



THOMAS, LONG,  
NIESEN & KENNARD

*Attorneys and Counsellors at Law*

Norman J. Kennard  
Direct Dial: 717.255.7627  
nkennard@thomaslonglaw.com

May 19, 2011

*Via Hand Delivery*

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street – Filing Room (2<sup>nd</sup> Floor)  
Harrisburg, PA 17105-3265

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 for filing with the Commission is the original and three (3) copies (plus one for each additional docket number) of the Answer of Armstrong Telecommunications Inc. to the Motion to Dismiss or Stay of Verizon Pennsylvania Inc., Verizon North LLC, MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services and MCI Communications Services Inc. A copy of this document has been served in accordance with the attached Certificate of Service.

If you have any questions with regard to this filing, please direct them to me. Thank you for your attention to this matter.

Very truly yours,

THOMAS, LONG, NIESEN & KENNARD

By:

  
Norman J. Kennard

cc: Dennis J. Buckley, Presiding Administrative Law Judge

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**Before The  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**Administrative Law Judge  
Dennis J. Buckley, Presiding**

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

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**ANSWER OF ARMSTRONG TELECOMMUNICATIONS INC. TO  
MOTION TO DISMISS OR STAY  
FILED BY VERIZON PENNSYLVANIA, INC.,  
VERIZON NORTH LLC, MCIMETRO ACCESS TRANSMISSION  
SERVICES, LLC, D/B/A VERIZON ACCESS TRANSMISSION  
AND MCI COMMUNICATIONS SERVICES INC.**

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David Reams Jamieson, ID No. 65678  
General Counsel  
Armstrong Holdings, Inc.  
One Armstrong Place  
Butler, PA 16001

Norman J. Kennard, ID No. 29921  
THOMAS, LONG, NIESEN & KENNARD  
212 Locust Street, Suite 500  
P.O. Box 9500  
Harrisburg, PA 17108-9500

*Attorneys for  
Armstrong Telecommunications Inc.*

DATE: May 19, 2011

Armstrong Telecommunications, Inc. (“Armstrong”) hereby answers the Motion to Dismiss or Stay (“Motion”) filed by Verizon Pennsylvania Inc., Verizon North LLC (together “Verizon ILECs”) MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services and MCI Communications Services Inc. (collectively “Verizon”) with the Pennsylvania Public Utility Commission (“Commission”) on April 19, 2011.

**I. REPLY TO BACKGROUND**

Verizon has obviously decided to argue its case on the basis of “spin.”<sup>1</sup> An old litigation adage states that “when the law is against you, argue the facts; when facts are against you, argue the law; when both are against you, attack your opponent.” This later tactic is adopted in Verizon’s Motion.

*Verizon’s arrogance is manifest in the first paragraph of its Motion where it claims that “[t]his dispute arises because Armstrong refuses to negotiate with Verizon to arrive at a mutually acceptable and reciprocal intercarrier compensation rate...”*<sup>2</sup> In many ways, this statement captures the essence of all that is wrong with Verizon’s approach in this case. It is inconceivable that Verizon believes that anyone could be convinced that it “attempted to deal reasonably with Armstrong and to avoid litigation” by approaching Armstrong “to initiate good faith negotiations for a traffic exchange agreement.”<sup>3</sup> Anyone reading Verizon’s August 27th letter to Armstrong quickly apprehends that Verizon has no real, good faith intention of negotiating for anything

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<sup>1</sup> “...spin is a form of propaganda, achieved through providing an interpretation of an event or campaign to persuade public opinion in favor or against a certain organization or public figure. While traditional public relations may also rely on creative presentation of the facts, “spin” often, though not always, implies disingenuous, deceptive and/or highly manipulative tactics.” [http://en.wikipedia.org/wiki/Spin\\_%28public\\_relations%29](http://en.wikipedia.org/wiki/Spin_%28public_relations%29)

<sup>2</sup> Verizon Motion at 1 (¶ 1).

<sup>3</sup> Verizon Motion at 2 (¶ 3).

other than what Verizon has already imposed via self-help (a rate that pays Armstrong nearly nothing for the use of its network in support of Verizon's toll customers' traffic).<sup>4</sup>

Rather than provide a complete and fair factual background of the dispute, Verizon, without any extrinsic support, attempts to portray Armstrong as an irrational villain that plays both sides of the fence. This is an inaccurate and self-serving attempt to distract the Commission from Verizon's own behavior, which has been and continues to be egregious.

Verizon uses four (4) major fictions to attempt to shift the responsibility for its actions to Armstrong:

**Verizon Fiction No. 1. This dispute arises because Armstrong refused to negotiate.**<sup>5</sup> We are here, in fact, because Verizon suddenly and unilaterally repudiated Armstrong's State Access Tariffs and the Interconnection Agreements executed in 2006, which remain currently in effect, that specify the rates to be paid by Armstrong and Verizon. Verizon undertook no less than a full breach of those agreements, following none of the established procedures required to raise a question about rates. Having complied with the Verizon ICAs and parties' respective tariffs for five years, Verizon's abrupt, one-sided decision to no longer pay the established rates and, instead, tender a self-help payment of vastly reduced compensation for both local and toll traffic termination (an 87% reduction) is the true genesis of this dispute.

Verizon's continuing "short" payment of the inapplicable rate of \$.0007/MOU and refusal to pay anything else is why Armstrong brought this complaint. Verizon simply nominated itself as the decision maker, adopting a "so sue me" attitude, while continuing to demand Armstrong's access services, but offering the lowest rate possible

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<sup>4</sup> Verizon's August 27, 2010 letter is Armstrong Exhibit 1 to its Motion for Partial Summary Judgment. Armstrong requests that its Motion for Partial Summary Judgment be incorporated by reference into this Answer.

<sup>5</sup> Verizon Motion at 1 (¶ 1).

next to nothing. The simultaneous failure of Verizon to seek permission or trigger arbitration is why Armstrong was forced to act. That is why “this dispute arises.”

