

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE COMPLAINT OF)	
A.R.C. NETWORKS, INC., D/B/A INFO-)	
HIGHWAY COMMUNICATIONS, AND XO)	
COMMUNICATIONS, INC., AGAINST VERIZON)	PSC COMPLAINT DOCKET
DELAWARE INC., FOR EMERGENCY DECLARA-)	NO. 334-05
TORY RELIEF RELATED TO THE CONTINUED)	
PROVISION OF CERTAIN UNBUNDLED)	
NETWORK ELEMENTS AFTER THE EFFECTIVE)	
DATE OF THE <u>ORDER ON REMAND</u> (FCC)	
04-290 2005) (FILED MARCH 7, 2005))	

ORDER NO. 6611

This 10th day of May, 2005, the Commission determines and Orders the following:

1. This docket is yet another proceeding that arises under the regime instituted by the 1996 federal Telecommunications Act ("the Act"). And, as in many of the other proceedings involving the Act, here the Commission's role is relatively narrow: to attempt to devine and apply directives issued by the Federal Communications Commission ("FCC"). In this particular matter, those directives are ones announced in the FCC's "TRO Order on Remand,"¹ the federal agency's latest effort to delineate the "unbundled network elements" ("UNEs") that incumbent local exchange carriers must offer to lease (at "TELRIC" prices) to competing local exchange carriers ("CLECs"). See 47 U.S.C. § 251(c)(3), (d)(2). The specific question now concerns exactly how the FCC directed carriers to implement its decision to

¹*In the Matter of: Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Dckt. No. 04-313 & CC Dckt. No. 01-338, Order on Remand, FCC 04-290 (FCC adopted Dec. 15, 2004; rel. Feb. 4, 2005) ("Order on Remand").

"declassify" (or remove) mass market local circuit switching" (and, hence, the "UNE-P" combination) as a network element that must be offered under § 251(c)(3).² Moreover, the Commission has been asked to perform this task on a very expedited basis. A.R.C. Networks, Inc. ("InfoHighway"), the complaining CLEC, filed its petition for an "emergency" declaratory ruling on March 7, 2005, just four days before the March 11th date when InfoHighway said Verizon Delaware Inc. ("VZ-DE") would begin breaching the terms of their interconnection agreement.³ And after receiving a bevy of pleadings, most with numerous attachments, the Commission considered InfoHighway's request at its public meeting on March 22, 2005. After hearing from the parties, the Commission decided (5-0) to deny InfoHighway's request for an immediate emergency declaration that would tell VZ-DE to continue to provide UNE-P combinations to InfoHighway for its new

²The "UNE-P[latform]" represents a lease of the combined DSO local loop, local circuit switching, and trunk-side shared transport at an aggregated TELRIC rate. Historically, such UNE-P combination has been the UNE offering often utilized by CLECs to provide their service to "mass market" customers: residential customers and small business customers using a small number of lines. The FCC's decision to remove DSO-related circuit switching (and hence derivatively the accompanying shared transport (see 47 C.F.R. § 51.319(d)(4)(C)) as a required § 251 UNE effectively ends the incumbents' obligation to provide a TELRIC-priced UNE-P offering.

³XO Delaware, Inc. ("XO") originally joined the emergency petition, also asserting that VZ-DE was about to breach the terms of their differing interconnection agreement. As counsel for the two CLECs explained to Staff, the issue for XO centered on the implementation of the Order of Remand's new rules pertaining to the unavailability of high capacity loops and dedicated transport as UNEs in certain circumstances. See 47 C.F.R. § 51.319(a)(4)-(5) (loops); 51.319(e) (dedicated transport) (2005). In contrast, InfoHighway's focus was on its need for the continued availability of TELRIC-priced UNE-P combinations. By counsel's letter dated March 17, 2005, XO withdrew as a party to the emergency petition. Consequently, when the matter arrived for the Commission's consideration, the arguments necessarily revolved around the FCC's directives related to local switching and hence the UNE-P combination.

customers until the carriers complete the change of law process in the interconnection contract.

2. The spark precipitating this matter came in early February 2005, when Verizon announced to CLECs that it would not accept, after March 11, 2005, CLECs' new orders for TELRIC-priced UNEs "de-listed" under the Order on Remand - including TELRIC-priced UNE-P combinations. After that date, the embedded base of UNE-P lines then being made available to CLECs would continue to be provided but would be subject to the FCC's transitional regime: a TELRIC, plus \$1 rate and a total phase-out of the TELRIC UNE-P offering within one year (by March 2006).⁴ To Verizon, its February notices represented implementation of the Order on Remand's directives. There, several times, the FCC had said that "[i]ncumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market switching."⁵ To VZ-DE, those directives created an immediate nationwide bar on the continued availability of new TELRIC-priced UNE-P combinations. That bar, VZ-DE asserts, not only trumps any

⁴Verizon has offered both short- and long-term alternative arrangements that mirror the UNE-P offering. Both of these "commercial" substitute offerings come at higher rates and with various conditions, or, in some cases, with additional services.

⁵Order on Remand at ¶ 5, bullet 3. See 47 C.F.R. § 51.319(d)(2)(i) (2005) ("An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DSO capacity loops.") See also Order on Remand at ¶ 226 ("Because unbundled local switching will no longer be available pursuant to section 251(c)(3), we establish a transition plan to migrate the embedded base of unbundled local circuit switching used to serve mass market customers to an alternate service arrangement"); id. at ¶ 227 ("This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3), except as otherwise specified in this Order.").

inconsistent obligations imposed under existing interconnection agreements but also overrides any prolonged "change of law/further negotiation" provisions that might be contained in any such agreements. Those existing agreements will likely have to be modified to conform to the Order on Remand's dictates (and to incorporate the transition period requirements) but any such amendment process could not alter the language that (with the exception of the "embedded base") incumbent LECs no longer have any obligation to provide CLECs with access to TELRIC-priced mass market circuit switching.

3. To InfoHighway, Verizon's February messages to CLECs were not implementation of the Order on Remand but notices of the incumbent's impending anticipatory breach of the carriers' interconnection agreements. In InfoHighway's view, under the 1996 Act, the called-for interconnection agreements define the duties and obligations of the carriers. And when the contracting carriers agree, in "change of law" provisions written into their contract, on how any subsequent changes in the background rules will be implemented - then the carriers are contractually bound to comply with their agreed-upon process when such underlying rules do shift. Moreover, InfoHighway says, the Order on Remand's directives - including those related to local switching (and hence UNE-P combinations) - do not purport to supercede the parties' contractual commitments to a prescribed "change of law" process. One need only look to ¶ 233 of the Order on Remand. There, the FCC said that not only that it "expecte[d] that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act," but that "the incumbent LEC

and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes." Thus, InfoHighway argues, under the section 251/252 regime, VZ-DE cannot unilaterally stop providing declassified elements as of March 11 and must continue to provide any UNEs called for by interconnection agreements until the completion of the contracts' change of law procedures.⁶ InfoHighway has an interconnection agreement with VZ-DE that sets forth a negotiation process to be instituted in the event of changes in background regulatory obligations and VZ-DE must follow such process to implement the Order on Remand directives. Until it does so, VZ-DE must provide UNE-P combinations in accord with the present terms of that contract.⁷

4. One initial difficulty is that InfoHighway's basic contract claim comes with glitches that could not be fully explored, let alone resolved, during the short period between filing and deliberations. First, the Commission notes that the "agreement" InfoHighway relies

⁶In its earlier 2003 "Triennial Review Order," the FCC had also revised the UNEs that incumbents had to make available to CLECs. In doing so, the FCC expressly declined to accede to the incumbent LECs requests that - in order to avoid delay in implementing these changes - it supersede the § 252 process and unilaterally change all interconnection agreements to have them conform to the new rules. Instead, the FCC sent the carriers off to use contractual change of law provisions or a "reverse" § 252 arbitration process to implement that Order's UNE changes. *In the Matter of: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 at ¶¶ 700-06 (FCC 2003) ("Triennial Review Order").

⁷InfoHighway also asserts that VZ-DE cannot unilaterally "cut-off" continued access to the UNE-P combination given the "independent" obligation of VZ-DE to provide loops and switching under the provisions of 47 U.S.C. § 271(c)(3). Similarly, it argues that, regardless of any de-listing of local switching as a UNE, VZ-DE must continue to offer that element (and the UNE-P combination) to comply with obligations imposed on Verizon (then Bell Atlantic) as a condition for approval of its acquisition of GTE. In each instance, InfoHighway posits, the § 271 or merger obligation is encompassed as the "applicable law" - along with § 271(c)(3) unbundling - which the agreement adopts to define VZ-DE's unbundling obligations.

upon was not one directly negotiated between InfoHighway and VZ-DE. Rather, InfoHighway (for its Delaware operations) exercised its right to "opt-into" an already approved agreement between VZ-DE and another CLEC. But exactly what other agreement was so adopted is, in itself, clouded with uncertainty. This Commission's records apparently refer to InfoHighway's adoption of the "Conectiv" agreement. Yet, InfoHighway says it later adopted the "Z-Tel" agreement. VZ-DE acknowledges that InfoHighway expressed that desire, but claims that the CLEC then delayed in completing the "adoption" paperwork.⁸ InfoHighway and VZ-DE quarrel over whether the delayed return scotched the adoption and, if it did not, who bears responsibility for the later failure to file notice of the adoption with the Commission. But the fact remains that - at present - this Commission's records do not now reflect any such adoption of the Z-Tel agreement.

5. In addition, VZ-DE points out that while the Z-Tel agreement does contain a "change of law" process provision (§ 4.6), it also contains another term that allows Verizon, "[n]otwithstanding anything in this Agreement to the contrary," to "discontinue the provision of any such service, payment, or benefit," if a "legislative, judicial, regulatory, or other governmental decision, order, determination or action, or any change in Applicable law" relieves Verizon of the requirement under "Applicable Law to provide

⁸The initial term of the 2001 Z-Tel agreement expired on June 1, 2003. Apparently, InfoHighway's efforts to adopt that agreement began sometime in February 2003. However, VZ-DE asserts that InfoHighway did not return the adoption paperwork to it until mid-2004.

any service, payment, or benefit”⁹ In such event, that term requires Verizon to provide written notice within 30 days prior to the discontinuance.¹⁰ In similar fashion, another term in the UNE Attachment to the agreement, explicitly provides that if “Verizon provides a UNE or Combination to Z-Tel, and the Commission, the FCC, a court, or other governmental body of appropriate jurisdiction determines, or has determined, that Verizon is not required by Applicable Law to provide such UNEs or Combination, Verizon may terminate the provision of such UNE or Combination to Z-Tel for new customers.”¹¹ In the short time frame available, the Commission surely cannot come to any definitive conclusions about the interplay between the change of law provision relied upon by InfoHighway and the other contractual terms cited by VZ-De. But what is clear is that it is unclear whether the contract commits the carriers to follow the negotiation/change of law process in all instances of changes in the background rules.

6. Again, the Commission was called to decide on the emergency petition on an expedited basis, without the opportunity to develop a full, clear record or to filter the legal questions through the normal Hearing Examiner Report process. Thus, similar to the case of a court’s consideration of an application for a temporary restraining order or a preliminary injunction, the Commission’s ruling on

⁹Z-Tel Agreement, § 4.7. A “service” is defined in the Agreement’s incorporated glossary to encompass a “Network Element.” Glossary, § 2.84.

¹⁰Id.

¹¹§ 1.5 of the incorporated “Unbundled Network Elements (UNEs) Attachment” to Z-Tel Agreement (emphasis added in quotation).

InfoHighway's request must necessarily deal not with final answers but probabilities and competing equities. Is there a reasonable likelihood that InfoHighway's interpretation of the Order on Remand would prevail if this matter was fully litigated? Similarly, is there a reasonable probability that its contractual theory would similarly be found to be the correct one? And what is the prevailing equity in this matter - not only as to balancing the "harms" that might flow to each carrier but the furtherance of the public interest.

7. At its meeting on March 22, the Commission withheld the immediate affirmative relief sought by InfoHighway (and thus denied its Emergency Petition) for several reasons. First, it is not immediately clear, on the abbreviated record, that InfoHighway has a reasonable likelihood of prevailing on its claim that VZ-DE has a continuing contractual obligation to provide InfoHighway access to the UNE-P combination to serve new (post March 11th) customers of InfoHighway. In their submissions, both InfoHighway and VZ-DE provided the Commission with copies of decisions from other state commissions which had already come down on one side or another of the question whether the Order on Remand's directives as to local switching (and hence UNE-P) were self-effectuating and superceding, or meant to be implemented by existing contractual change of law provisions. If one simply nose-counts those decisions, it may be that VZ-DE's position holds a slight edge - at least in the context of the obligation to continue to provide UNE-P combinations to serve new customers. This Commission need not (and indeed does not) now make any final definitive ruling on what the FCC intended in ¶ 233 of the

Order on Remand in the context of new UNE-P orders for new customers sought under existing interconnection agreements. It is enough to say that InfoHighway's presentation now comes up short of establishing a reasonable probability that it has the winning argument. The language VZ-DE quotes from the Order on Remand surely leans toward a view that the FCC intended a quick end to further provisioning of new UNE-P combinations for new customers.

8. Second, as noted above, uncertainty surrounds the heart of InfoHighway's claim - that it has a "contractual" right to continue to order UNE-P combinations for *new* customers until the end of the change of law process. Even assuming that the Z-Tel agreement is now the governing "adopted" contract, VZ-DE has pointed to other terms in that agreement which seem to allow Verizon to discontinue providing services and UNE combinations simply on notice in the event of later shifts in FCC rules or later judicial rulings related to the availability of such services or elements. Those other contractual provisions lead one to reasonably question whether the contract's change of law provision applies in all instances, and in particular to those instances of where once available UNEs are, by later rule change "removed" from the § 251(c)(3) list. Again, the uncertainty about not only what contract governs, but what process, if any, the contract calls for in this type of situation tilts against granting immediate emergency relief to InfoHighway.

9. Third, and maybe most importantly, the Commission cannot ignore the "transitional" directives also contained in the Order on Remand. The FCC has decreed that, at the end of the one-year

transition period (March 11, 2006), incumbents need not continue to provide any TELRIC-priced mass market local switching (and hence UNE-P combinations) to CLECs to serve any customer, whether the customer might be labeled *new* (post-March 2005) or *embedded* (pre-March 2005).¹² And everyone seemingly agrees that this directive trumps any contrary contractual language in then existing interconnection agreements. Under it, if change of law procedures are contractually required, they must be completed before then, not starting then. And, given the short time frame, the FCC surely desires that CLECs move quickly in developing alternative service arrangements for those embedded CLEC customers which will be served (during the transitional period) by the TELRIC plus \$1 priced UNE-P combination. The entire thrust of the FCC transitional scheme, this Commission thinks, is that sooner is better than later for migrating present UNE-P customers to services provided by such alternative arrangements. Given that, the Commission thinks the energies of the CLECs necessarily must turn to finding those alternative arrangements (whether it be another commercial agreement with VZ-DE, the use of resale (§ 251(c)(4)), or the use of its own infrastructure (packet switches). The sooner the alternative arrangements are brought into play, the quicker the CLECs *new* customers can be served under those arrangements, rather than looking to TELRIC-priced UNE-P service now but with an inevitable change in less than 12 months. It might be that the alternative arrangements may be more costly to the CLEC. But, under any scenario, the CLECs,

¹²47 C.F.R. § 51.319(d)(2)(i)-(iii) (2005).

if they choose to continue to serve any customers, will face those increases in March 2006. The FCC's transitional scheme was meant to ease the migration, not to postpone the inevitable.¹³

10. The Commission also must mention the timing of InfoHighway's emergency petition. The decisional outline of the Order on Remand was announced in December 2004. At that time, it was known that mass market local switching was to be de-listed as a UNE and that

¹³Similarly, the Commission is not convinced that InfoHighway has a winner in its assertion that the "checklist" provisions of 47 U.S.C. § 271(c)(2)(B)(iv)-(vi) represent additional "applicable law" under the Z-Tel agreement which would then require VZ-DE to continue to provide the UNE-P combination to serve its new customers. This claim was asserted, but not fully fleshed out, in the parties' arguments. The Commission (based on its counsel's representation) notes that the FCC has indeed determined that the provisions of 47 U.S.C. § 271(c)(2)(B)(iv)-(vi) do impose obligations on BOCs (such as VZ-DE) to provide unbundled local loops, local transport, and local switching "independent" of whether any similar unbundling is, or is not, required under § 251(c)(3). Triennial Review Order at ¶¶ 653-55. Yet, the FCC has said that these checklist obligations do not come accompanied with TELRIC pricing nor are they subject to the same "combination" requirements which surround the unbundling regime under § 251(c)(3). *Id.* at ¶¶ 656-64 (pricing) & ¶ 655 n. 1989 (combinations). See also United States Telecom Ass'n. v. FCC, 359 F.3d 554, 588-590 (D.C. Cir. 2004) (affirming distinctions drawn by FCC). Thus, there are significant questions (here largely unexplored) whether VZ-DE's § 271 loop, switching, and transport checklist obligations (either standing alone or as incorporated contractual "applicable law") would continue to require the provision of UNE-P combinations.

InfoHighway's other contention is that the UNE-P combination must continue to be offered because of conditions imposed on Verizon, then Bell Atlantic, under its takeover of GTE. Numerous CLECs made the identical assertion in response to VZ-DE's efforts in PSC Dckt. No. 04-68 to implement the changes to various UNE offerings directed by the FCC's 2003 Triennial Review Order. There, VZ-DE responded that such an argument misreads the nature of the merger conditions and that, in any event, such conditions had by then already expired. In PSC Order No. 6419 (May 18, 2004), this Commission strongly suggested, if not directed, the CLECs to take their claim (and VZ-DE's defense) to the FCC, the agency that had initially imposed the merger conditions. Counsel tells the Commission that 37 CLECs did, in September 2004, present a petition to the FCC (CC Dckt. No. 98-184) asking for a declaratory ruling on the continued vitality of the particular merger conditions and their interplay with the changes in UNE obligations wrought by the Triennial Review Order. So far, the FCC has not responded to that petition in the context of either the 2003 Triennial Review Order or the later Order on Remand. The FCC's apparent disinterest in providing prompt answers to the merger condition questions suggests that this state agency should hesitate to now go about enforcing any merger condition in the present situation.

competitive LECS would not (except under the transition regime) be able to add new switching UNES.¹⁴ And while the Order on Remand decision did in fact reverse the FCC's prior, long-standing view that local switching (and hence the UNE-P combination), was a UNE that had to be offered by incumbents, the FCC had forewarned in its August 2004 "Interim Order," that such a shift was a real possibility.¹⁵ While InfoHighway may not have earlier anticipated the "hard-line" that VZ-DE later took on the March 11th cut-off date, it was surely on notice that changes to the availability of TELRIC-priced UNE-P combinations were afoot.¹⁶ A filing before March 7 might have given this Commission more time to build a better record, require more structured submissions, and to consider the arguments.

11. Lastly, the Commission emphasizes the limits of this decision. At its meeting on March 22, the Commission's ultimate ruling was premised on how this matter was presented to it. Thus, the arguments the Commission heard focused on InfoHighway's ability to

¹⁴See "FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers," 2004 WL 29130101 (FCC press release Dec. 15, 2004).

¹⁵*In the Matter of: Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd. 16783 at ¶ 22 (FCC Aug. 20, 2004).

¹⁶The Commission also notes that InfoHighway was originally a party to the "arbitration" proceedings sought by VZ-DE to implement the 2003 Triennial Review Order. PSC Dckt No. 04-68. In that proceeding, VZ-DE eventually dismissed InfoHighway, as well as other CLECs, as parties. It did on the basis that its governing agreement with those CLECs allowed "changes" wrought by the Triennial Review Order's UNE changes to be made on "notice" rather than through a change of law process. While the Commission did not necessarily accept VZ-DE's reading of any of those contracts' terms on this issue (see PSC Order No. 6539 (Jan. 11, 2005)), VZ-DE's assertions surely sent a message to the eventually dismissed CLECs, such as InfoHighway. It said that VZ-DE would contest the applicability of any change of law provision in the case of any delisted UNE.

continue to obtain TELRIC-priced UNE-P combinations to serve its *new* customers in Delaware. Counsel's exchanges did not reach to the slightly different question about the continued availability of additional or relocated UNE-P combinations to serve InfoHighway's existing (March 11) 670-line Delaware customer base. In fact, the truncated record contains nothing about that scenario in the context of the CLEC's existing Delaware customers. We do not decide that issue here. It might require looking to other language in both the Order on Remand and the Z-Tel agreement.¹⁷ Moreover, that situation might present different equities - the CLECs ability to hold onto existing customers versus its opportunity to acquire new customers. The Commission's deliberations on March 22 and this Order do not pretend to resolve that issue on a record devoid of facts and argument. In addition, as said twice before, the Commission's decision here was rendered in the context of an "emergency" petition seeking immediate relief. It was reached on a truncated record without a structure for extended presentation of the issues. And it was rendered to speak to a single complaint seeking relief under a single contract. Given those limitations, the Commission reserves the right to revisit the issue (but not necessarily this emergency ruling) in the case of other interconnection agreements or in light of later judicial rulings or other FCC directives.

¹⁷For example, one of the contractual terms cited by VZ-DE speaks to VZ-DE's right, in cases of changes in law, to terminate the provision of UNEs or combinations "for new customers." See ¶ 5 & n. 11 above. That contractual term then goes on to define a six-month transition period to move existing carriers off the terminated UNE.

Now, therefore, **IT IS ORDERED:**

1. For the reasons set forth in the Body of this Order, the Commission denies the "Petition for an Emergency Declaratory Ruling" filed by A.R.C. Networks, Inc. (d/b/a InfoHighway Communications) filed March 7, 2005.

2. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

/s/ Joshua M. Twilley
Vice Chair

/s/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Dallas Winslow
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary