STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: PETITION OF VERIZON-RHODE ISLAND FOR ARBITRATION OF AN AMENDMENT TO INTERCONNECTION AGREEMENTS WITH COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERICAL MOBILE RADIO SERVICE PROVIDERS IN RHODE ISLAND TO IMPLEMENT THE TRIENNIAL REVIEW ORDER AND TRIENNIAL REVIEW REMAND ORDER	:	DOCKET NO. 3588

ORDER

On February 23, 2004, as allowed by the Telecommunications Act of 1996 ("Telco Act"), Verizon-Rhode Island ("VZ-RI") filed a petition with the Commission for arbitration to amend interconnection agreements ("ICAs") between VZ-RI and competitive local exchange carriers ("CLECs") in Rhode Island. VZ-RI claimed that the proposed amendment would implement changes in VZ-RI's unbundling network obligations promulgated in the FCC's Triennial Review Order ("TRO"). Two procedural arbitration decisions were issued, which limited the scope of the issues as well as the number of parties in this arbitration.[1] In accordance with the Public Utilities Commission's ("Commission") Regulations Governing Arbitration, Mediation, Review and Approval of Interconnection Agreements ("Arbitration Rules"), Steven Frias, Executive Counsel to the Commission, acted as Arbitrator in this matter.[2]

On August 20, 2004, the FCC issued its Interim Rules Order. VZ-RI and the CLECs engaged in further negotiation regarding the terms of an ICA Amendment. On

[1] Order Nos. 17960 (issued August 18, 2004) and 17802 (issued April 9, 2004).

[2] The procedural time limits contained in the Commission's Arbitration Rules were waived by the parties during the Arbitration proceeding. The parties requested further time adjustments from the Commission following the issuance of the Arbitration Decision. The request for extension of time to file comments in response to the Arbitration Decision was granted. Therefore, in light of the requests from the parties, they are deemed to have waived any objection to the presumption in the Arbitration Rules that the Commission's decision reviewing the parties' comments in response to the final Arbitration Decision was made more than thirty days from the date of the Arbitration Decision.

September 15, 2004, VZ-RI, AT&T, and the Competitive Carrier Group ("CCG") represented by the law firm of Adler, Pollock & Sheehan filed new ICA Amendments.[3] On January 7, 2005, the parties filed a joint statement of issues to be arbitrated in this proceeding and on April 6, 2005, the parties agreed to two supplemental issues.[4]

On February 4, 2005, the FCC issued its Triennial Review Remand Order ("TRRO"), which addressed issues as to VZ-RI's unbundling network obligations that had been reversed and/or remanded by the U.S. D.C. Circuit Court of Appeals.[5] On March 29, 2005, AT&T, MCI, and the CCG filed revised ICA Amendments to reflect the TRRO decision. On April 8, 2005, VZ-RI, AT&T, MCI and the CCG filed their initial briefs. On April 29, 2005, the same four parties filed reply briefs. On May 31, 2005, oral argument was conducted at which VZ-RI, AT&T and CCG were represented.[6]

On November 10, 2005, the Arbitrator issued an Arbitration Decision addressing all issues raised by the parties.[7] On December 13, 2005, the Arbitrator issued a Supplemental Arbitration Decision ("Supplemental Decision") at the request of VZ-RI to clarify a provision of the Arbitration Decision.[8]

On December 5, 2005, DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"), one of the members of CCG, filed Initial Comments on the Arbitration Decision dated November 10, 2005, requesting review and rejection and/or clarification of three issues. On December 19, 2005, VZ-RI filed its

[3] The CCG is composed of Choice One, Covad Communications Company and IDT America.
[4] At a pre-hearing conference on January 18, 2005, the Arbitrator determined that two sub-issues for issue 17 addressing Performance Assurance Plan ("PAP") metrics for hot cuts and Section 271 facilities were excluded from the arbitration.
[5] United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).
[6] On June 3, 2005, at the request of the Arbitrator, VZ-RI filed comments addressing the appropriate definition for routine network modifications.
[7] Order No. 18416 (issued November 10, 2005).
[8] Order No. 18472 (issued December 13, 2005).

Response to the Comments of Covad. On January 31, 2006, at an Open Meeting, the Commission affirmed the Arbitration Decision as to all three issues.

Commission Findings

Covad's First Request:

First, Covad requested "that the Commission reject the Arbitrator's finding in the Arbitration Decision that the Commission not examine network element entitlements under section 271 of the 1996 Act." Covad argued that because VZ-RI's Section 271 authority was granted based in part on the existence of ICAs, which the Commission has the jurisdiction to approve, the Commission has jurisdiction over the provisioning of Section 271 checklist items.[9]

VZ-RI noted in its Response that Section 271 authority was granted, not by the Commission, but by the FCC. VZ-RI also argued that the Commission's jurisdiction to approve and arbitrate ICAs under Section 252 of the Telco Act with regard to Section 251 obligations does not then translate into jurisdiction to enforce Section 271 checklist items.[10]

In performing statutory analysis on the issue of Section 271 jurisdiction and reaching the conclusion that it is the FCC and not this Commission which has jurisdiction over Section 271 obligations, the Arbitrator correctly noted that this issue has already been decided by the Commission in numerous cases, most recently in 2005. The Commission has stated that "CLECs should petition the FCC immediately for relief if VZ-RI is not appropriately provided access to its facilities pursuant to Section 271."[11]

[9] Covad's Initial Comments, pp. 1-2.
[10] VZ-RI Response to Initial Comments of Covad, p.2, citing Arbitration Decision, pp. 4-5.
[11] Order No. 18310 (issued July 28, 2005).

