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April 19, 2011

Via Electronic Filing
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Armstrong Telecommunications, Inc. v.
Verizon Pennsylvania Inc., Verizon North LLC, MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc.
Docket Nos. C-2010-2216205, C-2010-2216311, C-2010-2216325, and C-2010-2216293

Dear Secretary Chiavetta:

Enclosed please find Verizon's Motion to Dismiss or Stay, being filed on behalf of Verizon Pennsylvania Inc., Verizon North LLC, MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc. (collectively, "Verizon") in the above captioned matter.

If you have any questions, please feel free to contact me.

Very truly yours,

Suzan D. Paiva

SDP/slb

Via E-Mail and Federal Express
cc: The Honorable Dennis J. Buckley

Via E-Mail and First Class Mail
cc: Attached Certificate of Service

CERTIFICATE OF SERVICE

I, Suzan D. Paiva, hereby certify that I have this day served a copy of Verizon's Motion to Dismiss or Stay, 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 19th day of April, 2011.

VIA E-MAIL and FIRST CLASS MAIL

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Armstrong Telecommunications, Inc.	:	
	:	
Complainant,	:	
	:	
v.	:	Docket Nos. C-2010-2216205
	:	C-2010-2216311
Verizon Pennsylvania Inc., Verizon North LLC,	:	C-2010-2216325
MCImetro Access Transmission Services LLC	:	C-2010-2216293
d/b/a Verizon Access Transmission Services and	:	
MCI Communications Services Inc.,	:	
	:	
Respondents.	:	

VERIZON'S MOTION TO DISMISS OR STAY ARMSTRONG'S COMPLAINT

Pursuant to 52 Pa. Code § 5.103, Verizon moves to dismiss Armstrong's complaint because the Commission lacks jurisdiction over Armstrong's claims under Pennsylvania's Voice Over Internet Protocol Freedom Act. Even if the Commission did have jurisdiction over this dispute – which it does not – the Commission should stay this case to allow the Federal Communications Commission ("FCC") to decide a pending proceeding in which the FCC will address on an expedited basis the exact issue raised by Armstrong here: the appropriate intercarrier compensation for VoIP traffic. In support of this motion Verizon avers as follows:

I. BACKGROUND

1. This dispute arises because Armstrong[1] refuses to negotiate with Verizon[2] to arrive at a mutually acceptable and reciprocal intercarrier compensation rate for traffic

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[1] The complainant is Armstrong Telecommunications, Inc. ("Armstrong").

[2] This motion is filed on behalf of respondents Verizon Pennsylvania Inc., Verizon North LLC, MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services and MCI Communications Services Inc. (together, "Verizon").

that originates or terminates in Internet Protocol ("IP") format. Instead, Armstrong filed this formal complaint asking the Commission to treat VoIP traffic as traditional telephone traffic and to order Verizon to pay intrastate switched access charges on it.

2. Armstrong is a competitive local exchange carrier ("CLEC") that uses its connection to the public switched telephone network ("PSTN") to send IP traffic to and receive IP traffic from other carriers, including Verizon, for an affiliated cable telephony provider. Armstrong admits that all of the traffic coming from or destined to its cable affiliate is originated or terminated in IP format. (Armstrong Answer to New Matter ¶ 4).

3. Verizon attempted to deal reasonably with Armstrong and to avoid litigation by doing exactly what this Commission recognized as prudent and appropriate — approaching Armstrong "in order to initiate good faith negotiations for a traffic exchange agreement encompassing the subject of IP-enabled traffic."[3] Moreover, Verizon has continued to pay Armstrong at a rate of $0.0007 per minute for the disputed VoIP traffic pending its attempt to engage Armstrong in negotiations, which is the default rate for a substantial portion of the traffic that carriers exchange today (such as wireless and ISP-bound traffic).

4. Although Armstrong continues to insist that Verizon pay its tariffed intrastate switched access rates for IP-originated and IP-terminated traffic, Verizon generally is not paid tariffed access charges when Armstrong's VoIP customers place IP-to-PSTN calls to Verizon customers because Armstrong routes the bulk of its traffic indirectly through other carriers who are widely known to refuse to pay switched access charges on this VoIP traffic and pay Verizon at much lower rates, some lower than

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[3] *Palmerton Telephone Company v. Global NAPs South, Inc., etc.*, Docket C-2009-2093336 (Opinion and Order entered March 16, 2010) ("*GNAPs/Palmerton Order*") at 35.

$0.0007, or nothing. Armstrong here attempts to force Verizon to pay tariffed switched access rates on IP traffic, while continuing its practice of avoiding Verizon's switched access rates when the call direction is reversed.

5. On February 9, 2011 the FCC, the agency with exclusive jurisdiction over VoIP, confirmed that it is the appropriate regulatory body to set intercarrier compensation for VoIP traffic, and that it intends to do so in the near term. The FCC announced its intention to resolve the disputed issue that is at the heart of this case — how carriers should compensate each other on a fair and reciprocal basis for the exchange of VoIP traffic.[4]

6. The FCC's February 9, 2011 Notice of Proposed Rulemaking "recognize[d] the need for the [FCC] to move forward expeditiously" to resolve the "considerable dispute" over intercarrier compensation for VoIP traffic, an issue that is widely recognized to require uniform nationwide resolution by the FCC. (FCC 2/9/11 NPRM ¶ 613-614). The FCC intends to address this issue on an expedited schedule, ahead of its larger and more comprehensive effort to reform the existing intercarrier compensation regime. (FCC 2/9/11 NPRM ¶ 603-604).

7. A wide variety of parties — including this Commission — filed comments with the FCC on April 1, 2011. Reply comments were filed on April 18, 2011 and the matter is now ripe for the FCC's decision.

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[4] *Connect America Fund; a National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers; Developing a Unified Intercarrier Compensation Regime, etc.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, WC Docket No, 10-90, etc. (Feb. 9, 2011) (FCC 2/9/11 NPRM") (available on-line at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/FCC-11-13A1.pdf).

II. ARGUMENT

A. The Commission Should Dismiss The Complaint Because It Lacks Jurisdiction To Apply Armstrong's CLEC Access Tariff To VoIP Traffic.

17. The Commission lacks jurisdiction over Armstrong's claims seeking to apply its tariffed switched access charges to traffic that originates or terminates in IP format, due to Pennsylvania's Voice Over Internet Protocol Freedom Act, 73 P.S. § 2251.1, et seq. ("VoIP Freedom Act"). Accordingly, Armstrong's complaint must be dismissed.[5]

18. As "a creature of statute" this Commission "has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication" and must act within, and cannot exceed its jurisdiction.[6] "The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. A doubtful power does not exist. Such tribunals are extra judicial. They should act within the strict and exact limits defined."[7]

19. The Commission has already found that the cable telephony service provided by Armstrong's cable affiliate is an "IP-enabled" and "VoIP" service governed by the VoIP Freedom Act, and has therefore concluded that the Commission lacks jurisdiction over service complaints involving Armstrong's cable telephony service. *See*

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5 The Commission lacks jurisdiction for other reasons, including federal preemption. Verizon expects those issues to be clarified by the FCC's order and therefore does not raise them here, but reserves the right to challenge jurisdiction on other grounds in the future. Verizon's motion to dismiss is confined to a specific argument under Pennsylvania state law that the Commission did not consider in the *GNAPs/Palmerton* case due to the different facts presented there, as explained more specifically below.

6 *Feingold v. Bell of Pennsylvania*, 383 A.2d 791, 794 (Pa. 1977). *See also Loma, Inc. v. Pennsylvania Public Utility Commission*, 682 A.2d 424 (Pa. Cmwlth. 1996).

7 *Process Gas Consumers Group v. Pa. Public Util. Com*, 511 Pa. 88 (Pa. 1986) (quoting *Green v. Milk Control Commission*, 340 Pa. 1, 3, 16 A.2d 9, 9 (1940) *cert. denied* 312 U.S. 708, 61 S.Ct. 826, 85 L.Ed. 1140 (1941)).

Sandra Brown v. Armstrong Digital Services, Inc., d/b/a Armstrong Telephone, C-2008-2079810, 2009 Pa. PUC LEXIS 211 (ID of ALJ Corbett, May 12, 2009), adopted as the Commission's final order June 30, 2009 (agreeing with Armstrong that "Armstrong Telephone provides VoIP telephone service that this Commission does not regulate" by virtue of the VoIP Freedom Act).[8]

20. Similarly, as this Commission has recognized, "Pennsylvania's Voice-Over-Internet Protocol Freedom Act, P.L. 627 of 2008, codified at 73 P.S. § 2251.1 et seq., establishe[s] the Commission's jurisdictional boundaries over VoIP or IP-enabled services," and its application must be considered with regard to carrier-to-carrier disputes over compensation for VoIP traffic. *GNAPs/Palmerton Order* at 25-26.

21. The VoIP Freedom Act broadly removes all Commission jurisdiction over issues related to IP-enabled and VoIP services, providing that "[e]xcept as set forth in sections 5 and 6, notwithstanding any other provision of law, no department, agency, commission or political subdivision of the Commonwealth may enact or enforce, either directly or indirectly, any law, rule, regulation, standard, order or other provision having the force or effect of law that regulates, or has the effect of regulating, the rates, terms and conditions of VoIP service or IP-enabled service." 73 P.S. § 2251.4.

22. Unless a dispute falls under one of the narrow exceptions set forth in 73 P.S. § 2251.5 or 2251.6, the Commission lacks jurisdiction to regulate IP-enabled or VoIP service.

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[8] There is no dispute over the nature of the traffic in this case. Armstrong admits that all traffic that originates from or is destined to the end-user customers of its cable affiliate and that is exchanged with Verizon through Armstrong is "originated and terminated in IP-Protocol." (Armstrong Answer to New Matter, ¶ 4). *See* 73 P.S. § 2251.3 (defining "Internet Protocol" or "IP," "IP-enabled service" and "VoIP service").

23. The only exception that could conceivably apply to this dispute is Section 2251.6(1)(iv), which pertains to switched network access rates. "Nothing in this act shall be construed to modify . . . [t]he authority of a Commonwealth department, agency or commission to enforce applicable Federal or State statutes or regulations relating to . . . [s]witched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company." 73 P.S. § 2251.6(1)(iv).

24. In the *GNAPs/Palmerton* case — a case in which the Commission has already recognized that the VoIP Freedom Act would remove its jurisdiction over a dispute unless one of the enumerated statutory exceptions applied, *id.* at 25-26 — the Commission relied on Section 2251.6(1)(iv) to find jurisdiction.

25. The Commission concluded that this exception applied in the *GNAPs/Palmerton* case because "it is the question of 'switched network access' that is at issue here for the Palmerton PSTN facilities and the GNAPs traffic that these facilities terminate." *GNAPs/Palmerton Order* at 26.

26. The express terms of Section 2251.6(1)(iv) allow for the exception only in the case of "[s]witched network access rates or other intercarrier compensation rates for interexchange services *provided by a local exchange telecommunications company.*" (*emphasis added*).

27. However, in *GNAPs/Palmerton*, the switched network access services allegedly at issue were those of a "local exchange telecommunications company," namely, Palmerton. *See GNAPs/Palmerton Order* at 26, 31, 34 (recognizing that Palmerton was an "incumbent" carrier); Palmerton Complaint ¶ 3.

28. The term "local exchange telecommunications company" is defined under Chapter 30 of the Public Utility Code as "[a]n *incumbent carrier* authorized by the commission to provide local exchange telecommunications services." 66 Pa.C.S. § 3012 (emphasis added). This Commission has recognized that the defined term "local exchange telecommunications company" only includes ILECs and "no longer includes CLECs."[9]

29. There is no dispute that Armstrong is a CLEC, not an ILEC. *See* Armstrong Complaint § 3; CLEC Certification Orders entered at Docket A-311014. Because Armstrong is a CLEC, not a local exchange telecommunications company, its complaint regarding its switched access charges does not meet the statutory exception and the Commission lacks jurisdiction to hear this case.[10]

30. Because the Legislature expressly withheld from this Commission any jurisdiction to "enact or enforce, either directly or indirectly, any law, rule, regulation, standard, order or other provision having the force or effect of law that regulates, or has the effect of regulating, the rates, terms and conditions of VoIP service or IP-enabled service," (73 P.S. § 2251.4) and did not include a statutory exception to apply under the

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[9] *Petition of MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services for a Waiver of the Commission's Regulations at 52 Pa. Code §§ 53.58 and 53.39 to Permit Detariffing of Services to Enterprise and Large Business Customers*, Docket No. P-2009-2082991 (Opinion and Order entered June 3, 2009) ("*MCI Detariffing Order*") at 6. CLECs and cable telephony providers come under the term "alternative service provider," which is defined as "[a]n entity that provides telecommunications services in competition with a local exchange telecommunications company." 66 Pa. C.S. § 3012. The Commission has recognized that "Act 183 of the new Chapter 30 has differentiated the definition of an ILEC as a 'local exchange telecommunications company,' and that of a CLEC as an 'alternative service provider.' 66 Pa. C.S. § 3012. Thus, the new statute makes an express distinction between the two classes of providers of local exchange telecommunications services." *MCI Detariffing Order* at 6.

[10] It is not unreasonable that the Legislature preserved Commission jurisdiction over the access charges of incumbent carriers but not over switched access charges for cable telephony providers such as Armstrong. Rural ILECs have historically argued that they depend on contributions from switched access charges to subsidize local rates. But any associated policy considerations would only apply to ILECs, not to CLECs such as Armstrong.

facts here, the Commission must dismiss Armstrong's complaint seeking to enforce its tariffed switched access rates on traffic that Armstrong itself concedes is IP-enabled or VoIP traffic.[11]

B. If The Case Is Not Dismissed, It Should Be Stayed Pending The FCC's Consideration Of The Underlying Issues.

i. The Commission Should Stay This Case Pending Action In The FCC's Expedited Proceeding.

31. Aside from the fact discussed above that this Commission has no authority to determine intercarrier compensation obligations for VoIP traffic in this case, the FCC is considering the precise issue of intercarrier compensation for IP traffic and intends to resolve it in the near future. It would make no sense for this Commission to waste its resources trying to do the same thing. Therefore, if the Commission is not inclined to dismiss Armstrong's complaint at this time, it should, at a minimum, hold this matter in abeyance for a reasonable period of time to allow the FCC to provide the guidance it has promised in its 2/9/11 NPRM.

32. The Commission has recognized that it has the authority to stay its own proceedings to await developments in the federal forum where an ongoing federal case is considering issues expected to affect significantly a matter before this Commission. For

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[11] Because the VoIP Freedom Act only preserves authority "to enforce applicable Federal or State statutes or regulations," and not tariffs, the Commission determined that, by virtue of the exemption at Section 2251.6(1)(iv), it had jurisdiction in the *GNAPs/Palmerton* case to enforce 66 Pa. C.S. § 3017, which states that "[n]o person or entity may refuse to pay tariffed access charges for interexchange services provided by a local exchange telecommunications company." *GNAPs/Palmerton Order* at 26. This statutory provision, too, only applies to "local exchange telecommunications company" switched access charges, and not to CLEC switched access charges, and so provides no basis to address Armstrong's claims (even if VoIP traffic otherwise fell within the statute, and it does not). The VoIP Freedom Act also contains an exception preserving jurisdiction "to enforce applicable Federal or State statutes or regulations relating to rates, terms or conditions of protected services provided under tariffs which are subject to approval by the Pennsylvania Public Utility Commission." 73 P.S. § 2251.6(1)(v). However, "protected services" are defined under 66 Pa.C.S. § 3012 only to include specific "telecommunications services provided by a local exchange telecommunications company," and so this exception also does not apply to Armstrong's switched access rates for the same reason, because Armstrong is a CLEC.

example, the Commission has entered a number of orders staying action on two separate investigations of intrastate access rates to await an order in an ongoing intercarrier compensation proceeding before the FCC.[12]

33. This Commission has recognized from the outset that it is the FCC and not the state commissions that must make the call regarding jurisdictional issues relating to the exchange of VoIP traffic.[13] Even where the Commission reluctantly stepped in to address the dispute in the *GNAPs/Palmerton* case, it noted that it only did so because the FCC had not yet resolved the VoIP compensation issue and there was no sign that FCC action was imminent, and it deliberately confined its order to the specific facts of that case without making any sweeping pronouncements. Those facts included GNAPs' failure to pay *any* compensation on VoIP or other types of traffic, a much different scenario than is presented here.[14]

34. The issue of the appropriate compensation regime for IP-enabled and VoIP traffic is fully briefed before the FCC, as of yesterday. Moreover, the FCC now "recognize[s] the need for [it] to move forward expeditiously" to resolve the "considerable dispute" over intercarrier compensation for VoIP traffic, an issue that is

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12 *See, e.g., AT&T Communications of PA, LLC v. Verizon North Inc.*, No. C-20027195 (Opinion and Order entered January 8, 2007) (Opinion and Order entered September 12, 2008); *Investigation Regarding Intrastate Access Charge and IntraLATA Toll Rates of Rural Carriers and the Pennsylvania Universal Service Fund*, No. I-00040105 (opinion and Order entered August 30, 2005) (Opinion and Order entered November 15, 2006) (Opinion and Order entered April 24, 2008).

13 *See, e.g., Investigation into Voice over Internet Protocol as a Jurisdictional Service,* Docket No. M-00031707 (Opinion and Order entered May 24, 2004) at 4 ("it is premature to make conclusive jurisdictional or policy determinations or to take action until the FCC provides guidance.")

14 *GNAPs/Palmerton Order* at 42 (noting that its conclusion in that case was "[b]ased on the case-specific evidentiary record," including the fact that the record evidence did not establish that all of the traffic at issue was VoIP and the fact that GNAPS refused to negotiate a mutual compensation rate but rather took the position that it need not pay anything to terminate any of its traffic, wome of which was shown to be ordinary TDM traffic).

widely recognized to require uniform nationwide resolution by the FCC. (FCC 2/9/11 NPRM ¶ 613-614).

35. The FCC intends to address not only the issue of how VoIP carriers like Armstrong should be compensated, but also the arbitrage problem raised in Verizon's New Matter — specifically, the situation in which Armstrong demands payment from Verizon at relatively high intrastate switched access rates while Verizon is not always paid switched access on the VoIP traffic that comes to Verizon from Armstrong.[15] The FCC recognizes that there is "evidence of asymmetrical revenue flows for traffic exchanged between a traditional wireline LEC [i.e., Verizon] and a VoIP provider [i.e., Armstrong and its cable affiliate], with the VoIP provider (or its LEC partner) collecting access charges, for example, but refusing to pay them," which industry members argue presents an "economically irrational arbitrage opportunity" that will lead to results that are "discriminatory, inimical to the interests of consumers, and at war with the public interest." (FCC 2/9/11 NPRM at ¶ 610). The FCC intends to address these inequitable and anti-competitive compensation schemes as part of its current proceeding.

36. Putting aside the jurisdictional issues, from a practical perspective, litigation of the merits of Armstrong's claim would require the Commission and the parties to spend their time and limited resources trying to resolve the same VoIP compensation issue that is presently being addressed on an expedited schedule by the FCC. It also would put the Commission at risk of being inconsistent with the FCC's action and having its decision here invalidated. Indeed, Armstrong's own affiliates recently argued to this Commission that "it is better for Pennsylvania to see how the FCC

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[15] In the territories of some of the rural incumbent local exchange carriers Armstrong is charging nine cents a minute or more for intrastate switched access.

develops the details" of its larger intercarrier compensation reform "than it is to rush in ahead of it."[16]

37. If the Commission requires this complaint to proceed to the filing of testimony and a hearing, it promises to be controversial, complex, and vigorously litigated, with the outcome likely challenged on appeal, requiring an additional expenditure of Commission resources.

38. At least two federal courts have recently stayed their own consideration of a VoIP compensation dispute pending the FCC's decision, where "the main issue in this case is whether Plaintiffs' tariffed rates are even applicable to VoIP originated calls." *CenturyTel of Chatham, LLC v. Sprint Communs. Co. LP*, 2011 U.S. Dist. LEXIS 7132 (W.D. La. Jan. 24, 2011) (staying case for one year, following which "if any party is not satisfied that the FCC has made substantial progress toward deciding the matter, the party may file a motion to vacate the stay with this Court"); *see also Pac-West Telecomm, Inc. v. MCI Communications Servs., Inc.*, 2011 WL 1087195 (E.D. Cal. Mar. 23, 2011) (explaining that "opining on the compensation of VoIP technology . . . require[s] the expertise of the FCC," and that "efficiency requires staying this case . . . for six months in light of the 2011 NPRM"). This Commission should do the same here.

39. Administrative efficiency and the interest of orderly decision-making would best be served by staying this case or otherwise holding scheduling in abeyance pending the FCC's decision. Following the FCC's decision, the Commission may assess whether the FCC's action has resolved the parties' dispute or whether further action by this Commission is needed and is permissible under the VoIP Freedom Act.

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[16] *AT&T Communications of Pennsylvania v. Armstrong Telephone Company – Pennsylvania*, Docket No. C-2009-2098380, I-00040105, Exceptions of Armstrong Telephone Company – Pennsylvania, etc. (filed September 2, 2010) (pending).

40. Therefore, at a minimum, the Commission should stay this proceeding pending the completion of the FCC's proceeding on intercarrier compensation for VoIP. A stay will also allow the parties to focus on negotiating a commercial agreement to resolve the intercarrier compensation issue, as Verizon is doing with a number of other providers. In fact, Verizon has already executed a commercial VoIP compensation agreement with another provider, using the same $0.0007 per-minute rate that Verizon is currently paying Armstrong.

ii. The *Process Gas* Standard Does Not Apply To A Stay Request At This Stage Of The Proceeding, But In Any Event That Standard Is Satisfied.

41. The presiding officer's March 21, 2011 post-hearing order stated that Verizon's "Petition for Stay will be considered and decided under the criteria set forth in *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805, 808-809, (1983) which itself applies the standards set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958)." (3/21/11 Order at 4. n. 1).[17]

42. Verizon respectfully submits, however, that the Commission's authority to stay this case or hold scheduling in abeyance is not limited by the *Process Gas* standard. As the Pennsylvania Supreme Court explained in *Process Gas*, that standard was designed only to govern motions for a stay of a governmental agency final orders *pending appeal,* because "[a]n application for a stay pending appeal always involves a situation in

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[17] Under the *Process Gas* standard, "[o]n an application for a stay pending appeal the movant is required to make a substantial case on the merits and to show that without the stay, irreparable injury will be suffered. Additionally, before granting a request for a stay, the court must be satisfied the issuance of the stay will not substantially harm other interested parties in the proceedings and will not adversely affect the public interest." *Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 573 A.2d 1001, 1003 (Pa. 1990).

which the merits of the dispute have been fully considered in an adversary setting and a final decree rendered," and the Supreme Court therefore found that "it is essential that the unsuccessful party, who seeks a stay of a final order pending appellate review, make a strong showing under the *Virginia Jobbers* criteria in order to justify the issuance of a stay."[18]

43. In this case Verizon is not seeking a stay pending appeal and the Commission has not even begun to address the merits of this dispute. Rather, Verizon asks the Commission to exercise its discretion over scheduling issues before it commences litigation efforts or makes any decision on the merits in this open proceeding, rather than expending resources on this duplicative litigation. As the Commonwealth Court recognized in *Gwynedd Properties v. Bd. of Supervisors*, 635 A.2d 714, 718 (Pa. Commw. Ct. 1993), "the *Process Gas* test is inappropriate" in a case where no "final decision had been rendered on the merits." *Id.* Instead, the decision to grant a stay during pending proceedings is a matter in the "discretion" of the tribunal below because "[t]he trial court has the inherent power to stay the proceedings in one case during the pendency of another case which may resolve or moot the case which has been stayed." *Id.* It is well-settled that a pending case may be stayed to advance judicial or administrative economy and the interest of orderly decision-making without applying the *Process Gas* or similar standards.[19]

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[18] *Pa. Public Util. Com v. Process Gas Consumers Group,* 502 Pa. 545, 553 (Pa. 1983) (holding that "the standards established by the *Virginia Jobbers* court as refined by the *Washington Metropolitan Area* decision provide a rational basis for the issuance of *a stay pending appeal.*") (emphasis added).

[19] *See In re Penn-Delco Sch. Dist.,* 903 A.2d 600, 606-607 (Pa. Commw. Ct. 2006) ("[w]ithin its discretion, a trial court possesses the inherent power to stay a case during the pendency of another matter which may resolve the stayed case"); *Israelit v. Montgomery County,* 703 A.2d 722, 724 (Pa. Commw. Ct. 1997) (noting that "[t]rial courts have the inherent power to stay proceedings in a case pending the outcome of another case, where the latter's result might resolve or render moot the stayed case," and directing the court below "to enter an order pursuant to its inherent powers staying this

44. This Commission, too, possesses the discretion and inherent power to schedule its proceedings in a manner that best serves administrative efficiency. 66 Pa. C.S. § 703. The Commission does not apply the *Process Gas* standard to determine whether to stay a pending, open case. The Commission has recognized that where an ongoing federal proceeding is considering issues expected to affect significantly a matter before this Commission, it has the authority to stay its own proceeding to await developments in the federal forum. For example, the Commission has entered a number of orders staying action on two separate investigations of intrastate access rates to await an order in an ongoing intercarrier compensation proceeding before the FCC.[20] The Commission did not apply the *Process Gas* standard in these cases. Instead, it found that "the applicable legal standards" required a balancing of the interests involved, and it granted a stay where the benefit "of granting the stay . . . in our opinion, outweighs the potential benefits that could be achieved through a more immediate" litigation of the case.[21]

45. Here, the balance of the interests clearly weighs in favor of a stay. A stay will avoid procedural complexity and potential duplicative waste of administrative and party resources, and the FCC has stated its intention to decide the issue before it on an expedited basis and has already completed its comment schedule.

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case pending the Supreme Court's expected adjudication" in a case raising the same issue); *Singer v. Dong Sup Cha*, 379 Pa. Super. 556, 560-561 (Pa. Super. Ct. 1988) (the trial court "has the inherent, equitable power to stay the proceedings in the second suit during the pendency of the prior suit").

[20] *See, e.g., AT&T Communications of PA, LLC v. Verizon North Inc.*, No. C-20027195 (Opinion and Order entered January 8, 2007) (Opinion and Order entered September 12, 2008); *Investigation Regarding Intrastate Access Charge and IntraLATA Toll Rates of Rural Carriers and the Pennsylvania Universal Service Fund*, No. I-00040105 (opinion and Order entered August 30, 2005) (Opinion and Order entered November 15, 2006) (Opinion and Order entered April 24, 2008).

[21] *Investigation Regarding Intrastate Access Charge and IntraLATA Toll Rates of Rural Carriers and the Pennsylvania Universal Service Fund*, No. I-00040105 (opinion and Order entered August 30, 2005) at 17.

46. But even if the Commission applied the *Process Gas* standard – which it should not – in this instance the standard is satisfied.

47. Under the *Process Gas* standard, a party seeking a stay pending appeal must first make a strong showing that it is likely to prevail on the merits. *Process Gas*, 502 Pa. at 552. Verizon is likely to prevail on the merits, first because the Commission lacks jurisdiction to enforce Armstrong's CLEC switched access tariffs on VoIP traffic for the reasons discussed above, and, second, because as a substantive matter state access tariffs do not apply to VoIP traffic. VoIP traffic is interstate, information service traffic for jurisdictional purposes, and states are preempted from regulating the rates, terms, and conditions on which VoIP providers operate.[22] As such, two recent federal district court decisions have held that state tariffed access charge regimes do not apply to VoIP traffic.[23]

48. Next, under *Process Gas* a party seeking a stay must show that the balance of benefits and harms favors a stay, because there will be irreparable harm in the absence of a stay and the issuance of the stay will not substantially harm other interested parties or adversely affect the public interest. *Process Gas*, 502 Pa. at 552. In this case, the balance of benefits and harms weighs heavily in favor of a stay. Verizon and its customers will be irreparably harmed if Verizon is singled out and required to pay switched access rates on VoIP traffic where other carriers including Armstrong are able

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22 *See* Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004), *petitions for review denied, Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

23 *See PAETEC Communications, Inc. v. CommPartners, LLC*, No. 08-cv-397, 2010 WL 1767193 (D.D.C. Feb. 18, 2010); *Manhattan Telecommunications Corp. v. Global NAPs, Inc.*, No. 08-Civ-3829, 2010 WL 1326095 (S.D.N.Y. Mar. 31, 2010).

to avoid paying those rates for the same type of traffic pending the FCC's decision.[24] This Commission itself has recognized that perpetuating such asymmetrical compensation schemes is harmful to consumers and contrary to the public interest.[25] Verizon will continue to pay Armstrong at the rate of $0.0007, so Armstrong will be compensated for terminating traffic in the interim.

49. Also weighing in favor of a stay is the strong interest of this Commission, the affected parties and the public in having the matters at issue governed uniformly by the requirements of federal law, and having the governing legal standard decided correctly – both important considerations recognized by the Pennsylvania Supreme Court in *Process Gas*.[26]

III. CONCLUSION

50. For the foregoing reasons, the Commission should dismiss Armstrong's complaint because it lacks jurisdiction to enforce Armstrong's CLEC access tariff as to VoIP traffic. But even the Commission (incorrectly) concludes that it may have

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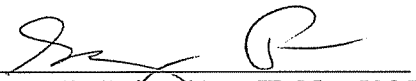
[24] Numerous providers in the industry are not paying traditional switched access charges on VoIP traffic. Contrary to the impression Armstrong tries to create, its dispute with Verizon over VoIP compensation is in no way extraordinary. As the FCC's 2/9/11 NPRM reflects, these collection disputes have become increasingly common because of the existing uncertainty about VoIP compensation obligations. They likely number into the hundreds, with some reaching back years. *See 2/9/11 NPRM* ¶ 610.

[25] Like the FCC, this Commission also disfavors asymmetrical arbitrage schemes such as Armstrong's attempt to collect access rates that it avoids paying, because they result in "an anticompetitive environment that artificially and inimically transmits inaccurate price signals to end-user consumers of telecommunications and communications services" and violate Chapter 30's directive to "[p]romote and encourage the provision of competitive services by a variety of service providers *on equal terms* throughout all geographic areas of this Commonwealth." *Palmerton Telephone Company v. Global NAPs South, Inc., etc.*, Docket C-2009-2093336 (Opinion and Order on Reconsideration entered August 3, 2010) ("GNAPs/Palmerton Recon Order") at 13-14 (quoting 66 Pa. C.S. § 3011(8)) (emphasis in original).

[26] *Process Gas*, 502 Pa. at 555 ("both the PUC and the public have an interest in having the substantial legal issues . . . decided correctly on the merits."). *See also MCI WorldCom, Inc. v. Pennsylvania Public Utility Commission*, 577 Pa. 294, 313-314, 844 A.2d 1239, 1250-51 (Pa. 2004) (recognizing the interest in having matters of local competition governed uniformly by federal law).

jurisdiction – or if it chooses not to decide the jurisdictional issue at this time – it would be wasteful and inefficient for the Commission to use resources trying to resolve this issue when the FCC is doing the same thing. If the Commission does not wish to address Verizon's motion to dismiss, it should order a stay of this proceeding until completion of the FCC's proceeding on VoIP compensation.

Respectfully submitted,



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