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July 18, 2011

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

In re: Pennsylvania Public Utility Commission v. Verizon Pennsylvania, Inc.,
Docket No. R-2011-2234464

Pennsylvania Telephone Association v. Verizon Pennsylvania Inc.,
Docket No. C-2011-2237456

Pennsylvania Public Utility Commission v. Verizon North, LLC,
Docket No. R-2011-2234462

Pennsylvania Telephone Association v. Verizon North, LLC,
Docket No. C-2011-2237496

Dear Secretary Chiavetta:

Enclosed for filing on behalf of the Pennsylvania Telephone Association is its Preliminary Objections to the New Matter of Verizon Pennsylvania Inc. and of Verizon North LLC in the above-referenced consolidated proceeding. Copies of the Preliminary Objections are being served in accordance with the attached Certificate of Service.

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

Very truly yours,

THOMAS, LONG, NIESEN & KENNARD

By:


Charles E. Thomas, III

Encl.

cc: Dennis J. Buckley, Presiding Administrative Law Judge

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission : R-2011-2234464
Pennsylvania Telephone Association : C-2011-2237456

v.

Verizon Pennsylvania Inc.

Pennsylvania Public Utility Commission : R-2011-2234462
Pennsylvania Telephone Association : C-2011-2237496

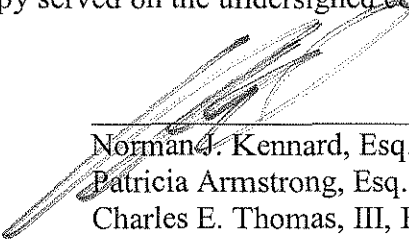
v.

Verizon North LLC

NOTICE TO PLEAD

TO: Verizon Pennsylvania Inc.
Verizon North LLC

You are hereby notified that, if you do not file a written response to the Pennsylvania Telephone Company's Preliminary Objections within ten (10) days from service of this notice, the facts set forth may be deemed to be true, without requiring other proof. All pleadings such as a Response to the Preliminary Objections must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned counsel for The Pennsylvania Telephone Association.



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*Attorneys for
Pennsylvania Telephone Association*

Date: July 18, 2011

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	R-2011-2234464
Pennsylvania Telephone Association	:	C-2011-2237456
	:	
v.	:	
	:	
Verizon Pennsylvania Inc.	:	
	:	

Pennsylvania Public Utility Commission	:	R-2011-2234462
Pennsylvania Telephone Association	:	C-2011-2237496
	:	
v.	:	
	:	
Verizon North LLC	:	

**PRELIMINARY OBJECTIONS OF
THE PENNSYLVANIA TELEPHONE ASSOCIATION
TO THE NEW MATTER OF
VERIZON PENNSYLVANIA INC. AND OF VERIZON NORTH LLC**

NOW COMES, the Pennsylvania Telephone Association (“PTA”),¹ by its attorneys, and, pursuant to 52 Pa. Code § 5.101, files these Preliminary Objections to the identical New Matter of Verizon Pennsylvania Inc. (“Verizon PA”) and of Verizon North LLC (“Verizon North”) (Verizon PA and Verizon North are collectively referred herein as “Verizon”), each filed with

¹ For purposes of this consolidated proceeding, the following companies are represented by and under the name of the Pennsylvania Telephone Association: Armstrong Telephone Company – Pennsylvania; Armstrong Telephone Company – North; Bentleyville Telephone Company; Citizens Telecommunications Company - New York; Citizens Telephone Company of Kecksburg; Commonwealth Telephone Company LLC d/b/a Frontier Communications Commonwealth Telephone Company; Frontier Communications of Breezewood, LLC; Frontier Communications of Canton, LLC; Frontier Communications of Lakewood, LLC; Frontier Communications of Oswayo River, LLC; Frontier Communications of Pennsylvania, LLC; Consolidated Communications of Pennsylvania Company; TDS Telecom/Deposit Telephone Company; Hickory Telephone Company; Ironton Telephone Company; Lackawaxen Telecommunications Services; Laurel Highland Telephone Company; TDS Telcom/Mahanoy & Mahantango Telephone Company; Marianna and Scenery Hill Telephone Company; The North-Eastern Pennsylvania Telephone Company; North Penn Telephone Company; Palmerton Telephone Company; Pennsylvania Telephone Company; Pymatuning Independent Telephone Company; South Canaan Telephone Company; TDS Telcom/Sugar Valley Telephone Company; Venus Telephone Corporation; West Side Telephone Company; and Yukon-Waltz Telephone Company (hereinafter collectively referred to as the “RLECs”).

the Public Utility Commission (“Commission”) on June 28, 2011, in the above-referenced consolidated proceeding. In support thereof, the PTA submits as follows:

I. BACKGROUND

1. On April 5, 2011, Verizon PA filed proposed Tariff Telephone – Pa. P.U.C. No. 219 and Verizon North filed proposed Tariff Telephone – Pa. P.U.C. No. 10 to establish new rates, terms and conditions for the provision of Tandem Transit Traffic Service which would impose significant increases in the rates that Verizon charges RLECs for tandem transit traffic. The tariffs were filed to be effective May 5, 2011 and provide for “the transport of local calls through [Verizon’s] switching and transport facilities to the end office (or its equivalent) of another local service provider.”²

2. On April 22, 2011, the PTA filed Complaints against Verizon’s tariffs seeking a suspension and dismissal of the tariffs.

3. Verizon filed Answers to the Complaints on May 5, 2011.

4. By Order entered May 19, 2011, the Commission suspended the tariffs by operation of law until December 4, 2011 and directed that an investigation be instituted to determine the lawfulness, justness, and reasonableness of the rates, rules and regulations contained in the tariffs.

5. On June 28, 2011, Verizon filed Amended Answers and New Matter to the PTA’s Complaints. The New Matter alleges, *inter alia*, that the Commission should require the RLECs to compensate Verizon for transit service used from June 27, 2007 through the effective date of the tariff at issue in order to prevent unjust enrichment on behalf of the RLECs.

² Verizon PA Transit Tariff, Executive Overview (filed April 5, 2011); Verizon North Transit Tariff, Executive Overview (filed April 5, 2011).

6. The PTA's Answer and Reply to the New Matter of Verizon, which is being filed contemporaneously herewith, is incorporated herein by reference.

II. COMMISSION REGULATIONS RE PRELIMINARY OBJECTIONS

7. The Commission's Regulations at Section 5.101(a), 52 Pa. Code § 5.101(a), provide that preliminary objections are available to challenge New Matter for the following reasons:

- (1) Lack of Commission jurisdiction or improper service of pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

8. Consistent with Section 5.101, the PTA raises the following preliminary objections to the New Matter of Verizon, each of which is sufficient reason for the dismissal of the New Matter.

III. PRELIMINARY OBJECTIONS

Preliminary Objection No. 1 Verizon's Late-Filed New Matter Fails To Conform To And Comply With Established Commission Regulations

9. Section 5.101 provides for the preliminary dismissal of an action that fails to conform to Chapter 5 of the Commission's regulations, 52 Pa. Code Ch 5. Specifically, Verizon's New Matter fails to conform to and comply with Sections 5.62 and 5.61(a) of the Commission's Regulations, 52 Pa. Code § 5.62 and 5.61(a).

10. Section 5.62 provides as follows:

(a) *Answers seeking affirmative relief.* In its answer, a respondent may seek relief against other parties in a proceeding if common questions of law or fact are present. The answer must conform to this chapter for answers generally and set forth:

- (1) The facts constituting the grounds of complaint.
- (2) The provisions of the statutes, rules, regulations or orders relied upon.
- (3) The injury complained of.
- (4) The relief sought.

(b) *Answers raising new matter.* An affirmative defense shall be pleaded in an answer or other responsive pleading under the heading of “New Matter.” A party may set forth as new matter another material fact which is not merely a denial of the averments of the preceding pleading.³

11. In its New Matter, Verizon not only raises new matter, but also seeks affirmative relief from the Commission and against the RLECs by requesting the Commission to require the RLECs to compensate Verizon for transit service used from June 27, 2007 through the effective date of the tariff at issue in order to prevent unjust enrichment on behalf of the RLECs. In support, Verizon avers that the RLECs “have not compensated Verizon for the use of its network to transit their local traffic to other local service providers” and that Verizon “has provided and is continuing to provide transit service to the [RLECs] without any compensation by them.”⁴ Consequently, Verizon contends, the RLECs will be unjustly enriched if they are not required to compensate Verizon for such service.⁵

12. Despite the requested relief, Verizon has failed to set forth any statute, rule, regulation or order it relies upon for seeking such relief.⁶ Nowhere in its New Matter does Verizon allege any act or thing done or omitted to be done by the RLECs in violation of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission. More specifically, the pleading cites no order or other requirement that

³ 52 Pa. Code § 5.62.

⁴ Verizon PA/Verizon North Amended Answers and New Matter at 18, New Matter ¶¶ 4-5.

⁵ *Id.* at 19, New Matter ¶ 8-9.

⁶ See 52 Pa. Code § 5.62(a)(2).

necessitated any payment by the RLECs for the use of Verizon's transit service. On the contrary, the parties' arrangements were such that no compensation whatsoever was required. In fact, the RLECs merely have engaged in a consistent course of conduct with Verizon whereby transit service has been provided by Verizon without charge to the RLECs. As such, the allegations raised by Verizon's New Matter are baseless, unsupported, and should be dismissed.

13. In addition to failing to conform its pleading with the requirements of Section 5.62, Verizon's New Matter also fails to comply with the timing requirements imposed under Section 5.61(a). Section 5.61(a) specifically provides that answers "shall be filed with the Commission *within 20 days* after the date of service."⁷

14. The PTA's complaints were served upon Verizon by first class mail on April 22, 2011. Consequently, Verizon's answers to the complaints, including any new matter it wished to raise, were due no later than May 16, 2011.⁸ While Verizon filed answers to the complaints on May 5, 2011, it did not plead its new matter until June 28, 2011, more than 43 days *after* the new matter must have been pled under the Commission's regulations. Verizon's complete failure to raise new matter in a timely manner, when it had a full opportunity and obligation to do so, now precludes it from pursuing such new matter and related affirmative relief. Accordingly, Verizon's late-filed and procedurally defective New Matter should be dismissed.

Preliminary Objection No. 2 The Commission Lacks Subject Matter Jurisdiction To Order The Requested Relief Based On A Claim Of Unjust Enrichment

15. Notwithstanding the procedural defects of the pleading, Verizon's New Matter is also deficient in that the Commission lacks subject matter jurisdiction to order the relief requested – *i.e.*, damages based on a claim of unjust enrichment.

⁷ 52 Pa. Code § 5.61(a) (emphasis added).

⁸ Twenty days from the date of service, plus three days. *See* 52 Pa. Code §§ 1.56.

16. Verizon's New Matter seeks to recover compensation in the form of damages, at the rates set forth in the proposed tariff for any and all tandem transit service provided to the RLECs from June 27, 2007 through the effective date of the tariffs.⁹ The recovery of such compensation is premised on the theory of unjust enrichment resulting from a contract implied in law. Unjust enrichment is, in essence, an equitable doctrine.¹⁰ The Commission, however, has no jurisdiction to adjudicate claims styled as a common law tort cause of action or as a request for equitable relief.¹¹

17. Even looking beyond the form of the action and the manner in which it is titled, the underlying new matter allegations are woefully lacking of any substantiated legal bases.¹² No statute, regulation, tariff, or order is cited to support Verizon's claim that the RLECs should compensate Verizon for the transit service used. In fact, nothing can be cited because Verizon provided transit service without charge to the RLECs based upon the mutually advantageous relationship between the parties.

18. Moreover, by failing to cite to any statute, regulation, tariff, or order that necessitates payment by the RLECs, Verizon's pleading and theory of unjust enrichment amounts to nothing more than a claim for damages. It is well established that the Commission lacks the authority to award damages.¹³

⁹ Verizon PA/Verizon North Amended Answers and New Matter at 20.

¹⁰ *Styer v. Hugo*, 619 A.2d 347 (Pa. Super. 1993), *aff'd*, 637 A.2d 276 (Pa. 1994).

¹¹ *County of Erie v. Verizon North Inc.*, Docket No. C-20032036, 2005 WL 6502718 (Order entered April 1, 2005) (quoting First Interim Order of ALJ Gesoff, issued February 2, 2004, at 4-5).

¹² *Id.* ("In order to determine where jurisdiction properly lies, courts must look beyond the form of the action and the manner in which it is titled to the essence of the underlying claims.") (citing *T.W. Phillips Gas v. Peoples Natural Gas Co.*, 492 A.2d 776, 779 (Pa. Cmwlth. 1985)).

¹³ *Pa. P.U.C. v. UGI Utilities, Inc.*, Docket No. M-2010-2138591 (Order entered 25, 2010); *Feingold v. Bell of Pennsylvania*, 383 A.2d 791, 794 (Pa. 1977) ("[The Commission's] remedial and enforcement powers [do] not include the authority to award damages for a breach of contract by a public utility.").

19. Even assuming *arguendo* that the Commission has jurisdiction over the requested relief based on the theory of unjust enrichment, Verizon’s pleading fails to demonstrate that it sufficiently satisfies the legal requirements necessary to prevail on an unjust enrichment claim.

20. The Superior Court explained the theory of unjust enrichment, or the doctrine of quasi-contract, as follows:

A quasi-contract imposes a duty, not as a result of any agreement, whether express or implied, but in spite of the absence of an agreement, when one party receives unjust enrichment at the expense of another. In determining if the doctrine applies, we focus not on the intention of the parties, but rather on whether the defendant has been unjustly enriched. The elements of unjust enrichment are “benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.” The most significant element of the doctrine is whether the enrichment of the defendant is unjust; the doctrine does not apply simply because the defendant may have benefited as a result of the actions of the plaintiff. Where unjust enrichment is found, the law implies a quasi-contract which requires the defendant to pay to plaintiff the value of the benefit conferred. In other words, the defendant makes restitution to the plaintiff in *quantum meruit*.¹⁴

21. In the instant matter, Verizon provided the subject transit service without charge to the RLECs based upon historical arrangements that mutually benefited both Verizon and the RLECs. Acting in accordance with those arrangements, the RLECs merely engaged in a consistent course of conduct with Verizon. Most important, however, Verizon never made any prior claim, until the filing of its new matter, to the RLECs seeking transit charges for the service provided. There was never any reasonable expectation on behalf of Verizon that it would be paid for such services because the RLECs were never under any obligation to pay, and Verizon was never entitled to collect, compensation. Under no circumstances were the RLECs unjustly enriched in connection with the use of Verizon’s transit service.

¹⁴ *Lackner v. Glosser*, 892 A.2d 21, 34 (Pa. Super. 2006) (quoting *AmeriPro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa. Super. 2001)).

22. To the extent the Commission has jurisdiction over this equitable claim, Verizon is barred or estopped from recovery of the requested compensation by the doctrine of laches due to its unreasonable and unjustified delay in pursuing the such relief. Laches has been defined as “an equitable doctrine essentially stating that where a complaining party in equity is guilty of failing to exercise due diligence in prosecuting a claim to the other parties detriment, that complaining party will be precluded from proceeding with his claim.”¹⁵ Here, Verizon waited at least fifteen (15) years (as marked by the passage of the Telecommunications Act of 1996) and likely longer, before claiming that it was owed compensation for transit service. It had ample opportunity to bring an action for recovery, but chose not to do so. Accordingly, Verizon is now prohibited from instituting an action due its failure to pursue the matter in a timely fashion.

23. Alternatively, the PTA submits a judgment of non pros would be appropriate under the circumstances. An entry of non pros is proper: “(1) where a party to a proceeding shows a want of due diligence in failing to proceed with reasonable promptness; (2) where there has been no compelling reason for the delay; and (3) where the delay has caused prejudice to the adverse party.”¹⁶ Here, Verizon has provided no justification for its failure to pursue this compensation issue with reasonable promptness or due diligence, nor a compelling reason for the delay. To wait fifteen (15) years before finally doing so is prejudicial to the RLECs who have maintained for years a consistent course of conduct with Verizon whereby transit service has been provided by Verizon without charge. To now say that the RLECs should compensate Verizon for its own shortcomings is unfair, unjust, and unreasonable.

24. For these reasons, the Commission should dismiss Verizon’s New Matter.

¹⁵ *Pa. P.U.C. v. UGI Corp.*, 65 Pa.P.U.C. 272 (1987) (quoting *Hankin v. Mintz*, 419 A.2d 588, 590 (Pa. Super. 1980).

¹⁶ *Pa. P.U.C. v. UGI Corp.*, *supra*.

Preliminary Objection No. 3

Verizon's New Matter Is Legally Insufficient For Failure To State A Cause of Action

25. Verizon's New Matter is legally insufficient for failing to state a case of action arising under the Public Utility Code. As discussed above, despite the requested relief, Verizon has failed to set forth any statute, rule, regulation or order it relies upon for seeking such relief.¹⁷ Nowhere in its New Matter does Verizon allege any act or thing done or omitted to be done by the RLECs in violation of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.¹⁸ More specifically, the pleading cites no order, tariff provision, or other requirement that necessitated any payment by the RLECs for the use of Verizon's transit service. On the contrary, the parties' arrangements were such that no compensation whatsoever was required. In fact, the RLECs merely have engaged in a consistent course of conduct with Verizon whereby transit service has been provided by Verizon without charge to the RLECs. As such, the allegations raised by Verizon's New Matter are baseless, unsupported, and should be dismissed.

Preliminary Objection No. 4

The Relief Requested By Verizon In Its New Matter Constitutes Illegal and Impermissible Retroactive Ratemaking

26. Verizon requests that the Commission "require the RLECs to compensate Verizon *at the rates set forth in the proposed tariffs* for any and all tandem transit service provided to them from June 27, 2007 through the effective date of the tariffs."¹⁹ Such relief constitutes illegal and impermissible retroactive ratemaking.

27. It is axiomatic that a tariff is not effective until filed and accepted by the Commission. As noted, the Verizon transit tariffs were filed on April 5, 2010, with an effective

¹⁷ See 52 Pa. Code § 5.62(a)(2).

¹⁸ See 66 Pa.C.S. § 701.

¹⁹ Verizon PA/Verizon North Amended Answers and New Matter at 20 (emphasis added).

date of May 5, 2011. By Order entered May 19, 2011, the Commission suspended the tariffs by operation of law until December 4, 2011 and directed that an investigation be instituted to determine the lawfulness, justness, and reasonableness of the rates, rules and regulations contained in the tariffs. Accordingly, the tariffs will not become effective until December 4, 2011, unless permitted by Commission order to become effective at an earlier date. Nevertheless, Verizon, through its New Matter, is attempting to impose tariffed rates retroactively on the RLECs for a period of time *prior to* the effective date of the tariffs.

28. The Commission has a long-standing policy against retroactive ratemaking.²⁰ The rates Verizon seeks to impose for the use of transit services by the RLECs are neither effective nor approved by this Commission. Even assuming the rates are permitted to go into effect as proposed in the tariffs, Verizon is prohibited from charging such rates to the RLECs for transit traffic service provided prior to the effective date. Only future transit traffic will be subject to such rates. Ultimately, Verizon's unjust enrichment claim is nothing more than a thinly veiled attempt to engage in retroactive ratemaking, and, as such, the Commission should properly dismiss it.

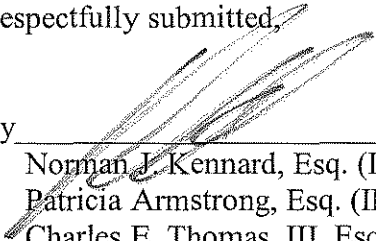
²⁰ *Popowsky v. Pa. P.U.C.*, 642 A.2d 648 (Pa. Cmwlth. 1994).

IV. CONCLUSION

WHEREFORE, for the reasons set forth above, the PTA respectfully requests that the Commission grant and sustain the foregoing Preliminary Objections and dismiss Verizon PA's and Verizon North's New Matter with prejudice.

Respectfully submitted,

By



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*Attorneys for
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Date: July 18, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2011, I did serve a true and correct copy of the foregoing Preliminary Objections upon the persons below via electronic mail and first class mail as follows:

Susan D. Paiva Esquire
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