

DT 03-174

**Review of No-Impairment Presumption for
DS-1 Switching Network Element**

**Order Closing Investigation of Impairment and Initiating a
New Docket for Investigation and Facilitation of
Transition Process**

O R D E R N O. 24,237

November 10, 2003

I. PROCEDURAL HISTORY

The New Hampshire Public Utilities Commission (Commission) initiated this docket on September 17, 2003 by issuing an Order of Notice requesting any competitive local exchange carrier (CLEC) that believed it would be "impaired," as that term is used in the Federal Communications Commission's (FCC's) *Triennial Review Order (TRO)*,¹ by lack of access to Verizon's unbundled local circuit switching for serving the enterprise market (DS-1 and above), to file a petition to that effect. The Commission directed that any such petition should include an offer of proof in support of the CLEC's impairment contention.

On September 26, 2003, DSCI Corporation and InfoHighway Communications Corporation (collectively

¹ *Report & Order and Order on Remand and Further Notice of Proposed Rulemaking*, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98, and 98-147. FCC 03-36, (rel. August 21, 2003).

DSCI/IH) jointly filed a petition pursuant to the Commission's Order of Notice. On October 2, 2003, RNK Telecom (RNK) and Verizon New Hampshire (Verizon) filed motions requesting intervention and the Office of the Consumer Advocate (OCA) notified the Commission of its intent to participate in the docket on behalf of residential ratepayers. The New Hampshire Telephone Association (NHTA), acting on behalf of certain of its members,² attended the technical discussions and requested inclusion on the service list but not intervenor status. On October 17, 2003, WorldCom, Inc. (MCI) filed a motion to intervene, assented to by Verizon, RNK, and DSCI/IH.

Following the process set out in the Commission's Order of Notice, Staff held technical discussions with the petitioners and intervenors on October 3, 2003, and filed a report on the outcome of the technical session. According to Staff's report, the participants in the technical discussions, except for the petitioners, agreed that DSCI/IH's petition, standing alone, does not present a claim of impairment as intended by the TRO. Staff's report contained a proposed procedural schedule which allowed for

² Bretton woods Telephone Company, Inc., Deville Telephone Company, Dunbarton Telephone Company, Inc., Granite State Telephone, Inc., Hollis Telephone Company, Kearsarge Telephone Company, Inc., Merrimack County Telephone Company, Northland Telephone Company of Maine, Inc., and Wilton Telephone Company.

DSCI/IH to file a more detailed Offer of Proof to further explain their claim of impairment.

On October 9, 2003, DSCI/IH notified the Commission that an order by the Second Circuit Court of Appeals had stayed state commission proceedings. Nonetheless, DSCI/IH filed their expanded Offer of Proof on October 21, 2003, reserving their right to modify the Offer of Proof based on subsequent appellate court proceedings. By secretarial letter dated October 22, 2003, the Commission established a procedural schedule and informed the parties and Staff that it would not suspend the docket based upon the Second Circuit Court's decision and would proceed under its state statutory authority.

Although no deadline for responsive submissions was included in the Procedural Schedule, Verizon filed a statement in response to DSCI/IH's Offer of Proof on October 28, 2003. On November 4, 2003, DSCI/IH filed a reply to Verizon's Response.

II. REGULATORY FRAMEWORK

The regulatory framework for examining a petition filed in this docket is set out in the FCC's *TRO*. The *TRO* established a national presumption that CLECs are not impaired without access to such switching but permits state commissions to rebut the presumption by conducting a more

granular analysis using economic and operational criteria detailed by the FCC and then, if warranted, petitioning the FCC for a waiver. *TRO*, ¶451, 455.

The FCC defined impairment by stating that a carrier is impaired when lack of access to a specific unbundled network element (UNE) "poses a barrier or barriers to entry... that are likely to make entry into a market uneconomic." *TRO*, ¶84. The FCC's discussion of impairment regarding DS-1 enterprise customers, at ¶¶451-458, directs state commissions to examine operational and economic factors.

As codified at 47 C.F.R. §51.319(d)(3)(i)(A), the Commission's examination of operational factors must consider (1) Verizon's performance in provisioning loops, (2) difficulties associated with obtaining collocation space due to lack of space or delays in provisioning, and (3) the difficulties associated with obtaining cross-connects in Verizon's wire center. As codified at 47 C.F.R. §51.319(d)(3)(i)(B), the Commission's examination of economic factors must consider (1) the cost of entry into a particular market, (2) CLECs' potential revenues from serving enterprise customers in that market, and (3) the prices CLECs are likely to be able to charge in that market.

III. SUMMARIES OF PARTIES' POSITIONS

A. Petitioners' Case

DSCI/IH request three types of relief from the Commission. First, they request that the Commission find that they are operationally impaired without Verizon's switching UNE and seek from the FCC a waiver of the national no-impairment presumption. DSCI/IH support this request by asserting that Verizon has not defined any process for accomplishing a seamless, i.e., non-disruptive transfer of DSCI/IH customers to alternate switching arrangements and that Verizon has interrupted service on DSCI/IH's DS-1 circuits during installation and repairs.

DSCI/IH describe the amount of UNE-P lines they have requested from Verizon in New Hampshire and the types of customers they service here. Their customers include a hospital, a medical support facility, and other customers for whom uninterrupted service is critical. According to DSCI/IH, a complex process requiring close coordination will be necessary to migrate customers from Verizon's UNE-P service to other facilities. DSCI/IH argue that Verizon's failure to begin establishing such a process, despite requests to do so, insures that migration will be extremely disruptive. The result, DSCI/IH claim, will be devastating as their existing customers will switch to Verizon rather

than endure the disruption. This is especially likely, they assert, because Verizon can convert the customers back to Verizon retail by a cost-free and disruption-free billing record change.

Thus, according to DSCI/IH, their existing customers are impaired under TRO standards. They claim that those customers are "marooned...on Verizon's network." (Reply at p. 4.) The Commission can and should look beyond the three factors listed in ¶456 of the TRO regarding operational impairment, they argue, because the TRO directs state commissions to examine local evidence and only identifies those factors "in particular." DSCI/IH claim that the use of the phrase "in particular" means that other factors are also pertinent. (Reply at p. 3.)

DSCI/IH contend that the FCC's decision regarding the ease of transition, without the necessity for hot-cuts, was an assumption that is not supported. DSCI/IH request that the Commission's request for waiver include facts that demonstrate the fallacy of the assumption.

Although DSCI/IH do not identify particular geographic areas where impairment exists, they posit that "substantial" geographic areas would meet the economic and operational impairment standards for new DS-1 enterprise customers. In support, DSCI/IH aver that, after a twenty-

month search, they are unable to identify an alternative provider of "economically priced ubiquitous state-wide coverage for DS-1 service." (Offer of Proof at p. 14-15.)

Furthermore, the Petitioners argue that they are unable to provide data for specific customer and geographic markets for this 90-day docket because the FCC's *TRO* calls for relevant market definitions to be established in the 9-month docket investigating mass market provisioning. This internal inconsistency within the *TRO*, according to DSCI/IH, makes for an impossible burden of proof.

Therefore, as its second form of relief, DSCI/IH request the Commission to ask the FCC for an extension of time beyond the 9-month docket to pursue the investigation of enterprise switching impairment in particular geographic areas.

Finally, if the Commission determines not to pursue a waiver of the no-impairment presumption, DSCI/IH request that the Commission order Verizon to keep current rates in place for unbundled local switching until a rate case can be completed. DSCI/IH argue that Verizon's current TELRIC rates in New Hampshire, or a price close to them, are likely to be found "just and reasonable." According to DSCI/IH, nothing in the *TRO* suggests that the FCC has preempted all state authority over local switching

pricing. The reasonableness of those prices affects in-state telecommunications services and competition.

B. Verizon's Response to Petitioners' Case

Verizon argues that DSCI/IH have not stated a claim that specific operational factors are impairing them from deploying their own switches for use in the enterprise customer market, as is required by the TRO. The Petitioners merely allege difficulties in provisioning UNE-P arrangements, according to Verizon. Even if the difficulties exist, Verizon argues, they are not material to the issue; evidence material to the issue pertains to Verizon's provisioning of stand-alone loops for use with CLEC switches, which DSCI/IH have not provided.

With regard to the claim that Verizon has not established a hot-cut transitioning process, Verizon argues that no hot-cut process is necessary for migration of enterprise customers. According to Verizon, ¶451 of the TRO states that the conversion process involves keeping the incumbent's service in place while the service to the new digital loop is initiated. In addition, Verizon claims that ¶¶700-706 of the TRO provide a framework for transition implementation under §252(b) of the TAct.

