

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
PUBLIC UTILITIES COMMISSION

IN RE: THE PETITION OF EASTERN :  
TELEPHONE, INC. REQUESTING :  
VERIZON RHODE ISLAND TO FILE : DOCKET NO. 3333  
A TARIFF PROVISION ALLOWING FOR THE :  
RESALE OF VOICE MESSAGING SERVICE :

REPORT AND ORDER

I. Pleadings

On May 18, 2001, Eastern Telephone, Inc. ("Eastern"), a competitive local exchange carrier, petitioned the Rhode Island Public Utilities Commission ("Commission") to direct Verizon Rhode Island ("VZ-RI") to file tariffs allowing for resale of voice messaging service by competitive local exchange carrier ("CLECs"). Eastern indicated that it is preparing to provide a comprehensive package of local resale telecommunications services to residential customers in Rhode Island. In communities where Eastern has provided service, Eastern gives a portion of total revenues to local public schools. Eastern resells local phone service through affinity marketing agreements, such as an agreement with the Massachusetts AFL-CIO, and has recently negotiated a similar agreement with the Narragansett Bay Commission.<sup>1</sup>

In its petition, Eastern noted that VZ-RI refers to voice messaging service as telephone service in its Rhode Island white pages telephone directory. In Massachusetts, Eastern stated it has been unable to act on

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<sup>1</sup> Petition of Eastern Telephone, Inc. pp. 1-2.

20 percent of letters of authorization to change local exchange providers from Verizon to Eastern because of its inability to include resold voice messaging services. Also, Eastern noted that in a letter dated October 3, 2000, Verizon stated it will provide voice messaging service for resale on a “case-by-case basis”.<sup>2</sup>

In addition, Eastern stated that state commissions have ordered that voice messaging be made available for resale by CLECs in Alabama, California, Florida, Kentucky, New York, Oregon, Vermont and Wyoming, while in Delaware voice messaging resale is required by statute. Furthermore, Eastern argued that R.I.G.L. § 39-1-1 states the Commission regulates intrastate communications and is responsible for eliminating unfair or destructive competitive practices. Lastly, Eastern noted that the Commission’s Resale Regulations provide that all telephone services provided at retail by VZ-RI are presumptively available to CLECs for resale.<sup>3</sup>

In response on June 7, 2001, VZ-RI filed an answer to the petition and a motion to dismiss. VZ-RI argued that it is not required to provide voice messaging service to CLECs under the Telecommunications Act of 1996 (“Act”). VZ-RI explained that the FCC has previously concluded that information services such as voice messaging do not constitute telecommunication services within the meaning of the Act. In addition,

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<sup>2</sup> *Id.*, p. 2.

<sup>3</sup> *Id.*, pp. 3-4 (citing Regulations Regarding “Avoided Cost” for Development of “Wholesale” Discounts from Retail Rate (hereinafter, “Resale Regulations”), pp. 1-2).

other state commissions have not required voice messaging to be offered resale such as: Massachusetts, Virginia, Minnesota, Arizona, Illinois, North Carolina, Ohio and Washington.<sup>4</sup>

Also, VZ-RI argued that Eastern could purchase the equipment and services to establish its own voice messaging service and does not need VZ-RI to resell its voice messaging service. As to Eastern's state law claim, VZ-RI stated that the Commission has permitted VZ-RI to offer this service on an unregulated basis since 1991 and argued that numerous entities are currently engaged in the sale of voice messaging services.<sup>5</sup>

On June 29, 2001, Eastern filed an objection to VZ-RI's motion to dismiss. Eastern explained that its argument is based entirely on the Commission's authority under state law and noted that several other state commissions have exercised their authority to require the resale of voice messaging. In addition, Eastern argued that replicating Verizon's voice messaging service would require a significant capital investment and a significant financial operating loss of \$2.50 per month per user for each voice mail subscriber.<sup>6</sup>

## II. Eastern's Brief

Eastern acknowledged that the FCC does not require voice messaging to be offered for resale, but noted the FCC has not preempted

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<sup>4</sup> VZ-RI's Answer and Motion to Dismiss, pp. 3-6.

