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 COMMERCIAL MOBILE RADIO SERIVCE PROVIDERS IN RHODE ISLAND TO IMPLEMENT THE TRIENNIAL REVIEW ORDER	:	DOCKET NO. 3588

SECOND PROCEDURAL ARBITRATION DECISION

Since the issuance of the Procedural Arbitration Decision on April 9, 2004, Verizon-Rhode Island ("VZ-RI") filed, on April 15, 2004, its revised Triennial Review Order ("TRO") amendments to interconnection agreements ("ICAs"). On April 16, 2004, the Arbitrator issued a memorandum indicating that the filing was in compliance with the Procedural Arbitration Decision. On April 28, 2004, VZ-RI, MCI, AT&T, and other CLECs filed statements of issues to be arbitrated in this proceeding. However, on May 4, 2004, VZ-RI filed a motion to hold the proceeding in abeyance until June 15, 2004. Various competitive local exchange carriers ("CLECs") filed responses essentially opposing VZ-RI's motion unless the status quo as to VZ-RI's wholesale obligations was preserved. On June 15, 2004, the Arbitrator issued a memorandum indicating that VZ-RI's motion was moot because the D.C. Circuit Court of Appeals had not issued a further stay of its decision reversing and remanding, in part, the FCC's TRO. After a pre-hearing conference on June 24, 2004, a new schedule was issued for the filing of a joint statement of issues to be arbitrated by the parties. On July 12, 2004, VZ-RI served on the parties a revised joint statement of issues to be arbitrated. On July 23, 2004, AT&T filed a motion for extension of the schedule that was set on June 24, 2004 for filing a joint statement of issues. On July 29, 2004, the Arbitrator granted AT&T's motion.

In addition, on July 12, 2004, VZ-RI filed on a notice of withdrawal of petition for arbitration to certain CLECs. Also, it filed a revised TRO amendment to ICAs for the CLECs who would remain in the arbitration. On July 22, 2004, members of the Competitive Carrier Coalition, who were affected by the withdrawal, represented by the law firm of Adler, Pollock & Sheehan ("Adler CCC") filed an objection to VZ-RI's notice of withdrawal.[1] The Adler CCC argued that VZ-RI needs a written amendment to these ICAs in order to discontinue offering UNEs and that VZ-RI waived the argument that it does not need a written amendment to these ICAs when it filed for arbitration. Also, the Adler CCC noted that the Commission and the parties have devoted considerable time and resources to this arbitration.

On July 30, 2004, Conversent filed an objection to VZ-RI's notice of withdrawal. Conversent argued that its ICA does require an amendment in order to implement a change of law, consistent with how VZ-RI and Conversent have conducted business in the past. In addition, Conversent expressed concern that this arbitration would create precedent as to VZ-RI's UNE obligations that would eventually be applied to Conversent. Also, Conversent suggested that VZ-RI was attempting to relitigate the issue of routine network modifications, and dismiss Conversent from the arbitration so that it would not benefit from the Arbitrator's ruling on this issue in this arbitration. Furthermore, Conversent noted that it has invested significant time and resources in this arbitration and that VZ-RI is exploiting its vast resources to force CLECs into numerous piece-meal proceedings. Lastly, Conversent emphasized that if and when VZ-RI seeks to

[1] These CLECs were: InfoHihghway Communications, Broadview Network Inc., Broadview NP Acquisition Corp., Bullseye Telecom Inc., Cleartel Telecommunications, DSCI Corporation, Equal Access Network LLC, KMC Telecom V Inc., XO Communications Inc., and XO Long Distance Service Inc.

discontinue providing UNEs to Conversent, the Commission will have to resolve this dispute at that time if it does not permit Conversent to address the issue in this arbitration.

On August 2, 2004 and August 3, 2004, VZ-RI responded to the objections of Adler CCC and Conversent. First, VZ-RI indicated that it can withdraw the petition as to these CLECs without their consent pursuant to Commission Procedure Rule 1.11(c), arguing that it would be more efficient to narrow the number of parties in this arbitration. Second, VZ-RI stated that it has not waived its right to cease providing UNEs without an ICA amendment because of footnote four in its original petition. Third, VZ-RI argued that any dispute as to the interpretation of specific ICAs or a VZ-RI action to cease providing UNEs is not ripe. Fourth, VZ-RI disagreed with Conversent's interpretation of its ICA that it requires a written amendment to implement a change of law. Fifth, VZ-RI argued that Conversent does not have standing in this proceeding because this arbitration may set precedent. Sixth, VZ-RI dismissed Conversent's argument regarding routine network modifications by noting that the parties will continue under the existing ICAs and therefore, their rights would remain unchanged. Seventh, VZ-RI argued that Conversent has not made a significant investment of time and resources in this proceeding because no discovery was issued, no testimony was prepared and no hearing was conducted.

On August 4, 2004, members of the Competitive Carrier Coalition represented by the law firm of Swidler, Berlin, Shereff, Friedman ("Swidler CCC") filed a letter.[2] Swidler CCC stated that VZ-RI may not unilaterally terminate a UNE by notice letter where VZ-RI and the CLEC are in disagreement. Also, Swidler CCC indicated that any

[2] These CLECs were: CTC Communications Corp.; DSL net Communications LLC, ICG Telecom Group Inc., Lightship Telecom LLC; and Ligthwave Communications LLC.

dispute under an ICA must be resolved through the dispute resolution process set forth in an ICA. On August 12, 2004, VZ-RI responded to the Swidler CCC's letter. VZ-RI stated that it can unilaterally terminate a UNE by notice letter even if a CLEC disagrees with VZ-RI's interpretation of the change of law. Also, VZ-RI stated it has satisfied the dispute resolution provisions of ICAs.

ARBITRATOR'S FINDINGS

At the outset, the Arbitrator will address VZ-RI's procedural argument that pursuant to Commission Procedure Rule 1.11(c) VZ-RI can presumptively withdraw its petition for arbitration as to certain CLECs, without their consent. This arbitration is governed by the Commission's Arbitration Regulations, and Commission Arbitration Regulation 6(e) specifically states that the "arbitrator may act…without regard to procedural provisions elsewhere in our rules". Accordingly, the Arbitrator does not find Commission Procedure Rule 1.11(c) applicable in these circumstances. In fact, these circumstances appear to be rather unique in the Commission's experience with ICA arbitrations, which explains the lack of a procedural Arbitration Regulation for this occurrence. However, a review of the Rhode Island Rules of Civil Procedure indicates that the most appropriate rule is Rule 41(a)(2), which states that if an answer has been filed, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper". Under Rule 41(a)(2), it is within the court's discretion to allow a complaint to be withdrawn.[3] Accordingly, this Arbitrator will review the arguments and utilize any discretion he has under the Commission's Arbitration Regulations.

[3] Tolle v. Carroll Touch, Inc. 23 F.3d 174 (7th Cir. 1994).

The CLECs essentially raised six arguments in objecting to VZ-RI's notice of withdrawal. First, the CLECs argues that their ICAs require written amendments while VZ-RI argues to the contrary. Regardless of who is correct on the merits, the purpose of this arbitration is not to interpret individuals ICAs but to amend ICAs. This issue is not within the scope of this arbitration. If VZ-RI is wrong in its interpretation of these ICAs, it will be at risk for not pursuing this arbitration. It should be noted that the CLECs could have petitioned for arbitration, but choose not to pursue this option. However, when the FCC changes its UNE rules once again, the CLECs will have the opportunity to petition for arbitration.

Next, the CLECs argued that whatever right VZ-RI had to avoid a written amendment to these ICAs was waived when VZ-RI filed the petition for arbitration while VZ-RI responded that it has not waived any contractual rights. Footnote Four of VZ-RI's petition of arbitration is a clear reservation of its rights, stating that, "by filing this petition, Verizon does not waive any rights it may have under the terms of existing interconnection agreements to cease providing access to these UNEs." VZ-RI's reservation of rights was express, clear and was made at the outset of this arbitration. VZ-RI has not waived any of its rights under its ICAs.

In addition, Conversent raised the concern that this arbitration will create precedent that could or will affect it while VZ-RI countered that this is not sufficient to give Conversent standing in this arbitration. The parties should be well aware that the Commission is free to ignore past precedent.[4] In any case, the Arbitrator is quite cognizant of need for a long-term perspective in this arbitration for determining such issues as what constitutes applicable law for VZ-RI's wholesale obligations or what, if

[4] New England Telephone & Telegraph v. PUC 446 A.2d 1376, 1389 (R.I. 1982)

any, transition period is needed for CLECs that lose access to UNEs at TELRIC rates. Even if Conversent is not to be a participant in this arbitration, it will undoubtedly continue to provide the Commission with a stream of public comment to enlighten the Commission as to arguments or decisions favorable to Conversent's financial interest.

Also, Conversent raised concerns relating to routine network modifications including that VZ-RI is attempting to re-litigate the issue, or that Conversent would not receive the benefit of this Arbitrator's prior ruling on this issue. VZ-RI dismissed these arguments by noting that Conversent would continue with the same rights it currently has under its ICA regarding routine network modifications. Conversent's concerns in this area are unfounded. VZ-RI should be aware that res judicata prevents VZ-RI from raising this issue again in this arbitration. Furthermore, if VZ-RI were to refuse to make routine network modifications for Conversent in violation of the FCC's TRO, Conversent could certainly seek legal relief from a variety of authorities, including this Commission.

Conversent argued that the issue of VZ-RI's legal obligation to provision UNEs to Conversent will simply resurface with the Commission when VZ-RI attempts to discontinue providing UNEs to Conversent at some future date. VZ-RI replied that it has not attempted to discontinue providing UNEs to Conversent so the issue should not now be addressed. There is a substantial likelihood that at some point VZ-RI will attempt to discontinue provisioning UNEs at TELRIC rates to Conversent, and therefore, Conversent will file a petition with the Commission for immediate relief. There is some merit for purposes of judicial/administrative economy of determining what is VZ-RI's wholesale obligations to Conversent in this arbitration so as to avoid the need for a separate docket requiring immediate Commission attention. However, the Arbitrator

does not have the authority to make declaratory judgment on VZ-RI's wholesale obligations to Coversent. Instead pursuant to Commission Arbitration Regulation 6(c), "the arbitrator shall be limited to resolving only those issues upon which arbitration has been requested." Declaratory judgment on the extent of VZ-RI's legal obligation to provision UNEs to Conversant is not an issue in this arbitration. The purpose of this arbitration is to determine an appropriate amendment to ICAs in order to implement a change of law.

Lastly, the CLECs emphasized that they have devoted significant time and resources in this arbitration while VZ-RI countered that these CLECs have not conducted discovery, filed testimony or participated in a hearing. The CLECs are correct. VZ-RI has caused these CLECs to expend needless time and resources. This is simply inappropriate. Either VZ-RI's initial request for arbitration with these CLECs that it now seeks to dismiss was frivolous or its current request to dismiss these CLECs from the arbitration is a taunt to these CLECs, which if acted upon, will result in more litigation before this Commission at a later date. As discussed earlier, Civil Procedure Rule 41 (a)(2) allows a court to impose terms and conditions on a withdrawal of a complaint, such as the assessment of attorney fees and costs upon the plantiff.[5] Unfortunately, this Arbitrator can not impose such a requirement upon VZ-RI because of the limitation of Commission Arbitration Regulation 6(c).

As a result, this Arbitrator must allow VZ-RI to withdraw its petition for arbitration with these various CLECs. VZ-RI initiated this arbitration and if it no longer seeks to arbitrate with particular CLECs, it appears to be their prerogative under the limitations of Commission's Arbitration Regulations. This arbitration was requested by

[5] Clark v. Tansy 13 F.3d 1407 (10th Cir. 1993)

VZ-RI, not the CLECs. The purpose of this arbitration is to determine an appropriate written ICA amendment to implement a change of law. It is not to make declaratory judgments or grant equitable relief. Instead this odyssey of arbitration must continue on with fewer participants in a fog of legal uncertainty even though it is apparent that this arbitration is ill timed and poorly designed.

Accordingly, it is

(17960) ORDERED:

1. VZ-RI's notice of withdrawal is granted, and the objections of various CLECs are denied.
2. Pursuant to Commission Rules Governing Arbitration of Interconnection Agreements, within fourteen days of issuance of this Second Procedural Arbitration Decision, parties may submit comments regarding this Second Procedural Arbitration Decision.
3. Pursuant to Commission Rules Governing Arbitration of Interconnection Agreements, within twenty-one days of issuance of this Second Procedural Arbitration Decision, parties may submit reply comments regarding this Second Procedural Arbitration Decision

DATED AND EFFECTIVE AT WARWICK, RHODE ISLAND ON AUGUST 18, 2004.

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Steve Frias, Arbitrator