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 RHDOE ISLAND TO IMPLEMENT THE TRIENNIAL REVIEW ORDER	:	DOCKET NO. 3588

ORDER
REVIEWING SECOND PROCEDURAL ARBITRATION DECISION

On August 18, 2004, the Arbitrator in this docket issued Order No. 17960, granting Verizon-Rhode Island's ("VZ-RI") Notice of Withdrawal of Petition for Arbitration to certain Competitive Local Exchange Carriers ("CLECs"), including Convserent Communications of Rhode Island, LLC ("Conversent"). On September 1, 2004, Conversent filed Comments on the Arbitrator's Second Arbitration Decision, requesting the Commission overrule the Second Procedural Arbitration Decision and allow Conversent to remain in the Arbitration. On September 8, 2004, VZ-RI filed a Reply to Comments of Conversent Regarding Second Procedural Arbitration Decision, arguing that the Arbitrator's decision should be affirmed. Neither party requested a hearing on the issue.

On November 9, 2004, the Public Utilities Commission ("Commission"), by unanimous vote, affirmed the Arbitrator's Second Procedural Arbitration Decision. The Commission noted that Conversent did not file independently for arbitration, but rather, filed objections to VZ-RI's Petition for Arbitration and Notice of Withdrawal. The Commission further found that Conversent will suffer no harm from being dismissed from the Arbitration. The Commission noted that, in the event VZ-RI takes action that

will affect the rights and/or obligations of VZ-RI to Conversent, Conversent may appeal to the Commission. To date, VZ-RI has taken no action to affect the status quo of the parties' agreement as to the proper treatment of unbundled network elements ("UNEs").

Conversent claimed that in its March 17, 2004 Response to VZ-RI's Petition for Arbitration, it requested specific rulings of law on the following six items:

(1) Whether Verizon's obligations for unbundling are controlled by other state and federal laws beyond rules enacted pursuant to Section 251 [of the Telecommunications Act of 1996].
(2) Whether Verizon can act to disconnect facilities upon "notice."
(3) Whether changes of law brought about by events at the federal level should be implemented through tariffs, rather than through contract amendment.
(4) What standards should govern new pricing for unbundled elements that are not subject to Section 251.
(5) What is an appropriate transition period for UNEs that are not subject to Section 251.
(6) Whether Verizon must perform routine network modifications for DS-1 loops at existing TELRIC rates without any further amendments to contracts.[1]

Conversent has also submitted an Arbitrator's Order from the Vermont Public Service Board regarding Verizon's Motion of Withdrawal in a like matter. The Arbitrator granted Verizon's request, subject to the condition that "any of the unlisted carriers that have, in [the Vermont] Docket, requested amendments to their interconnection agreements with Verizon may continue to pursue those claims."[2]

In response, VZ-RI argued that the issues raised by Conversent are only objections or defenses to VZ-RI's proposed Amendments to ICAs. VZ-RI also noted that the Vermont arbitrator found that "where the parties had raised 'additional issues for arbitration in their responses,' the Board should continue to arbitrate those issues. The arbitrator made no ruling on whether specific issues had been properly raised in parties'

[1] Conversent's Comments On the Arbitrator's Second Procedural Arbitration Decision ("Comments"), p. 2.
[2] Id. at 3-4, quoting Order Re: Verizon Motion of Wit6hdrawal (Docket No. 6932 Vermont PSB), pp. 1-2.

responses. Furthermore, the arbitrator clearly referred to issues raised 'in addition' to those raised by Verizon's petition, not defenses or objections to that petition."[3]

The Commission finds that Conversent's Issues One, Two, Three and Five are in response to Verizon's Petition for Arbitration. Absent Verizon's Petition, there would be no forum for Conversent to raise these issues. Unlike the Vermont Arbitrator's situation, Conversent has not requested additional issues to be arbitrated, but rather, have raised only responses to VZ-RI's Petition. A review of Conversent's ICA shows that Sections 11.0, 27.3 and 27.4 adequately address Issue Five. Sections 27.3 and 27.4 adequately address Issues Two and Three. With regard to Issue One, VZ-RI has not attempted to change its obligations to Conversent under its existing ICA, making determination of this issue unnecessary at present.

In short, Conversent has not suffered any harm as a result of being dismissed from the Arbitration. In the event VZ-RI attempts to exercise any right it believes it has under the Conversent ICA, Conversent will certainly petition the Commission for relief, in the event it believes it is being treated inappropriately. Arbitration is not the place to interpret ICAs, but rather, is to rule on new ICAs or amendments thereto.

Issues Four and Six, the only two issues that may be considered claims for relief, appear to be rate issues, generally not appropriate for arbitration. In its Order in Docket No. 3437, the Commission adopted and incorporated by reference, the Arbitrator's Recommended Decision, finding that "…an arbitration between two parties, …unlike a generic docket, does not include participation from either the Division of Public Utilities and Carriers ("Division"), which represents the ratepayers, or other CLECs. A decision

[3] VZ-RI's Reply to Comments of Conversent Regarding Second Procedural Arbitration Decision ("Reply Comments"), p. 2, n. 1, quoting Order Re: Verizon Motion of Wit6hdrawal (Docket No. 6932 Vermont PSB), p. 4-5.

on this issue could affect other CLECs when their ICAs expire."[4] Therefore, rate matters should generally be addressed by the Commission in a generic docket where every interested party and the Division can have an opportunity to be heard. Furthermore, the Arbitrator has already ruled that VZ-RI must perform routine network modifications for DS-1 loops at existing TELRIC rates until modified by the Commission in a generic docket. No appeal was taken on that decision by VZ-RI. Therefore, Conversent is not suffering any harm.

Conversent argued that Superior Court Rule of Civil Procedure 41(a)(2) precludes dismissal by VZ-RI. The Rule states, "If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court."[5] In response, VZ-RI argued that Conversent did not raise a counterclaim, and thus, the rule does not apply.[6]

The problem with Conversent's reliance upon this Rule is that Conversent did not "counterclaim" or, in other words, raise issues against VZ-RI that were appropriate for arbitration at this time. A counterclaim is an independent claim that you have against the petitioning party arising out of an action by that party. For example, Plaintiff and Defendant are involved in an automobile accident and Plaintiff sues Defendant for damages arising out of the automobile accident. Defendant also suffered damages, so Defendant "counter-sues" for damages arising out of that accident. This case is different. Conversent has not alleged that VZ-RI has taken action which has harmed Conversent. In fact, because VZ-RI has decided it does not need an amendment to Conversent's ICA,

[4] Order No. 17350 (issued January 24, 2003).
[5] Conversent Comments, pp. 5-6, quoting S. Ct. Rules Civ. Proc. 41(a)(2).
[6] VZ-RI Reply Comments, p. 7.

the amendment that is crafted as a result of this Arbitration will not harm Conversent. Therefore, Conversent's issues are nothing more than defenses to an amendment VZ-RI was originally trying to impose.

Conversent argued that whether or not this arbitration will be binding upon Conversent is not clear and whether or not the Arbitrator's finding that VZ-RI shall continue providing Routine Network Modifications at TELRIC rates are binding on Conversent.[7] VZ-RI has argued that nothing precludes VZ-RI from filing in the TELRIC docket.[8]

The Commission finds that regardless of whether or not VZ-RI is bound to continue providing the service at TELRIC rates with respect to Conversent because of this case, if VZ-RI attempts to change the rates charged to Conversent, Conversent will certainly petition the Commission for relief. Verizon has correctly noted in its Reply Comments that it is allowed to raise the pricing issue in Docket No. 2681 (TELRIC).

In conclusion, it is a fundamental principle that a court, or quasi-judicial agency such as the Commission, should not rule on a matter not yet ripe for review. The issue should be justiciable, affecting the immediate rights of the parties before the Commission. Conversent has an ICA with VZ-RI that is in effect and addresses the rights and obligations of both parties. VZ-RI has not attempted to change any provisions of Conversent's ICA or the status quo of provisioning of services, of providing connections to facilities or with respect to pricing. Furthermore, Conversent's ICA contains provisions that provide for transition periods in the areas of providing unbundled access and of changes of law. Therefore, Conversent has not raised any issue upon which

[7] Conversent Comments, pp. 6-8.
[8] VZ-RI Reply Comments, pp. 7-8.

the Commission should order it to remain in the Arbitration of an ICA Amendment between VZ-RI and CLECs that may not have adequate provisions in their ICAs.

Accordingly, it is hereby

(18045) ORDERED:

1. The Arbitrator's Second Procedural Decision, No. 17960 is affirmed.

EFFECTIVE AT WARWICK, RHODE ISLAND PURSUANT TO AN OPEN MEETING DECISION ON NOVEMBER 9, 2004. WRITTEN ORDER ISSUED NOVEMBER 19, 2004.

PUBLIC UTILITIES COMMISSION

_____
Elia Germani, Chairman

_____
Kate F. Racine, Commissioner

_____
Robert B. Holbrook, Commissioner