**DT 05-041**

**BROADVIEW NETWORKS, INC. et alia**

**Petition for Declaratory Ruling re Provisioning of Unbundled Network Elements**

**Order Granting in Part and Denying in Part CLECs' Petition**

**O R D E R N O. 24,564**

**December 15, 2005**

## I. INTRODUCTION AND BACKGROUND

A group of competitive local exchange carriers (CLECs) – Broadview Networks, Inc., Broadview NP Acquisition Corp., A.R.C. Networks, Inc. d/b/a InfoHighway Communications and DSCI Corporation (collectively, Petitioners) – instituted this proceeding before the New Hampshire Public Utilities Commission (Commission) on March 7, 2005, by filing a pleading captioned "Petition for Emergency Declaratory Relief." Petitioners requested an order directing Verizon New Hampshire (Verizon) to comply with certain interconnection agreements, specifically by continuing to provision certain unbundled network elements (UNEs) and combinations of UNEs to the CLECs covered by such agreements. UNEs consist of those specific elements of Verizon's network that Verizon, in its capacity as an incumbent local exchange carrier (ILEC), is or has previously been obligated to provide to CLECs, pursuant to relevant provisions of the Telecommunications Act of 1996 governing the promotion of competition in the telecommunications industry.

According to the Petitioners, they filed the petition in response to notification from Verizon that it would (1) reject all orders for UNE-P with due dates of March 11, 2005 or later and (2) reject all such orders for DS1 and DS3 transport, as well as DS1 and DS3 high-capacity loops, if such orders fall within certain of Verizon's wire centers. UNE-P, or unbundled

network element platform, refers to the purchase by CLECs from Verizon of local circuit switching and shared transport for use with the ILECs' local loops, which are the wires that connect each retail telephone customer to the local central office of the telephone network. "Transport" refers to facilities that transmit calls between central offices. According to the Petitioners, in refusing to provision new orders for these unbundled network elements Verizon is inappropriately relying on the Triennial Review Remand Order (TRO Remand Order) of the Federal Communications Commission, 20 F.C.C.R. 2533 (Feb. 4, 2005).

Petitioners supplemented their petition with reference to additional authority on March 11, 2005. The Commission advised Verizon by secretarial letter on March 15, 2005, that the Commission had established March 22, 2005, for Verizon to file a responsive pleading. Verizon did so on a timely basis.

Subsequent to the filing of the instant petition, the Commission has made certain decisions in other proceedings that bear upon the issues raised here by the Petitioners. On March 11, 2005, the Commission issued Order No. 24,442 in Docket Nos. DT 03-201 and DT 04-176, concluding that Verizon may remain obligated to provision certain UNEs pursuant to Section 271 of the Telecommunications Act, 47 U.S.C. § 271, notwithstanding the FCC's determinations in its Triennial Review proceeding that ILECs were no longer obligated to provision them under Section 251 of the Act, 47 U.S.C. § 251.[1] On April 22, 2005, the Commission determined via secretarial letter in Docket No. DT 05-034 that it would permit certain tariff revisions, submitted by Verizon in connection with its wholesale tariff, No. NHPUC 84, to go into effect pursuant to RSA 378:6, IV, while rejecting another. The tariff provisions that went into effect involved the

[1] Verizon has challenged this order in the U.S. District Court for the District of New Hampshire, on preemption grounds. However, the Order has not been stayed and it was not the subject of any rehearing motion or direct appeal

provisioning of DS1 and/or DS3 loops and dedicated high-capacity transport facilities (including dark fiber transport) to CLECs. Noting that the TRO Remand Order sets out certain criteria for discontinuing the provisioning of these UNEs at certain wire centers, the Commission opened a new docket, DT 05-083, to conduct an investigation, which is now in progress.

## II. POSITIONS OF PETITIONERS AND RESPONDENT

### A. Broadview Networks, Inc., Broadview NP Acquisition Corp., A.R.C. Networks, Inc. d/b/a InfoHighway Communications, and DSCI Corporation

According to the Petitioners, Verizon notified CLECs via a February 10, 2005 posting on the Verizon web site that CLECs would no longer be permitted to submit new orders for discontinued facilities for completion on or after March 11, 2005. "Discontinued facilities" in this context refers to network elements that are no longer subject to Section 251 unbundling requirements as the result of the TRO Remand Order. The Petitioners further indicated that Verizon advised the CLECs that, absent alternate arrangements with Verizon, the CLECs' embedded base – *i.e.*, facilities serving existing CLEC customers – of UNE-P lines would be subject to the transitional rate increases set forth in the TRO Remand Order.

The Petitioners stated in their petition that they each responded by letter to Verizon asserting that any failure by Verizon to provide unbundled local switching, high-capacity transport or high-capacity loops would be a material breach of Verizon's interconnection agreements with the petitioners. According to the Petitioners, Verizon responded by reiterating the position it expressed on February 10. The Petitioners stated that Verizon further indicated via its web site on March 2, 2005 that it had filed (1) a list of "Tier 1" and "Tier 2" wire centers that Verizon believed identify the routes over which Verizon is no

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pursuant to RSA 541.

longer obliged to provision DS1 and DS3 dedicated transport as the result of the TRO Remand Order, and (2) a separate list of wire centers with a similar status with respect to DS1 and DS3 loops. The Petitioners complained that Verizon had advised CLECs that they would be deemed to have actual or constructive knowledge of these wire center lists and that any CLECs submitting high-capacity loop or transport orders in disagreement with those lists will be deemed to be operating in bad faith and, thus, in breach of their interconnection agreements. According to Petitioners, Verizon strongly suggested it would ignore the FCC's explicit instructions by refusing to honor DS1 and DS3 loop and transport orders that fall within the wire center classifications contained on Verizon's lists.

The Petitioners direct the Commission's attention to the language in Section 251 setting forth the ILEC "duty to provide, to any requesting telecommunications carrier for the provisions of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis . . . in accordance with the terms and conditions of the agreement [*i.e*., the ILEC's interconnection agreement with the requesting CLEC] and the requirements of this section and section 252." 467 U.S.C. § 251(c)(3). Stressing the explicit references to the interconnection agreement and sections 251 and 252, the Petitioners contend that this reflects a congressional intent to use the Telecommunications Act to "build on rights and obligations set forth in interconnection agreements negotiated and amended pursuant to this section and Section 252." Petition at 5.

According to the Petitioners, Verizon has taken the "audacious" position that it can "unilaterally alter its rights and obligations to an entire industry merely by posting notice on its electronic bulletin board." *Id*. Contending that Verizon's only lawful recourse is negotiating

amendments to interconnection agreements, the Petitioners direct the Commission's attention to Paragraph 233 of the TRO Remand Order:

> We expect that incumbent LECs and competing carriers will implement the [FCC's] findings as directed by section 252 of the Act. . . . We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes.

The Petitioners stress the stated obligation of ILECs to implement the FCC's determinations and contend that Verizon has failed to conduct or to offer to conduct the requisite good-faith negotiations.

The Petitioners draw the Commission's attention to the phrase "applicable law" as it occurs in its interconnection agreement with Verizon.[2] According to the Petitioners, the relevant applicable law includes but is not limited to (1) the obligations under which Bell Atlantic and GTE gained approval to merge (whereupon the surviving entity was renamed "Verizon"), (2) Section 271 of the Telecommunications Act and state law. In the Petitioners' opinion, Verizon has refused to negotiate or to arbitrate and, therefore, has sought to deprive the Commission of its ability to consider issues arising under this applicable law.

The Petitioners complain that Verizon has unilaterally established terms that should be determined via negotiations. Specifically, the Petitioners report that Verizon has

[2] Pursuant to 47 U.S.C. § 252(i), Broadview opted into a previously negotiated interconnection agreement between Verizon and another CLEC, Global NAPs. Section 4 of that agreement is entitled "Applicable Law" and specifies, inter alia, that the phrase is intended to encompass both federal and state law and that "[e]ach party shall comply with Applicable Law in the course of performing this Agreement."

asserted a right to decide which wire centers have been relieved of certain unbundling obligations pursuant to the TRO Remand Order and has further warned that any CLEC in disagreement may be treated as having acted in bad faith and therefore in breach of the applicable interconnection agreement. The Petitioners' position is that Verizon's actions are at variance with Paragraph 234 of the TRO Remand Order, specifying that

> ... to submit an order to obtain a high-capacity loop or transport UNE, a requesting [CLEC] must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed [in previous sections of the TRO Remand Order] and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3).

According to the Petitioners, the TRO Remand Order and its still-applicable predecessor, the FCC's 2003 Triennial Review Order, are complex documents that establish a variety of rights for both ILECs and CLECs. The Petitioners contend that CLECs are entitled to have those rights specifically embodied in their interconnection agreements, rather than having to rely on Verizon's self-serving interpretation of these decisions. It is the position of the Petitioners that the change-of-law provisions of interconnection agreements are designed precisely to prevent this kind of conduct and that, Verizon, therefore, is in breach of this aspect of its interconnection agreement with the Petitioners.

Finally, the Petitioners take the position that regardless of Verizon's obligation to offer UNEs under Section 251, the ILEC has additional unbundling obligations by virtue of having obtained authority to offer long-distance service in New Hampshire according to 47 U.S.C. § 271. According to the Petitioners, Verizon's Section 271 obligations in New Hampshire separately require Verizon to offer the UNEs at issue in this proceeding.

**B. Verizon New Hampshire**

Verizon contends that the Petitioners are seeking to use the "change of law" provisions of its interconnection agreement as an improper means to put off the effectiveness of the decision in the TRO Remand Order that Verizon is no longer obligated to process new orders for certain UNEs. According to Verizon, the FCC has the authority to issue directives that are immediately effective – and the FCC clearly used this authority by specifying March 11, 2005 as the date on which such new orders would no longer be effective.

Further, Verizon contends that the FCC was explicit in the TRO Remand Order's transition plan that CLECs had a specified period of time – either 12 or 18 months, depending on the UNE – to eliminate their embedded base of affected UNE arrangements by converting them to other arrangements. According to Verizon, the elimination of new orders is an integral part of this transition plan and is not conditioned on renegotiation of interconnection agreements.

According to Verizon, the FCC carefully selected March 11, 2005 as the effective date of the transition plan to avoid having a period when no rules governing these UNEs were in place, belying the notion that the FCC intended to delay the start of the transition period to allow for negotiations. Verizon characterizes as "beside the point" any argument that the change-of-law provisions of an interconnection agreement are implicated by the determinations in the TRO Remand Order as to new UNE orders because such agreements cannot exempt carriers from complying with an explicit directive of federal law. Verizon Opposition at 12. In contrast, according to Verizon, the FCC explicitly contemplated in the TRO Remand order that the change-of-law provisions of interconnection agreements would apply to the transition of the embedded base to other arrangements. Verizon directs the Commission to a decision of the

Indiana Utility Regulatory Commission, entered on March 9, 2005, which reached such a conclusion.

In the opinion of Verizon, the Petitioners are wrong when they assert that Paragraph 233 of the TRO Remand Order makes amendment of interconnection agreements under Section 252 a precondition to compliance with the mandates in the order. Verizon characterizes this paragraph as simply a "general direction to the parties to revise their contracts when necessary as a result of the new rules." *Id*. at 14. According to Verizon, Paragraph 233 means that carriers would negotiate contract amendments to implement the permanent unbundling rules contained in the FCC order, without regard to the separate provisions in the order eliminating new requests for the affected UNEs.

Verizon references the FCC's determination at Paragraph 218 of the TRO Remand Order that it would "seriously undermine infrastructure investment and hinder the development of genuine facilities-based competition" if ILECs were to continue to provision UNE-P to CLECs. According to Verizon, "it makes no sense to suggest that those harms should be suffered for so long as the parties take to amend their agreements." Verizon Opposition at 15. Neither would it make sense, according to Verizon, for the FCC to have specified March 11, 2005 as the date on which requesting carriers may not obtain new UNEs of the affected types if carriers then had 12 months to effectuate the changes by negotiation.

It is further Verizon's position that even if the language of the interconnection agreements were dispositive here, Verizon should still prevail. According to Verizon, petitioners Broadview Networks, Inc. and Broadview NP Acquisition Corporation are parties to pre-existing interconnection agreements via a Section 252(i) adoption of the terms of another CLEC's

interconnection agreement. Verizon notes that, in each instance, the adopting CLEC agreed in writing with Verizon that the adoption "does not include adoption of any provision imposing an unbundling obligation on Verizon that no longer applies to Verizon" under the (1) *Triennial Review Order*, (2) the decision of the U.S. Court of Appeals for the District of Columbia Circuit reviewing the Triennial Review Order, *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) or (3) Section 251(c)(3) generally. Verizon points out that the UNEs at issue here are precisely those whose unbundling the Court of Appeals required the FCC to reconsider.

Verizon further contends that the "applicable law" provisions of each interconnection agreement at issue in this proceeding explicitly requires its parties to comply with FCC directives. According to Verizon, the Petitioners miss the point when they assert that "applicable law" includes certain merger conditions and other legal requirements. In the view of Verizon, this is immaterial because the TRO Remand Order is also part of the applicable law and it is the TRO Remand Order that Verizon is implementing here. Verizon additionally contends that Section 4.7 of each applicable interconnection agreement recites that "[n]otwithstanding anything in this Agreement to the contrary," Verizon may discontinue on 30 days' notice the provision of any UNE that a governmental decision determines is no longer required to be offered by Verizon. Verizon Opposition at 18.

Next Verizon contends that granting the relief requested by the Petitioners would have the effect of staying the TRO Remand Order, something the Commission is not empowered to do. According to Verizon, state commissions are preempted by federal law, as applied by the Supremacy Clause of the U.S. Constitution, from imposing unbundling requirements or

otherwise "disrupting the federal framework" established via the FCC's unbundling rules. *Id*. at 20.

Finally, Verizon takes the position that its Section 271 obligations do not provide a basis for staying the new FCC unbundling rules. According to Verizon, it is not in violation of its New Hampshire Section 271 obligations because it has "consistently stated its willingness to enter into individually-negotiated commercial agreements to provision network elements required by section 271 but no longer required to be unbundled under Section 251." *Id*. at 26. Moreover, according to Verizon, the interpretation and enforcement of Section 271 is entirely the province of the FCC.

## III. COMMISSION ANALYSIS

We begin by reiterating certain determinations made earlier this year in other dockets that bear directly on the instant dispute.

Order No. 24,442, entered in Docket Nos. DT 03-201 and DT 04-176 on March 11, 2005, noted that the de-listing of a UNE pursuant to Section 251 by the FCC in connection with its triennial review was not dispositive of whether Verizon remained obligated to provision the UNE by virtue of its status as an RBOC with Section 271 long distance authority in New Hampshire. Order No. 24,442, slip op. at 39, 42-43. Rejecting Verizon's contention that the Commission was preempted from doing so by applicable federal law, we indicated that we would evaluate on a case-by-case basis whether a particular UNE is subject to such a Section 271 unbundling requirement. *Id*. at 39-40.

On April 22, 2005, we determined in Docket No. DT 05-034 that certain tariff revisions submitted by Verizon would become effective by operation of law. One such change

permitted the immediate discontinuance of UNE-P as an unbundled network element subject to new orders from CLECs. While unbundled loops, switching and transport continue to be required by Section 271, the TRO Remand Order eliminates unbundled mass market switching (*i.e.*, switching used to serve residential customers and small businesses) as a Section 251 element. TRO Remand Order at ¶¶ 204-09. Local switching as a stand-alone element is required to be offered by RBOCs with Section 271 authority, but the FCC explicitly determined in the Triennial Review Order that it will not require RBOCs to combine network elements pursuant to Section 271 if the elements are no longer required to be unbundled under Section 251. *See* Triennial Review Order at ¶ 655 n. 1990 (noting that, unlike Section 251(c)(3), the relevant sections of the Section 271 checklist "contain no mention of 'combining.'") Thus, because mass market switching is no longer subject to unbundling under Section 251, neither Section 251 nor Section 271 require Verizon to offer UNE-P to CLECs in New Hampshire.

Also effective by operation of law in Docket No. DT 05-034 were tariff revisions allowing Verizon to discontinue provisioning DS1 and DS3 loops and dedicated high-capacity interoffice transport facilities (including dark fiber interoffice transport) in certain wire centers which were not specified in the tariff. We opened Docket No. DT 05-083 to conduct an RSA 365:5 investigation to determine which wire centers in New Hampshire are affected and reserved the right to determine whether Verizon remains obligated to provide delisted Section 251 UNEs in the affected wire centers pursuant to Section 271.

To a significant extent, our decisions in Docket Nos. DT 03-201, 04-176 and 05-034 are dispositive of the issues raised here. First, regarding the continued provisioning of UNE-P, because we have found that UNE-P is no longer subject to unbundling under either Section

251 or 271, the only remaining question as to UNE-P is whether the language in any of the applicable interconnection agreements requires a different result. It is our determination that the change-of-law provisions in the applicable interconnection agreements are outcome-determinative. Specifically, as Verizon notes, there is clear language in those agreements reciting that once Verizon is no longer obligated to provision a particular UNE, Verizon may discontinue such provisioning on 30 days' notice "[n]otwithstanding anything in this Agreement to the contrary." As we have found previously, Verizon is clearly no longer obligated to provide UNE-P under Section 251 or Section 271. We reject the Petitioners' claim, therefore, that Verizon must continue to provide UNE-P. We remind the parties however, that they remain obligated to negotiate transition plans for the embedded base. TRO Remand Order at ¶¶ 142, 196 and 227.

With respect to the other UNEs at issue here, DS1 and DS3 transport, as well as DS1 and DS3 high-capacity loops, the issue is somewhat more complicated inasmuch as Section 251 delisting affects some wire centers but not others and, unlike the situation with UNE-P, there is no clear guidance from the FCC about whether any Section 271 obligations would enter the calculus.

As to the question of which wire centers are implicated by the Section 251 determinations in the TRO Remand Order, Docket No. DT 05-083 has been opened for the purpose of determining those wire centers in New Hampshire from which Verizon remains obligated to provision high capacity loops and interoffice transport. We do not agree with the position, which the CLECs ascribe to Verizon, that placing orders in wire centers that Verizon has declared are no longer impaired would constitute a breach of their interconnection

agreements. The FCC's instructions are clear: "To submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed . . . above . . . . The incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority." *See* TRO Remand Order at ¶ 234. Therefore, in the event that a CLEC's inquiry results in a finding of impairment, the CLEC may place its orders and Verizon must fulfill them. On the other hand, we find that the change-of-law provisions in the applicable interconnection agreements apply once the CLEC concludes, after its reasonably diligent inquiry, that it is no longer impaired without access to a particular network element in a particular wire center. At such time, Verizon and the CLEC are obligated to negotiate a transition plan for the existing Section 251 UNEs.

The remaining question is whether, in the event a wire center is no longer impaired, Verizon would remain obligated to provide these elements under Section 271. The basis of our assertion of jurisdiction over Section 271 matters in Order No. 24,442 was a commitment Verizon made, in exchange for the Commission's favorable recommendation to the FCC regarding Section 271 authority for Verizon, to make its wholesale offerings available to CLECs via a tariff. This commitment does not extend to interconnection agreements. Accordingly, we have no basis for determining that Verizon is violating its Section 271 commitments if it were to refuse to provision new orders for DS1 and DS3 interoffice transport or loops, under the interconnection agreements at issue here, in the event it is determined that CLECs are no longer impaired without access to such elements in particular wire center(s).

Accordingly we grant in part the request of the Petitioners and find that Verizon must continue to provide high capacity loops and interoffice transport in those wire centers which the CLECs believe to be impaired during the pendency of the wire centers docket, DT 05-083. In addition, we find that although Verizon is not obligated to continue to provide UNE-P, it is obligated to negotiate transition plans for those who have been taking UNE-P. Finally, regarding notice, we find that Verizon provided adequate notice and reject the Petitioners' assertion to the contrary. The remainder of the Petition is denied.

**Based upon the foregoing, it is hereby**

**ORDERED**, that the petition of Broadview Networks, Inc., Broadview NP Acquisition Corp., A.R.C. Networks, Inc. d/b/a InfoHighway Communications and DSCI Corporation for declaratory and other relief is GRANTED IN PART and DENIED IN PART as set forth more fully in the Order herein.

By order of the Public Utilities Commission of New Hampshire this fifteenth day of December, 2005.

| Thomas B. Getz | Graham J. Morrison | Michael D. Harrington |
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| Chairman | Commissioner | Commissioner |

Attested by:

Kimberly Nolin Smith
Assistant Secretary