

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation Regarding Intrastate Access	:	
Charges and IntraLATA Toll Rates of Rural	:	
Carriers and the Pennsylvania Universal	:	I-00040105
Service Fund	:	

**ORDER DENYING JOINT PETITION REQUESTING CERTIFICATION OF A
MATERIAL QUESTION TO THE COMMISSION**

On December 20, 2004, the Pennsylvania Public Utility Commission (Commission) entered an Order instituting this proceeding to investigate whether to implement further access charge reductions and intraLATA toll rate reductions in the service territories of rural incumbent local exchange carriers (RLECs). The investigation was stayed pending the outcome of a parallel federal investigation which was expected to impact the PUC's own investigation, or until further consideration.

By Order entered April 24, 2008, the Commission reopened the matter docketed at I-00040105 and directed that the Office of Administrative Law Judge conduct appropriate proceedings to carry out the following:

1. To address whether the cap of \$18.00 on residential monthly service rates and any corresponding cap on business monthly service rates should be raised, whether funding for the Pennsylvania Universal Service Fund should be increased, and whether or not a "needs based" test (and applicable criteria) for rural ILEC support funding from the PaUSF in conjunction with the federal USF support payments that the rural ILECs receive should be established in order to determine which rural ILECs qualify for PaUSF funding as described in the body of the April 24, 2008 Order; and
2. That the proceedings also address the following issues:
 - (a) Whether the Commission has the authority under Chapter 30 and other relevant provisions of the Public Utility Code to perform a just and reasonable rate analysis of the rural ILECs' residential rates for basic local exchange services when such rates exceed the appropriate residential rate benchmark.

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(b) The appropriate benchmark for the rural ILEC residential rate for basic local exchange service taking into account the statutory requirements for maintaining and enhancing universal telecommunications services at affordable rates. Participating parties are encouraged to submit appropriate studies and testimony, including economic cost studies that can provide the necessary information for the establishment of the appropriate residential benchmark rate for maintaining and enhancing universal telephone service goals in Pennsylvania.

(c) Whether PaUSF funding support should be received by rural ILECs that incrementally pierce the appropriate residential rate cap because of the regular annual Chapter 30 revenue increases, and whether the Commission's PaUSF regulations at 52 Pa. Code § 63.161 et seq. should be accordingly revised. The relevant inquiry should include the role of non-expired "banked revenues" that rural ILECs may have accumulated through the operation of their respective Chapter 30 modified alternative regulation plans and corresponding price stability mechanisms.

(d) Whether the potential availability of PaUSF support distributions to those rural ILECs that pierce the appropriate residential rate cap because of their respective annual Chapter 30 annual revenue increases has any anti-competitive or other adverse effects, especially with respect to the currently established PaUSF support contribution mechanism and its participating telecommunications utility carriers.

(e) The "needs based" test should address the following interlinked areas that involve the operations of the rural ILECs:

(i) The Chapter 30 annual rural ILEC price stability mechanism revenue increases:

(ii) The annual federal USF support that the Pennsylvania rural ILECs receive;

(iii) The fact that most of the Pennsylvania rural ILECs are "average schedule" telephone utility companies that do not jurisdictionalize a number of revenue, expense, and asset parameters for their regulations operations;

(iv) Whether there is any relevance that rural ILEC assets and facilities may be used both for the provision of regulated intrastate telecommunications services, but also for the provision of non-jurisdictional services that potentially include unregulated services;

(v) Whether the overall financial health of the rural ILECs that continue to get both PaUSF and federal USF support should play a role for continuing to receive PaUSF support distributions; and

(vi) Whether the PaUSF level of support distributions to the recipient rural ILECs should be adjusted in relation to the revenue increases in local exchange rates that have been or are implemented through their respective Chapter 30 modified alternative regulation plans and price stability mechanisms.

The Order also directs that the Recommended Decision in this matter be issued within twelve (12) months of the entry date of the order, April 24, 2008.

On May 30, 2008, a Notice of Prehearing Conference was issued and served to those entities served with the Commission's April 24, 2008 Order. I issued a Prehearing Order which directed those entities wishing to participate to file an entry of appearance. Those who entered appearances would comprise the service list for the remainder of this portion of the reactivated case.

Entries of appearance were filed by Sprint Communications Company, L.P. (Sprint); the Office of Consumer Advocate (OCA); Cellco Partnership d/b/a Verizon Wireless (Verizon Wireless); Verizon Pennsylvania Inc., Verizon North Inc. and MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, LLC (Verizon); Rural Telephone Company Coalition (RTCC); AT&T Communications of Pennsylvania, LLC, TCG Pittsburgh, Inc. and TCG New Jersey, Inc. (AT&T); Office of Small Business Advocate (OSBA); The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania (Embarq); Omnipoint Communications Inc. d/b/a T-Mobile, Omnipoint Communications Enterprises LLC d/b/a T-Mobile and VoiceStream Pittsburgh LP d/b/a T-Mobile (T-Mobile).

Prehearing memos were filed by these same entities as well as the Broadband Cable Association of Pennsylvania (BCAP), and Comcast Phone of Pennsylvania LLC d/b/a Comcast Digital Phone and Comcast Business Communications (Comcast). The Prehearing Conference was held as scheduled on June 18, 2008, and each entity was represented by counsel. Numerous matters were considered, as indicated in the following discussion.

On March 10, 2008, Comcast filed a Petition to Intervene, alleging that it is impacted by the rates charged for access by RLECs and is also a contributor to the PaUSF. No objections or responses were filed, and it was granted as unopposed. On June 17, 2008, a Motion for Admission Pro Hac Vice was filed by Deanne M. O'Dell, Esq. for John C. Dodge, Esq. The Motion was unopposed at the prehearing conference and was granted.

A Petition to Intervene was filed by BCAP on June 6, 2008. At the prehearing conference, no party indicated opposition, and the petition was granted.

On June 11, 2008, a Motion to Substitute a Representative Organization was filed jointly by the RTCC and the Pennsylvania Telephone Association (PTA) seeking to substitute the PTA for the RTCC, which had previously been involved in the case. The Motion indicates, and counsel confirmed at the prehearing conference, that the PTA and RTCC sought to have the PTA take over the representation of thirty-one companies.¹ Counsel for the PTA stated that the PTA has agreed to take discovery for all thirty-one companies, and that the responses will be those of the individual companies.

On June 17, 2008, a Motion for Admission Pro Hac Vice was filed by Sue Benedek, Esq., for Joseph R. Stewart, Esq. At the prehearing conference, no party indicated opposition, and the petition was granted.

¹ The list includes: Armstrong Telephone Company – PA; Armstrong Telephone Company – North; Bentleyville Telephone Company; Buffalo Valley Telephone Company; Citizens Telecommunications Company – New York; Citizens Telephone Company of Kecksburg; Commonwealth Telephone Company LLC d/b/a Frontier Communications Commonwealth Telephone Company; Frontier Communications of Breezewood, LLC; Frontier Communications of Canton, LLC; Frontier Communications of Lakewood, LLC; Frontier Communications of Oswayo River, LLC; Frontier Communications of PA, LLC; Conestoga Telephone & Telegraph Company; Denver and Ephrata Telephone and Telegraph Company; Hickory Telephone Company; Ironton Telephone Company; Lackawaxen Telecommunications Services; Laurel Highland Telephone Company; TDS Telcom/Mahanoy & Mahantango Telephone Company; Marianna and Scenery Hill Telephone Company; The Northeastern PA Telephone Company; North Penn Telephone Company; Consolidated Communications of PA Company; Palmerton Telephone Company; PA Telephone Company; Pymatuning Independent Telephone Company; South Canaan Telephone Company; TDS Telcom/Sugar Valley Telephone Company; Venus Telephone Corporation; Windstream PA, LLC., and Yukon-Waltz Telephone Company.

The parties agreed to a procedural schedule, which was adopted by the Scheduling Order, and subsequent Amended Scheduling Order dated June 24, 2008.

All parties agreed to electronic service of discovery, answers and briefs on the due date prior to 4:00 pm, followed by hard copy. Parties shall use overnight mail if the electronic copy omits exhibits or attachments.

A protective order was issued prior to the stay of the case and remains in effect.

Both Verizon and the OCA filed Motions to Compel Answers to Discovery against Embarq and the PTA. In addition, AT&T requested that the Answers filed by Embarq and PTA be disregarded as untimely. By e-mail on Wednesday, August 6, 2008, followed by hard copy service of the notice, the parties were informed that oral argument would be held on August 12, 2008 to discuss the motions. By Order issued August 8, 2008, the AT&T request to disregard the answers as untimely was denied.

Oral argument was held as scheduled, with all parties afforded an opportunity to weigh in regarding the subject matter. By Order issued August 20, 2008, the motions were granted in part and denied in part.

On August 26, 2008, Embarq and PTA filed a Joint Petition Requesting Certification of a Material Question to the Commission. On September 2, 2008, OCA filed a Response opposing the Joint Petition, and the Joint Petitioners filed a Joint Brief in Support of the Joint Petition. This Order addresses the Joint Petition.

DISCUSSION

The August 20, 2008 Order disposed of four discovery motions, two filed by OCA and two filed by Verizon. This Joint Petition deals only with the OCA discovery motions, which were directed against the PTA Companies and Embarq.

OCA seeks information necessary to perform an economic cost study used by the Federal Communications Commission (FCC), known as the Synthesis Model. The cost study is meant to determine the total cost of providing service as well as the incremental cost of providing residential service. This, in turn, aids in determining whether any service is being subsidized.

The Joint Petition cites 52 Pa. Code § 5.304(a)(2) as the authority:

§ 5.304. Interlocutory review of discovery matters.

(a) *General.* Rulings of presiding officers on discovery are not subject to interlocutory review unless one or more of the following apply:

- (1) Interlocutory review is ordered by the Commission.
- (2) Interlocutory review is certified by the presiding officer.
- (3) The ruling has as its subject matter the deposing of a Commissioner or Commission employee.

(b) *Standard for certification.* A presiding officer may certify that a discovery ruling is appropriate for interlocutory review when the ruling involves an important question of law or policy that should be resolved immediately by the Commission.

(c) *Petition for certification.* A petition for interlocutory review of a presiding officer's ruling on discovery must:

- (1) Be filed within 3 days of the ruling.
- (2) Be in writing.

(3) State the question to be certified and the reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceedings.

(4) Be no more than 3 pages in length.

(5) Be filed with the Secretary and served on all parties and the presiding officer.

(d) *Responsive brief.* A party may file a responsive brief within 7 days of a request for certification, which:

(1) Either supports or opposes certification.

(2) Addresses the merits of the question for which certification is requested.

(3) Addresses whether a stay of proceedings is required to protect the substantial rights of a party.

(4) Does not exceed 15 pages.

(e) *Presiding officer's decision.* The presiding officer will announce the decision in writing or orally on the record within 5 days of the deadline for filing responsive briefs. The presiding officer's decision will include the reasons why certification has been granted or denied and whether a stay of the proceedings has been granted.

(1) If the presiding officer denies the request for certification, no further action is required of the presiding officer.

(2) If the presiding officer's decision is to grant the request for certification, the presiding officer will serve to each Commissioner the certified question within 5 days of the announcement of the decision. The presiding officer will include the reasons justifying certification, rulings on the certified question and extracts from the record that will assist the Commission in reaching a decision.

(f) *Brief to the Commission following certification.* Parties may submit a brief to the Commission and no other briefs are permitted unless directed by the Commission. A brief may not exceed 15 pages and must address:

- (1) The issue of certification.
- (2) The merits of the certified question.
- (3) The stay of proceedings, when appropriate.

(g) *Scheduling of certified question.* Upon the expiration of the time provided for filing briefs, the Secretary will schedule the certified question for consideration at the next meeting of the Commission.

(h) *Action by the Commission.* Within 30 days of receipt of the certified question by the Secretary, the Commission will, without permitting oral argument, do one of the following:

- (1) Continue, revoke or grant a stay of proceedings.
- (2) Determine that the certification was improper and return the matter to the presiding officer for resolution.
- (3) Answer the certified question.

(i) *Failure to act.* Failure of the Commission to act on a certified question within 30 days of its receipt will be deemed to be an affirmance of the decision of the presiding officer.

(j) *Effect on proceedings.* An interlocutory appeal from the ruling of the presiding officer on discovery will not result in a stay of the proceedings except upon a finding by the presiding officer or the Commission that extraordinary circumstances exist, or to protect the substantial rights of the parties.

52 Pa. Code § 5.304 (emphasis added).

Under the standard set forth in the regulation, a discovery issue is NOT subject to certification by the presiding officer for interlocutory review unless the presiding officer certifies that the ruling involves **an important question of law or policy that should be resolved immediately by the Commission.** 52 Pa. Code § 5.305(b). What the Joint Petitioners present is a *factual* issue which they failed to develop

sufficiently in arguing against the OCA Motions to Compel. The issue in this matter fails to meet the standard which justifies Commission review.

1. The interrogatories promulgated do not have to produce information which is admissible at hearing. Rather, the information must reasonably lead to information which is admissible at hearing.

An investigation into the affordability of local rates logically includes a determination of the cost of providing the service. The information requested will allow the OCA to develop a cost study which purportedly provides this basic starting information. Whether the OCA has chosen the correct cost study, whether it is performed correctly, and its ultimate usefulness is secondary to the determination of whether the information necessary to perform a cost study should be given to the OCA. The ultimate admissibility of the resulting cost study is speculation at this point, and is not a factor in addressing whether the interrogatories should be answered.

2. The OCA Interrogatories are consistent with the Commission's directive.

Commission has directed the parties to discuss “the appropriate benchmark for the rural ILEC residential rate for basic local exchange service Participating parties are encouraged to submit appropriate studies and testimony, including economic cost studies that can provide the necessary information for the establishment of the appropriate residential benchmark rate for maintaining and enhancing universal telephone service goals in Pennsylvania,” April 24, 2008 Commission Order, ¶2(b).

As OCA states in its Brief:

As the OCA articulated in its Motion to Compel filed in response to the PTA and Embarq Objections, each question in OCA Set III interrogatories seeks information that will be used by the OCA's expert witness to run an economic cost study used by the FCC, known as the Synthesis Model. Each question relates to a separate data

input required for the FCC study. More specifically, the OCA questions seek information about facility and customer location (OCA Set III-1-3), the cost of individual facilities (OCA Set III-4-18) and the depreciation value of various network accounts (OCA Set III-19). Each one of these interrogatories is required to run the FCC economic cost study. By running the Synthesis Model, the incremental cost of providing telecommunications services for the PTA and Embarq can be determined. The incremental cost study is one type of economic cost study that could be used in this proceeding to assess whether any service is being subsidized. Whether or not basic local exchange service is being subsidized could impact what the residential benchmark rate cap should be.

OCA Brief p. 4.

The OCA is preparing the only cost study in the investigation. The parties were asked point blank at oral argument if any other party planned to prepare and present a cost study, and no other party responded. The OCA proposed cost study is directly on point in responding to the Commission's directive.

3. The Companies have failed to support their claim that the discovery is unreasonable, oppressive, unduly burdensome or expensive or required unreasonable investigation.

Having established that the discovery request is consistent with the Commission's Order of April 24, 2008, the next step is to look to the Commission's regulations regarding limitations on discovery.

§ 5.361. Limitation of scope of discovery and deposition.

- (a) Discovery or deposition is not permitted which:
 - (1) Is sought in bad faith.

(2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or party.

(3) Relates to matter which is privileged.

(4) Would require the making of an unreasonable investigation by the deponent, a party or witness.

* * *

52 Pa. Code § 5.361.

The PTA and Embarq have claimed that compiling the information requested would be unreasonably burdensome, but they have failed to provide any concrete facts which support this claim. Counsel claimed that searching records would be unduly burdensome, but could not provide even a ballpark figure for the number of any of the devices installed in 2007 which were sought in OCA questions 15 through 18 (residential network interface devices, business network interface devices, distribution terminal or cross connect boxes). There is a vast difference between searching records for one device and searching for two thousand, and absolutely no guidance was given on which number was closer to accurate. PTA and Embarq failed to support their claims that the information imposed an undue burden. Note that, even if they had, it would fail to rise to the level of “an important question of law or policy,” necessary to support certification to the Commission. 52 Pa. Code § 5.304(b).

Identifying information for customers is that which is kept in the normal course of business, and the parties were directed to work together to develop the least burdensome format for the provision of the necessary information.

Accounting information was sought, and that was also objected to as unreasonably burdensome although it must clearly be kept in the normal course of business.

In addition, information is limited to cost-based companies, which would keep their records in a more compatible format than those which participate in NECA averaging.

Note that the Petitioners have provided more detailed claims in their Joint Brief In Support of the Joint Petition regarding the time necessary to gather information than they did during the proceeding regarding the Motions to Compel. *See* pages 9 and 10. The proper time to present facts is prior to the issuance of the Order disposing of the Motions to Compel. This is the *appeal* of the Order. Additional claims, including supporting facts or unsupported speculation, which should have been presented during consideration of the Motions to Compel will not be considered. Again, even if this were presented properly, whether or not a discovery order creates an undue burden is not “an important question of law or policy that should be resolved immediately by the Commission.” 52 Pa. Code § 5.304(b).

4. The characterization of the Material Question for Review is misleading.

The Joint Petitioners attempt to shift the focus of this inquiry by presenting it in a manner slanted to guarantee their success:

Does the scope of this narrow and limited proceeding, as envisioned by the Commission, which addresses the affordability of local rates, include the development of hypothetical, forward-looking, incremental cost studies of local service by the rural telephone companies and should information related to such a study be compelled where the compilation of such is unreasonably burdensome and requires unreasonable investigation?

Suggested answer: No. The Commission did not envision or intend for the scope of this limited proceeding to include the development of cost studies of local service. Moreover, pursuant to 52 Pa. Code § 5.361(a)(2) and (a)(4), unduly burdensome discovery or discovery requiring the making of an unreasonable investigation may not be compelled.

Of course, the answer to the question as presented by the Joint Petitioners must be “no,” because the Commission regulation protects litigants from discovery which is unduly burdensome or unreasonable. However, this is not the appropriate question for review.

The question arising from the OCA Motions to Compel Embarq and PTA to answer interrogatories is **whether the provision of information necessary to run an economic cost study is unduly burdensome or unreasonable to the Companies?** This question is fact-based, and is not a ruling which “involves an important question of law or policy that should be resolved immediately by the Commission.” 52 Pa. Code § 5.304(b).

Even if it were appropriate for certification to the Commission, based on the information provided to support the statement, Embarq and PTA failed to provide sufficient support for a finding that the provision of answers to the interrogatories in question is unduly burdensome or unreasonable, and therefore, the August 20, 2008 Order directing those responses is correct. Therefore, the Joint Petition Requesting Certification of a Material Question to the Commission is denied.

5. The Order of August 20, 2008 is not stayed.

Although it is certain that this Order will be appealed to the Commission despite the regulatory language stating that “Rulings of presiding officers on discovery are not subject to interlocutory review,” 52 Pa. Code § 5.304(a), in the absence of specific exceptions, this case is on a fast-track litigation schedule which makes a stay of the August 20, 2008 Order regarding discovery issues impractical.²

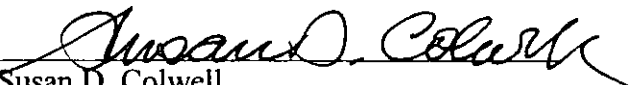
THEREFORE,

² Note that Embarq, PTA and OCA filed a Joint Motion for Further Stay of the entire proceeding on August 29, 2008, which has been assigned to OSA for recommendation. Granting that Joint Motion will result in a de facto stay of the August 20, 2008 Order.

IT IS ORDERED:

1. That the Joint Petition Requesting Certification of a material Question to the Commission is denied as failing to present an important question of law or policy that should be resolved immediately by the Commission.
2. That the request for a stay is denied.

Dated: September 3, 2008


Susan D. Colwell
Administrative Law Judge