

DT 01-013

VITTS NETWORKS

Investigation Into Cessation of Network Operations

O R D E R N O. 23,646

March 5, 2001

APPEARANCES: Devine, Millimet & Branch, P.A., Frederick Coolbroth, Esq., on behalf of Vitts Networks, Inc.; Marcia Thunberg, Esq., for the Office of the Consumer Advocate; Kathryn M. Bailey and Lynmarie Cusack, Esq., for the Staff of the New Hampshire Public Utilities Commission.

I. BACKGROUND

On January 23, 2001, the New Hampshire Public Utilities Commission (Commission) opened an investigation regarding the Vitts Networks, Inc. (Vitts) announcement that it intended to cease operations on or about February 28, 2001. The Commission directed Vitts to file information explaining the terms and conditions under which Vitts intended to cease operations, its plans for complying with Commission rules and the status of customer deposits.

On January 26, 2001, Vitts filed a letter requesting to cease operation in New Hampshire with a waiver of the 60-day notice period. The letter indicated that Vitts would take reasonable steps to provide for an orderly transition allowing customers time to migrate to an alternate carrier. Additionally, the letter requested that the customer list enclosed at the Commission's request be granted confidential

treatment.

After the January 26, 2001, cessation request, Vitts, via its Internet web site, announced that it had obtained adequate funding to continue to operate in the near term. The Internet notice also indicated that Vitts intended to provide services beyond February 28, 2001. As a result of both the request for cessation and the announcement of continuation, this Commission issued an Order of Notice setting a hearing for February 7, 2001.

II. HEARING

The hearing addressed Vitts' compliance with the Commission's rules, whether a waiver of the rules was in the public interest, Vitts' plans and options for continued operation in the near term, and the treatment of customer lists as confidential. In addition to comments and representations made by Vitts, several individuals from the general public addressed topics related to the confidential treatment of Vitts' customer list, the need for continued and uninterrupted high-speed internet access, and the belief that Verizon was using its market power to hinder competition.

A. Assertions by Vitts

In response to the issues presented in the Notice of Hearing, Vitts offered a statement with regard to its future

intentions. Vitts commented that it was faced with difficulties in raising external capital because key investors declined to go forward with the next round of financing. As a result, simultaneously with the hearing, Vitts was filing for relief under Chapter 11 of the Federal Bankruptcy Code in the United States Bankruptcy Court in Delaware. Vitts indicated this action would keep the operations going and enable the company to seek long-term financing or strategic business partners.

Vitts represented that it did not now intend to cease operations and it was therefore withdrawing its January 26, 2001, cessation request. Vitts also represented that it intended to fully comply with the Commission's rules and the requirements of the Chapter 11 Reorganization. Vitts asserted that any service terminations would be made in strict accordance with Commission rules. Finally, Vitts indicated that it had no customer deposits.

In discussing the confidential treatment of its customer list, Vitts represented that it had met the requirements of RSA 378:43, II. Vitts asserted that the information was not general public knowledge, that Vitts had taken measures to prevent the dissemination of the information in the ordinary course of business, and that the information

pertained to the provision of competitive services.

After Vitts' statement, the hearing was opened for inquiry by those present. Only Staff, the Office of Consumer Advocate (OCA) and the Commissioners asked questions. The questions focused mostly on Vitts' representation that it was filing for Chapter 11 Bankruptcy protection. In particular, the Commission asked why Vitts chose Delaware as the venue in which to file for Bankruptcy as it would be difficult for New Hampshire customers. The Company responded that it was incorporated in Delaware and that it believed Delaware presented a better opportunity to find new investors.

The Commission also asked if there was anything the Commission "should do to remove barriers that might be ... in Vitts' way to [its] continu[ed] provi[sion] [of] service." Vitts responded that its general belief was "that the Commission has done what it can to promote competition in New Hampshire" and that the problem facing Vitts was thought to be "an external event due to market perceptions of new telephone companies... ." Vitts' went on to say that it did not believe it was anything "Commission-driven that has brought the Company to this point." Hearing Transcript, February 7, 2001, p. 18.

The Commission requested that Vitts provide

information showing that it had sufficient personnel support to carry on its operations and for copies of its bankruptcy filing. On February 12, 2001, in response to the record requests, Vित्स submitted copies of its organizational charts depicting the Technical Support and Operations departments. Vित्स also attached a copy of its bankruptcy pleading made with the U.S. Bankruptcy Court in the State of Delaware.

B. PUBLIC COMMENTS

After the questioning of Vित्स was completed, seven individuals and counsel for Verizon New Hampshire provided the Commission with comments. Most of the public comments centered around the need to ensure that the advanced services provided by Vित्स were not interrupted. At least two of the individuals making remarks noted that high-speed access to the internet was the lifeblood of commercial enterprise. Several of the commenting individuals also remarked that Verizon was a major roadblock for getting service from advanced service competitors.

Verizon indicated that the service being provided by Vित्स was a sophisticated service with specially designed circuits and not easily replicated in a few days. Verizon also asserted that it was not the carrier of last resort in this situation, nor one that could provide a universal

solution to the problem.