<sup>5</sup> *Id.*, pp. 8-10.

<sup>6</sup> Eastern's Objection, pp. 2-4.

state commissions from requiring the resale of voice messaging.<sup>7</sup> Eastern argued that R.I.G.L. § 39-1-1(b) allows the Commission to act in the area of telephone service to prevent “unfair or destructive competitive practices.” Eastern noted the Commission has previously held that “competition on the local exchange and intrastate toll markets...should be permitted as broadly as possible, as soon as possible.”<sup>8</sup> In addition, Eastern argued that the Commission’s Resale Regulations make no distinction in requiring the resale of retail services between services that are considered telecommunication services or information services.<sup>9</sup> In essence, Eastern argued that the crucial consideration is not whether voice messaging service constitutes a telecommunications service but rather its impact on competition and consumers.<sup>10</sup>

Eastern reiterated the numerous state jurisdictions that have held that voice messaging must be available for resale. Eastern explained that the decisions of these state commissions “reflect the latitude that federal policy gives to state commissions in general, and in particular to establish what services are subject to resale.”<sup>11</sup> In most of these decisions, Eastern explained that state commissions have looked to “their own authority under federal or state law and have made independent policy decisions based on market conditions.”<sup>12</sup> For

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<sup>7</sup> Eastern’s Brief, pp. 4-8.

<sup>8</sup> *Id.*, p. 8 (citing Order No. 14756 (issued 6/30/95), p. 4).

<sup>9</sup> *Id.*, p. 11 (citing Commission’s Resale Regulations, pp. 1-2).

<sup>10</sup> *Id.*, p. 11.

<sup>11</sup> *Id.*, p. 12.

<sup>12</sup> *Id.*

instance, Eastern noted that the Vermont Public Service Board based its decision to require the resale of voice mail on its state law authority.<sup>13</sup> In contrast, Eastern argued that the state commissions that VZ-RI cites, such as the Massachusetts D.T.E., based their decisions on the sole premise that voice messaging is an information service under federal policy.<sup>14</sup>

### III. VZ-RI's Brief

At the outset VZ-RI concurred that the FCC has not preempted state commissions from requiring the resale of the voice messaging service. VZ-RI noted that R.I.G.L. § 39-1-1 allows the Commission to regulate communications. Also, VZ-RI argued that the Commission should interpret the word “communications” in the same manner as the FCC. VZ-RI emphasized that the FCC does not consider voice messaging to be a communication service, and therefore urged the Commission not to consider voice messaging to be a communication service under R.I.G.L. § 39-1-1.<sup>15</sup>

In addition, VZ-RI argued that no specific state law imposes a resale requirement on VZ-RI, and that the Commission's Resale Regulations, as well as its Order No. 15111, In re: “Avoided Cost” for Development of “Wholesale” Discounts from Retail Rates (issued Jan. 29, 1998), stemmed from the requirements of the Act. VZ-RI disagreed with

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<sup>13</sup> Id., p. 13.

<sup>14</sup> Id., pp. 12, 14.

<sup>15</sup> VZ-RI's Brief, pp. 2-6.

Eastern's assertion that the Commission should require the resale of voice messaging in order to prevent an "unfair or destructive competitive practices" under R.I.G.L. § 39-1-1. VZ-RI noted that since 1991 there has been competition for voice messaging.<sup>16</sup> Furthermore, VZ-RI argued that many state commission decisions requiring the resale of voice messaging either preceded the passage of the Act or the FCC's order declaring that voice messaging is an information service. VZ-RI urged this Commission to follow the example of the Massachusetts D.T.E., which mirrored the FCC in not requiring voice messaging to be offered for resale. Lastly, VZ-RI argued that there is no mechanism under Rhode Island law to require voice messaging to be resold at an avoided cost discount.<sup>17</sup>

#### COMMISSION FINDINGS

At an open meeting on December 13, 2001, the Commission reviewed the evidence presented and arguments made by the parties. For the reasons discussed below, the Commission found it was in the best interest of the ratepayers to grant Eastern's petition and deny VZ-RI's motion to dismiss. Accordingly, pursuant to R.I.G.L. § 39-1-1, 39-1-38, and 39-2-1, VZ-RI shall file modifications to its tariff to provide for the resale of voice messaging service at the avoided cost discount within 10 days of the issuance of this Report and Order.

