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July 14, 2010

**VIA ELECTRONIC FILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, PA 17120

**Re: XO Communications Services, Inc.  
v. Verizon Pennsylvania Inc.  
Docket No. C-2008-2038195**

Dear Secretary Chiavetta:

Enclosed please find the Exceptions of Verizon Pennsylvania Inc., being filed in the above referenced matter. Since these Exceptions are being filed electronically, the original hardcopy is being sent to the Commission via Federal Express. That hardcopy includes the originally signed Verification, pursuant to 52 Pa. Code § 1.36(a).

If you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Suzan D. Paiva".

Suzan D. Paiva

SDP/slb  
Enclosure

**VIA E-MAIL and U.S. MAIL**  
cc: Cheryl Walker Davis, Esquire  
Attached Certificate of Service

**CERTIFICATE OF SERVICE**

I, Suzan D. Paiva, hereby certify that I have this day served a copy of Verizon Pennsylvania Inc.'s Exceptions, upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 14<sup>th</sup> day of July, 2010.

**VIA E-MAIL and FIRST CLASS U.S. MAIL**

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

|                                  |   |                |
|----------------------------------|---|----------------|
| XO Communications Services, Inc. | : |                |
| Complainant                      | : | C-2008-2038195 |
|                                  | : |                |
| v.                               | : |                |
|                                  | : |                |
| Verizon Pennsylvania Inc.        | : |                |
| Respondent                       | : |                |

**EXCEPTION OF VERIZON PENNSYLVANIA INC.**

Pursuant to 52 Pa. Code § 5.533, Verizon Pennsylvania Inc. (“Verizon”) excepts in part to the Recommended Decision of Administrative Law Judge (“ALJ”) Louis G. Cocheres issued on June 24, 2010 (“RD”) in the complaint of XO Communications Services, Inc. (“XO”) against Verizon.

Verizon does not except to the substantive conclusion of the RD resolving XO’s complaint, which holds that Verizon should cease charging the dedicated tandem trunk port rate for access toll connecting trunks to XO and credit or refund past charges to XO. In fact, Verizon already ceased applying the disputed charge to XO following this Commission’s January 29, 2010 decision in *Choice One Communications of Pennsylvania, Inc., etc., v. Verizon Pennsylvania Inc., etc.*, Docket No. C-2008-2029477 and C-2008-2029479. Verizon also already provided XO with credits for past disputed billings and thus already provided the relief requested in the complaint, rendering the dispute between XO and Verizon moot.

Verizon files these exceptions for the limited purpose of asking the Commission to reject the portion of the RD that recommends a refund order with respect to other carriers operating under the same form of interconnection agreement (“ICA”) and an administratively burdensome accounting to be filed with the Commission. The

Commission should refrain from issuing a refund order in a moot case, or alternatively should exercise its discretion under 66 Pa. C.S. § 1312(a) to find that a refund order is unnecessary under the facts of this case because the issue of disputes and credits or refunds for other carriers is already adequately addressed by their Commission-approved ICAs. Further, Verizon voluntarily ceased imposing this charge on other CLECs and provided refunds and/or credits for those carriers disputing past billings in the manner required by their ICAs and/or applicable settlement agreements.<sup>1</sup>

**Exception: The Commission Should Reject The Recommendation For A Refund Order Because The Case Is Moot And Because Other Carriers' Disputes Are Adequately Addressed By Their Commission-Approved ICAs.**

This case is a private customer complaint brought by XO against its wholesale provider, Verizon, challenging Verizon's authority to impose its tariffed dedicated tandem trunk port charge in a specific factual situation. The ALJ agreed with XO that Verizon should not impose this charge for ports associated with access toll connecting trunks. Verizon does not except to that holding, and in fact already ceased charging XO and provided XO with credits for the past disputed billings. The RD also recommends that the Commission issue a "refund order" under 66 Pa. C.S. § 1312(a) requiring Verizon to issue refunds to "any other CLEC which elected to subtend Verizon's access tandem switch for the transmission and routing of long distance traffic pursuant to the MCI Metro Access Transmission Services, Inc.'s Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc." (RD, Ordering ¶ 2). Such refunds would be issued within 30 days, and Verizon would be required within 60 days to file a "complete accounting of

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<sup>1</sup> Verizon provides a verification pursuant to 52 Pa. Code § 1.36 supporting its factual assertions that it ceased charging the dedicated tandem trunk port charge under the relevant circumstances and the issuance of credits and refunds. Verizon respectfully requests that the Commission reopen the record pursuant to 52 Pa. Code § 5.571 for the limited purpose of considering these new facts as support for Verizon's exception to the refund order and accounting.

all amounts refunded and detailed with entries of the names and addresses of all patrons eligible for a refund, the date of payment, the amount of refund, the amount of interest paid and the reasons for any failure to make a refund,” to be served on all eligible patrons with a further opportunity for them to disagree with the accounting. (RD, Ordering ¶ 6).

Verizon respectfully submits that the refund order and the administratively burdensome accounting process required by the RD are not necessary or appropriate under the facts of this case and should be rejected.

**A. The Commission Should Not Issue A Refund Order In A Moot Case**

The Commission should reject the portion of the RD recommending a refund order because the underlying dispute between Verizon and XO is moot. In light of that resolution, the complaint should be dismissed and the case closed. Verizon already complied with the relief requested by the complaint and so there is no actual case or controversy between Verizon and XO. As this Commission recently recognized, “[t]he mootness doctrine requires that an actual controversy exist at all stages of review, not merely when the complaint is filed,” and “[a]n issue can become moot during the pendency of an appeal due to an intervening change in the facts of the case or due to a change in the applicable law.”<sup>2</sup> “It is a well-established principle of law” that moot questions should not be decided, even if the issue is presented by a “litigant[] who clearly had standing to sue at the outset of the litigation.”<sup>3</sup> Because the underlying dispute

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<sup>2</sup> *Zack v. AT&T Communications of Pennsylvania, LLC*, Docket No. C-2009-2127566, 2010 Pa. PUC LEXIS 68 (February 22, 2010 ID of ALJ Conrad, adopted by Opinion and Order entered June 22, 2010) (citing *In re Gross*, 476 Pa. 203, 382 A.2d 116 (1978)). See also *Picone v. Bangor Area Sch. Dist.*, 936 A.2d 556, 561 (Pa. Commw. Ct. 2007).

<sup>3</sup> *In re Cain*, 527 Pa. 260, 263 (Pa. 1991).

between Verizon and XO is moot, the Commission should dismiss the case without reaching the issue of the refund order and accounting for other carriers.

To the extent the factual status of other similarly-situated carriers is relevant to the mootness inquiry, Verizon also ceased imposing the dedicated trunk port charge associated with access toll connecting trunk ports for all carriers in Pennsylvania. Moreover, where carriers disputed past charges for these ports, Verizon provided credits or refunds under the terms of their ICAs and/or applicable settlement agreements. Accordingly, there is no active case or controversy as to the need for a refund order generally.

**B. The Commission Should Exercise Its Discretion Under 66 Pa. C.S. § 1312(a) Not To Issue A Refund Order Under The Facts Of This Case**

Even if the Commission does not dismiss this case as moot (which it should), the Commission should reject the recommendation for a refund order and accounting under the facts of this case. While 66 Pa. C.S. § 1312(a) authorizes the Commission to order refunds for similarly-situated customers under certain circumstances, whether or not to issue a refund order in a particular case is within this Commission's sound discretion.<sup>4</sup> Notably, the Commission did not issue a refund order in connection with its January 29, 2010 decision in *Choice One Communications of Pennsylvania, Inc., etc., v. Verizon Pennsylvania Inc., etc.*, Docket No. C-2008-2029477 and C-2008-2029479, although that case involved the very same issue and same form of ICA. A refund order is likewise unnecessary and inappropriate in this case.

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<sup>4</sup> *Emporium Water Co. v. PUC*, 859 A.2d 20 (Pa. Commw. Ct. 2004) (recognizing that "the Commission's authority to order refunds pursuant to Section 1312(a) of the Code is discretionary.")

Here, a sound legal and factual basis exists to support the Commission's exercise of discretion *not* to require a refund order and not to impose upon Verizon the attendant administrative complexity of an accounting to this Commission. First, the matter of resolving any disputes over past charges is already adequately addressed by the terms of each carrier's ICA. Indeed, XO noted that its own Commission complaint was the last step in the dispute resolution process set forth in its ICA. (XO Main Br. at 6). If a carrier is dissatisfied with Verizon's handling of its dispute under the ICA, and the parties cannot resolve the disagreement among themselves, then the carrier may bring the issue to the Commission, just as XO did. The Commission need not fear that a carrier that disagrees with Verizon's handling of its claim on this issue would be left without recourse. But there is no need to anticipate disputes that may never arise and to create an administratively burdensome accounting process for no purpose.

Second, following this Commission's decision in *Choice One*, Verizon voluntarily ceased charging all carriers for dedicated trunk ports and has followed the provisions of its Commission-approved ICAs to provide credits or refunds for disputed past charges, so there is no need for a refund order or accounting. The Commission should exercise its discretion to reject the refund order and detailed accounting for other carriers operating under the same form of ICA, as described in Ordering Paragraphs 5 and 6 of the RD, and instead should defer to the dispute resolution terms of the existing Commission-approved ICAs to resolve any issues with regard to credits and refunds for other carriers.

**C. Conclusion**

Accordingly, Verizon respectfully requests that the Commission dismiss the entire case as moot or, alternatively, allow the RD to become final pursuant to 52 Pa. Code § 5.536(a) as to the dispute between Verizon and XO only, but exercise its discretion to reject the imposition of a refund order and accounting for other carriers pursuant to 66 Pa. C.S. § 1312(a) under the facts of this case.



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Counsel for Verizon Pennsylvania Inc.

Dated: July 14, 2010

**VERIFICATION**

I, Peter J. D'Amico, state that I am Product Manager – Switched Access and Interconnection, for Verizon, and that as such I am authorized to make this verification on behalf of Verizon Pennsylvania Inc. (“Verizon”). I have reviewed the factual assertions set forth in Verizon’s Exceptions to the Recommended Decision in this matter and verify that the facts contained therein are true to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa. C. S. § 4904, relating to unsworn falsification to authorities.

Date: July 13, 2010

A handwritten signature in black ink, appearing to read 'P. J. D'Amico', written over a horizontal line.

Peter J. D'Amico

DOCKET NO. C-2008-2038195