

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: VERIZON-RHODE ISLAND'S FILING :
OF OCTOBER 2, 2003 TO AMEND TARIFF : DOCKET NO. 3556
NO. 18. :

REPORT AND ORDER

I. PLEADINGS

On August 1, 2003, the FCC issued the Triennial Review Order ("TRO"), which eliminated unbundling requirements for certain network elements. On October 2, 2003, Verizon-Rhode Island ("VZ-RI") filed with the Rhode Island Public Utilities Commission ("Commission") proposed amendments to RIPUC Tariff No. 18 to implement the FCC's TRO. Specifically, VZ-RI's proposed amendments which would remove line sharing and certain forms of interoffice facilities ("IOF") such as IOF dark fiber, and OC3 and OC12 IOF transport as being classified as an unbundled network elements ("UNE"). On October 21, 2003, the Division of Public Utilities and Carriers ("Division") did not recommend suspension of the amended tariff. On October 28, 2003, Covad Communications ("Covad") filed a complaint with the Commission requesting that the proposed amendments to the tariff be suspended and modified. First, Covad argued that VZ-RI misinterpreted the FCC's TRO because a line sharing arrangement is eligible for grandfathering not just when the DSL service began before October 2, 2003 but also if a CLEC submitted an order to provision DSL service to a customer prior to October 2, 2003. Also, Covad argued that grandfathering applies at all times during which the DSL service is provided to a particular end-user customer and not only to a

customer over the exact copper loop or subloop serving the end-user at the exact customer location where the service was initially commenced.¹

Second, Covad maintained that the Commission can require VZ-RI to provide line sharing prospectively under Section 271 of the 1996 Telecommunications Act. Also, Covad noted that a Bell Operating Company (“BOC”) is required to provide access to line sharing in order to obtain FCC approval of a Section 271 application to provide long distance service and this requirement continues even after the issuance of the TRO. Covad argued that although network elements required under Section 271 are to be set at just, reasonable and non-discriminatory rates as set forth in Section 201 and 202, this Commission could require TELRIC pricing for Section 271 network elements. Also, Covad maintained that it is non-discriminatory pricing that the recurring rate for line sharing should be the same amount of loop cost allocated by VZ-RI to its own DSL services, which is zero.²

Third, Covad argued that the Commission has independent state law authority to continue line sharing as a UNE. Covad emphasized that the FCC in the TRO did not preempt any existing state line sharing requirements or preclude the adoption of future state line sharing requirements. Rather, Covad noted that the FCC invited parties to seek declaratory rulings from the FCC as to whether a state line sharing requirement substantially prevented implementation of Section 251. Also, Covad argued that the facts relied upon by the FCC to reach its finding of national non-impairment for line sharing is not applicable to Rhode Island.³

¹ Covad’s complaint, pp. 3-4.

² *Id.*, at pp. 4-11.

³ *Id.*, at pp. 11-12.

On October 29, 2003, VZ-RI filed a response. VZ-RI maintained that its amendments to Tariff No. 18 fully comply with the FCC's TRO. Also, VZ-RI argued that the Commission has been preempted by the FCC in determining that line sharing is not a UNE.⁴ At an open meeting on October 30, 2003, the Commission suspended VZ-RI's amended Tariff No. 18. Subsequent to this open meeting, Conversent and AT&T filed motions to intervene.

II. BRIEFS

On December 9, 2003, the parties filed briefs. In its brief, VZ-RI maintained that state commissions have been preempted by the FCC regarding the network elements which the FCC has not required to be unbundled in the TRO. In addition, VZ-RI argued that this Commission has no independent state law authority to require VZ-RI to unbundle its network and offer it for lease to its competitors. In regards to Section 271, VZ-RI argued that line sharing is not specifically required under Section 271 and that whether a rate satisfied the just and reasonable pricing standard of Section 271, 201 and 202 will be done through federal tariffs.⁵ VZ-RI maintained that line sharing relates to a particular loop serving the customer at a specific location and not to specific customers who may move. Also, VZ-RI stated that the FCC's TRO allows for the grandfathering of line sharing customers who had begun receiving DSL service from the CLEC by October 2, 2003.⁶

VZ-RI noted that the FCC's TRO eliminated as a UNE certain facilities that connect the ILEC's network to the CLECs' network. For instance, a transmission link from the CLEC's network to the ILEC's switch is not dedicated transport and therefore,

⁴ VZ-RI's letter of 10/29/03.

⁵ VZ-RI's brief, pp. 2-11.

⁶ Id., pp. 11-18.

is not a UNE. VZ-RI argued there is no need for a transition period to eliminate IOF transport as a UNE because the TRO was issued on August 21, 2003 and delay would only allow CLECs to obtain these non-UNE facilities at TELRIC prices. VZ-RI represented that it did not intend to immediately terminate CLECs' provisioning arrangements and indicated that it may have a continuing obligation to provide certain network elements pursuant to interconnection agreements ("ICA"). However, VZ-RI opined that an ICA obligation should be independent from a tariff requirement. Also, VZ-RI argued that its proposed amended Tariff No. 18 does not interfere with the negotiation and arbitration of ICAs.⁷

In its brief, Covad argued that VZ-RI misinterpreted the FCC's TRO regarding the grandfathering of existing line sharing. Specifically, Covad maintained that a customer need not be receiving DSL service before October 2, 2003 and also that the customer should not lose the service if the customer changes location. Also, Covad indicated that VZ-RI's tariff does not detail either the transitional plan contained in the FCC's TRO or VZ-RI's obligation under Section 271. In addition, Covad maintained that VZ-RI only provides line splitting for UNE-P CLEC providers, therefore discriminating against UNE-L CLEC providers.⁸

Next, Covad argued that VZ-RI must continue to provide unbundled access to line sharing pursuant to Section 271. Covad noted that the FCC has insisted that a BOC long distance applicant offer non-discriminatory access to the high frequency portion of the loop ("HFPL") in order to comply with checklist item number 4 and that it continue to do so after the TRO decision. Covad maintained that this Commission has the authority to

⁷ *Id.*, pp. 18-23.

⁸ Covad's brief, pp. 1-9.

require VZ-RI to provide unbundled access to line sharing pursuant to Section 271 or Rhode Island General Laws. Furthermore, Covad indicated that state utility commissions actually investigate a carrier's costs and approve rates, reasoning that this state commission can set a TELRIC rate or TELRIC equivalent rate in conformance with the just, reasonable and non-discriminatory standard of Sections 201 and 202. Covad noted that the recurring rate for HFPL is set at the same amount of the loop cost allocated by VZ-RI to its DSL services, which is zero.

Also, Covad argued that the Commission has independent state law authority under Title 39 to order line sharing or unbundled access to the HFPL, and that the Telecommunications Act did not preempt the Commission's independent state law authority. Furthermore, Covad maintained that the FCC's TRO did not preempt a state commission's authority, and that the FCC did not specifically preempt any existing state law unbundling requirements for HFPL or hybrid loops. Lastly, Covad argued that the Commission has the authority to require VZ-RI to provide access HFPL based on Rhode Island's specific circumstances.⁹

In a letter, Conversent acknowledged that dark fiber channel termination facility is no longer considered interoffice transport under the FCC's TRO. However, Conversent requested a commercially reasonable period of time to determine if: (1) it will self-provision this facility; (2) find an alternative vendor of dark fiber at the required location; or (3) lease it from VZ-RI at just and reasonable rates pursuant to Section 271. Conversent argued that VZ-RI does not offer dark fiber channel termination facilities at just and reasonable rates. Accordingly, Conversent requested that VZ-RI's tariff be stayed until VZ-RI offers Conversent just and reasonable rates for dark fiber channel

⁹ Id., pp. 20-30.

termination facilities or a reasonable amount of time to migrate off of VZ-RI's facilities.¹⁰

III. REPLY BRIEFS

On December 23, 2003, the parties filed reply briefs. In its reply brief, VZ-RI argued that the Commission can not ignore the FCC's decision eliminating line sharing as a UNE. First, VZ-RI indicated that Covad would continue to have access to HFPL if it paid for the entire loop, which is what is required by Section 271. Second, VZ-RI emphasized that only the FCC may determine if a BOC is meeting its Section 271 obligation while a state commission's role is limited to consultation. Third, VZ-RI stressed that there is no state law authorizing line sharing and instead, the FCC has asserted that a state attempt to require unbundling in this area would not likely survive a preemption analysis.¹¹

In regards to Covad's assertions that VZ-RI is misinterpreting the FCC's TRO for grandfathered line sharing, VZ-RI once again maintained that it has implemented the FCC's TRO correctly. Also, VZ-RI acknowledged that it is required to comply with the FCC's rules governing new line sharing arrangements under the transition period, but that it is unnecessary to specifically detail these rules in the tariff. Furthermore, VZ-RI indicated that the only section in the tariff discussing line splitting makes no distinction between UNE-P and UNE-L lines, thus not discriminating against differing CLECs.¹²

As for Conversent, VZ-RI denied that there is a Section 271 obligation for it to provide dark fiber channel termination facilities. However, VZ-RI agreed to continue to

¹⁰ Conversent's 12/9/03 letter.

¹¹ VZ-RI's reply brief, pp. 1-11.

¹² Id., pp. 11-12.

provide dark fiber channel termination facilities until it offers Conversent a commercial agreement for such facilities. VZ-RI expected to make this offer by mid-January 2004.¹³

In its reply brief, Covad reiterated that the FCC's TRO does not explicitly preempt state authority to order line sharing and that the FCC can not abrogate the state authority to order unbundling. Also, Covad repeated that line sharing or access to HFPL is required by Section 271 and that this Commission can enforce VZ-RI's Section 271 obligations and set rates under Sections 201, 202 and 271 at the equivalent of TELRIC rates.¹⁴ In addition, Covad once more stated that VZ-RI's interpretation of the FCC's TRO regarding grandfathered line sharing customers is unlawful and indicated that limiting line splitting to only UNE-P CLECs is discriminatory.¹⁵

In its reply brief, Conversent reasserted that VZ-RI is required by Section 271 to provide dark fiber channel termination facilities at just and reasonable rates. As a result, Conversent urged the Commission only to allow VZ-RI's proposed tariff to go into effect once VZ-RI has filed a tariff pursuant to Section 271 to provide dark fiber channel termination facilities. In alternative, Conversent argued that the Commission has the authority to create a 12 month transition period for a CLEC to have the opportunity to deploy its own facilities or find a third-party vendor.¹⁶

IV. DATA RESPONSES AND FURTHER COMMENTS

After reply briefs were filed, the Commission issued data requests to the parties. On January 21, 2004 both VZ-RI and Conversent agreed that a CLEC could file a compliant with the FCC requesting that the FCC determine if a network element must be

¹³ *Id.*, pp. 12-14.

¹⁴ Covad's reply brief, pp. 1-11.

¹⁵ *Id.*, pp. 11-18.

¹⁶ Conversent's reply brief, pp. 1-6.

offered pursuant to Section 271.¹⁷ Also, on February 26, 2004 Covad filed a letter with the Commission. In the letter, Covad interpreted decisions by a Maine PUC Hearing Examiner, the North Carolina Utilities Commission, and the Georgia PSC as indicating that a BOC must continue to provide line sharing pursuant to Section 271.¹⁸

Lastly, at the request of the Commission, the parties submitted comments as to how the D.C. Circuit Court of Appeals decision of March 2, 2004 in U.S.T.A. v. F.C.C. affected VZ-RI's proposed tariff revision. On April 2, 2004, VZ-RI submitted a statement that the D.C. Circuit Court affirmed the FCC's decision regarding elimination of IOF transport at very high capacity levels such as OCn, and the FCC's decision related to line sharing. Also, VZ-RI acknowledged that the FCC's decision to exclude entrance facilities or dark fiber facilities connecting VZ-RI's central office and the CLEC's switch from the definition of dedicated transport was remanded. However, VZ-RI noted that the decision was not vacated and explained that since there are currently no dark fiber entrance facilities in Rhode Island being provided as UNEs, there was no need for a transition or delay in approving the tariff.¹⁹ On April 2, 2004 Conversent stated that because the issue of entrance facilities was remanded, VZ-RI's tariff was premature. Also, Conversent argued that in order to facilitate negotiation among the parties, the Commission should not approve VZ-RI's tariff. In addition, Conversent maintained that if the tariff is approved, it should only be effective prospectively or 30 days from the

¹⁷ VZ-RI and Conversent data responses of 1/21/04.