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<sup>16</sup> Id., pp. 8-11.

<sup>17</sup> Id., pp. 12-13.

At the outset, the Commission notes that both parties are in agreement that the FCC has not preempted state commissions from requiring the resale of voice messaging. The issue presented is whether the Commission has the legal authority to mandate the resale of voice messaging and, if so, to weigh the beneficial and negative impacts of implementing such a policy.

In reviewing the Commission's state law authority, the Commission initially notes that pursuant to R.I.G.L. § 39-1-38, the provisions of Title 39 are to be "interpreted and construed liberally." R.I.G.L. § 39-1-1 states that the policy of this Commission is to prevent "unfair or destructive competitive practices" in the area of "communication". Furthermore, in R.I.G.L. § 39-2-1, a public utility must have "reasonable and just" rates "for any telephone or telegraph message conveyed." Verizon argues that the term "communication" in R.I.G.L. § 39-1-1 should be interpreted in the same manner as the FCC interprets telecommunications in the Act so as exclude voice messaging from being offered for resale. The Commission must disagree with Verizon on this matter of interpretation.

It is clear the legislature uses the terms "communication" and "telephone service" interchangeably and that the provisions of Title 39 are to be construed liberally. Consequently, the Commission has and will continue to broadly interpret the term "communication" to be synonymous with telephone service under Title 39. Also, unlike the FCC,

this Commission has never drawn a distinction between telecommunications services and other telephone services. Indeed, the Commission's Resale Regulations provide that "all services provided at retail" by Verizon "shall be presumptively available" to CLECs "for resale" and "at a discount".<sup>18</sup> In those regulations, the Commission did not limit these services to telecommunications but defined "services provided at retail" to be "telephone services".<sup>19</sup> Furthermore, VZ-RI in its white pages directory referred to voice messaging as a telephone service. Thus, the Commission concludes that voice messaging is a telephone service and a communication subject to the Commission's jurisdiction under its broad authority conferred by Title 39.

The next question is whether R.I.G.L. § 39-1-1 allows the Commission to require VZ-RI to resell voice messaging at a wholesale discount. VZ-RI argues that the Commission does not have specific statutory authority to require the resale of voice messaging at a wholesale discount. We disagree. The Commission has previously utilized R.I.G.L. § 39-1-1 to impose wholesale service requirements on VZ-RI, even though Rhode Island's statutes may not contain the express language demanded by VZ-RI. For instance, the Commission recently ordered VZ-RI to provision dark fiber through its intermediate central offices pursuant to this Commission's "ample authority under state law",

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<sup>18</sup> Commission's Resale Regulations, p. 2.

<sup>19</sup> Id.

although the phrase “dark fiber” appears nowhere in Title 39.<sup>20</sup> Also, the Commission has required Verizon to provide unbundled network element (“UNE”) combinations solely and expressly based on its state law authority conferred under R.I.G.L. § 39-1-1, 39-1-38 and 39-2-1,<sup>21</sup> although again, these statutory provisions make no specific mention of UNEs. Further, the Commission notes that dark fiber and UNEs only arose after the passage of the Act in 1996. If R.I.G.L. § 39-1-1 allows the Commission to impose requirements on VZ-RI relating to the provisioning of dark fiber and UNEs, it similarly allows the Commission to do so in regards to the resale of voice messaging.