One commentor, Mr. Steinman, the national manager for MCI's state and municipal contracts, questioned the need to keep Vitts' federal, state and local government customer list confidential. Another individual asked that the Commission require Vitts to disclose its investors. Finally, John Leslie, the Secretary of the New Hampshire ISP Association, wanted the record to reflect what he considered a potential problem with the ability of a company in bankruptcy to reprovise its lines. Mr. Leslie pointed out that he was aware of another company in Chapter 11 Bankruptcy that could not release its lines to other customers.

C. Miscellaneous

On February 20, 2001, Vitts filed a letter with the Commission requesting the return of the customer list provided to the agency. Vitts stated that it was "extremely concerned the list might be obtained erroneously by parties who have interest different from [theirs]." Vitts further averred that any such disclosure would cause it irreparable harm during its attempt to work through its financial crisis.

III. COMMISSION ANALYSIS

This case was opened as a result of our concerns that Vitts Networks would cease operations without complying

with Commission's rules regarding customer notification. Vitts was originally granted Competitive Local Exchange Carrier (CLEC) status conditioned upon its agreement to comply with our rules. As such, one purpose of the hearing held on February 7, 2001, was to explore whether granting a waiver of our 60-day customer notification rule was in the public interest. We, however, are not now required to make such a determination since Vitts has withdrawn its cessation request and represented that it would fully comply with our rules should it seek to cease operations in the future.

A. Vitts' Near Term Plan

Our concern regarding the Company's plans and options for continued operation in the near term has also been addressed. Vitts' announcement that it was filing Chapter 11 Bankruptcy and its subsequent delivery of its initial bankruptcy pleading to this Commission eases some of our concerns about the Company's near term operations. The filing of the Bankruptcy in Delaware, however, does raise another issue. While we recognize that Vitts is incorporated in Delaware, it is still primarily a New England company. Persons from New Hampshire interested in the bankruptcy will not have the same opportunity to participate given the Delaware location.

When this issue was addressed at the hearing, the company provided no persuasive response as to why it filed in Delaware. We are troubled that pursuant to 28 USC §1334(e) the Delaware court has exclusive jurisdiction of all of the Vitts "property, wherever located". Given that the majority of Vitts' property is in New England, it would be more reasonable that the venue for the action is New Hampshire. We would strongly encourage Vitts to reconsider the venue for the bankruptcy proceeding.

B. Provisioning of Service

A number of commentators during the hearing focused their remarks on the inability to quickly switch to another provider of comparable high-speed internet access or DSL. Several alleged that this problem was due to Verizon's inflexibility with providers of DSL. When asked a related inquiry, Vitts disclosed no problems.

The Commission is concerned about the public allegations with regard to the provisioning of DSL. The New Hampshire Legislature has found that the

telecommunications infrastructure is a critical component of New Hampshire's economic development efforts and economy. A telecommunications planning and development initiative is therefore established to identify telecommunications infrastructure strengths, weaknesses, and objectives, to create a central repository of relevant information, and to promote this telecommunications infrastructure as an

integral part of economic development efforts. 2000 NH Laws 298:1, I.

Under this new initiative, the director of economic development has a duty to "identify shortcomings in the deployment of telecommunications infrastructure" and to "work with providers of telecommunications services,... [and others] to assist efforts to enhance the deployment of telecommunications services." RSA 12-A: 45 I, (c)(1), and (2) (effective July 1, 2000).

Given this initiative and the Advisory Committee that is established under RSA 12-A: 46, we believe the state can adequately review, investigate and address the concerns raised by the public about the deployment of high-speed internet access to all parts of the state. As the concerns raised are not directly related to the questions before us in this docket, we will not address them here, but will ensure the Telecommunications Planning and Development Advisory Committee is made aware of the public perception. Further, to the extent that the issue of provisioning DSL service is the subject of existing open dockets, we will consider these issues in those dockets and elsewhere as appropriate.

C. Confidential Treatment of Customer List

In January, prior to the Order of Notice, the Commission requested that Vitts provide it with its customer

list to assist our determining whether it was in the public good to allow the company to cease operations. Vitts initially provided one copy of the list and asked us to treat it as confidential. Vitts requests that the list be returned. As we requested the list for a specific purpose - to aid in our responsibilities under PUC Rule 1304.03 (d)- and no longer need to make a decision under that rule, we see no purpose in keeping the list. Thus, we will direct our Executive Director to return the list immediately to Vitts. We will point out, however, that we have in the past treated customer lists as confidential. See Re Claremont Gas Corporation, 79 NH PUC 466 (1994). Moreover, we would agree that pursuant to RSA 378:43, I, the information we requested would have been maintained confidentially as long as the Company satisfied the requirements of RSA 378:43, II.

As discussed earlier, one individual questioned the need for confidentiality of federal, state and local government customers. We are not in a position to parse out which customers might be governmental entities. We, rather, suggest that under RSA 91-A an interested individual might go directly to an agency and access the information relating to a service provider. However, since we do not believe we should maintain the list at all, we do not need to determine the merits of the

request.

Based upon the foregoing, it is hereby

ORDERED, that our Executive Director return the customer list to Vitts, and it is

FURTHER ORDERED, that Vitts' cessation request be deemed withdrawn and this docket be closed.

By order of the Public Utilities Commission of New Hampshire this Hampshire this fifth day of March, 2001.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary