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May 19, 2011

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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**Via Federal Express**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> 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 the original and three copies of Verizon's Answer to the Motion of Armstrong Telecommunications Inc. for Partial Summary Judgment, 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/meb

**Via E-Mail and Federal Express**  
cc: The Honorable Dennis J. Buckley  
Attached Certificate of Service

**CERTIFICATE OF SERVICE**

I, Suzan D. Paiva, hereby certify that I have this day served a copy of Verizon's Answer to the Motion of Armstrong Telecommunications Inc. for Partial Summary Judgment, 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 19<sup>th</sup> day of May, 2011.

**VIA E-MAIL and FEDERAL EXPRESS**

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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU



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Attorney for Verizon

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Armstrong Telecommunications, Inc. :  
:   
Complainant, :  
:   
v. :  
:   
Verizon Pennsylvania Inc., Verizon North LLC, :  
MCImetro Access Transmission Services LLC :  
d/b/a Verizon Access Transmission Services and :  
MCI Communications Services Inc., :  
:   
Respondents. :

Docket Nos. C-2010-2216205  
C-2010-2216311  
C-2010-2216325  
C-2010-2216293

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SECRETARY'S BUREAU

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**VERIZON'S ANSWER TO ARMSTRONG'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Counsel for Verizon

Dated: May 19, 2011

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ARGUMENT ..... 2

    A. The Commission Should Dismiss or Stay the Case..... 2

    B. Disputed Issues of Material Fact Preclude Summary Judgment ..... 4

        1. The Facts Are Materially Different From Those in  
           *GNAPs/Palmerton*..... 6

            a. Verizon Attempted in Good Faith to Negotiate with  
               Armstrong. .... 7

            b. Verizon is Paying Armstrong Compensation for VoIP  
               Traffic Pending Negotiations..... 8

            c. Other Factual Differences ..... 10

        2. Public Policy Considerations Require Development of an  
           Evidentiary Record ..... 11

        3. Evidentiary Facts Are Relevant to a Federal Preemption Analysis  
           ..... 14

            a. The Details of Armstrong’s VoIP Services Are Relevant to  
               Determining Whether it is Jurisdictionally Interstate ..... 14

            b. The Commission Would Have to Examine the Evidence to  
               Determine Whether VoIP is an Information Service..... 17

        4. Evidentiary Facts are Relevant to the Nature of Armstrong’s  
           Traffic, and its Claims Regarding ICAs and its Access Tariff ..... 20

II. CONCLUSION..... 23

## I. INTRODUCTION

Armstrong's<sup>1</sup> summary judgment motion asks this Commission to ignore material facts that are in dispute, skip the development of an evidentiary record, and summarily rule that Verizon<sup>2</sup> must pay intrastate access rates on Voice over Internet Protocol ("VoIP") traffic. The motion should be denied.

As Verizon has previously explained in its motion to dismiss or stay, the Commission's lack of jurisdiction over VoIP traffic compensation was confirmed when the Voice over Internet Protocol Freedom Act ("VoIP Freedom Act") was signed into law. And if the Commission did have jurisdiction — which it does not — the Commission should not rush ahead to address Armstrong's claims while the issues central to this dispute are currently before the Federal Communications Commission ("FCC"). But even if the Commission erroneously decided to move ahead now with this proceeding, the Commission must deny Armstrong's summary judgment motion because there are material facts in dispute.

As the Commission itself has already emphasized, intercarrier disputes of this nature are usually "lengthy, detailed, fact-sensitive, and live evidentiary adjudications that involve the cross-examination of expert witnesses before administrative law judges."<sup>3</sup> Armstrong's claims here are no exception to this general rule, and nothing in Armstrong's motion proves otherwise.

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<sup>1</sup> The complainant is Armstrong Telecommunications, Inc. ("Armstrong").

<sup>2</sup> Respondents are 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").

<sup>3</sup> *Connect America Fund; a National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers; Developing a Unified Intercarrier Compensation*

Armstrong's motion is based entirely on an overreaching interpretation of this Commission's *GNAPs/Palmerton Order*, which Armstrong contends stands for the sweeping proposition that intrastate switched access rates apply to all VoIP traffic in Pennsylvania, in all cases, and under all sets of facts. But Armstrong's reading of the case is directly contradicted by the express language of the case itself. Contrary to Armstrong's suggestion, this Commission made clear in *GNAPs/Palmerton* that it was *not* announcing such a general rule, nor was it dispensing with the need to consider the specific facts in future cases. To the contrary, the Commission emphasized numerous times that its *GNAPs/Palmerton* decision was "[b]ased on the case-specific evidentiary record," and made "[i]n view of the specific facts that have been presented."<sup>4</sup>

Accordingly, if the Commission reaches the merits of Armstrong's arguments, it must deny Armstrong's summary judgment motion and allow for the development of evidence relating to the parties' specific dispute. In particular, Verizon must be provided the opportunity to show the Commission how the facts here differ in material respects from those in *GNAPs/Palmerton*.

## II. ARGUMENT

### A. The Commission Should Dismiss or Stay the Case

For all the reasons explained in Verizon's motion to dismiss or stay, the Commission should not proceed with this case now. Verizon's motion explains why the Commission lacks jurisdiction over this matter, which of course would preclude the

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*Regime, etc.*, WC Docket No, 10-90, etc, Comments of the Pennsylvania Public Utility Commission filed April 1, 2011 ("PUC FCC Comments 4/1/11") at 6-7 (Wood Verification, Exhibit 2).

<sup>4</sup> *Palmerton Telephone Company v. Global NAPs South, Inc., etc.*, Docket C-2009-2093336 (Opinion and Order entered March 16, 2010) ("*GNAPs/Palmerton Order*") at 43, 46.

Commission from entering summary judgment on behalf of Armstrong.<sup>5</sup> The Commission's lack of jurisdiction is a matter of both state and federal law. Armstrong takes issue with the plain preemption language of the state statute, the Voice Over Internet Protocol Freedom Act, 73 P.S. § 2251.1, et seq. ("VoIP Freedom Act"), but offers no reasonable argument as to why the statute does not apply.<sup>6</sup> And while the

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<sup>5</sup> It is well-settled that subject matter jurisdiction is a prerequisite to exercising the power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390, 152 Pa. Commw. 409 (Pa.Cmwlth. 1992), *app. denied*, 637 A.2d 293, 536 Pa. 633 (Pa. 1993) (lack of subject matter jurisdiction cannot be waived and court has a duty to raise lack of jurisdiction *sua sponte*).

<sup>6</sup> Armstrong argues that the VoIP Freedom Act does not apply because "enforcing intercarrier compensation between telecommunications carriers cannot in any way, be construed as regulating the rates terms and conditions of VoIP service." (Armstrong Br. at 30). According to Armstrong, 73 P.S. § 2251.4 only prohibits Commission regulation of "retail" VoIP services, not regulation of wholesale or carrier-to-carrier matters involving VoIP or IP-enabled services. (*Id.* at 30-31). But the statute does not distinguish between retail and wholesale "rates, terms and conditions." It refers broadly to "regulating, the rates, terms and conditions of VoIP service or IP-enabled service." Section 2251.6(1)(iv)'s reference to "intercarrier compensation" would be unnecessary if the statute were intended to address only retail VoIP services; thus, Armstrong's argument would violate the basic statutory construction principle against meaningless surplus language under Pennsylvania law. *Key Savings & Loan v. Louis John, Inc.*, 379 Pa. Super. 226, 232, 549 A.2d 988, 992 (1988) (the individual provisions of a statute must be interpreted to give effect to the entire statute because the legislature is presumed to have intended to avoid mere surplusage); *see also Habecker v. Nationwide Ins. Co.*, 299 Pa. Super. 463, 445 A.2d 1222 (1982). And if the Commission granted Armstrong's request to apply the intrastate access rate regime to calls delivered to or originated from VoIP subscribers, the Commission would, in fact, be regulating the retail VoIP service. An integral part of the retail VoIP service Armstrong offers includes the ability to make calls to and receive calls from Verizon's (and others') networks. A Commission ruling that intrastate access charges is the right measure of compensation for the aspect of the retail VoIP service that allows end users to make calls to and receive calls from the public switched telephone network ("PSTN") would regulate the VoIP service, and the entity providing it, just as surely as requiring a local exchange carrier to file tariffs to collect originating and terminating access charges on traditional voice calls regulates that carrier.

Armstrong also argues that it fits within the definition of a "local exchange telecommunications company" as used in 73 P.S. § 2251.6(1)(iv). (Armstrong Br. at 32). But as Verizon explained in its motion to dismiss or stay, Armstrong is a CLEC (not an ILEC like Palmerton), which this Commission has held is not a "local exchange telecommunications company" under Pennsylvania law. Incredibly, Armstrong takes issue with that threshold point by claiming that the definition of that phrase in 66 Pa. C.S. § 3012 is not applicable to the VoIP Freedom Act. (Armstrong Br. at 32). But Pennsylvania's Statutory Construction Act states that "[w]hen the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters . . . other statutes upon the same or similar subjects." 1 Pa.C.S. § 1921(c)(5) (emphasis added). It is therefore well-established that "[w]here a court needs to define an undefined term, it may consult definitions in statutes." *H.E. Rohrer, Inc. v. Zoning Hearing Bd. of Jackson Twp.*, 808 A.2d 1014 (Pa. Cmwlth. 2002). *See also Tink-Wig Mt. Lake Forest Prop. Owners Ass'n v. Lackawaxen Twp. Zoning Hearing Bd.*, 986 A.2d 935 (Pa. Commw. Ct. 2009); *Adams Outdoor Adver., L.P. v. Zoning Hearing Bd.*, 909 A.2d 469 (Pa. Commw. Ct. 2006).

Commission may not agree with Verizon on the clarity of federal preemption, as explained below, it could not rule on that issue without analyzing relevant facts.

Moreover, jurisdictional issues aside, as Verizon explained in its motion, the Commission should at a minimum stay this case until the FCC rules on its pending docket to avoid the risk of an inconsistent decision and waste of resources.<sup>7</sup> Indeed, this Commission acknowledged in its own comments to the FCC that that the proper compensation regime for VoIP traffic is something *the FCC* must decide.<sup>8</sup> With the FCC poised to do just that on an expedited track, proceeding with this case now would be inefficient.<sup>9</sup>

#### **B. Disputed Issues of Material Fact Preclude Summary Judgment**

Even if the Commission determines incorrectly to proceed with this case now, it may not resolve the case on summary judgment in light of numerous factual issues that would require resolution. The heart of Armstrong's summary judgment motion is its contention that this Commission's *GNAPs/Palmerton* order stands "for the comprehensive proposition that traditional compensation rules apply" to all VoIP traffic regardless of the specific facts or circumstances presented. (Armstrong Br. at 26). That

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The VoIP Freedom Act was adopted after the enactment of the current version of Chapter 30, the statute that establishes the parameters of the Commission's regulatory authority over telephone providers in general and intrastate access charges in particular. Chapter 30 is clearly another "statute[] upon the same or similar subjects" within the meaning of 1 Pa.C.S. § 1921(c)(5). The only reasonable conclusion is that when the legislature used terms that are defined in Chapter 30 in the VoIP Freedom Act without supplying an alternative definition, it intended them to have the same meaning that is given to them in Chapter 30.

<sup>7</sup> In addition to the courts Verizon listed as having stayed VoIP compensation disputes (Verizon Motion at 11), a stay was issued today in *CBeyond Communications LLC v. MCI Communications Services, Inc.*, No. 1:11-0693 (N.D. Ga., May 19, 2011) (issuing six month stay because "FCC action . . . will narrow – and could potentially eliminate – the issues in dispute.")

<sup>8</sup> See, e.g., PUC FCC Comments 4/1/11 at 4 (Wood Verification, Exhibit 2).

<sup>9</sup> The VoIP compensation issue has been fully briefed and the FCC commissioners have stated they may act "within a few months." See <http://beta.fcc.gov/blog/making-universal-service-and-intercarrier-compensation-reform-happen> (visited May 7, 2011) (Wood Verification, Exhibit 1).

is wrong. The Commission could not have been clearer in *GNAPs/Palmerton* that its decision was not a sweeping comprehensive pronouncement intended to foreclose individual factual considerations in the future, but rather it “confine[d] our decision in this matter to the specific facts of this case and to the parties before us.”

(*GNAPs/Palmerton Order* at 58; *see also* at 30 (basing its conclusions on “the evidentiary record”); at 42 (referring to making its decision based on “the present factual situation, and in accordance with the evidentiary record,”); at 43 (“[b]ased on the case-specific evidentiary record,”); and at 46 (“[i]n view of the specific facts that have been presented”)). On reconsideration, the Commission again emphasized that its conclusion was “based on the case-specific evidentiary record,” and “the specific facts that have been presented,” with respect to Global NAPs’ conduct.<sup>10</sup>

Consistent with its care in confining the *GNAPs/Palmerton* ruling to just the facts and circumstances before it, this Commission advised the FCC that state decisions on VoIP intercarrier compensation disputes “are usually reached after lengthy, detailed, fact-sensitive, and live evidentiary adjudications that involve the cross-examination of expert witnesses before administrative law judges (ALJs) and not just the mere conduct of administrative ‘paper hearings.’”<sup>11</sup> Although Verizon disagrees that a state commission is the appropriate forum to resolve a VoIP compensation dispute, if the Commission proceeds to do so here, Armstrong’s request that the Commission resolve this case as an “administrative paper hearing” cannot be squared with the Commission’s account before the FCC as to how it would handle a VoIP intercarrier compensation dispute.

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<sup>10</sup> *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 12, 14.

<sup>11</sup> PUC Comments to FCC 4/1/11 at 6-7 (Wood Verification, Exhibit 2).

Moreover, in considering a motion for summary judgment, the Commission “must examine the record in the light most favorable to the non-moving party,” giving that party “the benefit of all reasonable inferences.”<sup>12</sup> As discussed below, there are numerous material facts that require development here, including facts about the differences between this case and that of *GNAPs/Palmerton*. No decision can be made without first allowing Verizon to present evidence, cross-examine witnesses and have this dispute decided on a full record.

**1. The Facts Are Materially Different From Those in *GNAPs/Palmerton***

The Commission recognized in *GNAPs/Palmerton* that one of the facts to be examined in an intercarrier compensation dispute is whether a carrier attempted “to initiate good faith negotiations for a traffic exchange agreement encompassing the subject of IP enabled traffic.”<sup>13</sup> In that case, the Commission found material that GNAPs refused to pay anything for any of the traffic it terminated to Palmerton and only broached the subject of negotiation, without any accompanying payment, at the late stages of the litigation. The Commission noted that “[c]osts attach to the termination of any type of traffic” even VoIP traffic, and “Palmerton deserves compensation for the traffic that it terminates at its facilities.” (*GNAPs/Palmerton Recon Order* at 11). The Commission explained on reconsideration that the significant fact was that “GNAPs has not paid” anything to Palmerton, and noted that a belated offer to “negotiate” during the later stages

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<sup>12</sup> *Moses v. T.N.T. Red Star Express*, 725 A.2d 792, 795-96(Pa. Super. 1999), *appeal denied*, 559 Pa. 692, 739 A.2d 1058 (1999); *Mertz v. Lakotos*, 381 A.2d 501 (Pa. Cmwlth. 1976). *See also Marks v. Tasman*, 527 Pa. 132, 135, 589 A.2d 205, 206 (1991) (“[a]ll doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.”); *Pa. State Univ. v. County of Ctr.*, 532 Pa. 142, 145 (Pa. 1992) (*citing Musser v. Vilsmeier Auction Co., Inc.*, 522 Pa. 367, 369, 562 A.2d 279, 280 (1989)) (“Summary judgment may be entered only in those cases where the right is clear and free from doubt.”).

<sup>13</sup> *GNAPs/Palmerton Order* at 35.

of litigation and without any payment was not sufficient. (*Id.* 20-21). The facts on both negotiation and compensation are different here than they were in *GNAPs/Palmerton*.

**a. Verizon Attempted in Good Faith to Negotiate with Armstrong.**

In this case, Verizon *is* paying Armstrong for termination of its traffic and Verizon offered to negotiate mutual and reciprocal terms for the exchange of VoIP traffic. Contrary to Armstrong's assertions, it was Armstrong that categorically refused to negotiate.<sup>14</sup> Based on the Commission's observations in *GNAPs/Palmerton*, these facts are material to resolving a VoIP compensation dispute. The parties' conflicting accounts of the extent and nature of negotiation attempts, as well as the reasonableness of the rate Verizon is paying Armstrong pending negotiations, are among the fact disputes that prevent the Commission from granting summary judgment for Armstrong. Due process requires that Verizon have the opportunity to develop and present those facts in an evidentiary proceeding.

Had the Commission not been as careful it was to limit its decision to the specific facts of *GNAPs/Palmerton*, it would have undermined the incentive for carriers to negotiate voluntary traffic exchange agreements — an outcome that the Commission itself does not want to encourage. The Commission favors VoIP compensation agreements, and in fact noted in *GNAPs/Palmerton* that “various *voluntary* interconnection agreement arrangements have been approved by the Commission that

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<sup>14</sup> The Commission need only look at the e-mails attached as Armstrong's Exhibit 2 to the Cipoletti Declaration to see which party was negotiating in good faith (Verizon) and which party took an unyielding position and refused to negotiate (Armstrong). For example, in a December 10, 2010 string of e-mails, Verizon's Pat Merrick made a detailed settlement offer covering past due amounts, going forward rates and other items (Armstrong has redacted the substance of the offer). The Armstrong response was to insist that it would not consider anything but Verizon's payment of its access charges and “[w]e will be filing our case to resolve this with the PaPUC next week.”

address the exchange of VoIP traffic” at rates substantially lower than intrastate switched access.<sup>15</sup> The Commission also recognized that it would have been a legitimate and reasonable response to the dispute if GNAPs had approached Palmerton “in order to initiate good faith negotiations for a traffic exchange agreement encompassing the subject of IP enabled traffic.”<sup>16</sup> If the Commission grants Armstrong’s summary judgment motion, which assumes the Commission has already established a blanket rule that tariffed access charges apply to VoIP traffic, it will remove carriers’ incentives to negotiate VoIP compensation agreements in Pennsylvania.

**b. Verizon is Paying Armstrong Compensation for VoIP Traffic Pending Negotiations**

Armstrong concedes that Verizon has been paying it for terminating VoIP traffic, just not at a rate as high as Armstrong would like. Verizon proposed that the parties adopt this rate — \$0.0007 a minute — as a mutual and reciprocal rate for the exchange of VoIP traffic. Armstrong mischaracterizes Verizon’s position, contending that Verizon argues that \$0.0007 is the only rate that “lawfully applies” to this traffic and that it has not made an offer to negotiate. (Armstrong Br. at 10). Rather, in the absence of an FCC decision clarifying what, if any, rate lawfully applies for the termination of VoIP traffic, Verizon invited Armstrong to negotiate a mutually acceptable rate for this traffic and has been paying Armstrong at \$0.0007 in the interim.<sup>17</sup> Contrary to Armstrong’s arguments that this rate is “virtually nothing,” and has “no economic or historical significance,”

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<sup>15</sup> *GNAPs/Palmerton Order* at 34, n. 22.

<sup>16</sup> *GNAPs/Palmerton Order* at 35.

<sup>17</sup> It is true that Verizon has argued to the FCC that \$0.0007 per minute should be the default rate for the exchange of VoIP traffic in the absence of a commercial agreement. (VZ FCC Reply Comments at 12). The FCC is still considering that and other proposals. Verizon has opposed proposals for a “bill-and-keep” regime where carriers pay each other nothing to terminate VoIP traffic in the absence of an agreement. (*Id.*)

(Armstrong Br. at 2, 52-53), the \$0.0007 a minute rate is already widely in use in the industry. It is already the default rate for a substantial portion of the traffic that carriers exchange today (such as wireless and ISP-bound traffic), as a result of the FCC's mirroring rule.<sup>18</sup> Moreover, the market is already moving toward a default rate of \$0.0007 for VoIP traffic that connects with the PSTN. In just the last few weeks, Verizon Florida and a major cable company, Bright House Networks Information Services, settled an ongoing dispute and agreed to exchange certain VoIP traffic under their new interconnection agreement at a rate of \$0.0007 per minute.<sup>19</sup> Verizon also recently entered into a commercial agreement with Bandwidth.com for the exchange of VoIP traffic at \$0.0007 per minute.<sup>20</sup> And Verizon has entered into negotiated, publicly filed interconnection agreements with several carriers—including AT&T and Level 3—that established rates at or below \$0.0007 per minute for terminating local traffic and ISP-bound traffic.<sup>21</sup> Verizon Wireless, too, has entered into commercially negotiated agreements with several CLECs, including a nationwide agreement with Comcast, to exchange traffic at or below the \$0.0007 per minute rate.<sup>22</sup>

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<sup>18</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”) ¶ 89. As the FCC explained, “[t]o limit arbitrage opportunities that arose from ‘excessively high reciprocal compensation rates,’ the Commission adopted a gradually declining cap on intercarrier compensation for ISP-bound traffic, beginning at \$ .0015 per minute of use and declining to \$ .0007 per minute of use, the current cap. The Commission derived the rate caps from contemporaneous interconnection agreements, in which carriers voluntarily agreed to rates comparable to the rate caps adopted by the Commission.” *In re High-Cost Universal Serv. Support*, 24 FCC Rcd 6475 (F.C.C. 2008).

<sup>19</sup> Letter from Dulaney O’Roark, Verizon, to Ann Cole, Florida Public Service Commission, Florida PSC Docket No. O90501-TP, Attachment at 76 (April 28, 2011).

<sup>20</sup> See *Bandwidth.com Enters Into a Groundbreaking Commercial Agreement with Verizon for the Exchange of VoIP Traffic*, <http://bandwidth.com/about/read/verizonAgreement.html> (Jan. 18, 2011) (Wood Verification, Exhibit 3).

<sup>21</sup> See *Comments of Verizon and Verizon Wireless, Developing a Unified Intercarrier Compensation Regime*, WC Docket Nos. 05-337 et al., at 49-50 (Nov. 26, 2008) (Wood Verification, Exhibit 4).

<sup>22</sup> *Id.*

Indeed, one of the alternatives the FCC is considering in its VoIP compensation rulemaking is whether “all interconnected VoIP traffic be subject to . . . [a] defined rate, such as \$ 0.0007 per minute.” (2/9/11 NPRM ¶ 616). As both the FCC and the courts have recognized, the fact that “carriers have agreed to rates” for intercarrier compensation through voluntary, arms-length negotiations, is substantial evidence that those rates are just and reasonable.<sup>23</sup> Accordingly there is no basis for the Commission to conclude as a matter of law, without the consideration of facts such as those Verizon points to here, that the \$0.0007 rate is tantamount to paying nothing, as Armstrong asserts.