**Verizon Fiction No. 2. Verizon attempted to “deal reasonably” with Armstrong.**<sup>6</sup> This is a subsidiary argument to Fiction No. 1, whereby Verizon sweepingly proclaims that its “kidnap-and-ransom” approach to negotiations with Armstrong was undertaken in “good faith.” This façade also is transparent. There was no notice or conciliatory approach. There was no acknowledgement of existing legal obligations.

Clearly, there were other legitimate options available to Verizon; like those specified in both the applicable ICAs, tariffs or the Public Utility Code, including:

- Providing notice of ICA termination and seeking to renegotiate with Armstrong;
- Challenging the ICA-specified rates, as the ICA allows; or
- Filing a complaint, as the tariff specifies.<sup>7</sup>

Verizon chose not to avail itself of these options. Instead, it simply refused to pay the agreed upon rates for services it continues to receive, opting instead for a much lower rate of its own choosing.

There is nothing remotely close to “good faith” about Verizon’s approach to compensating Armstrong for the use of its network. The Verizon ICAs and Armstrong’s tariff legally bind the parties and cannot be simply ripped up and ignored as Verizon proposes.

Not surprisingly, Verizon’s legal justification for its action is similarly specious.

Verizon relies upon the Federal Communication Commission’s (“FCC”) *Vonage*

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<sup>6</sup> Verizon Motion at 2 (¶ 3).

<sup>7</sup> See Armstrong Motion for Partial Summary Judgment at 55-56.

*Decision*<sup>8</sup> that never addressed compensation aspects of VoIP traffic and importantly, was focused solely upon nomadic VoIP traffic that has no bearing here.<sup>9</sup> Further, it must be noted that the *Vonage Decision* was issued by the FCC *almost a full year prior* to Verizon and Armstrong agreeing to the very rates that Verizon now says are unlawful. Indeed, in recent comments to the FCC, Verizon concedes as much.<sup>10</sup>

**Verizon Fiction No. 3. There is no mutually agreed-to rate and, therefore, \$.0007 per minute is reasonable.**<sup>11</sup> A mutually agreed-to set of rates for *both* toll and local traffic became effective by mutual assent of the parties on June 3, 2005 and was approved by this Commission. Until Verizon's recent refusal to pay, those rates were never in dispute, and Verizon has paid them for the prior five years.<sup>12</sup> The \$.0007/MOU rate has no application to the traffic exchanged between Verizon and Armstrong. While it is true that the FCC has, in the past, used the \$.0007 per minute rate as a default in the case of one-way local traffic destined to a dial-up Internet Service Provider, the traffic here clearly is not ISP-bound.

**Verizon Fiction No. 4. Verizon was provoked and is reacting to Armstrong's routing of toll traffic through other carriers "known to refuse to pay".**<sup>13</sup> This sweeping attempt to shift blame is refuted by Verizon's own traffic study, answers to interrogatories and admissions.<sup>14</sup> Simply put, Verizon's misplaced argument would hold

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<sup>8</sup> *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267, Memorandum Opinion and Order, released November 12, 2004, at ¶ 3 ("*Vonage Decision*").

<sup>9</sup> See Armstrong Motion for Partial Summary Judgment at 11 (fn 19).

<sup>10</sup> See discussion *infra*.

<sup>11</sup> Verizon Motion at 1 (¶ 1) and 2 (¶ 3).

<sup>12</sup> Armstrong Motion for Partial Summary Judgment at 16-20 and Exhibits 8 and 9.

<sup>13</sup> Verizon Motion at 2 (¶ 4).

<sup>14</sup> See Armstrong Motion for Partial Summary Judgment at 42 - 50.

Armstrong responsible for the actions of other carriers over which Armstrong has no control. Verizon agrees that Armstrong is not liable for such payments.

Further, Verizon's assertion that other carriers do not pay is factually disproved by its own evidence. Verizon is paid either tariffed or contractually agreed-to rates on 95% of the traffic originating on the Armstrong network and received by Verizon. On those *de minimus* amounts upon which the delivering carrier has protested Verizon's rate, Verizon has undertaken no action to collect. These facts, however, do not matter, as Verizon has conceded that liability for terminating LEC's access rates is upon the delivering carrier and Armstrong is not liable to Verizon for these payments.<sup>15</sup> When Verizon traffic was found in the traffic delivered to Palmerton Telephone, the remedy was to sue Global NAPs, not cease payment to Verizon. Yet, that is exactly what Verizon has done here – sought to hold the originating carrier liable and not the delivering carrier.

Each of these claims was anticipated by Armstrong in its Motion for Partial Summary Judgment, and Armstrong asks Your Honor to refer to that document for further detailed discussion of these points.

## II. REPLY TO ARGUMENT

### A. There is No Basis to Dismiss Armstrong's Complaint.

Verizon has filed an untimely motion alleging lack of Commission jurisdiction over Armstrong's dispute. Such a filing could have and should have been submitted as a preliminary objection within twenty (20) days of service of the complaint as recognized under the

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<sup>15</sup> *Id.* at 45-46, 50.

Commissions' regulations.<sup>16</sup> There are no facts nor law upon which Verizon relies that were not available to Verizon when it filed its Answer on January 10, 2011. That was the proper time for a motion to dismiss and Verizon's request for such a decision now is out-of-order. Instead, Verizon's request for dismissal should be treated for what it is, a procedurally deficient attempt to counteract the Motion for Partial Summary Judgment that Verizon knew Armstrong would be filing on that same date.

Procedural deficiencies aside, Verizon's motion also fails on the merits and should be denied. For example, Verizon's reliance on the "Voice-Over-Internet Protocol Freedom Act"<sup>17</sup> is misplaced and overreaching. The Act proscribes regulation of "the rates, terms and conditions of VoIP service or IP-enabled service."<sup>18</sup> Verizon argues that enforcing intercarrier compensation between telecommunications carriers<sup>19</sup> is tantamount to regulating the retail rates, terms and conditions of VoIP service and, thus, violates the Act. This "indirectly-regulating-VoIP-services" argument is no different than arguing that the FCC's *Vonage Decision* precludes the collection of intercarrier compensation, a position which has been repeatedly rejected. As this Commission stated in the *Palmerton Opinion*:

...we are not dealing here with the retail services of an interconnected albeit nomadic VoIP service provider. Neither are we trying to apply regulation that would have had the potential of touching the intrastate retail operations of an interconnected nomadic VoIP provider such as Vonage...<sup>20</sup>

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<sup>16</sup> 52 Pa. Code § 5.101(a)(1).

<sup>17</sup> 73 Pa. C.S. § 2251.1 *et seq.*

<sup>18</sup> 73 Pa. C.S. § 2251.4. ("Except as set forth in sections 5 and 6, notwithstanding any other provision of law, no department, agency, commission or political subdivision of the Commonwealth may enact or enforce, either directly or indirectly, any law, rule, regulation, standard, order or other provision having the force or effect of law that regulates, or has the effect of regulating, the rates, terms and conditions of VoIP service or IP-enabled service.").

<sup>19</sup> See Armstrong Motion for Partial Summary Judgment at 36-39.

<sup>20</sup> *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates*, Docket C-2009-2093336, Opinion and Order entered March 16, 2010 ("*Palmerton Opinion*") at 27; See also *Palmerton Opinion* at 29 ("Again, in contrast to the *Vonage v. NE PSC* federal court decisions, this Commission is not dealing here with jurisdictional traffic allocations that relate to the retail operations, services, and revenues of a nomadic VoIP provider.").

Those same facts apply here. Armstrong is a telecommunications service provider certified by this Commission to provide telecommunications services, including access and local call termination. It is not the cable company and the regulation of retail rates, terms and conditions of the cable company voice product is not even remotely raised by Armstrong's complaint.

Verizon seeks to muddy the water on this issue by relying upon the Sandra Brown complaint.<sup>21</sup> This attempt, however, must also fail as the entity at issue in the Brown complaint is not the same entity that instituted this case. For purposes of background, Sandra Brown brought a complaint before the Commission alleging "various deficiencies relating to the installation of cable, Internet and telephone service provided by Armstrong Digital Services, Inc., d/b/a Armstrong Telephone [this is the cable company]."<sup>22</sup> It was dismissed by ALJ Corbett, after Ms. Brown failed to appear, based upon the following conclusion:

Armstrong Telephone provides VoIP telephone service that this Commission does not regulate. It is neither a regulated local exchange carrier nor a regulated competitive local exchange carrier. Consequently, the Commission has no jurisdiction over the subject matter that Complainant wishes to bring before it. Therefore, the complaint will be dismissed.<sup>23</sup>

Contrary to the situation in Ms. Brown's complaint, Armstrong, the CLEC complainant here, is "a regulated local exchange carrier." Further, the subject matter of this complaint is not the retail service discussed by ALJ Corbett. Instead, the services at issue here (i.e., exchange access and local call termination) are telecommunications services governed by tariffs and interconnection agreement both of which have been approved by the Commission. The Sandra Brown case is inapplicable.

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<sup>21</sup> Verizon Motion at 4-5 (¶ 19) (citing *Sandra Brown v. Armstrong Digital Services, Inc. d/b/a Armstrong Telephone*, Docket No. C-2008-2079810, 2009 PaPUC Lexus 21 (ALJ Corbett Initial Decision dated May 12, 2009) and Commission Order entered June 30, 2009) ("*Sandra Brown Proceeding*").

<sup>22</sup> *Sandra Brown Proceeding*, ALJ Corbett Initial Decision at 1.

<sup>23</sup> *Id.*, ALJ Corbett Initial Decision at 4.

The appropriate focus here is upon the nature of the service being provided to Verizon by Armstrong (exchange access and local call termination services) in support of Verizon's own toll and local customer services, not the protocols used by a third party somewhere else on the call to serve an end user. Exactly on point to the issues at hand is the case involving Time Warner, the cable VoIP service provider, and its desire to obtain PSTN connectivity through wholesale CLECs.<sup>24</sup> The FCC ruled that:

We further conclude that the statutory classification of the end-user service, and the classification of VoIP specifically, is not dispositive of the wholesale carrier's rights under section 251...<sup>25</sup>

It made no difference to the FCC that the traffic delivered to or from the wholesale CLEC might have begun or ended in Internet protocol.

Nor has the Commission construed the VoIP Freedom Act to limit carrier-to-carrier regulation. Subsequent to the enactment of the Act, the Commission has continued to find that wholesale CLECs serving cable companies are jurisdictional telecommunications carriers and has certified them, as well as their access tariffs.<sup>26</sup> Nor is Verizon's legal argument persuasive. While Verizon argues, by reference to another title, Title 66 of Pennsylvania Consolidated Statutes, that the term "local exchange telecommunications company" is limited to an ILEC,<sup>27</sup>

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<sup>24</sup> "TWC purchases wholesale telecommunications services from certain telecommunications carriers, including MCI WorldCom Network Services Inc. (MCI) and Sprint Communications Company, L.P. (Sprint), to connect TWC's VoIP service customers with the public switched telephone network (PSTN). MCI and Sprint provide transport for the origination and termination on the PSTN through their interconnection agreements with incumbent LECs." *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, Memorandum Opinion and Order, released March 1, 2007 at ¶ 2 ("*Time Warner Decision*").

<sup>25</sup> *Time Warner Decision* at ¶ 9-10.

<sup>26</sup> *Application of Comcast Business Communications, LLC d/b/a Comcast Long Distance for expanded Authority to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier to the Public in the Commonwealth of Pennsylvania in the Service Territories of Windstream Pennsylvania, Inc. et al*, 2008 WL 4145481 (Pa P.U.C.) ("CBC proposes to provide 'Local Interconnection Service' (LIS) which acts as a gateway to the public switched telephone network for local qualifying cable-based voice over Internet protocol (VOIP) service providers in these rural territories.").

<sup>27</sup> 66 Pa. C.S. § 3012 (Definition of "local exchange telecommunications company").

this definitional limitation is nowhere reflected in the Title 73 VoIP Freedom Act. Nor is there any indication that the General Assembly intended to adopt one. Again, such a position, if Verizon chooses to take it, is neither accurate nor persuasive.

For the reasons stated above, Verizon's Motion to Dismiss is both procedurally and substantively defective and should be denied.

**B. There is No Basis to Stay Resolution of This Proceeding.**

Verizon, having improperly repudiated its contractual and tariff obligations to Armstrong and changed the parties' long-standing course of dealing, now seeks the Commission's imprimatur by requesting a stay of the *status quo*. Of course, the *status quo*, given Verizon's unilateral, self-help refusal to pay, is a request to deny relief to Armstrong and condone Verizon's blatant violation of applicable tariffs, Commission-approved ICAs and "kidnap-and-ransom" method of dealing with other regulated telecommunications providers.

Armstrong adamantly opposes any stay of the Commission's resolution of the merits of its complaint. Indeed, Armstrong has concurrently filed a Motion for Partial Summary Judgment, as there are no factual disputes and Armstrong is entitled to judgment as a matter of law. Armstrong deserves restoration of the *status quo ante* -- the circumstances that existed *prior to* Verizon's unilateral actions of illegal repudiation and self-help. Verizon's proposition here is as flawed as every other position it has taken in this case.

Pursuant to Your Honor's March 21, 2011 Post-Hearing Order, Verizon's petition for stay is to be considered and decided according to the criteria set forth in *Pa. P.U.C. v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983).<sup>28</sup> Under *Process Gas*, Verizon, as the petitioner, has the obligation to successfully demonstrate *all* of the following:

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<sup>28</sup> See Post-Hearing Order entered May 21, 2011, at 4 n.1.

- (1) A strong likelihood of success on the merits;
- (2) Irreparable injury if a stay is denied;
- (3) Issuance of a stay will not substantially harm other interested parties; and
- (4) Issuance of a stay will not adversely affect the public interest.<sup>29</sup>

When confronted with a case in which the latter three factors strongly favor interim relief, a court may exercise its discretion to grant a stay if the petitioner makes a “substantial” case on the merits.<sup>30</sup>

In its Motion, Verizon argues that the *Process Gas* standard does not apply in a proceeding where a final order has not been entered<sup>31</sup> and that, instead, the Commission should “exercise its discretion over scheduling issues before it commences litigation efforts or makes any decision on the merits in this open proceeding[.]”<sup>32</sup> In support, Verizon selectively quotes (and thereby intentionally misquotes) the Commonwealth Court case of *Gwynedd Properties v. Bd. of Supervisors* for the proposition that “‘the *Process Gas* test is inappropriate’ in a case where no ‘final decision had been rendered on the merits.’”<sup>33</sup> The Commonwealth Court, however, never made such a pronouncement. Actually, the Court refused to apply the *Process Gas* standard in that case because one of the parties lacked standing, not because a final decision had not been rendered on the merits.<sup>34</sup> Verizon’s manipulation and mischaracterization of the Court’s words are blatant and obvious.

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<sup>29</sup> *Process Gas*, 467 A.2d at 808-09.

<sup>30</sup> *Id.*

<sup>31</sup> See Verizon Motion at 12 (¶ 42) (“[T]he Commission’s authority to stay this case or hold scheduling in abeyance is not limited by the *Process Gas* standard.”)

<sup>32</sup> Verizon Motion at 13 (¶ 43).

<sup>33</sup> Verizon Motion at 13 (¶ 43) (quoting *Gwynedd Properties*, 635 A.2d 714, 718 (Pa. Cmwlth. 1993).

<sup>34</sup> The pertinent portion of the court’s opinion reads as follows:

*Gwynedd* cites the criteria enunciated by the Supreme Court in *Pennsylvania Public Utility Commission v. Process Gas Consumers*, 502 Pa. 545, 467 A.2d 805 (1983), as the test that the Township must meet to persuade the trial court to impose a stay. Ordinarily, that would be the applicable standard, but we disagree that the *Process Gas* standard should be applied in this case. In *Process Gas* both parties clearly had standing and a final decision had been rendered on the merits; because that is not the

Verizon also relies on several other Commonwealth Court cases to support its position that *Process Gas* does not apply.<sup>35</sup> Such reliance, however, is misplaced as those cases do not supersede or have any bearing on the Commission’s adoption and application of the *Process Gas* criteria as the appropriate standard for considering a motion for a stay during the course of a proceeding.

Contrary to Verizon’s assertions, it is well established that the Commission *does*, in fact, apply the *Process Gas* standard to determine whether to stay a pending, open proceeding.<sup>36</sup> Even assuming *arguendo* the Commission does not have a clear standard for reviewing motions for a stay of proceedings (which Armstrong submits that it does), the Commission would be free to adopt the *Process Gas* standard in the instant matter. An affirmative statement that a certain standard applies in specific situation does not mean the converse is true – *i.e.*, the fact that *Process Gas* governs applications for a stay pending the appeal of a final order does not constitute a blanket prohibition of the use and application of that standard with respect to motions for a stay during a Commission proceeding prior to the entry of an appealable final order. The standard may apply in both situations.

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case here, the *Process Gas* test is inappropriate. Because the trial court had the power to dismiss this action, we find as a logical corollary, that a party’s present lack of standing is sufficient to support the trial court’s grant of a stay. Given the narrow scope of the issue before us, we conclude that the trial court did not abuse its discretion in granting a stay, when Gwynedd, at least temporarily, lacks standing.

*Gwynedd Properties*, 635 A.2d at 718.

<sup>35</sup> Verizon cites three cases in footnote 19 – *In re Penn-Delco Sch. Dist.*, 903 A.2d 600 (Pa. Cmwlth. 2006); *Israelit v. Montgomery County*, 703 A.2d 722 (Pa. Cmwlth. 1997); and *Singer v. Dong Sup Cha*, 379 Pa. Super. 556 (1988) – arguing that a pending case may be stayed to advance judicial or administrative economy and the interest of orderly decision-making “without applying the *Process Gas* or similar standards.” Verizon Motion at 13 (¶ 43, n.19). None of these cases addresses the applicability of *Process Gas* or the Commission’s adoption and use thereof. Indeed, the cited cases only refer to the power of a “trial court” to use its discretion to stay a case pending action in another case.

<sup>36</sup> See, e.g., *Re Pennsylvania-American Water Company*, 97 Pa.P.U.C. 157 (2002) (applying the criteria set forth in *Process Gas* to determine a motion for stay of proceedings); *Brunn v. Pennsylvania Power Co.*, Docket No. C-20066209 (Order entered September 29, 2006) (adopting the *Process Gas* standard with respect to a petition for stay of an open proceeding); *Re Core Communications, Inc.*, Docket No. A-310922F003 *et al.* and A-310922F002 Am-A & Am-B (Order entered May 31, 2007) (recognizing the standards of *Process Gas* are applicable for the Commission’s consideration of stay of pending docketed matters).

The Commission has correctly noted that the appropriate standard for review of Verizon's Motion is *Process Gas*. Armstrong submits that Verizon has failed to satisfy the *Process Gas* criteria and that its motion for a stay should be denied.

**1. There Is Little Or No Likelihood Of Success Verizon On Its Legal Arguments.**

As support for its request for a stay, Verizon variously asserts that: this Commission has no jurisdiction over traffic that, at any time, is in Internet protocol; the FCC is posed to preempt the states' regulation of carrier-to-carrier intrastate traffic in its most recent NPRM;<sup>37</sup> the FCC will set rates at the \$.0007 per minute level; and the FCC's actions in this regard are imminent.

As discussed extensively in Armstrong's Motion for Partial Summary Judgment, this Commission assuredly has jurisdiction over intrastate traffic under a cohesive and consistent body of law.<sup>38</sup> The calls at issue originate in Pennsylvania and terminate within Pennsylvania and, thus, are intrastate in nature. The numbers used are Pennsylvania numbers. All parties' services are fixed in nature, so there is no question as to whether the underlying called and calling parties are located in Pennsylvania when the calls are made and received -- they are. Verizon has acknowledged before the FCC a much different view from its preemption claims made in this case,<sup>39</sup> expressly conceding that the FCC has not acted.<sup>40</sup>

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<sup>37</sup> *In the Matter of Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, WC Docket No. 07-135; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, GN Docket No. 09-51; *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; and *Lifeline and Link-Up*, WC Docket No. 03-109, ("FCC NPRM Docket") Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking released February 9, 2011 ("FCC NPRM").

<sup>38</sup> See Armstrong Motion for Partial Summary Judgment at 25-33.

<sup>39</sup> *FCC NPRM Docket*, Comments of Verizon and Verizon Wireless filed April 1, 2011 ("Verizon 4/1 Comments") at 3-4 ("The lingering absence of a Commission decision on VoIP compensation has produced a chaotic environment in which carriers are forced to engage in perpetual disputes over the proper compensation for this traffic. The situation is marked by endless lawsuits, administrative complaints, and financial uncertainty that

Suggesting that a stay is reasonable, Verizon distorts two federal court decisions that have referred complaint cases on the basis of the primary jurisdiction doctrine. Unfortunately for Verizon, this argument, like the others raised in its motion, relies on significant distortions of the underlying authority and Verizon ignores the fact that these cases actually belie its position. Neither court cited by Verizon “stayed [its] own consideration of a VoIP compensation dispute pending the FCC’s decision.”<sup>41</sup> The collection actions filed by the plaintiff LECs seeking compensation have been referred to the FCC for resolution of the issue of liability. The courts are not awaiting the FCC’s decision in its NPRM. The courts have affirmatively asked the FCC to decide the liability issue in the underlying complaint case so that it may proceed to determine damages.

This is not at all what Verizon is asking here. Here, Verizon is inviting a state agency that clearly possesses the necessary expertise and subject matter jurisdiction, to decline to exercise that jurisdiction (and implement prior decisions) so that, per Verizon’s hope, the FCC can be given time to preempt that authority. The Commission should decline Verizon’s invitation. As this Commission noted to the FCC in its NPRM proceeding on this very topic, “the resolution of these [VoIP] disputes [by the states] has proceeded *independently* and does not *rely* on the non-existing FCC classification of interconnected VoIP traffic.”<sup>42</sup>

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significantly detracts from important priorities such as the broader deployment of broadband and the advanced services that ride over it.”). Verizon does not note that its own behavior has triggered some of this litigation.

<sup>40</sup> Verizon 4/1 Comments at 8 (“The Commission, however, has never determined ‘the appropriate intercarrier compensation framework’ for VoIP traffic that originates or terminates on the PSTN. In particular, the Commission has not yet decided whether legacy intercarrier compensation rules—such as tariffed switched access charges—apply to VoIP traffic. As the Commission acknowledges, this lack of clarity has led to disputes and litigation before federal courts and state commissions. Many of these disputes were initially stayed pending the Commission’s resolution of the intercarrier compensation rules for VoIP. But, in more recent cases, several courts and state commissions have made clear that they are no longer willing to postpone their decisions until the Commission acts.”) (citations omitted).

<sup>41</sup> Verizon Motion at 11 (¶ 38).

<sup>42</sup> Comments of the Pennsylvania Public Utility Commission filed before the FCC on April 18, 2011 at the *FCC NPRM Docket* (“PA PUC 4/18 Comments”) at 6 (emphasis in original).

Further, to this point, Verizon's "hopes" for federal preemption is not well-founded. No where does the *FCC* suggest in its *NPRM Docket* that the states will be preempted. The best the FCC could manage on this point is to "seek comment on whether and how the Commission could use CAF [Universal Service Fund replacement mechanism] support *to create incentives* for states to take action that will advance our mutual goals."<sup>43</sup> There is no indication whatsoever in the *NPRM* that the FCC is seeking to declare all intercarrier compensation to be federally jurisdictional. The FCC's direction is far more analogous to the policy strings contained in federal highway funding than a blatant usurpation of states' rights. Verizon's arguments to the contrary are, at best, misguided, wishful thinking.

Verizon asserts that, at the very least, the FCC is poised to do *something*. We have all heard this before. Again, Verizon is overly optimistic about the likelihood of an FCC determination. The FCC has promised to act on the issue of intercarrier compensation reform on numerous occasions for more than a decade, even before the *Unified Intercarrier Compensation NOPR* was released in 2005.<sup>44</sup> Whether the FCC will actually act this time is unclear. What is clear, however, is the fact that Verizon exaggerates, by miscitation, the FCC's "recognition" that there is "*some* [the word excluded by Verizon in its own quotation<sup>45</sup>] evidence of asymmetrical revenue flows," that would warrant action. Tellingly, the FCC references relied upon by Verizon are to the behavior of Global NAPs, magicJack, Sprint and the like.<sup>46</sup> It is truly ironic that Verizon, by its refusal to pay Armstrong while still collecting contracted-for and tariffed

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<sup>43</sup> *FCC NPRM Docket* at ¶ 296.

<sup>44</sup> *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Report and Order, issued March 3, 2005 ("*Unified Intercarrier Compensation NOPR*") and *In re IP-Enabled Services*, 19 F.C.C.R. 4863 (2004) ("*IP-Enabled Investigation*").

<sup>45</sup> Verizon Motion at 10 (¶ 35).

<sup>46</sup> *FCC NPRM* at ¶¶ 608-611.

intercarrier compensation from Armstrong, has now seized on the same “economically irrational arbitrage opportunity”<sup>47</sup> about which it so bitterly complains to the FCC.

In 2009, the FCC acknowledged that it had not revised the compensation rules for nomadic VoIP or preempted the application of access charges and declared that the state commissions should act in the meantime on the basis of “existing law”:

... that the lack of regulatory direction from the Commission [FCC] regarding these issues does not, in fact, stand as a legal obstacle to the PUCT’s resolution of the arbitration.... We emphasize that the PUCT should not wait for Commission [FCC] action to move forward. Rather, the PUCT must proceed to arbitrate this interconnection agreement in a timely manner, relying on existing law.<sup>48</sup>

The Commission recognized this in the *Palmerton Opinion*, where it stated:

Although the FCC has not yet formally proceeded with any jurisdictional classification of interconnected VoIP calls, it still expects state utility regulatory commissions to deal with and resolve intercarrier compensation disputes that may implicate interconnected VoIP.... Finally, the FCC fully expects state utility regulatory commissions to address intercarrier compensation issues that involve intrastate traffic and access matters.<sup>49</sup>

The circumstances underpinning the aforementioned authority have not changed. As the Commission correctly observed, the FCC has not acted and “...we do not need and cannot afford to wait and speculate whether the FCC will reach some sort of coherent and sustainable conclusion to its IP-enabled services and intercarrier compensation reform proceedings, when this might happen, and what the FCC’s conclusions might be.”<sup>50</sup>

It appears Verizon is simply wishing that its entire federal advocacy position were already approved and implemented by the FCC and asks this Commission to act as if it has been.

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<sup>47</sup> Verizon Motion at 10 (¶ 35).

<sup>48</sup> *Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*. WC Docket No. 09-134, Memorandum Opinion And Order, released October 9, 2009 (“*UTEX Opinion*”), at ¶¶ 9 and 10.

<sup>49</sup> *Palmerton Opinion* at 41-42 (citing generally *UTEX Opinion* and *North County Communications Corp. v. MetroPCS California, LLC*, File No. EB-06-MD-007, Memorandum Opinion and Order, DA 09-719, released March 30, 2009).

<sup>50</sup> *Palmerton Opinion* at 26.

While it is true that Verizon is arguing to the FCC that the states should be preempted on this issue, as noted previously, there is no indication from the FCC that it has any intention of doing so (or even if it were so inclined, when and how).

Nor is there any indication that the FCC will adopt Verizon's advocacy for a \$.0007/MOU rate. First, it is worth noting Verizon's admission to the FCC that the \$.0007 rate does not currently apply to VoIP traffic.<sup>51</sup> Instead, Verizon urges that the FCC "should" implement a rate of \$.0007/minute,<sup>52</sup> recognizing that this is not currently the case.<sup>53</sup> And, most importantly for our purposes here, even under Verizon's view as expressed to the FCC, the \$.0007/minute rate would be a "default rate" that applies in the *absence* of an agreement.<sup>54</sup> It does not argue that the \$.0007 rate should disrupt compensation already agreed to in *existing* interconnection agreements.<sup>55</sup> Thus, even Verizon's own FCC Comments, which favor "agreements between interconnecting carriers," do not support Verizon's actions in the instant case where Verizon has blatantly disregarded effective and approved ICAs that include rates Verizon now declares itself unwilling to pay.

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<sup>51</sup> Verizon 4/1 Comments at 8, *supra* ("The Commission, however, has never determined "the appropriate intercarrier compensation framework" for VoIP traffic that originates or terminates on the PSTN. *NPRM* ¶ 608. In particular, the Commission has not yet decided whether legacy intercarrier compensation rules—such as tariffed switched access charges—apply to VoIP traffic.")

<sup>52</sup> Verizon 4/1 Comments at 4 ("The Commission should immediately adopt a single low default rate of \$0.0007 per minute prospectively for all VoIP traffic that connects with the PSTN at either end-point of a call.")

<sup>53</sup> Verizon 4/1 Comments at 4 ("Swift action setting a low default rate for VoIP traffic will provide carriers and investors with needed certainty and allow for more efficient deployment of broadband and advanced services.")

<sup>54</sup> Verizon 4/1 Comments at 5-6 ("Most important, the Commission should hold that intercarrier compensation rates for VoIP traffic should be established in the first instance not through top-down, one-size-fits-all regulation, but through negotiated, commercial agreements between interconnecting carriers. A market-based approach, relying on negotiated, commercial agreements, is the best long-term solution to ensuring the efficiency of the communications markets in the face of rapid technological change. Indeed, negotiated agreements have proven successful in a variety of circumstances - most notably in the Internet itself. If providers are unable to reach a commercial agreement, however, the Commission should also establish a default rate of \$0.0007 per minute for the origination and termination of VoIP traffic on the PSTN, under its exclusive jurisdiction over VoIP services.")

<sup>55</sup> Comments of Verizon and Verizon Wireless filed before the FCC April 18, 2011 at the *FCC NPRM Docket* ("Verizon 4/18 Comments") at 11 ("All traffic that connects with the PSTN and is not covered by voluntary commercial agreements—regardless of carrier or of the distance it travels—should be subject to a default terminating rate of \$0.0007 per minute for traffic delivered to the terminating carrier's serving end office.")

Nor would the \$.0007/MOU rate advocated by Verizon, even if adopted by the FCC, be retroactively implemented, particularly in cases where existing agreements already address payment. Verizon began withholding proper payment with Armstrong's August 2010 bills (representing July 2010 service). If we take Verizon's arguments (and regulatory aspirations) to their logical conclusion, we find Verizon seeking this Commission's tacit agreement to nullify its legal obligation in anticipation of the FCC adopting its position relative to VoIP traffic. This conclusion smacks of arrogance and cannot be supported by this Commission. Verizon, like every other carrier, needs to abide by its legal obligations until such time as it is granted the authority to do otherwise.

The FCC has received many, many comments from a universe of interested parties, whose positions are widely disparate and contradictory. From a brief review of the comments it does not appear that Verizon has attempted to build any type of coalition. Indeed, many of its positions are extreme and lack support. Other commenters have taken directly contrary positions, including that states should continue to regulate intrastate traffic<sup>56</sup> and that traditional compensation should apply to all traffic regardless of the underlying technology on one end of the call.<sup>57</sup> Such comments represent a more balanced view than Verizon's attempts to carve the world into its best financial scenario.

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<sup>56</sup> PA PUC 4/18 Comments at 3 ("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. 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. The same logic of bi-jurisdictional regulatory responsibility should be applied to intercarrier compensation matters that involve intrastate and interstate VoIP traffic.") (citations omitted).

<sup>57</sup> PA PUC 4/18 Comments at 14 ("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.").

Nonetheless, none of these views can be said to trump existing law, nor should this Commission accept Verizon's invitation to ignore existing law in favor of rules the FCC may (or may not) adopt in the future. Verizon is required by its own agreements and the current law to pay Armstrong specified rates when it uses Armstrong's exchange access services. No amount of spin or *ad hominem* attack can alter those obligations.

**2. There Is No Irreparable Injury To Verizon If A Stay Is Denied.**

There is no irreparable harm to Verizon were it to continue to pay Armstrong according to the same terms and conditions under which the parties operated for five years prior to the August 27<sup>th</sup> Letter. Mere monetary loss is insufficient grounds for finding irreparable harm.<sup>58</sup>

Nor is there any harm associated with proceeding to hear this case, particularly in the posture of the Motion for Summary Judgment now pending before Your Honor. It is highly ironic and even duplicitous for Verizon to argue that the case should be stayed because the Commission and the parties should not have to "spend their time and limited resources"<sup>59</sup> to resolve this dispute. If that were the case, then why did Verizon jump the gun and assert its refusal to pay in advance of any FCC decision?<sup>60</sup> As set forth in Armstrong's Motion for Partial Summary Judgment, Verizon's unilateral decision breached the interconnection agreements with the Verizon ILECs, as well as violated the parties' clear course of dealing for the last five years that switched access compensation is due for toll traffic exchanged with all the Verizon entities.

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<sup>58</sup> *Three County Services, Inc. v. The Philadelphia Inquirer*, 337 Pa. Super. 241, 486 A.2d 997 (1985) (holding appellee was only entitled to a preliminary injunction if the loss pending final adjudication was not be compensable by an award of money damages).

<sup>59</sup> Verizon Motion at 10 (¶ 36).

<sup>60</sup> Particularly where it exhorts the FCC to resolution on the same basis. See Verizon 4/1 Comments at 9 ("This litigation is costly, and it diverts resources from new and innovative services and broadband networks. It also has resulted in contradictory legal rulings: most federal courts have held that the legacy access charge regime does not apply to VoIP, while state commissions generally have sought to assert jurisdiction over VoIP traffic to apply legacy intercarrier compensation rules to that service. The regulatory uncertainty in this area is likely deterring investment in VoIP and the associated growth in broadband usage and deployment.").

Verizon could have saved everybody's "time and limited resources" were it to have maintained the *status quo of payment* until the FCC actually acted or it sought lawful redress of any supposed mistreatment that it may believe has occurred. Instead, Verizon decided to unilaterally adopt and implement its own federal advocacy, to the detriment of Armstrong, without the consent of either Armstrong or this Commission. While arguing to the FCC that its policy positions "should" be implemented, Verizon is simultaneously attempting to force the capitulation of other carriers by refusing to pay them agreed-to rates for the use of their networks (thereby withholding millions of dollars that are important to the ongoing operations of those carriers). These are not the actions of a party who operates in good faith. In that light, Verizon's suggestion that everyone else should now just stand down and save resources until some indeterminate time in the future when the FCC might do something seems all the more ludicrous.

Nor is there is any harm associated with requiring Verizon to continue meeting its contractual commitments or the enforcement of Armstrong's tariff. In retrospect, while it seemed irrational, from an external perspective, for Verizon to suddenly, in August 2010, cease paying Armstrong the previously agreed-to rates, it is now clear that Verizon is simply setting its own policies without regard to what the law or regulators have said or may say. Verizon's position is now painfully clear -- its world view should be everybody's world view. More troubling than Verizon's arrogant attitude is the fact that Verizon seems perfectly willing to use its considerable market power and resources to bludgeon the rest of the industry into submission. Verizon's advocacy is not the law and Verizon has no right to compel compliance with Verizon's view and then seek to stay that outcome until a day when the FCC may act.

Nor is there any harm in requiring Verizon to follow lawful procedures to challenge the rates paid to Armstrong. The Verizon ICAs and Armstrong's tariff clearly specify the lawful

mechanisms available to bring an action that would serve Verizon's obvious objective to pay less.<sup>61</sup> Verizon acknowledges none of these. It did not serve notice that it sought to terminate the current ICA and negotiate a new one. It did not file a proceeding to challenge an ICA-specified charge and then seek a refund as the ICAs require. It did not file a complaint, in violation of the procedures set forth in Armstrong's access tariff, but rather has forced Armstrong to do so. Its actions are also contrary to the Pennsylvania Public Utility Code, which requires that a complaint must be filed challenging an existing tariffed rate.<sup>62</sup> Verizon simply nominated itself as the decision maker, adopting a "so sue me" attitude, while continuing to demand Armstrong's access services, but offering the lowest rate possible (next to nothing).

### **3. The Issuance Of A Stay Will Substantially Harm Armstrong.**

The harm to Armstrong is clearly Verizon's suspension of the agreed to revenue streams and the simultaneous stay of Armstrong's attempts to collect that lawfully due compensation. By refusing to pay the agreed to rates for the use of its network, Verizon is withholding millions of dollars from Armstrong's ongoing operations.

Verizon's proposes to stay its own payment obligations, but not Armstrong's obligation to continue provisioning call terminating services for Verizon's benefit. It does not ask for a stay that preserves the payments that Verizon was making prior to August 27, 2010, but rather seeks Commission endorsement of its refusal to pay.

By holding large sums of Armstrong monies hostage, which grow by approximately \$200,000 monthly,<sup>63</sup> and offering virtually nothing by comparison (13% of the lawfully owed

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<sup>61</sup> See Armstrong Motion for Partial Summary Judgment at 16-20.

<sup>62</sup> 66 Pa.C.S. §§ 315 (a), 316, 701, 703 (g), and 1309 (a).

<sup>63</sup> See Armstrong Motion for Partial Summary Judgment at Exhibit 3.

amount),<sup>64</sup> Verizon uses its market clout as the largest LEC and toll carrier in Pennsylvania to cash starve Armstrong and thereby force concessions. By doing so, Verizon violates its 2006 ICA commitment to pay rates for local and toll termination at rates that are 4.2 times and 8.1 times higher, respectively, than it now is “offering.” The audacity of such an approach is truly infuriating and to claim it is simply a “good faith offer” to negotiate is arrogance perfected. Verizon’s attempts to negotiate were really, just simple, brutal assertions of market power to force capitulation of a competitor.

#### **4. Issuance of A Stay Is Also Contrary To The Public Interest.**

There is no conceivable public interest served by the Commission’s endorsement of Verizon’s action or by implicitly suspending Verizon’s lawful obligations. Indeed, Verizon’s Motion cites no public interest benefits.

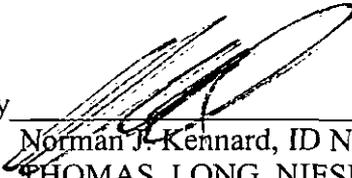
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<sup>64</sup> *Id.*

III. CONCLUSION

WHEREFORE, Armstrong Telecommunications Inc. requests that Verizon's Motion to Dismiss or Stay be denied.

Respectfully submitted,

By   
Norman J. Kennard, ID No. 29921  
THOMAS, LONG, NIESEN & KENNARD  
212 Locust Street, Suite 500  
P.O. Box 9500  
Harrisburg, PA 17108-9500  
[nkennard@thomaslonglaw.com](mailto:nkennard@thomaslonglaw.com)  
Tel: (717) 255-7600  
Fax: (717) 236-8278

David Reams Jamieson, ID No. 65678  
General Counsel  
Armstrong Holdings, Inc.  
One Armstrong Place  
Butler, PA 16001  
[djameison@agoc.com](mailto:djameison@agoc.com)  
Tel: (724) 283-0925  
Fax: (724) 283-9655

*Attorneys for  
Armstrong Telecommunications Inc.*

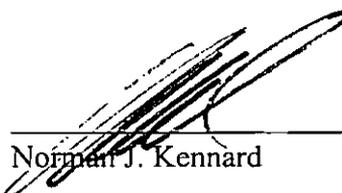
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this 19<sup>th</sup> day of May, 2011, served a true and correct copy of the foregoing Prehearing Conference Memorandum in the above-captioned proceeding, upon the persons and in the manner via first class and electronic mail as follows:

Suzan D. Paiva Esquire  
Verizon  
1717 Arch Street  
Philadelphia, PA 19103  
Suzan.D.Paiva@Verizon.com



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Norman J. Kennard

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