Although the FCC has not required voice messaging to be offered for resale, neither had the FCC required the provisioning of dark fiber through intermediate offices or required UNE combinations at the time the Commission ordered VZ-RI to do so. Stated more generally, there are instances in which this Commission will exercise its independent state law authority and not automatically follow the example of the FCC. Moreover, the Commission has exercised its authority regarding the resale of telephone service even prior to the Act. For instance, in 1986 this Commission exercised its authority under the broad language of R.I.G.L. § 39-1-1 to “regulate potential resellers of the telephone service” such as pay-phone service.<sup>22</sup> The Commission notes that other state

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<sup>20</sup> Order No. 16808 (issued 12/31/01), p. 21.

<sup>21</sup> Order No. 16012 (issued 12/6/99) and Order No. 16183 (issued 2/7/00).

<sup>22</sup> Order No. 11987 (issued 4/9/86).

commissions have required voice messaging to be offered for resale including states of New York, Vermont and Delaware in the Verizon service territory. The Commission notes that the Vermont Public Service Board required Verizon to offer voice messaging for resale on the basis of its state law authority after the FCC made a determination that voice messaging is an information service not required for resale.<sup>23</sup> The Vermont commission made this determination even without “a detailed factual record” about cost-effective voice mail alternatives for resellers or whether it “deterred” customers “from switching to a CLEC that does not offer voice mail”.<sup>24</sup> In this instance, the Commission has legal authority under Title 39 to require the resale of voice messaging and there is evidence in the record that it is not cost effective for a reseller to provide voice messaging and that the lack of a voice mail offering will deter customers from switching to resellers. Eastern presented evidence that its inability to resell voice messaging has prevented it from obtaining 20 percent of its prospective customers. This is not a de minimus amount of potential customers. Also, Eastern presented evidence that it is not cost effective for it to provide voice messaging independently.

Finally, having concluded that the Commission has the legal authority to require VZ-RI to resell voice messaging service, the Commission must decide whether the adoption of this requirement is reasonable as a matter of policy. In making this determination, the

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<sup>23</sup> Vermont Public Service Board, Docket No. 5900 (issued 6/29/99), pp. 106-108.

Commission will first look to see if any other states in Verizon's service territory have adopted the policy in question.<sup>25</sup> As noted above, the states of New York, Vermont and Delaware have adopted this policy.

Secondly, the Commission will weigh the benefit to the CLECs of implementing a proposed policy against the burden placed on Verizon.<sup>26</sup> Eastern has provided evidence that it is not economically cost effective for it to create a voice messaging service and that without offering voice messaging service Eastern would not be able to attract more customers. VZ-RI did not provide any evidence that it would be administratively burdensome for VZ-RI to provide voice messaging service for resale by CLECs or that it will cause substantial economic harm to Verizon. In fact, Verizon has indicated that will provide voice messaging service to resellers on a "case by case basis". Overall, it appears that requiring VZ-RI to provide voice messaging service for resale by CLECs would not significantly harm Verizon but could significantly assist in the development of local telephone competition.

Accordingly, it is

(16938) ORDERED:

1. Eastern Telephone, Inc.'s petition of May 18, 2001 is hereby granted.

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<sup>24</sup> Id., pp. 89, 108.

<sup>25</sup> Order No. 16808 (issued 12/3/01), p. 21.

<sup>26</sup> Id.

2. Verizon Rhode Island's motion to dismiss of June 7, 2001 is hereby denied.
3. Verizon Rhode Island shall file modification to its tariff to provide for the resale of voice messaging service at the avoided cost discount within 10 days of the issuance of this Report and Order.

EFFECTIVE AT WARWICK, RHODE ISLAND PURSUANT TO AN OPEN MEETING DECISION ON DECEMBER 13, 2001. WRITTEN ORDER ISSUED MARCH 11, 2002.

PUBLIC UTILITIES COMMISSION

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Elia Germani, Chairman

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Kate F. Racine, Commissioner

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Brenda K. Gaynor, Commissioner