

DT 01-013

VITTS NETWORKS

Investigation Into Cessation of Network Operations

Order Denying Motion for Waiver

O R D E R N O. 23,660

March 23, 2001

I. BACKGROUND

On March 5, 2001, the Commission issued Order No. 23,646 closing its investigation into Vitts Network's (Vitts) announcement that it intended to cease operations within New Hampshire. At the initiation of the docket, the Commission had directed Vitts to provide information explaining the terms and conditions under which Vitts intended to cease operations, noting the requirements of N.H. Admin. Rule Puc 1304.03(d). During a hearing held on February 7, 2001, Vitts testified that it was withdrawing its cessation request. Accordingly, the Commission did not address whether a waiver of the 60-day customer notification rule was in the public interest, and closed this docket. We now reopen the docket to address a subsequent motion submitted by Vitts.

On March 13, 2001, Vitts filed a letter motion with the Commission requesting a waiver of the 60-day customer notice requirement found in N.H. Admin. Rule Puc 1304.03(d)(2). In support of its motion, Vitts states that since the company's

filing for Chapter 11 bankruptcy on February 7, 2001, it has been attempting to raise capital or identify a strategic business partner in order to sustain its business. Vitts states that while it is continuing these efforts, maintaining service depletes the company's resources that would otherwise be available for the company's creditors, and that such creditors may request an immediate termination of services. Accordingly, Vitts states that it must attempt to balance the interests of its customers who want continued service with the interests of its creditors.

Vitts avers that since its customers have been on notice of its financial situation since approximately January 22, 2001, and given Vitts' public disclosure of its attempts to sustain its business, a thirty day notice period following a request to cease operations is sufficient to serve the intent of the notice provision, and is a reasonable compromise to balance the interests of its customers and creditors.

On March 14 the Office of Consumer Advocate (OCA) filed a letter noting that customers have had some notice of a possible need to migrate to a more stable alternative provider since January 22, 2001. The OCA also states that Vitts has not argued that the Bankruptcy filing preempts compliance with Puc 1304.03(d), and provides citation to case law that sets forth the standards under which the Commission may take action against a

debtor such as Vitts.

At its public meeting of March 15, 2001, the Commission considered Vitts' request and determined that additional information was necessary in order to act on the motion. The Commission directed its Executive Director to request, by letter, additional information concerning representations and refunds to Vitts' customers, the ability of customers to find alternative service in 30 days, and the date on which Vitts intends to cease to provide service. The letter was provided to Vitts on March 16, and Vitts responded by hand-delivered letter that same day.

In its March 16 letter, Vitts notes that at the public hearing on February 7, 2001 in this docket, it stated that it "intends to comply fully with the Commission's rules" but that its duties under Chapter 11 of the Bankruptcy Code may not be 100% clear, and that under the Code a party may make a motion before the Bankruptcy court for an alternative order regarding the operation of the business. Vitts also stated that the creditors' committee indicated it would file an emergency motion with the court to cease operations immediately, that Vitts was initially able to persuade the committee to refrain from filing its motion so it could provide customers an additional 30 days to seek alternatives, but that there is now no agreement and such filing may be made within the next few days. Additionally, Vitts

stated in the letter, that it is "obligated to preserve cash resources for its creditors and therefore requests to cease operations."

On March 19, 2001, the Official Committee of Unsecured Creditors submitted to this Commission's jurisdiction by filing a letter urging the Commission to permit Vitts to cease business operations immediately in light of: the prior notices sent to Vitts' business customers; the fact that Vitts serves only business and not residential customers; and that the funds utilized by Vitts in continuing its operations will reduce the amount available to pay creditors.

The Commission has also received submittals, including letters and e-mail messages from numerous Vitts customers, including several state agencies, each urging the Commission to require adherence to the full 60 day notice provision in order to afford them a reasonable time to secure alternative service.

II. DISCUSSION

Vitts argues in its motion that waiver of the 60 day notice requirement and approval of a 30 day notice is appropriate as a reasonable compromise to balance the interests of the Company's creditors and the interests of its customers who want continued service. The Commission agrees that these two interests are significant and must be considered in resolving this matter, but they do not exhaust the relevant interests the Commission must consider.

A primary concern of the Commission, in accordance with the responsibility assigned to it by both the New Hampshire Legislature and federal statute, has been and continues to be the fostering of a competitive market for the provision of advanced telecommunications services within New Hampshire. RSA 374:22-g provides that the Commission may authorize the provision of telecommunications services by more than one provider in any service territory where it is consistent with the public good. In considering the public good, the Commission is to consider the interests of competition, among other factors. RSA 374:22-g, II.

Similarly, the federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§151 et seq. (the "TACT"), specifically charges state commissions to:

encourage the deployment on a reasonable and timely basis of advanced telecommunications

capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment. Pub. L. 104-104, Title VII, §706, 110 Stat. 153(a).

Subsequent to the passage of the TACT, and as required by RSA 374:22-g, III, this Commission promulgated rules "to foster the growth of competition in local telecommunications markets." N.H. Admin. Rule Puc 1301.01. As part of these rules, the Commission adopted the provision which is the subject of Vitts' motion: the requirement that the Commission shall only approve a CLEC's request to cease operations where "a period of 60 days has elapsed within which the CLEC's customers can migrate to an alternate provider." Puc 1304.03(d) (2).

This rule is not simply designed to provide some protection to customers in those instances where their chosen provider determines it must cease operations, but it is also designed to promote competition by providing *potential* customers a measure of assurance that the new competitive market is not without regulatory standards, and that there are provisions for the stable entry and exit of providers. The success of the competitive market is dependent on the willingness of customers to choose alternatives to their customary telecommunications provider, and the Commission has determined that customers would

be reluctant to choose such alternatives where they may be left without service on a moment's notice. The 60-day requirement balances the public's interests in a workable competitive market with those of the provider and its creditors in the speedy wind-down of its services, and was made an express condition of CLEC certification. Thus, in this instance, the Commission must consider not only the interests of Vitts' customers in retaining service for a while longer while they pursue service alternatives, but must also consider the impact the waiver of the notice requirement would have upon the broader consumer perception of the stability and desirability of taking service from alternative providers, which is critical for the success of the competitive market.

N.H. Admin. Rule Puc 201.05 provides that a waiver of our rules shall be granted when the waiver serves the public interest and the waiver does not disrupt the orderly proceeding of the Commission. N.H. Admin. Rule Puc 201.05 (a) (1) and (2). In evaluating whether the requested waiver is in the public interest, we must analyze whether (1) "compliance with the rule would be onerous given the circumstances of the affected person; and (2) the purpose of the rule shall be satisfied by an alternative method proposed." N.H. Admin. Rule Puc 201.05 (e) (1) and (2).

While we are sympathetic to the argument that

compliance with the 60-day standard is difficult given Vitts' circumstances, we cannot find that the purpose of the rule is satisfied by any alternative method. Numerous Internet Service Providers (ISP) have indicated to us that they cannot find similar DSL services to meet the needs of their customers if the Commission allows a fast shut down of Vitts' operations. Moreover, entities such as the State's Department of Administrative Services (DAS) have noted that the process to replace a service comparable to Vitts' is intensive and takes considerable lead-time. DAS further states that granting the Vitts' request "would have a very negative impact on the State's ability to conduct its business."

We also do not agree with the argument put forward by the unsecured creditors that Vitts' customers have had actual notice of its financial condition since approximately January 22, 2001, and that such actual notice should be considered as providing part of the required 60-day notice of termination. Vitts represented during the February 7, 2001 hearing that it would fully comply with our rules should it determine to cease operations in the future. This representation certainly provided customers a reasonable basis to assume that its financial difficulties were resolved and there was no longer a need to pursue service alternatives. In addition, Vitts has not provided clear notice directly to its customers about a specific shut-down

date.

Under the facts of this case, we find that the broader interest of promoting a competitive market coupled with the specific interests of Vitts' customers in needing time to obtain an alternative provider weigh against the granting of the waiver. Inasmuch as the requested waiver does not serve the public interest, we will deny the motion. The market for the provision of comparable high-speed internet access services is not yet mature, and customers need the assurance that there will be a reasonable period to be able to switch to another provider if necessary.

While we deny Vitts' motion, we also urge all of its customers to immediately investigate and pursue alternatives. We believe that Vitts should take all steps to ensure customers can transition as quickly and efficiently as possible to another provider. To that end we will require Vitts to provide its customers with the circuit ID number, service location zip code, and Service Billing Number (SBN). By requiring Vitts to give this information to customers and not to other providers we are confident that slamming will not be a concern. Furthermore, we do not believe this or any requirement we impose on Vitts constitutes an obligation to commit additional resources.

The Commission believes that its determination here is consistent with the requirements of 11 U.S.C. §362(b)(4)

providing for an exemption for state regulatory action from the requirements of the automatic stay provision of the Code. Vitts' customers are also advised to monitor the websites of the Commission (www.puc.state.nh.us) and the Department of Resources and Economic Development (www.ded.state.nh.us/obid) for information regarding alternative service providers and the process of migrating to another provider.

Based upon the foregoing, it is hereby

ORDERED, that Vitts Networks' motion for a waiver of N.H. Admin. Rule Puc 1304.03(d) (2) is denied; and it is

FURTHER ORDERED, pursuant to N.H. Admin. Rule Puc 1304.03(d), the Commission approves Vitts' request to cease operations on the following conditions:

(1) All of Vitts customers shall be notified by letter or e-mail of the request to cease operations; and

(2) Said notice shall also state that the customer has 60 days from the date of this order to migrate to an alternative provider; and it is

FURTHER ORDERED, that Vitts provide its customers their circuit ID number, service location zip code, SBN and other information that will make it easier to efficiently change providers.

By order of the Public Utilities Commission of New Hampshire this twenty-third day of March, 2001.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary