

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: IMPLEMENTATION OF THE FCC'S :
TRIENNIAL REVIEW ORDER AND REVIEW : DOCKET NOS. 3550 &
OF VERIZON-RHODE ISLAND'S TELRIC FILINGS : 2681

REPORT AND ORDER

I. INTRODUCTION

In Order No. 16793, the Rhode Island Public Utilities Commission (“Commission”) required that Verizon-Rhode Island (“VZ-RI”) file updated TELRIC cost studies no later than May 1, 2002. VZ-RI filed updated TELRIC cost studies. However, VZ-RI did not utilize the methodologies utilized in the 1997 TELRIC cost studies. Pursuant to an August 6, 2002 bench decision reflected in Order No. 17395, the Commission directed VZ-RI to re-file these cost studies utilizing the 1997 methodologies, and stayed any further proceedings in Docket No. 2681.

On February 20, 2003, the Federal Communications Commission (“FCC”) adopted new rules concerning the obligation of incumbent local exchange carriers (“ILECs”) to provide unbundled network elements (“UNEs”) to competitive local exchange carriers (“CLECs”). On March 26, 2003, VZ-RI filed a motion to postpone a further filing of TELRIC cost studies until the Commission completes its implementation of the FCC’s Triennial Review Order (“TRO”). VZ-RI maintained that some UNEs will be eliminated or redefined by the TRO and thus, large parts of VZ-RI’s new TELRIC studies would be rendered moot. Accordingly, VZ-RI argued that proceeding with TELRIC studies would lead to a significant waste of resources for the Commission and the parties. On March 31, 2003, the Division of Public Utilities and Carriers (“Division”) indicated that it did not oppose VZ-RI’s motion, but recommended that within 30 days of

the issuance of the FCC's TRO, the Commission conduct a pre-hearing conference to determine a timetable for the filing of the appropriate TELRIC studies. On April 7, 2003, AT&T and MCI filed responses indicating they opposed VZ-RI's motion to postpone further TELRIC filings. They argued that VZ-RI's argument that the TRO will impact the TELRIC cost studies is overstated. Also, they noted that a postponement will delay the availability of properly priced UNEs for many months, and that going forward with the TELRIC filings will not be unduly burdensome on VZ-RI. On April 15, 2003, Cox also filed a response in opposition to VZ-RI's motion. On April 22, 2003 VZ-RI responded that the Commission has already found that VZ-RI's current rates are TELRIC compliant and noted that Rhode Island has the second most competitive intrastate market in the country. Also, VZ-RI emphasized that it is more logical to determine first which UNEs will be required under the TRO and then to establish appropriate TELRIC prices for those UNEs. At an open meeting on May 8, 2003, the Commission granted VZ-RI's motion and directed staff to conduct a pre-hearing conference within 30 days of the issuance of the TRO to determine an appropriate schedule for the TRO and TELRIC proceedings. The Commission found that it would be a more efficient use of the Commission's limited resources to await the TRO to determine what UNEs will be required before setting TELRIC rates for UNEs that may be eliminated.

On August 21, 2003, the FCC issued its TRO, which in part, delegated to the state commissions the authority to determine if switches for mass market customers, (residential and small business), and dedicated transport would remain UNEs provided at TELRIC rates. As a result, the Commission initiated Docket No. 3550. VZ-RI filed direct testimony on December 8, 2003 while the CLECs filed their direct testimony on

February 24, 2004. VZ-RI was scheduled to file its testimony on March 19, 2004 while CLECs were scheduled to file their surrebuttal testimony on April 14, 2004. The Division was scheduled to file their direct testimony on April 23, 2004. Hearings were scheduled to begin May 3, 2004.

In addition, after the FCC's TRO was issued, at a series of pre-hearing conferences, most of the parties, in particular, the Division in its letter dated October 8, 2003, agreed that the RIPUC's TELRIC proceeding should follow after the conclusion of the RIPUC's TRO proceeding. For the sake of efficiency, the only exception made was that TELRIC rates for individual hot cuts would be reviewed during the TRO proceeding because the FCC's TRO indicated a need to establish a new batch hot cut process at TELRIC rates. On December 8, 2003, VZ-RI filed a TELRIC cost study for individual hot cuts and the batch hot cut process.

On March 2, 2004, the D.C. Circuit Court of Appeals reversed the FCC on its delegation to the state commissions of its decision making authority to determine if switches to mass market customers and dedicated transport are UNEs. Sixty days after March 2, 2004, the D.C. Circuit court decision will go into effect and the case will be remanded to the FCC. As a result, VZ-RI filed a motion to stay the Commission's TRO and TELRIC proceedings.

II. PARTIES' POSITIONS

In its motion and supplemental filing, VZ-RI indicated that it is unclear what role if any, there will be for the state commissions after the remand to the FCC. Also, VZ-RI argued that a hot cut batch process review and a proceeding to set a TELRIC rate for individual hot cuts are unnecessary. VZ-RI emphasized that a stay while the federal

courts determine the status of the vacated TRO and for the FCC to give new guidance on UNEs will not be of harm to any CLEC.

The CLECs opposed VZ-RI's motion for a stay. DSCI indicated that the FCC and the parties are seeking a stay of the D.C. Circuit decision. Also, DSCI noted that the D.C. Circuit recognized that the FCC may rely on fact finding by the state PUCs and therefore, this proceeding could be helpful to the FCC. MCI indicated that the TRO is still in effect until 60 days after March 2, 2004. MCI noted that a majority of the FCC, as well as NARUC believe there is a role for state commissions in determining what is a UNE. Covad noted that the D.C. Circuit's decision could be stayed and overturned. AT&T speculated that the D.C. Circuit's decision will likely be stayed and overturned. AT&T argued that state commissions should continue developing their respective evidentiary records to assist the FCC. AT&T argued that VZ-RI's current hot cut process is over-priced and operationally inefficient, and that facilities based competition will only occur when the hot cut process is seamless and not over-priced. Also, AT&T provided a copy of the Michigan PUC order denying Southwestern Bell Corporation's motion for a stay. Conversent argued that state commissions should continue to gather evidence in order to have input with the FCC. Conversent also argued that state commissions have authority under Section 271 and state law to define UNEs. Conversent emphasized the need to maintain the status quo as to UNEs at TELRIC rates pending the appeals and any further FCC action. Also, Conversent argued that the hot cut proceeding, individual and batch process, should proceed because VZ-RI has a less manually intensive and less costly hot cut process than what it is currently providing in Rhode Island.

The Division recommended that the stay be granted, including the hot cut issues, until enough clarity can be obtained from the courts so that substantial administrative resources are not wasted. However, the Division recommended that the Commission should indicate that the status quo as to UNEs at TELRIC rates be preserved during the stay. The Division indicated that if the DC Circuit is reversed, most of the information needed has been filed so the Commission can complete the TRO proceeding in a timely manner, but if the DC Circuit is affirmed the Commission will have avoided expending administrative resources.

COMMISSION FINDINGS

The DC Circuit Court decision reversing and remanding the FCC's TRO will go into effect sixty days after March 2, 2004, just before this Commission's hearings in these dockets are scheduled to begin. Although it is possible that the D.C. Circuit Court decision will be reversed or stayed, the Commission notes that this is the third time in eight years that the FCC's UNE rules have been reversed and remanded by the federal courts. This Commission is not interested in joining with the FCC in suffering the torment of Sisyphus, who was condemned by the gods for all eternity to push a large boulder up a hill just to see it roll back down again. The Commission will not engage in protracted TRO and TELRIC proceedings just to see its work later rendered irrelevant by the courts. If the D. C. Circuit Court decision is reversed or stayed, the Commission will restart its proceedings quickly.

The CLECs have argued that regardless of the outcome of any appeal, the FCC will give state commissions an advisory/fact finding role regarding UNEs. This is quite possible, but it is pure speculation as to what facts or what issues the FCC will seek an

advisory opinion from this Commission. Before having the parties file more pre-filed testimony and conducting days of hearings, the Commission prefers to wait for enlightenment from the FCC. Otherwise, the Commission would be embarking on a journey into the heart of darkness. Unlike the commissions at large states, this Commission has simply too small a staff to engage in an extensive proceeding, which could be rendered moot.

Regarding continuation of the proceedings as they relate to the batch hot cut process and setting TELRIC rates for individual hot cuts, there is some merit with going forward with a proceeding related to hot cuts. Developing a batch hot cut process and reviewing the TELRIC rate for an individual hot cut would likely promote competition. However, developing a batch hot cut process is not a pressing concern for Rhode Island because most competition in Rhode Island is not UNE-Platform but instead is facilities-based such as Cox and Conversent. The argument that facilities-based competition will never develop unless a batch hot cut process is implemented is simply false. Rhode Island has the second highest level of competition for local telecommunications, of which, an extremely high percentage is facilities-based. In Rhode Island, many residential and small business customers can choose a facilities-based CLEC. The Commission recognizes that the batch hot cut process is very important for states with high levels of UNE-Platform such as New York and Michigan. In all likelihood, a batch hot cut process will be developed in New York that can be implemented in Rhode Island, with its much smaller volumes of UNE-Platform. Accordingly, it would probably be a more efficient use of the Commission's time and resources to await developments in New York.

As for a review of the TELRIC rate for individual hot cuts, VZ-RI's individual hot cut rate is approximately \$42, which is much less expensive than VZ-MA's rate of approximately \$89 and only \$7 more expensive than VZ-NY's rate of approximately \$35. On its face, the current TELRIC rate for an individual hot cut in Rhode Island does not appear unreasonable when compared to the rates approved in the two other large states in the former NYNEX service territory. However, if other states begin adopting a lower TELRIC rate for an individual hot cut based on VZ-RI's new, less manual, hot cut process then the Commission can review the hot cut rate. Accordingly, it is more efficient to review the TELRIC rate for an individual hot cut either in the context of an entire TELRIC proceeding after other states have reviewed VZ-RI's less manual hot cut process or after a hot cut batch process has been developed in another state such as New York.

For the present, the Commission will stay the TRO and TELRIC proceedings until there is more clear direction from the federal courts and the FCC. However, as recommended by the Division and Conversent, the Commission will maintain the status quo in Rhode Island regarding UNEs. To the extent permitted under law, VZ-RI is required to continue to provision Rhode Island's existing UNEs currently priced at existing TELRIC rates until it receives permission to terminate this obligation for a specific network element from this Commission. The Commission will consider lifting the stay if there is a significant change of circumstances, such as the FCC giving new guidance to state commissions, the D.C. Circuit decision being reversed or stayed, or a batch hot cut process being adopted in New York.

Accordingly, it is

(17790) ORDERED:

1. Further proceedings in the Rhode Island Public Utilities Commission's Triennial Review Order docket is stayed.
2. Further proceedings in the Rhode Island Public Utilities Commission's TELRIC docket is stayed.
3. To the extent permitted by law, Verizon-Rhode Island must obtain approval from the Rhode Island Public Utilities Commission prior to terminating its obligation to provision existing Rhode Island UNEs at TELRIC rates.

EFFECTIVE AT WARWICK, RHODE ISLAND, PURSUANT TO AN OPEN MEETING DECISION ON MARCH 18, 2004. WRITTEN ORDER ISSUED MARCH 26, 2004.

PUBLIC UTILITIES COMMISSION

Elia Germani, Chairman

Kate F. Racine, Commissioner

Robert B. Holbrook, Commissioner

