] American Farm Lines v. Black Ball Freight Services, 397 U.S. 532, 539 (1970).
[91] Roberts v. Narragansett Elec. Co., 490 A.2d 506, 507 (R.I. 1985).

present evidence before the commission."[92] Likewise, by considering and granting VZ-RI's waiver of the July 1, 2004 deadline in the ARP, the Commission is merely granting VZ-RI the opportunity to request a rate increase pursuant to R.I.G.L. Section 39-3-11, which will give the Division an initial two month review period and the possibility of an investigation lasting an additional six months. In this investigation, the parties will have the opportunity to argue the substantive merits as to whether VZ-RI should receive any increase. VZ-RI files this request for rate relief with no assurance it will receive even a penny.

In interpreting or administrating its Procedural Rules, the Commission must recall the guidance of Justice Benjamin Cardozo who declared "a system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity."[93] The purpose of procedural rules is to make real for interested persons the rights secured by substantive law. The Commission should not render these substantive rights meaningless. No settlement or procedural objection divests this Commission of its statutory authority to review and modify rates. To coin counsel for the Division's poker parlance, it is the Commission, not the utility or any other party, holding three aces in ratemaking. VZ-RI's waiver will simply give the Commission the opportunity to review and if justified modify VZ-RI's rates. Regardless of the number of rules cited and hyper-technical objections made by counsel for the Division, the Commission will never transform itself into Dicken's High Court of the

[92] Id.

[93] Reed v. Allen, 286 U.S. 191, 209 (1932) (Cardozo, dissenting). In Reed, Justice Cardozo and the progressive wing of the Court dissented from the majority's decision that caused an heir to lose the right to his grandfather's property to his distant relatives because of technical procedures.

Chancery, where the purpose of the law was to ferret out technicalities with which to deny justice.[94]

Since the beginning of the 20th century, the law has moved away from an obsession with the rigid application of technical rules, which was referred to scathingly as "mechanical jurisprudence" by Harvard Law School Dean Roscoe Pound.[95] It was Dean Roscoe Pound who noted that "mechanical jurisprudence" causes attorneys to "lose sight of the end of procedure" and instead use procedure "for defeating or delaying substantive law and justice."[96] Dean Roscoe Pound further elaborated that "every time a party goes out of court on a mere point or practice, substantive law suffers an injury."[97] The opposition to the rigid application of procedure in the area of administrative and regulatory law was expressed by President Franklin D. Roosevelt when he attacked "the lawyers" who "prefer that decisions be influenced by a shrewd play upon technical rules ... rather than to get down on the merits."[98] The preeminent New Deal regulator James J. Landis also denounced the "Alice-in-Wonderland procedures" being required at regulatory agencies as "reminiscent" of "eighteenth century ... procedure then prevalent in England" which enabled lawyers to "drag out proceedings" and "draw out issues beyond all reasonable bounds."[99] Not surprisingly, one of the harshest condemnations of lawyers was written by the great 18th century English satirist Jonathan Swift, who described lawyers as "a society ... bred ... in the art of proving ... that white is black

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[94] Charles Dickens, Bleak House (1853). In Bleak House, the case of Jarndyce v. Jarndyce in the High Court of the Chancery drags on for so long that the legal costs leave nothing in the estate for the heirs.
[95] Morton J. Horwitz, The Transformation of American Law 1870-1960, (1992) p. 217, see Roscoe Pound, "Mechanical Jurisprudence", 8 Columbia Law Review, 605, 607 (1908).
[96] Roscoe Pound, "Mechanical Jurisprudence," 8 Columbia Law Review 608, 617 (1908).
[97] Id. at p. 619.
[98] Morton J. Horwitz, The Transformation of American Law" 1870-1960, (1992), p. 231.
[99] Id. at p. 244.

and black is white" and which hold the view that "all the rest of the people are slaves."[100] This Commission will not be enslaved by any party's interpretation of its rules including Division counsel's "mechanical" interpretation because "an administrative agency is not a slave to its rules."[101] The Commission's only master is its statutory duty to set just and reasonable rates and promote the public interest.

Accordingly, it is

(18198) ORDERED:

1. Verizon-Rhode Island's filing for a partial waiver of the Alternative Regulation Plan approved in Order No. 17417 is hereby approved, and Verizon-Rhode Island may file for a one dollar increase in residential basic exchange rates for 2005 pursuant to Rhode Island General Laws, specifically R.I.G.L. 39-3-11.

EFFECTIVE IN WARWICK, RHODE ISLAND PURSUANT TO AN OPEN MEETING DECISION ON MARCH 28, 2005. WRITTEN ORDER ISSUED APRIL 6, 2005.

PUBLIC UTILITES COMMISSION

Elia Germani, Chairman

Robert Holbrook, Commissioner

[100] Jonathan Swift, Gulliver's Travels, Part IV, Chapter 5 (1727), p. 272.
[101] Sun Oil Co. v. FPC, 256 F.2d 233, 239 (5th Cir. 1958).

NOTICE OF RIGHT OF APPEAL PURSUANT TO R.I.G.L. SECTION 39-5-1, ANY PERSON AGGRIEVED BY A DECISION OR ORDER OF THE COMMISSION MAY, WITHIN SEVEN (7) DAYS FROM THE DATE OF THE ORDER, PETITION THE SUPREME COURT FOR A WRIT OF CERTIORARI TO REVIEW THE LEGALITY AND REASONABLESS OF THE DECISION OR ORDER.