¹⁸ Covad's letter of 2/26/04.

¹⁹ VZ-RI's statement

Commission's order.²⁰ On April 3, 2004, the Division opined that VZ-RI's tariff is consistent with the FCC's TRO and the D.C. Circuit Court's recent decision.²¹

At an open meeting on April 29, 2004, the Commission reviewed the evidence and the arguments and voted to allow VZ-RI's proposed revisions to Tariff No. 18 to go into effect.

COMMISSION FINDINGS

In its tariff revisions, VZ-RI proposed three changes. First, VZ-RI proposed eliminating OC transport from classification as a UNE. In the TRO, the FCC eliminated OC transport as a UNE and the D.C. Circuit Court affirmed this decision. Furthermore, no CLEC raised an objection to the elimination of OC transport as a UNE. Accordingly, the Commission approves of VZ-RI's tariff revision as to OC transport.

Second, VZ-RI proposed elimination of dark fiber IOF termination channel transport as a UNE. In the TRO, the FCC eliminated dark fiber IOF termination channel transport from classification as a UNE. Conversent raised legitimate legal objections as to VZ-RI's proposed revisions. It is unclear whether dark fiber IOF termination channel transport is required under Section 271, but that determination should be made by the FCC. As to the Commission's state law authority, it is clear that this Commission has utilized its state law authority to create UNEs. For instance, the Commission required dark fiber interoffice transport to be provided as a UNE.²² This was necessary to promote facilities-based competition. However, there is no dark fiber IOF termination channel transport in Rhode Island being provided as a UNE. Accordingly, there is no need for the Commission to exercise its state law authority to either maintain it as a UNE or create a

²⁰ Conversent's statement

²¹ Division's statement

²² Order No. 16808.

transition period for CLECs to self-provision or enter into an arrangement with alternative wholesale providers for this type of dark fiber transport.

Third, VZ-RI proposed a revision to eliminate line sharing from the classification as a UNE. The FCC's TRO eliminated line sharing as a UNE and this was affirmed by the D.C. Circuit Court. Covad made various objections. In regards to grandfathered CLEC line sharing customers, there are approximately 500 customers in Rhode Island, a very small group. There appear to be no customers in Rhode Island who applied for line sharing before October 2, 2003, who previously had line sharing provisioned to them by October 2, 2003. As a result, Covad's argument in this area need not be addressed. As for Covad's argument that the grandfathering provision should apply to a CLEC line sharing customer wherever the customer may move in the future, Covad's interpretation is not technically feasible. There are portions of VZ-RI's network that cannot provide line sharing. In regards to Covad's arguments that this Commission could require line sharing as a UNE under Section 271 or state law, or create a transition plan, the FCC clearly stated that it would be "unlikely" that a state commission that contradicts the TRO in regards to line sharing "would fail to conflict" with federal law.²³ The Commission should not attempt to exercise its authority if it is likely to be pre-empted, especially in an area that is not vital to facilities-based competition. Also, there is no need for the Commission to create a transition plan for line sharing because the FCC has already set forth a specific transition plan for line sharing. Accordingly, the Commission will accept VZ-RI's proposed revision to the line sharing provisions of the tariff. As a result, the Commission approved VZ-RI's proposed revisions to Tariff No. 18 in its entirety.

²³ FCC's TRO, para. 195.

Accordingly, it is

(18017) ORDERED:

1. Verizon-Rhode Island's revisions to Tariff No. 18 filed on October 2, 2003, is approved.
2. Verizon-Rhode Island shall comply with all other findings and instructions contained in this Report and Order.

EFFECTIVE IN WARWICK, RHODE ISLAND ON APRIL 29, 2004,
PURSUANT TO AN OPEN MEETING ON APRIL 29, 2004. WRITTEN ORDER
ISSUED OCTOBER 12, 2004.

PUBLIC UTILITIES COMMISSION

Elia Germani, Chairman

Kate F. Racine, Commissioner

Robert B. Holbrook, Commissioner