The Commission's decisions on this point have been based on the language of the Telco Act and FCC Orders claiming exclusive jurisdiction over Section 271 issues.[12]

The Commission affirms the decision of the Arbitrator on this issue. The result of the Arbitration decision is that new ICAs and the ICA amendments in question will not reference Section 271 requirements. As the Arbitration Decision noted, the effect of this decision is that all pre-existing references to Section 271 shall be deemed inconsistent and thus, be superseded.[13]

Covad's Second Request:

Covad next requested that the Commission clarify that the Arbitration Decision as written does not limit access to specific 271 network elements already defined in Covad's ICA.[14] This issue is directly related to the Covad's first request.

As noted above, the Arbitration Decision does directly address the Commission's role with regard to Section 271 items, noting that Section 252(c) does not reference Section 271 in the Telco Act. Therefore, the Arbitration Decision quite clearly states that it is inappropriate for the Commission to require references to Section 271 obligations in an ICA because "the only law which governs an ICA at this time is Section 251 and the federal regulations implementing Section 251".[15]

Covad's argument seems to stem from a misreading of one sentence of the Arbitration Decision where the Arbitrator states, "this ICA Amendment, which will implement the TRO and TRRO, supersedes any inconsistent provisions in the current

[12] See Order No. 18310, citing TRO ¶ 664 (issued July 28, 2005).
[13] See Arbitration Decision, p. 6.
[14] Covad's Initial Comments, p. 2.
[15] Arbitration Decision, p. 6.

ICA, but to the extent this ICA Amendment does not affect pre-existing rights or obligations in the ICA, those rights and obligations are still binding."[16]

This language follows the determination that the ICA Amendment will not reference Section 271 obligations. Therefore, reading this sentence, the first half clearly notes that any such language referencing Section 271 obligations would be inconsistent and superseded.

Covad seems to be relying on the second half of this sentence which states that pre-existing rights and obligations in the ICA are not affected by the ICA Amendment, references to their pre-existing Section 271 language creates additional rights and should remain effective in the ICA.[17] This specific issue was never raised with the Arbitrator. The arguments by the CCG never raised Covad's issue. However, even if the issue had been raised, a plain reading of the Arbitration Decision indicates that the second half of this sentence was meant to address issues outside of those which were arbitrated. Pre-existing rights as discussed by the Arbitrator are rights that were already contained in the ICAs and were not addressed by the arbitration or which fall outside of the Section 252 arbitration process.

Covad's Third Request:

Finally, Covad requested that the Commission clarify that the Arbitration Decision as written does not limit the definition of Applicable Law that is already defined within the parties' ICAs. Again, Covad argues that the use of "Applicable Law" is a pre-

[16] Id.
[17] Covad's Initial Comments, p. 2, n.3.

existing right and should be allowed to remain effective in order to maintain references to Section 271 language in its ICA.[18]

The Arbitration Decision specifically found that references to "Applicable Law" rather than references to specific law upon which the parties would rely when interpreting their own ICAs created ambiguities in the document. Arguably, such a term implies no meeting of the minds on the question of which law applies. Therefore, the Arbitrator determined that rather than referring to "Applicable Law", the ICAs should refer specifically to governing statutory and regulatory provisions. Citing a Commission Order, the Arbitrator stated that "there is no need to create 'certain confusion and possibly unnecessary litigation' by requiring the ICAs to use the phrase 'applicable law'."[19] In the event new laws or regulations are passed, the parties may implement same through their change of law provisions, thus protecting their respective interests.

The Arbitration Decision was abundantly clear with regard to the use of the term "Applicable Law" in the ICA Amendment or in future ICAs. Again, this is not a pre-existing right which was not addressed by the Arbitrator, but rather, was an issue squarely addressed in the Arbitration which determined that the use of the term "Applicable Law" has been superseded by the Arbitrator's decision.[20] The Commission affirms this determination by the Arbitrator.

Conclusion

The Commission's findings that the Arbitrator was correct to find that Section 271 obligations cannot be independently included in the ICA and that references to Section 271 and "Applicable Law" will be deemed superseded by the language approved

[18] Id.
[19] Arbitration Decision, p. 4, citing, Order No. 18310 (issued July 28, 2005).
[20] Arbitration Decision, pp. 3-4.

by the Arbitrator in no way purports to limit access to Section 271 network elements nor does it attempt to absolve VZ-RI of its Section 271 obligations. Rather, what this affirmation does is again reiterate the fact that the United States is a federal form of government. Jurisdiction is separated between the federal and state governments in the Telco Act. The federal government has jurisdiction over Section 271, as initially shown by the fact that it was the FCC and not the State of Rhode Island which granted VZ-RI Section 271 authority. The state government has jurisdiction over ICAs under Section 252(c) of the Telco Act, as specifically stated in the statute. There is nothing in this Order which would preclude Covad from petitioning the FCC if it believes its Section 271 rights are being violated by VZ-RI or that VZ-RI is not fulfilling its Section 271 obligations.

Accordingly, it is hereby

(18522) ORDERED:

1. The Arbitration Decision, Order No. 18416 is affirmed.
2. The parties shall file an ICA Amendment with the Arbitrator consistent with the findings in the Arbitration Decision and with this Order no later than thirty (30) days from the date of the written Order for review.
3. Within seven (7) days of receipt of the ICA Amendment, the Arbitrator shall file a recommendation to the Commission stating whether the ICA Amendment is in compliance with Order No. 18416 and with this Order.

EFFECTIVE AT WARWICK, RHODE ISLAND PURSUANT TO AN OPEN MEETING DECISION ON JANUARY 31, 2006. WRITTEN ORDER ISSUED FEBRUARY 1, 2006.

PUBLIC UTILITIES COMMISSION

Elia Germani, Chairman

Robert B. Holbrook, Commissioner

Mary E. Bray, Commissioner