### c. Other Factual Differences

There are other material factual differences between this case and *GNAPs/Palmerton* that require this Commission to develop a factual record rather than accept Armstrong’s invitation to impose the *GNAPs/Palmerton* result as a “one-size-fits-all” resolution — if the Commission believes it has jurisdiction to act. For example:

- Palmerton was an RLEC, a group that has traditionally argued dependence on switched access revenue to meet regulatory and service obligations. Armstrong, by contrast, is a cable telephony provider with no basis to make similar claims about access revenue and with the full pricing and regulatory flexibility to recover its costs from its retail customers.
- GNAPs was, in Armstrong’s own words, a “bad actor,” (Armstrong Br. at 45), that paid nothing to terminate even traffic demonstrated to be TDM-originated and claimed the right to terminate all traffic to Palmerton for free. Verizon’s

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<sup>23</sup> *ISP Remand Order* ¶ 85; see also *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) (“Triennial Review Order”) ¶ 664 (finding that “arms-length agreements” demonstrate that the rate is “just and reasonable”); *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 530 (2008) (reaffirming that the *Mobile-Sierra* doctrine requires an agency to “presume that the rate set out in a freely negotiated . . . contract meets the ‘just and reasonable’ requirement imposed by law”).

actions on negotiation and compensation do not reflect the positions of a “bad actor.”

- GNAPs had no interconnection agreement or direct connection with Palmerton, and was sending a mixed stream of ordinary TDM and VoIP traffic indirectly through the tandem provider with no means for identifying VoIP traffic. Here, by contrast, Armstrong admits that all of the traffic at issue is IP-originated or IP-terminated.

## **2. Public Policy Considerations Require Development of an Evidentiary Record**

Armstrong concedes that its argument for the application of switched access rates is based in part on “public policy” that it claims comes from *GNAPs/Palmerton* (Armstrong Br. at 41). The facts here, though, are materially different so if the Commission decides incorrectly to consider “broader regulatory policy” issues, it must do so under the facts of this case. Indeed, policy concerns cut the opposite direction on the facts here. Armstrong essentially asks this Commission to force Verizon to pay switched access rates when a Verizon customer places a call to an Armstrong customer, while Verizon is not paid tariffed access charges much of the time when Armstrong’s VoIP customers place IP-to-PSTN calls to Verizon customers. This imbalance in the compensation occurs because Armstrong routes the bulk of its traffic indirectly through other carriers who are able to offer the best price through what Armstrong terms “least cost routing techniques” because they do not pay switched access charges on this VoIP traffic to the terminating carrier.

Contrary to Armstrong’s attempt to trivialize this problem, the FCC has recognized the anti-competitive effect of Armstrong’s current practices. 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 a result of its present proceeding. Like the FCC, this Commission also disfavors asymmetrical arrangements 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.”<sup>24</sup>

Armstrong concedes that it hands off “some of its traffic” to “third party interexchange carriers” who engage in what Armstrong terms “least cost routing techniques” and who may hand off the traffic to other carriers. (Armstrong Br. at 42).<sup>25</sup> If this Commission proceeds to the merits of this dispute, then it must develop an evidentiary record on, for example, how Armstrong is routing its traffic, whether it sends traffic through carriers known to dispute the application of access charges to VoIP, and to

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<sup>24</sup> *GNAPs/Palmerton Recon Order* at 13-14 (quoting 66 Pa. C.S. § 3011(8)) (emphasis in original).

<sup>25</sup> Armstrong contends that it delivered 38% of its traffic to Verizon directly during the week studied by Verizon. (Armstrong Br. at 42). But the vast bulk of the directly delivered minutes were for traffic classified as “local” and would be billed at the relatively low reciprocal compensation rates. As demonstrated by Verizon’s responses to Armstrong’s Requests for Admission, Verizon’s monthly bills to Armstrong for intrastate terminating switched access are minimal, under \$300, reflecting the fact that only a tiny portion of that traffic is delivered to Verizon directly. *See* Cipoletti Affidavit, Exhibit 6, Verizon Response to Request for Admission 20. By contrast, according to Armstrong, its monthly access billings to Verizon are approximately \$200,000 per month. *See* Cipoletti Affidavit, Exhibit 3, “Intra Billed, Total Verizon Accounts.” Thus, Armstrong’s billings to Verizon are nearly 700 times higher than Verizon’s billings to Armstrong.

what extent Armstrong benefits from its intermediary routing arrangements.<sup>26</sup> The Commission cannot merely take Armstrong's word, for purposes of summary judgment, that it only uses "reputable" carriers, that it does not know "which carriers actually deliver each of its calls" to Verizon and that it is not reasonable for Verizon to contend that Armstrong knows or "should know that Verizon is not being paid." (Armstrong Br. at 43). None of those alleged "facts" is "undisputed." Verizon has the right to seek discovery on them and test them through an evidentiary hearing.<sup>27</sup>

Indeed, many of the facts needed to develop a complete record here are in Armstrong's sole possession. For example, only Armstrong knows facts about its relationships with its wholesale providers, how Armstrong's pricing from such carriers is related to the VoIP nature of its traffic, and whether Armstrong's wholesale providers may themselves use intermediaries to terminate traffic originated by Armstrong's end users. The "procedural requirements demanded by rudimentary due process" require that Verizon "must at least be afforded a proper opportunity . . . to present its evidence with respect to" these and other relevant issues.<sup>28</sup>

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<sup>26</sup> Armstrong points out that Verizon is not billing Armstrong terminating charges on traffic that is indirectly delivered to Verizon by other carriers, as if this fact disposes of the entire issue. (Armstrong Br. at 45). But Armstrong misses the point. If Armstrong is benefitting from a lower cost structure because the carriers it uses to deliver its traffic are not paying access, then that is a relevant set of facts to be considered when deciding whether the Commission should force Verizon to pay switched access charges on the traffic it delivers to Armstrong, and whether enforcing such a rule would have anti-competitive and anti-consumer consequences.

<sup>27</sup> Ironically, Armstrong faults Verizon's traffic study, produced in discovery, because it is based on one week of data and does not identify "the carriers with whom Armstrong does business." (Armstrong Br. at 44). But the data in such studies are exactly the type of information to be considered in the full evidentiary proceeding that would be required if the Commission proceeds with this case. Indeed, a full evidentiary proceeding is necessary to allow Verizon the right to conduct additional studies of different periods to support its initial study and also to rely on Armstrong's admissions in discovery regarding the carriers with whom it does business.

<sup>28</sup> *Appeal of West Alexander*, 450 Pa. 453, 460 (Pa. 1973) ("Studying papers is not a hearing; passing on a report moving across one's desk is not a hearing. The very genius of American jurisprudence shines in the opportunity it affords every litigant to present his case openly, publicly and untrammled.")

### 3. Evidentiary Facts Are Relevant to a Federal Preemption Analysis

Armstrong argues that this Commission should decide that interconnected VoIP service is *not* jurisdictionally interstate, (Armstrong Br. at 24), and that VoIP traffic is *not* an “information service” under federal law. (Armstrong Br. at 33-34).<sup>29</sup> As explained above and in Verizon’s motion, the Commission should decline to do so, and should await the FCC’s guidance. But if the Commission nonetheless believes it has jurisdiction to consider these questions as an independent matter, and if it proceeds to address them now, then it cannot decide them in Armstrong’s favor on summary judgment. Instead it must allow for the development and presentation of relevant evidence relating to Armstrong’s VoIP service and the nature of the specific traffic that is in dispute between the parties.

#### a. The Details of Armstrong’s VoIP Services Are Relevant to Determining Whether it is Jurisdictionally Interstate

Armstrong contends that because the FCC did not explicitly preempt state jurisdiction over cable VoIP service in its landmark *Vonage* order,<sup>30</sup> this Commission is free to find that Armstrong’s VoIP traffic is *not* jurisdictionally interstate — at least until the FCC finds otherwise. (Armstrong Br. at 27). Armstrong is wrong. The United

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<sup>29</sup> If Armstrong’s traffic is jurisdictionally interstate, this Commission lacks jurisdiction over intercarrier compensation for the termination of such traffic. *See, e.g., Millenianet v. Pa. PUC*, 2009 Pa. Commw. Unpub. LEXIS 786, 5-6 (Pa. Commw. Ct. 2009) (“the PUC does not have jurisdiction over interstate telecommunications services” by virtue of 66 Pa.C.S. § 104, and issues relating to the adequacy or reasonableness of services and billing practices for interstate services are within the FCC’s exclusive jurisdiction). Similarly, state commissions are preempted from regulating information services. *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) (“*Vonage Order*”) ¶ 21, *petitions for review denied, Minnesota Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007). That national policy dates back to the 1960s, and a series of FCC orders “finding that economic regulation of information services would disserve the public interest” and that information services would be “best able to burgeon and flourish in an environment of free give-and-take of the market place.” *Id.* (internal quotation marks omitted).

<sup>30</sup> *See Vonage Order* ¶ 32.

States Supreme Court has made clear that state law is preempted not just where Congress or the FCC has stated expressly that state action is preempted; preemption also occurs where there “is an actual conflict between state and federal law.”<sup>31</sup> Moreover, the United States Supreme Court has rejected the view that “a formal agency statement of preemptive intent [is] a prerequisite to concluding that a conflict exists.”<sup>32</sup>

The FCC’s *Vonage Order*, upheld by the Eighth Circuit, found that *all* VoIP services having certain “basic characteristics” are “practical[ly] inseverab[le]”: that is, they cannot practically be split into separate interstate and intrastate components.<sup>33</sup> Although the FCC had only Vonage’s services before it, it made clear that it “would preempt state regulation” of any services sharing the same basic characteristics, to the same extent.<sup>34</sup> The FCC did not limit its conclusions in *Vonage* strictly to “nomadic” VoIP services (which can be used from multiple locations), as opposed to “fixed” VoIP services like Armstrong’s (which are associated with a particular location). The FCC made clear that “other types of IP-enabled services having basic characteristics similar to” Vonage’s service — a class the FCC expressly recognized included “cable companies” and other “facilities-based providers” — would also be jurisdictionally interstate.<sup>35</sup> For example, most VoIP services offer “a suite of integrated capabilities”

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<sup>31</sup> *Altria Group, Inc. v. Good*, 555 U.S., 70, 129 S. Ct. 538, 543 (2008); *see also* *Wyeth v. Levine*, 555 U.S. 555 (2009).

<sup>32</sup> *Geier v. American Honda Motor Co.*, 529 U.S. 861, 884 (2000).

<sup>33</sup> *Vonage Order* ¶ 32.

<sup>34</sup> *Id.*; *see also id.* ¶ 1 (stating that it is “highly unlikely that the Commission would fail to preempt state regulation of [facilities-based] services to the same extent”).

<sup>35</sup> *Id.* ¶¶ 25 n.93, 32. Indeed, the FCC cited an array of submissions from cable providers and their trade associations demonstrating that cable companies’ VoIP offerings share these basic characteristics. *See id.* ¶ 32 n.113. For example, the FCC pointed to Cox Communications’ statement that cable VoIP providers’ network design permits them to “offer a single, integrated service that includes both local and long distance calling and a host of other features that can be supported from national or regional data centers and accessed by users across state lines” to indicate that this service was also

that enables consumers to “originate and receive voice communications and access other features and capabilities.”<sup>36</sup> Tellingly absent from that list of “basic characteristics” of VoIP service is any requirement that a service must be portable in order for state regulation to be preempted.

Because of that omission, Verizon believes that the FCC has already determined all cable VoIP services to be inseverable and jurisdictionally interstate. But if the Commission disagrees, it would have to apply the relevant standard articulated by the FCC to the case-specific facts relating to Armstrong’s cable VoIP service. That would require the development of an evidentiary record exploring the extent to which Armstrong’s service has each of the basic characteristics the FCC identified in the *Vonage Order* that make it an inseverable, interstate service that is subject to the FCC’s exclusive jurisdiction. For example, the Commission would have to consider the extent to which Armstrong’s calling features are inextricably intertwined with other computing and information service functions as part of a single integrated service offering. Some cable VoIP providers, for example, allow customers to access their voicemail through a secure website and forward digitized voice messages to any e-mail address; route Caller ID information through a traditional Caller ID device, their personal computer or television, and receive notifications of incoming calls through instant messages or on their television screen; enable, disable and customize voice and video features over the

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inseverable. *Id.* The FCC also cited a filing from the National Cable & Telecommunications Association, which explained that “[c]able VoIP offers consumers an integrated package of voice and enhanced features that are unavailable from traditional circuit-switched service” *Id.* As the FCC explained, the “integrated capabilities and features” characteristics of VoIP “are not unique to [Vonage’s service], but are inherent features of most, if not all, IP-based services.” *Id.* ¶ 25 n.93.

<sup>36</sup> *Id.* ¶ 32.

Internet; enable distinctive rings for different callers; and establish rules for the selective handling of incoming calls.

The Commission also would have to consider whether Armstrong’s integrated features, functions and capabilities allow subscribers to conduct multiple simultaneous voice communications sessions and perform different types of simultaneous actions over Armstrong’s broadband network. The extent to which Armstrong and its customers do not distinguish between “local” and “long distance” calls and whether the service relies on Internet Protocol addresses that have no identifiable geographic location would also have to be examined. This would require evidence regarding the design of Armstrong’s network, including whether components used to provide integrated, IP-enabled features and capabilities are located *outside* of Pennsylvania.

Verizon is confident that with the proper evidentiary record before it and applying the guidance provided by the FCC in *Vonage* this Commission would have to conclude that the traffic at issue is interstate in jurisdiction. But this is not a matter that can be decided in Armstrong’s favor on summary judgment.

**b. The Commission Would Have to Examine the Evidence to Determine Whether VoIP is an Information Service**

There is no dispute that information services are subject to exclusive federal regulation, so Armstrong urges the Commission to decide that its VoIP traffic is *not* “information service” traffic under federal law. (Armstrong Br. at 34). But if the Commission believes that the FCC’s guidance does not already compel a finding that all cable VoIP services are “information services,” it must consider the factors set forth in *Vonage* and by the U.S. Supreme Court in its *Brand X* decision, to make that determination itself — again on a complete evidentiary record.

Under long-standing federal precedent, a service that offers the capability to perform a “net protocol conversion” — in this case, the conversion from IP to Time Division Multiplexing (“TDM”) protocol or *vice versa* — satisfies the federal definition of information service.<sup>37</sup> This Commission therefore must examine whether the traffic at issues includes a net protocol conversion, looking at the format in which the traffic originates and terminates.

Verizon believes that VoIP meets the federal statutory definition of an information service because it offers consumers an integrated suite of capabilities — not merely voice communication, but advanced features such as voicemail, online account configuration and management, and find-me/follow-me and other single-number/multiple-phone services — that allow consumers to “generat[e], acquir[e], stor[e], transform[], process[], retriev[e], utilize[e], or mak[e] available information via telecommunications.”<sup>38</sup> Because those capabilities are offered as part of a single, integrated, any-distance service — and cannot practicably be broken apart into

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<sup>37</sup> See, e.g., *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm’n*, 461 F. Supp. 2d 1055, 1082 (E.D. Mo. 2006). See also *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 977 (2005). VoIP services are also information services under the federal definition because they involve a net protocol conversion. When a VoIP customer places a call to, or receives a call from, the PSTN, the call is originated in one format (IP, if the call originates with a VoIP customer) and is terminated in another (time division multiplexing (“TDM”), if the call terminates with a traditional telephone customer). In the U.S. Supreme Court’s words, that “net protocol conversion” is what enables communication “between networks that employ different data-transmission formats.” *Brand X.*, 545 U.S. at 977.

In this case with the traffic flowing between Verizon and Armstrong, Verizon sends most calls to Armstrong in “standard PSTN format” (that is, TDM) and those calls terminate to the “ultimate end users” in IP format. In the other direction — from Armstrong’s VoIP end users to Verizon — the protocol conversion is from IP to TDM. Armstrong implies that the fact that the traffic sent by Verizon to Armstrong for the most part originates in TDM, is exchanged in TDM with Armstrong and is converted to IP by Armstrong’s cable affiliate before being terminated in IP bears some significance to the analysis. (Armstrong Br. at 15). It does not; this traffic is still undergoes a “net protocol conversion.” Verizon also originates and terminates some calls, to and from its VoIP customers, in IP format.

<sup>38</sup> 47 U.S.C. § 153(20).

component pieces — these services at a minimum “combine both telecommunications and information components” and as a result “are treated as information services.”<sup>39</sup>

The Commission may not agree with that assessment as a general matter, but it would have to take evidence regarding the relevant features and factors specific to Armstrong before it could determine that Armstrong’s service is not an information service. For example, the Commission would have to consider how Armstrong customers can take advantage of the benefits of IP technology, for example through integrated calling and messaging features and capabilities that allow them to manage their communications preferences and functions using their phone, computer or television. It would have to take evidence regarding the service’s use of information stored in various electronic databases — such as the databases that associate IP addresses with 10-digit telephone numbers and the off-network SS7 databases that house the Caller ID information used to show Armstrong customers who is calling them — because the ability to access, retrieve and use the information housed in such databases constitutes the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications” that defines an information service under federal law.<sup>40</sup>

The Commission also would have to look at the extent to which Armstrong’s customers have the capability to generate, acquire, store, transform, process, retrieve, utilize and make available information to control their communications interactively

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<sup>39</sup> See *PAETEC Communications, Inc. v. CommPartners, LLC*, No. 08-cv-397, 2010 WL 1767193 (D.D.C. Feb. 18, 2010) at \*6.

<sup>40</sup> Indeed, in *Brand X*, the Supreme Court upheld the FCC’s conclusion that the similar use of the Domain Name System (“DNS”) database – which “matches the Web page addresses that end users type into their browsers (or ‘click’ on) with the Internet Protocol addresses of the servers containing the Web page the users wish to access” – renders the broadband Internet service that cable companies provide an information service.

and/or remotely. These features, functions, and capabilities go well beyond those available with traditional circuit-switched telephone services and are tightly integrated and intertwined with the other capabilities enabled by a cable VoIP provider's IP network, thereby offering a wide array of capabilities for "generating, acquiring, storing, transforming, processing, retrieving, utilizing and making available information via telecommunications." The Commission would have to evaluate whether the evidence shows that the transmission component of Armstrong's cable VoIP service is "sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering." *Brand X*, 545 U.S. at 990.

In short, the Commission cannot decide, as a matter of law on summary judgment, that the traffic at issue is not information services traffic without reviewing the facts about that traffic, and the services Armstrong provides.

**4. Evidentiary Facts are Relevant to the Nature of Armstrong's Traffic, and its Claims Regarding ICAs and its Access Tariff**

Of course, there are other relevant facts that must be considered if the Commission were to proceed with this case. For example, summary judgment could not be granted without examining the nature of the VoIP calls at issue and whether they are all completed on an intrastate or interstate basis. And facts behind Armstrong's claims that the interconnection agreements between it and the Verizon ILECs, as well as its intrastate switched access tariff, require Verizon to pay access charges or reciprocal compensation charges on VoIP traffic would need to be fleshed out in an evidentiary proceeding as well. For example, Armstrong's claim that Verizon should have terminated the ICAs and filed a complaint against Armstrong's intrastate switched access

tariff before it could dispute and pay a rate other than what Armstrong has been billing (Armstrong Br. at 16-20) cannot just be accepted at the summary judgment stage.

Indeed, Armstrong’s description of the facts on these points is misleading. Armstrong fails to make clear that it only has ICAs with the two Verizon ILECs — Verizon Pennsylvania Inc. and Verizon North Inc. These ICAs do not apply to the other two respondents, MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services and MCI Communications Services Inc. But in any event, the ICAs do not require the payment of reciprocal compensation or tariffed switched access charges on VoIP traffic. Armstrong cites no authority to support its arguments. In fact, the cases where courts have interpreted ICAs to require the payment of tariffed access charges on VoIP traffic have turned on very explicit contract language.<sup>41</sup> Here, there is no language explicitly agreeing to pay intrastate access charges or reciprocal compensation on VoIP traffic or to pay intrastate rates contrary to the requirements of federal law. The ICAs do not support Armstrong’s argument that VoIP traffic is “reciprocal compensation” traffic. The term “reciprocal compensation traffic” excludes interstate traffic (ICA Interconnection Attachment § 2.81), and traffic “that is not subject to Reciprocal Compensation under Section 251(b)(5) of the Act.” (*Id.* § 7.2.3).<sup>42</sup> Armstrong also claims that the ICA requires payment of tariffed switched access charges on VoIP traffic because “to the extent that charges for a service are not identified in the

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<sup>41</sup> See, e.g., *Cent. Tel. Co. of Va. v. Sprint Communs. Co. of Va., Inc.*, 2011 U.S. Dist. LEXIS 20711, 3-4 (E.D. Va. Mar. 1, 2011) (relying on contract provision stating that “[v]oice calls that are transmitted, in whole or in part, via the public Internet or a private IP network (VoIP) shall be compensated in the same manner as voice traffic (e.g., reciprocal compensation, interstate access and interstate access).

<sup>42</sup> The end office reciprocal compensation rate in the ICAs is \$.000987 for Verizon Pennsylvania Inc. and \$.0030000 for Verizon North LLC, which are much lower than the switched access rates Armstrong charges. See Cipoletti Affidavit, Exhibit 6, Verizon Response to Request for Admission No. 25.

ICA, tariffs apply.” (Armstrong Br. at 19). But Armstrong’s argument begs the question, since it presumes this is the type of traffic to which intrastate switched access tariffed rates apply, but it is not. Armstrong points to no language in the tariff or the ICA that requires the payment of access charges on VoIP traffic.

Moreover, neither the ICAs nor the tariff require Verizon to pay Armstrong the billed rate pending resolution of the dispute even if the documents applied to VoIP traffic (which they do not), as Armstrong claims. According to the ICAs,

If any portion of an amount billed by a Party under this Agreement is subject to a good faith dispute between the Parties, the billed Party shall give notice to the billing Party of the amounts it disputes (“Disputed Amounts”) and include in such notice the specific details and reasons for disputing each item. A Party may also dispute prospectively with a single notice a class of charges that it disputes. Notice of a dispute may be given by a Party at any time, either before or after an amount is paid, and a Party’s payment of an amount shall not constitute a waiver of such Party’s right to subsequently dispute its obligation to pay such amount or to seek a refund of any amount paid. ***The billed Party shall pay by the Due Date all undisputed amounts.*** Billing disputes shall be subject to the terms of Section 14, Dispute Resolution.

ICA § 9.3. The ICA goes on to require the parties to engage in good faith negotiation for at least 45 days, and “[i]f the Parties have been unable to resolve the dispute within 45 days of the date of the initiating Party’s written notice, either Party may pursue any remedies available to it under this Agreement, at law, in equity, or otherwise, including, but not limited to, instituting an appropriate proceeding before the Commission, the FCC, or a court of competent jurisdiction. (ICA § 14.2). The ICA does not require payment of the disputed amount or any portion thereof at any point prior to the resolution of the dispute. Thus, if the Commission were to conclude erroneously that the ICA governed this dispute, it would need to consider as an evidentiary matter whether Armstrong engaged in good faith negotiations to rule on compliance with this provision.

Similarly, Armstrong’s access tariff states that:

The Customer shall notify the Company of any disputed items on an invoice within 90 days of receipt of the invoice. The Company will assess a late payment charge of up to the highest interest rate allowable by law per month for any past due balance that exceeds 30 days. If the Customer and the Company are unable to resolve the dispute to their mutual satisfaction, the Customer may file a complaint with the Pennsylvania Public Utility Commission in accordance with the Commission's rules of procedures.

Armstrong Pa. PUC No. 5, § 2.5.2(F). The tariff goes on to say that “[t]he late payment charge does not apply to unpaid balances associated with disputed amounts.” (*Id.* § 2.5.6). The tariff also does not require any portion of the disputed amount to be paid during the pendency of the dispute.

Thus, although Verizon continues to pay Armstrong at the rate of \$0.0007, there is no basis in contract or in law to require Verizon to pay Armstrong's full charges pending resolution of this dispute. But there are a number of factual issues intertwined with the contractual and tariff documents if the Commission were to decide incorrectly that they are relevant to this case.

## **II. CONCLUSION**

For the foregoing reasons and the reasons set forth in Verizon's motion to dismiss or stay, the Commission should not proceed with this case now. But if the Commission elects to move ahead, Armstrong's summary judgment motion must be denied to allow, at a minimum, the development of a full evidentiary record.

Respectfully submitted,



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Counsel for Verizon

Dated: May 19, 2011

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Armstrong Telecommunications, Inc.

Complainant,

v.

Verizon Pennsylvania Inc., Verizon North LLC,  
MCI metro Access Transmission Services LLC  
d/b/a Verizon Access Transmission Services and  
MCI Communications Services Inc.,

Respondents.

Docket Nos. C-2010-2216205  
C-2010-2216311  
C-2010-2216325  
C-2010-2216293

**VERIFICATION OF PHILIP J. WOOD, JR. IN OPPOSITION  
TO MOTION FOR SUMMARY JUDGMENT**

I, Philip J. wood, Jr. state that I am Director – State Government Relations, Public Affairs, Policy & Communications for Verizon, and that as such I am authorized to make this verification on behalf of Verizon Pennsylvania Inc., Verizon North LLC, MCI metro Access Transmission Services LLC d/b/a Verizon Access Transmission Services and MCI Communications Services Inc. (together, “Verizon”) in the above captioned matter.

1. A true and correct copy of the document that appears at the official Federal Communications Commission (“FCC”) Blog at <http://beta.fcc.gov/blog/making-universal-service-and-intercarrier-compensation-reform-happen> visited and saved on May 7, 2011, is attached hereto as Verizon Exhibit 1.

2. A true and correct copy of the Comments of the Pennsylvania Public Utility Commission filed April 1, 2011 in the FCC docket *Connect America Fund; a National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for*

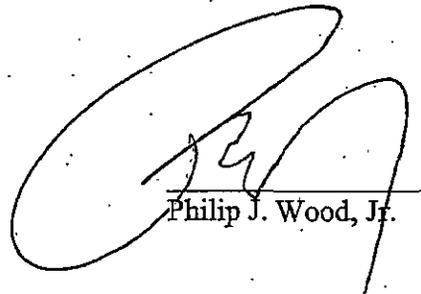
*Local Exchange Carriers; Developing a Unified Intercarrier Compensation Regime, etc.*,  
WC Docket No, 10-90, etc, is attached hereto as Verizon Exhibit 2.

4. A true and correct copy of the press release issued January 18, 2011  
entitled "Bandwidth.com Enters into a Groundbreaking Commercial Agreement with  
Verizon for the Exchange of VoIP Traffic," and available at  
<http://bandwidth.com/about/read/verizonAgreement.html> is attached hereto as Verizon  
Exhibit 3.

5. A true and correct copy of the cover and pages 49-51 of the Comments of  
Verizon and Verizon Wireless filed November 26, 2008 at the FCC docket *Developing a  
Unified Intercarrier Compensation Regime*, WC Docket Nos. 05-337 et al., at 49-50 is  
attached hereto as Verizon Exhibit 4.

The foregoing statements 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: May 19, 2011



Philip J. Wood, Jr.

**Verizon Exhibit 1**

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MAY 19 2011

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

## Official FCC Blog

### **Making Universal Service and Intercarrier Compensation Reform Happen**

**by: Julius Genachowski, Michael Copps, Robert McDowell, Mignon Clyburn, Meredith Baker – FCC Commissioners**

When we voted unanimously to approve the USF/ICC Transformation NPRM last month, each of us made clear that we are committed to reforming the Universal Service Fund (USF) and the Intercarrier Compensation (ICC) system, and to doing so as soon as possible. We must eliminate waste and inefficiency and modernize USF and ICC to bring the benefits of broadband to all Americans. We can't afford to delay.

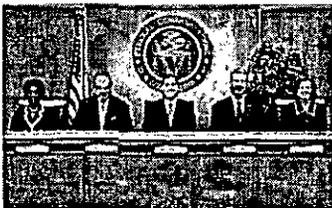
As part of our process, today we're announcing the first of a small number of open, public workshops to identify solutions to key issues in the USF/ICC proceeding. This first workshop at the FCC on April 6th will focus on ICC issues. At least one of the others will be held outside of Washington, DC, and all of them will be live-streamed on the Internet and will enable online participation. More details on the workshops will be released soon.

At these workshops, we're looking forward to robust discussions with a diverse group of stakeholders. And we're expecting participants to come prepared with responses to our reform proposals—and/or proposals of their own—that recognize that reform will entail compromise and shared sacrifice, as well as shared opportunity.

In addition to the workshops, we of course encourage parties to file comments in response to the Notice of Proposed Rulemaking (NPRM). As a reminder, the first comments on certain issues are due on April 1, and the last reply comments are due on May 23. While the NPRM included many reform ideas, there may be others that merit consideration as well. We remain open to considering all ideas put forth in the workshops and comments.

Once the record is complete in late May, we look forward to moving to an Order within a few months—it's going to be a busy spring and summer.

*The time is right to make reform happen, and to do so through an open, public, and participatory process.*



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**Verizon Exhibit 2**

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MAY 19 2011

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
Connect America Fund	)	WC Docket No. 10-90
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
High-Cost Universal Service Support	)	WC Docket No. 05-337
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
Lifeline and Link-Up	)	WC Docket No. 03-109

**COMMENTS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION  
(SECTION XV)**

The Pennsylvania Public Utility Commission (Pa. PUC) hereby submits these Comments to Section XV of the *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking* (NPRM) that was released by the Federal Communications Commission (FCC or Commission) on February 9, 2011. These Comments are submitted in accordance with Public Notice DA 11-141 that was released on March 2, 2011. The FCC has established the deadlines of April 1, 2011 and April 18, 2011 for the respective submission of Comments and Reply Comments on Section XV of the NPRM.

The Pa. PUC appreciates the opportunity to submit these Comments. As a preliminary matter, these Comments should not be construed as binding on the Pa. PUC in any proceeding pending before the Pa. PUC. Moreover, these Comments could change in response to

subsequent events. This includes a later review of other filed comments and legal and/or regulatory developments at the federal or state level.

## I. INTRODUCTION

The Pa. PUC welcomes the FCC's initiative in putting forward numerous reform proposals that address various and interlinked issues in the areas of the federal universal service fund (USF) and intercarrier compensation in its overall NPRM. The FCC's reform proposals that are intended to reduce inefficiencies and waste by curbing arbitrage opportunities in the existing intercarrier compensation system and contained in Section XV of the NPRM are particularly noteworthy.<sup>1</sup> However, the Pa. PUC continues to point out the fundamental principle that the area of intercarrier compensation is both legally and technically subject to the overall concept of federalism and the dual federal and state jurisdiction. Consequently, various legal and technical proposals that directly ignore or indirectly attempt to circumvent this principle are unlawful, technically inapplicable, and will not lead to the desirable intercarrier compensation reforms both at the federal and state levels.

## II. INTERCARRIER COMPENSATION AND VOIP TRAFFIC

### A. Classification of VoIP and Scope of VoIP Traffic

The FCC's classification of interconnected voice over the Internet Protocol (VoIP) as a Title II telecommunications service could have resolved many perceived issues in the area of intercarrier compensation a long time ago<sup>2</sup> where such issues involve the exchange, transport, and termination of interconnected VoIP and, potentially, other types of Internet Protocol (IP) based traffic as well. The FCC has consistently refrained from such a classification. For example, the FCC has avoided this issue in its December 23, 2010 *Net Neutrality Order* through the use of the term "specialized traffic" for VoIP calls,<sup>3</sup> and its solicitation of comments in the instant proceeding is largely premised on the lack of such a classification.<sup>4</sup> As the NPRM points

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<sup>1</sup> NPRM, Section II, Executive Summary, Figure 3, at 16, and Section XV, at 191.

<sup>2</sup> NPRM, n. 924, at 194, referencing *IP-Enabled Services*, WC Docket No. 04-36, Report and Order, 24 FCC Red 6039 (2009).

<sup>3</sup> *In re Preserving the Open Internet Broadband Industry Practices*, (FCC Rel. December 23, 2010), GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, FCC 10-201.

<sup>4</sup> NPRM, ¶ 618, at 196-197.

out, a number of states have reached their own determinations on VoIP classification.<sup>5</sup> Other states have reached their own individual statutory determinations on whether *retail* interconnected VoIP services should be subject to regulation.<sup>6</sup> However, as the Pa. PUC explains below, the classification of interconnected VoIP is not absolutely crucial in dealing with relevant intercarrier compensation matters where VoIP and other IP-based traffic are involved.

In view of the FCC’s laudable goal to avoid arbitrage inefficiencies in the area of intercarrier compensation, it is intuitive that “fixed facilities” and “nomadic” interconnected VoIP traffic should not be distinguished for intercarrier compensation purposes. Such a potential distinction would be artificial and ill-advised, and holds the potential of achieving results that would be contrary to the goal of avoiding arbitrage inefficiencies. At the end of the day, “traffic is traffic” no matter in *what protocol* it is initiated, transmitted, and eventually terminated with or without necessary protocol conversions. Furthermore, telecommunications carriers are constantly called upon and are legally obliged to transport, switch and terminate traffic of *various* protocols – including time division multiplexing (TDM), VoIP, and other protocols – through the use of the *same* physical facilities while accruing relevant economic costs for the use of such facilities. Thus, the distinction between “fixed” and “nomadic” VoIP traffic should be immaterial for intercarrier compensation purposes.

**B. Existing Intercarrier Compensation Rates Should Apply to Interconnected VoIP Traffic**

**1. The FCC Cannot Directly or Indirectly Preempt the States**

The dual federal and state jurisdiction in matters pertaining to intercarrier compensation is a *fundamental* premise that should remain unaltered when dealing with interconnected VoIP or other types of IP-based traffic.<sup>7</sup> The FCC has already recognized the *jurisdictional* division of VoIP traffic and associated revenues for the purpose of federal and state universal service fund (USF) contribution assessments.<sup>8</sup> The same logic of bi-jurisdictional regulatory responsibility

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<sup>5</sup> NPRM, n. 935, at 197.

<sup>6</sup> See generally Pennsylvania “Voice-Over-Internet Protocol Freedom Act,” 73 P.S. § 2251.1 *et seq.*

<sup>7</sup> *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355 (1986) (state commission has jurisdiction over intrastate rates and intrastate depreciation rates).

<sup>8</sup> NPRM n 937, at 197 referencing *Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, (FCC Rel.

should be applied to intercarrier compensation matters that involve intrastate and interstate VoIP traffic. Therefore, the FCC should “determine that interconnected VoIP traffic is subject to the same intercarrier compensation charges – intrastate access, interstate access, and reciprocal compensation – as other voice telephone service traffic both today, and during any intercarrier compensation reform transition.”<sup>9</sup>

Other proposed alternatives such as bill-and-keep for interconnected VoIP traffic or VoIP-specific intercarrier compensation rates can and do lead to the direct or indirect preemption of state jurisdiction over intrastate carrier access charges and reciprocal compensation rates and their appropriate application to intrastate interconnected VoIP traffic. Such a result would be unlawful and unwarranted. It is intuitive that irrespective of the VoIP classification issue, the states cannot have “split jurisdiction” when it comes to their respective abilities to assess interconnected VoIP providers state-specific USF contribution assessments (as the FCC has explicitly acknowledged) while being effectively prohibited from addressing intrastate intercarrier compensation matters that involve the wholesale transmission, switching and termination of interconnected VoIP traffic that accesses the physical facilities of telecommunications carriers at a non-zero economic cost.

Section 252(d) of the federal Telecommunications Act of 1996 (TA-96), 47 U.S.C. § 252(d), directs the FCC to preempt, to the extent necessary, the enforcement of any State or local statute, regulation, or legal requirement that is proscribed by Section 253(a), 47 U.S.C. § 253(a), and is outside the authority reserved for State and local governments under Section 253(b), 47 U.S.C. § 253(b). Section 253(a) provides:

[n]o State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Section 253(b) provides that nothing in Section 253:

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November 5, 2010), WC Docket No. 06-122, Declaratory Ruling, FCC 10-185. See also *In re Universal Service Contribution Methodology, et al.*, (FCC June 27, 2006), WC Docket No. 06-122 *et al.*, Report and Order and Notice of Proposed Rulemaking, FCC 06-94, ¶¶ 53-58, at 27-30; *Vonage Holdings Corp. v. FCC*, Nos. 06-1276, 06-1317, (D.C. Cir. June 1, 2007) (upholding FCC’s authority to assess “interconnected” VoIP providers for federal USF purposes without classifying “interconnected” VoIP service as a “telecommunications service”).

<sup>9</sup> NPRM ¶ 618, at 196.

Shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications, and safeguard the rights of consumers.

The FCC's approach in making preemption determinations is very careful and mindful of the precarious balance between state and federal regulation. The FCC has long had a two-part test for determining whether to preempt a state.

The FCC first determines whether the legal requirements are proscribed by the terms of Section 253(a). If the FCC finds that the provisions are proscribed by Section 253(a), considered in isolation, the FCC next determines whether they fall within the exception to Section 253(a) set forth in Section 253(b). The FCC only preempts if the requirements are impermissible under Section 253(a) and do not satisfy the requirements of Section 253(b). Importantly, the FCC does not preempt if the requirement proscribes Section 253(a) but meets Section 253(b) considered in isolation.<sup>10</sup> In addition, the FCC does not preempt if the requirement is competitively neutral and is necessary to advance certain specified public interest objectives.<sup>11</sup>

The FCC previously rejected attempts to preempt Pennsylvania law based on claims that Pennsylvania law on the legal treatment of wholesale access service was inconsistent with federal law.<sup>12</sup> The FCC rejected that claim and found that Pennsylvania law was entirely consistent with federal law in holding that wholesale and retail service constituted "telecommunications" service, particularly in the *DQE* and *Fiber Optics* decisions.

In *DQE* and *Fiber Optics*, the FCC examined Pennsylvania law and concluded that Pennsylvania, like federal law, recognized that wholesale common carrier service constituted "telecommunications" under state and federal law. Incumbent carriers cannot refuse access to Section 251 pole attachment rights simply because the transmission path services provided by a common carrier wholesale provider may accommodate "information" services. The FCC made

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<sup>10</sup> *In re: Silver Star Telephone Company*, Docket No. CCB Pol 97-1 (FCC September 24, 1997), paragraph 38.

<sup>11</sup> *In re: American Communications Services, Inc.*, Docket No. 97-100 (FCC December 23, 1999), ¶ 9.

<sup>12</sup> *In the Matter of DQE Communications, Inc. v. North Pittsburgh Telephone Company*, File No. EB-05-MD-027 (FCC February 2, 2007) (*DQE*); *In re: Fiber Technologies Networks, Inc. v. North Pittsburgh Telephone Company*, File No. EB-05-MD-014 (FCC February 23, 2007) (*Fiber Optics*) (Pennsylvania law and federal law are consistent on wholesale and retail service under state and federal law).

that determination by reliance on the *Time Warner* approach.<sup>13</sup> That same approach is appropriate here.

The FCC reasoned that wholesale service provided by a common carrier provider is “telecommunications” even if the services provided over that wholesale intercarrier connection may not be telecommunications. The FCC holdings in *Time Warner* and *DQE* or *Fiber Optics* do not stand for the proposition that a state-certificated common carrier provider of wholesale service is not responsible for remitting compensation to other carriers for access services rendered. This is particularly true when interconnected VoIP providers utilize the physical access facilities and services for the transmission, switching and termination of interstate and intrastate VoIP traffic at a non-zero economic cost. This alone invalidates the NPRM proposal that bill and keep arrangements somehow can be used in lieu of established interstate and intrastate intercarrier compensation mechanisms that can and do apply for jurisdictional VoIP traffic. Consequently, state jurisdiction over intrastate intercarrier compensation matters where VoIP traffic is implicated must be maintained.

**2. The States Have Successfully Been Resolving Intrastate Intercarrier Compensation Disputes Involving VoIP Traffic Through the Use of Existing Mechanisms and Common Carrier Principles**

The states have successfully been resolving intrastate intercarrier compensation disputes involving interconnected VoIP traffic through the use of existing mechanisms and common carrier principles. The resolution of such disputes is being carried out consistent with applicable federal guidelines (inclusive of FCC decisions) and individual state law. The resolution of these disputes has proceeded *independently* and does not *rely* on the non-existing FCC classification of interconnected VoIP traffic. Rather, the states have largely relied on the technical and legal fact that the common carrier wholesale transport and termination of traffic that also *includes* interconnected VoIP calls constitutes a *telecommunications* service that is properly subject to the bi-jurisdictional regulatory oversight of the states and the FCC. This approach is fully consistent with a number of prior FCC rulings including the *Time Warner*, *DQE* and *Fiber Optics* decisions. Furthermore, these state decisions are usually reached after lengthy, detailed, fact-

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<sup>13</sup> *In re Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55 (FCC March 1, 2007), Memorandum Opinion and Order, DA-07-709, *slip op.* (*Time Warner* FCC decision).

sensitive, and live evidentiary adjudications that involve the cross-examination of expert witnesses before administrative law judges (ALJs) and not just the mere conduct of administrative “paper hearings.” The experience of the Pa. PUC is not unique in this regard.

A voluminous evidentiary record was developed before the Pa. PUC during the course of the formal complaint adjudication involving the refusal of Global NAPs (GNAPs) to pay intrastate intercarrier compensation for the indirect termination of interexchange traffic to the public switched telephone network (PSTN) facilities of Palmerton Telephone Company (Palmerton) a rural incumbent local exchange carrier (ILEC) operating in Pennsylvania. This evidentiary record conclusively established that contrary to the GNAPs practice of non-payment of *both intrastate and* interstate intercarrier compensation for the termination of interexchange traffic at Palmerton’s PSTN facilities, other entities that also directly or indirectly terminate the same types of traffic in the switched access network of the same ILEC — including calls that originally are initiated in a fixed VoIP protocol —do pay the jurisdictionally prescribed and appropriate amounts of intercarrier compensation in accordance with Palmerton’s switched carrier access tariffs. The Pa. PUC Order states in relevant part the following:

The majority of Pennsylvania and federal legal authority that has already been discussed points to the inescapable conclusion that the Commission has the appropriate subject matter jurisdiction over Palmerton’s Formal Complaint. The next issue is whether this Commission’s intrastate subject matter jurisdiction and the proper and lawful application of intrastate carrier access charges are somehow altered or nullified because of the presence of the allegedly “unique” VoIP or IP-enabled calls in the traffic that is transported by GNAPs and indirectly terminated at Palmerton’s PSTN facilities.

The answer can be readily found in the evidentiary record that amply and credibly documents the routine application of Palmerton’s intrastate carrier access tariff to intrastate interexchange traffic containing VoIP or IP-enabled calls *irrespective* of their final communication protocol conversion in their transport and final termination by Palmerton. This routine application of Palmerton’s intrastate carrier access tariffs on the appropriate traffic has resulted in a corresponding absence of intercarrier compensation disputes in the ordinary and established course of intercarrier compensation business dealings.

For example, cable companies such as Adelphia, Comcast, and RCN *originate* fixed VoIP or IP-enabled wireline interexchange calls that terminate at Palmerton’s PSTN’s facilities. When Palmerton directly bills these companies under its intrastate carrier access tariff for the termination of these intrastate

interexchange calls to its facilities, Palmerton receives the appropriate amount of intercarrier compensation irrespective of whether these fixed VoIP or IP-enabled originated wireline calls have been converted to a TDM protocol prior to their final termination at Palmerton's PSTN facilities. Tr. 519-520. *See also* Palmerton Exh. 12 at 27-28 (Comcast Deposition), and Palmerton Exc. at 30-31.

The same also happens with the fixed VoIP or IP-enabled intrastate interexchange wireline calls that Palmerton terminates from its own affiliate Blue Ridge Digital Phone, a cable company, where such calls first transit through Sprint's common carrier telecommunications network prior to reaching Palmerton's PSTN. Sprint pays Palmerton the appropriate intrastate intercarrier compensation. Tr. 518-519, 536. Further, other companies, such as Service Electric, that also engage in the common carrier telecommunications transit transport of intrastate interexchange VoIP or IP-enabled originating wireline traffic behave in a similar and ordinary fashion. Tr. 631-633, 636. (The more unique aspects of intercarrier compensation that apply on intrastate interexchange wireless calls terminating at the PSTN facilities of an ILEC such as Palmerton are addressed below.)

*Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates*, Pa. PUC Docket No. C-2009-2093336, Order entered March 16, 2010, at 29-31 (Pa. PUC Order, footnotes omitted).<sup>14</sup>

The Pa. PUC also reached the following conclusions that address the applicability of the FCC's *Vonage* holding<sup>15</sup> in intrastate intercarrier compensation disputes where interexchange VoIP calls are implicated. These Pa. PUC conclusions are in line with other state utility commission and court decisions on intrastate intercarrier compensation disputes that involve the wholesale common carrier transport and termination of interexchange VoIP calls:<sup>16</sup>

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<sup>14</sup> The Pa. PUC also observed that the "evidentiary record indicates that at least four more companies, other than GNAPs, have refused to pay terminating access charges to Palmerton and other ILECs, with at least one more intercarrier compensation dispute between one or more ILECs and one of those four companies currently pending before" the Pa. PUC. Pa. PUC Order n. 20 at 31 citing Tr. 532.

<sup>15</sup> *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (FCC Rel. November 12, 2004), Memorandum Opinion and Order, FCC 04-267, 19 FCC Rcd. 22,404 (2004) (FCC *Vonage* decision), *aff'd*, *Minnesota Pub. Util. Comm'n v. FCC*, 483 F.3d 570 (8<sup>th</sup> Cir. 2007).

<sup>16</sup> Some of the relevant cases include: *Global NAPs Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 73 (1<sup>st</sup> Cir. 2006); *Verizon New York Inc. v. Global NAPS, Inc.*, 463 F.Supp.2d 330, 342 (E.D.N.Y. 2006), 2006 U.S. Dist. LEXIS 87085; *In re Sprint Communications Company L.P. v. Iowa Telecommunications Services Inc. d/b/a Iowa Telecom*, (Iowa Util. Bd. February 4, 2011), Iowa Util. Bd. Docket No. FCU-2010-0001; *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Tel. Co., and Wilton Telephone Co.*, DT 08-28, Order No. 25,043 (NH PUC November 10, 2009) (NH PUC Order); *Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc.*, Docket No.

The overwhelming weight of legal authority of Pennsylvania and federal law, as well as the relevant decisions of other state utility regulatory commissions and courts of appropriate jurisdictions that have dealt with a large number of intercarrier compensation disputes involving GNAPs, leads to the inescapable conclusion that the FCC *Vonage* decision is not relevant or material on matters pertaining to the intercarrier compensation dispute before us. We believe that the NH PUC [New Hampshire Public Utilities Commission] Order – and other similar decisions – that the FCC *Vonage* decision primarily affects the potential state role on market entry and regulation of nomadic VoIP service providers – is correct. NH PUC Order at 17-19. Here, as in many other jurisdictions, we are not dealing with the issue of market entry and regulation of nomadic VoIP service providers. Instead, we are dealing with the issue of GNAPs, a telecommunications utility carrier, which transports and terminates traffic at Palmerton's PSTN facilities. As in the case of the TDS ILECs [incumbent local exchange carriers] in New Hampshire, Palmerton indirectly receives and terminates traffic that has been transported by GNAPs via the Verizon PA [Verizon Pennsylvania Inc.] tandem switch on Market Street, Philadelphia, Pa. Tr. 667-668, GNAPs Exh. 6.

The FCC *Vonage* decision plainly does not, nor was it intended to, address the issue of whether intercarrier compensation applies for the use of Palmerton's PSTN [public switched telephone network] facilities when terminating VoIP calls. Costs indeed attach to the termination of *any type of traffic* that Palmerton receives, and such costs do not “magically disappear” when the traffic includes VoIP calls whether those are of the nomadic or fixed type. Under the existing and so far unaltered premises of both Pennsylvania and federal law, the Commission determines that Palmerton is entitled to compensation for the traffic that it terminates at its facilities.

Furthermore, indirect transmission of such traffic by GNAPs to Palmerton constitutes a common carrier telecommunications service that falls squarely within this Commission's jurisdiction under applicable Pennsylvania and federal law. Pennsylvania's Voice-Over-Internet Protocol Freedom Act, P.L. 627 of 2008, codified at 73 P.S. § 2251.1 *et seq.*, established the Commission's jurisdictional boundaries over VoIP or IP-enabled services. 73 P.S. § 2251.4. The Act clearly provides that the Commission retains jurisdiction over “[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). And 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. *See also* 66 Pa. C.S. § 3017 (“Refusal to pay access charges prohibited. — No person or entity may refuse to pay tariffed access charges for

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21905 (GA PSC July 29, 2009), Order Adopting in Part and Modifying in Part the Hearing Officer's Initial Decision, Document No. 121910 (GA PSC Order).

interexchange services provided by a local exchange telecommunications company.”).

Pa. PUC Order at 24-25 (emphasis in the original).

The Pa. PUC also ascertained that its decision to apply conventional intrastate carrier access charges to the wholesale common carrier interexchange traffic that terminated at Palmerton’s PSTN access facilities was fully consistent with the FCC’s *Time Warner* decision.

The Pa. PUC quoted the following relevant part of the FCC’s *Time Warner* decision:

17. Certain commenters ask us to reach other issues, including the application of section 251(b)(5) and the classification of VoIP services. [See, e.g., Qwest Comments at 6 (“The Nebraska position is obviously dependent on how the Commission ultimately classifies VoIP service”).] We do not find it appropriate or necessary here to resolve the complex issues surrounding the interpretation of Title II more generally or the subsections of section 251 more specifically that the Commission is currently addressing elsewhere on more comprehensive records. [See, e.g., *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, 20 FCC Rcd 4685 (2005).] For example, the question concerning the proper statutory classification of VoIP remains pending in the *IP-Enabled Services* docket. [*IP-Enabled Services*, 20 FCC Rcd at 10245. Similarly, we disagree with the assertions that it is necessary to complete the proceedings pending in the IP-enabled services, intercarrier compensation, and universal service dockets in order to take action on or instead of taking action on this Petition. See, e.g., NTCA Reply Comments at 5-6.] Moreover, in this declaratory ruling proceeding we do not find it appropriate to revisit any state commission’s evidentiary assessment of whether an entity demonstrated that it held itself out to the public sufficiently to be deemed a common carrier under well-established case law. In the particular wholesale/retail provider relationship described by Time Warner in the instant petition, the wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between those two parties. We make such an arrangement an explicit condition to the section 251 rights provided herein. [See, e.g., Verizon Comments at 2 (stating that one of the wholesale services it provides to Time Warner Cable is “administration, payment, and collection of intercarrier compensation, including exchange access and reciprocal compensation”); Sprint Nextel Comments at 5 (offering to provide for its wholesale customers “intercarrier compensation, including exchange access and reciprocal compensation”).] We do not, however, prejudge the Commission’s determination of what compensation is appropriate, or any other issues pending in the *Intercarrier Compensation* docket.

Pa. PUC Order at 12-13, quoting *Time Warner* FCC Decision, ¶ 17, at 10-11 (original FCC footnotes in brackets).

It is rather obvious that the Section 251, 47 U.S.C. § 251, interconnection arrangements that are addressed in the FCC *Time Warner* decision do not preclude the application of interstate and intrastate carrier access charges for the termination of interexchange traffic, and also apply the usual reciprocal compensation arrangements for the mutual movement and termination of *local* exchange traffic between interconnected wholesale CLEC and ILEC telecommunications carriers.

### **3. The Current System of Jurisdictional Intercarrier Compensation Treats VoIP Traffic in A Lawful, Technically Valid, and Technology Neutral Manner**

The current system of jurisdictional intercarrier compensation treats interconnected VoIP traffic in a lawful, technically valid, and technology neutral manner. The FCC should explicitly adopt the use of the existing intercarrier compensation mechanism – intrastate access, interstate access, and reciprocal compensation – for *all* traffic inclusive of VoIP calls. To do otherwise, it will simply invite an unnecessary but unending cycle of jurisdictional intercarrier compensation disputes that would center on the handling and termination of traffic that includes VoIP calls, and where such disputes will have to be extensively litigated both before the state utility regulatory commissions such as the Pa. PUC and the FCC. If the FCC were to discontinue the use of the present intercarrier compensation system for just VoIP calls while retaining it for other types of traffic that traverse and terminate at the same physical facilities of telecommunications carriers, this approach would create unwarranted anti-competitive results that are not sustainable on the basis of applicable federal and state law. The Pa. PUC addressed this issue in detail:

Now that the legal and technical reasons for exercising subject matter jurisdiction in this intercarrier compensation dispute have been discussed and the fundamental merits of the Palmerton Complaint have been sustained, broader regulatory policy issues must also be covered. In our May 5, 2009 Order, we noted that, if “certain competing telecommunications carriers pay intercarrier compensation for VoIP traffic termination, while others take the position that they may avoid such payments for the termination of similar traffic, there can be an anticompetitive environment that artificially and inimically transmits inaccurate price signals to end-user consumers of telecommunications and communications services.” Docket No. C-2009-2093336, Order entered May 5, 2009, at 8-9. One

of the statutory policy directives in Chapter 30 of the Public Utility Code mandates this Commission to:

Promote and encourage the provision of competitive services by a variety of service providers *on equal terms* throughout all geographic areas of this Commonwealth without jeopardizing the provision of universal telecommunications service at affordable rates.

66 Pa. C.S. § 3011(8) (emphasis added).

It is obvious that a telecommunications carrier that needs and obtains Palmerton's intrastate carrier access services at the prescribed jurisdictional rates that the carrier then pays to Palmerton will be competitively but artificially disadvantaged if another carrier obtains the same Palmerton carrier access services and pays no intercarrier compensation.

The FCC has expressed similar concerns:

The Commission [FCC] is sensitive to the concern that *disparate treatment* of voice services that both use IP technology and interconnect with the PSTN could have *competitive implications*. We note that all telecommunications services are subject to our existing rules regarding intercarrier compensation. Consequently, when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges. Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport. Thus our ruling here should not place AT&T at a competitive disadvantage. We are adopting this order to clarify the application of access charges to these specific services to remedy the current situation in which some carriers *may be paying access charges for these services while others are not*.

FCC AT&T IP in the Middle Order, ¶ 19 at 13-14 (emphasis added, citations omitted).

In view of the specific facts that have been presented, GNAPs' non-payment of intrastate carrier access charges to Palmerton cannot be condoned as a matter of law and as a matter of sound regulatory policy. This conclusion is based on existing Pennsylvania and federal law and this Commission's subject matter jurisdiction to resolve intercarrier compensation disputes.

Pa. PUC Order at 45-46.

The potential discontinuance of the existing intercarrier compensation mechanism for just VoIP calls will also create arbitrage inefficiencies and perverse disincentives for the necessary and *continuous* capital investments in access facilities inclusive of broadband by telecommunications common carriers. If such facilities can be utilized by other entities transmitting VoIP calls at zero cost or at a differential compensatory rate that is substantially lower than the economic cost of access and termination, then these telecommunications carriers will have no incentive to continue investing. The end result may be the unwarranted and the undesirable effects of “traffic jams” on the “information highway,” especially in areas where smaller and rural telecommunications carriers are the providers of last resort (POLR) for both PSTN voice and broadband access services.

Because the states have been successful in coherently and consistently managing intrastate intercarrier compensation disputes where VoIP traffic is implicated through the *existing* mechanisms and under applicable federal and state laws, certain entities have sought the FCC’s preemption of the state role in this area. A related petition has been pending before the FCC for more than a year.<sup>17</sup> The FCC should decline such misplaced invitations to preempt the states and should affirm the continuous application of existing intercarrier compensation mechanisms for interconnected VoIP traffic.

### C. Conclusion

The Pa. PUC continues to point out the fundamental principle that the area of intercarrier compensation is both legally and technically subject to the overall concept of federalism and the dual federal and state jurisdiction. Therefore, the FCC should not, either directly or indirectly, preempt the state when it comes to regulating intercarrier compensation charges for intrastate VOIP traffic.

States such as Pennsylvania have been successfully resolving intercarrier compensation disputes involving VOIP traffic through the use of existing mechanisms and common carrier principles. The resolution of these disputes has proceeded independently and does not rely on

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<sup>17</sup> NPRM n. 913, at 192 referencing *In re Global NAPs Petition for Declaratory Ruling and for Preemption of the Pennsylvania, New Hampshire and Maryland State Commissions*, WC Docket No. 10-60. See also Initial Comments of the Pa. PUC, April 2, 2010, and Reply Comments of the Pa. PUC, April 12, 2010, at WC Docket No. 10-60.

the non-existing FCC classification of interconnected VoIP traffic. Rather, the states have largely relied on the technical and legal fact that the common carrier wholesale transport and termination of traffic that also includes interconnected VoIP calls constitutes a telecommunications service that is properly subject to the bi-jurisdictional regulatory oversight of the states and the FCC. This approach is fully consistent with a number of prior FCC rulings including the *Time Warner*, *DQE* and *Fiber Optics* decisions. Furthermore, these state decisions are usually reached after lengthy, detailed, fact-sensitive, and live evidentiary adjudications that involve the cross-examination of expert witnesses before ALJs and not just the mere conduct of administrative “paper hearings.” The experience of the Pa. PUC is not unique in this regard, as a voluminous evidentiary record was developed before the Pa. PUC during the course of the formal complaint adjudication involving the refusal of Global NAPs to pay intrastate intercarrier compensation for the indirect termination of interexchange traffic to the PSTN facilities of Palmerton, a rural ILEC operating in Pennsylvania.

The current system of jurisdictional intercarrier compensation treats interconnected VoIP traffic in a lawful, technically valid, and technology neutral manner. The FCC should explicitly adopt the use of the existing intercarrier compensation mechanism – intrastate access, interstate access, and reciprocal compensation – for all traffic inclusive of VoIP calls. To do otherwise will simply invite an unnecessary but unending cycle of jurisdictional intercarrier compensation disputes that would center on the handling and termination of traffic that includes VoIP calls and will also create arbitrage inefficiencies and perverse disincentives for the necessary and continuous capital investments in access facilities inclusive of broadband by telecommunications common carriers.

### **III. PHANTOM TRAFFIC AND TRAFFIC STIMULATION**

#### **A. Phantom Traffic**

The Pa. PUC welcomes the proposed initiatives of the FCC that will address the issue of phantom traffic.<sup>18</sup> The Pa. PUC agrees that there is a need for additional rules that will address the need for sufficient identifying information for each call that transits through and terminates in a telecommunications or communications network. The Pa. PUC also shares the FCC’s concerns

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<sup>18</sup> NPRM ¶ 620, at 198.

that any adopted rules that will address the issue of phantom traffic should be of equal and more general applicability irrespectively of whether the transmitted call is utilizing the conventional TDM protocol and signaling system seven (SS7) or whether the call is originated and transmitted in IP.<sup>19</sup> The Pa. PUC as well as other states is willing to constructively cooperate with the FCC on this issue.

## **B. Traffic Stimulation**

The Pa. PUC also appreciates the FCC initiatives and proposals in addressing issues related to traffic stimulation or, alternatively, traffic pumping. The NPRM identifies access stimulation as “an arbitrage scheme employed to take advantage of intercarrier compensation rates by generating elevated traffic volumes to maximize revenues.”<sup>20</sup> In response to the NPRM’s invitation for comments the Pa. PUC states that it has not adjudicated formal complaint cases where traffic stimulation was the sole or primary issue.<sup>21</sup> The Pa. PUC urges the FCC to address this issue in cooperation with the states under the bi-jurisdictional framework that governs intercarrier compensation. Furthermore, the Pa. PUC expresses its concern and reserves its comments on whether issues of reciprocal compensation between competitive local exchange carriers (CLECs or competitive LECs) and wireless CMRS carriers properly belong in the area of traffic stimulation. The Pa. PUC believes that more generic issues of intercarrier compensation that involve *any* type of telecommunications carrier, should be addressed within the corresponding generic context of the NPRM itself and not in an isolated and piecemeal fashion as the NPRM proposes to do here.<sup>22</sup> To do otherwise invites unwarranted arbitrage inefficiencies and potentially raises unwelcome anti-competitive impacts. Finally, such proposals appear to unlawfully intrude into the state jurisdictional sphere of intrastate carrier access services and rates.

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<sup>19</sup> NPRM ¶¶ 627-628, at 202.

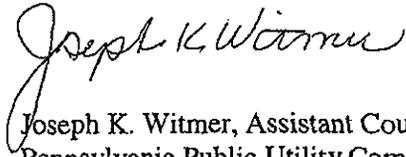
<sup>20</sup> NPRM, ¶ 636, at 205 (footnotes omitted).

<sup>21</sup> NPRM ¶ 675, at 219.

<sup>22</sup> NPRM ¶¶ 671-673, at 217-218.

The Pa. PUC thanks the FCC for providing an opportunity to file these Comments.

Respectfully Submitted,  
The Commonwealth of Pennsylvania  
Public Utility Commission



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April 1, 2011.

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## **Bandwidth.com Enters Into a Groundbreaking Commercial Agreement with Verizon for the Exchange of VoIP Traffic**

**Cary, NC - January 18, 2011** - Bandwidth.com, Inc., a privately held telecommunications company in Research Triangle Park, North Carolina, announced today that it has signed a commercial deal with the Verizon wireline companies under which the parties agree to terminate each other's VoIP traffic at a rate of \$0.0007 per minute.

The agreed upon rate, which applies to traffic that originates from or terminates to a VoIP end user, provides the companies with cost certainty for the traffic they exchange, thereby increasing the opportunity for both companies to make further investments in innovative services that benefit their customers.

"For too long, uncertainty over what charges apply to VoIP traffic has served as a wall to the innovations customers want and the lower prices they need," said John Murdock, President of Bandwidth.com. "We are delighted to be working with Verizon in reaching a commercial deal that hopefully will serve as a path for the industry and service providers to move forward and better serve customers."

"This agreement demonstrates how VoIP and other innovative services can flourish through private agreements. We know from our experience first hand how such services can spur economic growth and workplace productivity, while lowering costs and generating job growth," Murdock noted.

For all business-related inquires please call 866-578-8999 or visit <http://bandwidth.com/enterprise/>.

### **About Bandwidth.com**

Bandwidth.com is among the fastest growing communications networks, providing annually millions of phone numbers and billions of minutes of calls for over 6,000 business customers in all fifty states. Founded in 1999, Bandwidth.com is a profitable company located in Research Triangle Park, NC. For more information, please visit <http://www.bandwidth.com>.

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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link Up	)	WC Docket No. 03-109
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Numbering Resource Optimization	)	CC Docket No. 99-200
	)	
Implementation of the Local Competition	)	
Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Developing a Unified Intercarrier Compensation	)	
Regime	)	CC Docket No. 01-92
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
IP-Enabled Services	)	WC Docket No. 04-36

**COMMENTS OF VERIZON AND VERIZON WIRELESS**

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November 26, 2008

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that parties have already negotiated in the marketplace. Finally, individual state rate determinations will likely spawn court challenges that will further delay implementation of a new intercarrier compensation regime.

Instead, the more sensible and efficient approach would be for the Commission to rely on evidence of negotiated, market outcomes to conclude that \$0.0007 per minute is a “reasonable approximation of the additional costs” of terminating calls and to cap the final uniform default terminating rate that can be set by the states at that level. *See* 47 U.S.C. § 252(d)(2)(A)(ii). The Commission first adopted the \$0.0007 per minute rate in crafting the current rules governing ISP-bound traffic and the mirroring rule, drawing upon then-“recently negotiated interconnection agreements,” which showed a “downward trend in intercarrier compensation rates.” *ISP Remand Order* ¶ 85. As the Commission explained at that time, to the extent that all of a carrier’s costs are not recovered through the \$0.0007 per minute rate, the carrier may recover them from its own end users. *Id.* ¶¶ 71, 83-85. Seven years later, the \$0.0007 per minute rate is still consistent with market outcomes. Verizon has entered into, and publicly filed, interconnection agreements with a number of carriers, including (pre-merger) AT&T and Level 3, that set a rate at *or below* \$0.0007 per minute for terminating local traffic and for ISP-bound traffic, demonstrating that the “trend toward substantially lower [intercarrier compensation] rates,” *ISP Remand Order* ¶ 83, has continued.<sup>64</sup>

Notably, the widespread use of rates at or below \$0.0007 per minute is not limited to carriers exchanging traffic subject to the ISP-bound traffic rule or mirroring rule. For

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<sup>64</sup> *See also* Ex Parte Letter from Level 3 Communications to Marlene Dortch, FCC, CC Docket No. 99-68, WC Docket No. 01-92, at 5-6 (Aug. 18, 2008) (“*Level 3 Ex Parte*”) (Level 3 providing examples of negotiated agreements at or below the \$0.0007 per minute rate).

example, traffic exchanged between CMRS providers and CLECs is not subject to either the ISP-bound traffic regime or the mirroring rule, yet Verizon Wireless has entered into commercially negotiated agreements with at least 25 CLECs, including Comcast, to exchange traffic at or below the \$0.0007 per minute rate.<sup>65</sup> The Commission can reasonably conclude that carriers would not agree to terminate traffic at rates or below \$0.0007 per minute – whether in the context of ISP-bound traffic, the mirroring rule, or in other agreements – unless such a rate, together with end user recoveries, provided a “reasonable approximation of the additional costs” of terminating that traffic.<sup>66</sup> And, as the draft orders themselves note, the Commission has recognized that the “just and reasonable” standard of Sections 201 and 202 does *not* require cost-based rates.<sup>67</sup> Indeed, the Commission and courts have long recognized that rates set through market-based negotiations are instructive in determining appropriate – and “just and reasonable” – compensation rates. *See, e.g., ISP Remand Order* ¶ 85.<sup>68</sup> The Commission can therefore

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<sup>65</sup> Verizon Wireless has negotiated agreements with at least three different CLECs in five states in which the parties voluntarily agreed to the \$0.0007 per minute rate. Verizon Wireless has also negotiated at least 22 bill-and-keep agreements with CLECs, including Comcast. Verizon Wireless’ bill and keep agreement with Comcast was filed in 29 states.

<sup>66</sup> *See Level 3 Ex Parte* at 12-13.

<sup>67</sup> *See Appendix A* ¶ 300, *Appendix C* ¶ 295 (recognizing that “the Commission has, in fact, adopted regulatory approaches that deviated from cost-based ratemaking” and citing examples).

<sup>68</sup> *See also Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958, ¶ 39, ¶ 40 n.136 (2007) (finding that “commercially negotiated rates” provide “just and reasonable prices”), *petitions for review dismissed, Covad Commc’ns. Group, Inc. v. FCC*, Nos. 07-70898 et al. (9th Cir. June 14, 2007); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 664 (2003) (finding that “arms-length agreements . . . to provide [an] element at [a] rate”

rely on evidence of negotiated, market outcomes to conclude that \$0.0007 per minute is a “reasonable approximation of the additional costs” of terminating calls and to cap the final uniform default terminating rate that can be set by the states can set under Section 252(d)(2) at \$0.0007 per minute.

Indeed, relying on market outcomes in this manner would be consistent with the deregulatory goals of the Act. In Section 252(d)(2)(B), Congress provided that neither the Commission nor the states were to conduct “rate regulation proceeding[s] to establish with particularity the additional costs of transporting and terminating calls,” indicating a clear preference that detailed cost proceedings not be used in determining a “reasonable approximation of [] additional costs.” This provision of the statute further supports relying on the market evidence supporting a terminating rate of \$0.0007 per minute, rather than a theoretical cost model.

Neither does the Eighth Circuit’s opinion regarding “proxy” rates in *Iowa Utilities Board* stand as an obstacle to this market-based approach.<sup>69</sup> The Eighth Circuit invalidated the proxy rules based on concerns of judicial estoppel and because the proxies themselves were based on a cost model (TELRIC) that the Eighth Circuit had deemed

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“demonstrate[s]” that the rate is “just and reasonable”), *aff’d in pertinent part, USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 543 U.S. 925 (2004); *Illinois Pub. Telecomms. Ass’n v. FCC*, 117 F.3d 555, 562 (D.C. Cir. 1997) (in competitive markets, the Commission may “conclude that market forces generally will keep prices at a reasonable level”). *See also Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (holding, in an analogous context, that an agency “may rely upon market-based prices . . . to assure a ‘just and reasonable’ result”); *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 128 S. Ct. 2733, 2737 (2008) (reaffirming that the Mobile-Sierra doctrine requires an agency to “presume that the rate set out in a freely negotiated . . . contract meets the ‘just and reasonable’ requirement imposed by law”).

<sup>69</sup> *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8<sup>th</sup> Cir. 2000), *rev’d in part, Verizon Commc’ns. Corp. v. FCC*, 535 U.S. 467 (2002).

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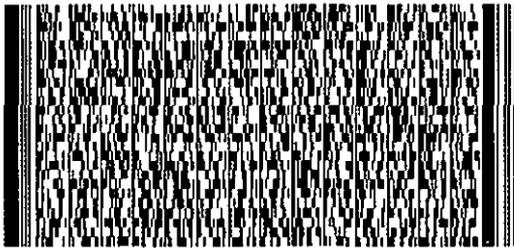
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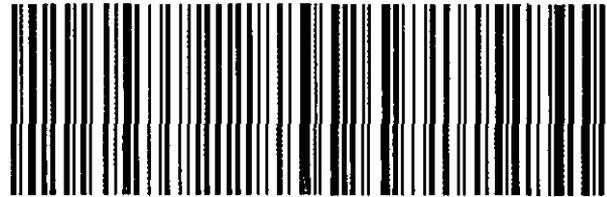
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