Verizon also argues that DSCI/IH have provided no economic data at all and therefore have failed to make the

requisite factual showing that entry into a particular market is uneconomic in the absence of the switching UNE. Even if DSCI/IH were to lose all of their existing customers, according to Verizon, they are not impaired in the sense meant by the *TRO*.

Verizon rebuts DSCI/IH's argument that relevant markets cannot be determined at this time. According to Verizon, an appeal of the *TRO* is the appropriate venue for challenging that order's internal inconsistency. Verizon states that in order to provide DSCI/IH with the relief they seek, the Commission would have to ask the FCC to reconsider its order rather than request a waiver of the national presumption.

With regard to DSCI/IH's request that the Commission order Verizon to retain current rates for switching until after a rate case, Verizon argues that the FCC has given states no role in pricing network elements required to be provided by §271, as opposed to §251. Verizon contends that, pursuant to ¶664 of the *TRO*, TELRIC pricing is not required for elements that have been removed from the list of §251 UNEs and that the FCC has specific and exclusive enforcement authority under §271(d)(6).

IV. ANALYSIS

The impairment standard is stated clearly in ¶84 of the *TRO* and codified at 47 C.F.R 319(d), as set out in section II above. In ¶84 the FCC states that a competitive carrier is impaired

when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic. That is, ...whether all potential revenues from entering a market exceed the costs of entry, taking into consideration any countervailing advantages that a new entrant may have.

This is the standard by which the FCC itself concluded that a national no-impairment presumption exists with regard to enterprise market switching elements. It is also the standard by which the FCC will decide whether to grant a state request for waiver of the national no-impairment presumption. Therefore, it is the standard by which we will examine DSCI/IH's Offer of Proof.

In neither the Offer of Proof nor the Reply to Verizon's Response did DSCI/IH present claims that address the FCC's impairment standard. DSCI/IH do not claim impairment to their ability to enter the enterprise market without the Verizon switching UNE. Rather, they claim impairment to their ability to provide continued service to

customers they have acquired since entering the market with the switching UNE.

We find that DSCI/IH have not stated a claim that can be addressed in a docket noticed to deal with the *TRO*'s impairment standard. Given the specificity of 47 C.F.R. 319(d)(3)(I)(A) and (B), we are unconvinced that the FCC intended state commissions to look beyond those factors. Therefore, we conclude that DSCI/IH's request for this investigation to continue in order to determine impairment as the basis for a request for waiver from the FCC must be denied.

Nonetheless, on the basis of the Offer of Proof, we find that DSCI/IH have alleged a significant transition problem that should be investigated. Accordingly, we will initiate a separate docket for consideration of the transition problems raised by DSCI/IH and other similarly situated CLECs. More specifically, we find it necessary to investigate whether the FCC's statement in the *TRO* regarding the conversion process for CLEC enterprise customers generally, at *TRO* ¶451, cited by Verizon, is appropriate in New Hampshire. As the FCC made clear at other points in the *TRO*, it considers state commissions the appropriately situated fact finder for local issues. For example, the FCC assigns to individual state commissions

the task of approving and implementing a batch cut migration process for mass market customers so that the transition will be a "seamless, low cost process." TRO, ¶¶423, 460. We observe that a state commission is also in the best position, when the issue is raised, to determine the technical requirements for insuring a similarly seamless transition from UNE-P for enterprise customers.

The transition framework is explained by 47 C.F.R. 319(d)(3)(ii)(A). That FCC rule states

DS1 capacity and above end-user transition. Each requesting telecommunications carrier shall transfer its end-user customers service using DS1 and above capacity loops and unbundled local circuit switching to an alternative arrangement within 90 days from the end of the 90-day state commission consideration period set forth in paragraph (d)(5)(I), unless a **longer** period is necessary to comply with a "change of law" *provision* in an applicable interconnection agreement. (Bolding added for emphasis.)

Pursuant to that rule, the shortest period of time by which customers must be migrated to alternative arrangements is 180 days after the effective date of the TRO (March 31, 2004).

Based upon the foregoing, it is hereby

ORDERED, that the claim of impairment by DSCI and InfoHighway initiated in this docket is hereby dismissed; and it is

FURTHER ORDERED, that a new docket will be opened to investigate the transition problems raised by DSCI and InfoHighway.

By order of the Public Utilities Commission of New Hampshire this tenth day of November, 2003.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary