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July 28, 2011

**Via Electronic Filing**

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

**Re: Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc.  
Pennsylvania Telephone Association v. Verizon Pennsylvania Inc.  
Pennsylvania Public Utility Commission v. Verizon North LLC  
Pennsylvania Telephone Association v. Verizon North LLC  
Docket Nos., R-2011-2234464, C-2011-2237456, R-2011-2234462, C-2011-2237496**

Dear Secretary Chiavetta:

Enclosed please find Verizon's Answer to Preliminary Objections of the Pennsylvania Telephone Association, in the above captioned matter.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

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

Suzan D. Paiva

SDP/meb  
Enc.

**Via E-Mail and First Class U.S. Mail**  
cc: The Honorable Dennis J. Buckley  
Herbert Nurick, Mediation Coordinator  
Attached Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
Pennsylvania Telephone Association	:	R-2011-2234464
	:	C-2011-2237456
v.	:	
	:	
Verizon Pennsylvania Inc.	:	
	:	
	:	
Pennsylvania Public Utility Commission	:	
Pennsylvania Telephone Association	:	R-2011-2234462
	:	C-2011-2237496
v.	:	
	:	
Verizon North LLC	:	

**VERIZON’S ANSWER TO PRELIMINARY OBJECTIONS**

Pursuant to 52 Pa. Code § 5.101(f), Verizon Pennsylvania Inc. and Verizon North LLC (“Verizon”) hereby answer the preliminary objections to Verizon’s new matter filed by the Pennsylvania Telephone Association (“PTA”).

**I. INTRODUCTION**

Verizon’s amended answer seeks affirmative relief pursuant to 52 Pa. Code § 5.62(a). Verizon alleges in its new matter that for at least several years now it has been providing to the PTA Complainants<sup>1</sup> a “service,” as defined in 66 Pa. C.S. § 102, by transiting the RLECs’ local traffic destined to other local service providers through Verizon’s network. This is exactly the same “service” that Verizon provides to other local service providers and for which it receives compensation from those local service providers. Verizon further alleges that the RLECs are knowingly using Verizon’s

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<sup>1</sup> The “PTA Complainants” are those companies identified in footnote 1 to the PTA’s answer to Verizon’s new matter, which are the companies being represented by the PTA in this action.

network for this purpose and accepting the benefit of this transit service without compensating Verizon for it. The new matter asks the Commission to require the PTA Complainants to compensate Verizon for this transit service to avoid unjust enrichment.

The PTA's preliminary objections assert meritless technical arguments in an attempt to avoid having the Commission reach the substance of the claim. These preliminary objections do not satisfy the heavy burden required for preliminary dismissal without a consideration of the merits. "In ruling on preliminary objections [the Commission] must accept as true all well-pleaded facts and all inferences reasonably deducible therefrom," and it cannot sustain preliminary objections unless it "appear[s] with certainty that the law will not permit recovery."<sup>2</sup> Moreover, "any" doubt must "be resolved by a refusal to sustain them." (*Id.*)

In its New Matter, Verizon alleged all of the elements of a claim of unjust enrichment, based on its provision of a "service" within this Commission's jurisdiction that conferred a benefit on the PTA Complainants without compensation.<sup>3</sup> Where a "service" as defined by the Public Utility Code has been provided without compensation, the Commission possesses the authority to consider whether compensation should be required to avoid "unjust enrichment." For example, the Commission found that it has authority to permit "the 'back-billing' of a commercial customer who knowingly received

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<sup>2</sup> *Dorfman v. Pennsylvania Social Servs. Union B Local 668*, 752 A.2d 933, 936 (Pa. Commw. Ct. 2000). See also *Valentino v. Dominion Retail, Inc. t/a Peoples Plus*, Docket No. C-20055447, 2006 Pa. PUC LEXIS 27, 3-4 (Order entered January 12, 2006, adopting ID of Chief ALJ Smith) ("The Commission must view the [new matter] in a light most favorable to [Verizon], and the [new matter] should be dismissed only when it appears that [Verizon] would not be entitled to relief under any circumstances.")

<sup>3</sup> See, e.g., *Braun v. Wal-Mart Stores, Inc.*, 2011 PA Super 121 (Pa. Super. Ct. 2011) ("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.")

and used the public utility service for which, due to mutual inadvertence and due to the negligence of the public utility, the said ratepayer paid nothing.”<sup>4</sup> In the words of the Commission: “[a] contrary result would unjustly enrich Complainant at the expense of the other ratepayers.”<sup>5</sup> Similarly, the Commission has observed that a consumer of public utility service “has a ‘duty to pay for services rendered’” and “[a]ny other result would unjustly enrich the Complainant.”<sup>6</sup>

As discussed in response to the specific numbered paragraphs of the preliminary objections below, Verizon stated a legally cognizable claim that complies with the Commission’s procedural regulations and is within the Commission’s authority to consider. Therefore, the PTA’s preliminary objections should be denied.

## II. ANSWER TO PRELIMINARY OBJECTIONS

1. Verizon admits that the tariffs at issue were filed on the date specified, which tariffs are in writing and speak for themselves. Verizon denies that the tariffs “would impose significant increases” in the rates the PTA Complainants pay Verizon for transit. To the contrary, the PTA Complaints currently pay nothing for the use of the service, and the tariffs would simply require PTA Complainants to compensate Verizon for transit at the same rate paid by other carriers that utilize Verizon’s network to transit their local traffic.

2. Admitted.

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<sup>4</sup> *Cefalo v. Pennsylvania Gas and Water Company*, Docket No. C-881680, 1989 Pa. PUC LEXIS 123; 69 Pa. PUC 265 (Opinion and Order entered July 7, 1989).

<sup>5</sup> *Id.*

<sup>6</sup> *Rogers v. PECO Energy Company*, Docket No. C-00003599, 2001 Pa. PUC LEXIS 2 (Opinion and Order entered January 12, 2001).

3. Admitted. By way of further response, the Commission served the complaints on Verizon under cover of Secretarial Letters dated April 25, 2011. Those letters instructed Verizon that it “may” file an answer within 10 days (or by May 5, 2011) pursuant to 52 Pa. Code § 5.61(d). That regulation specifies that “[f]or complaints which are docketed with Commission-instituted rate proceedings, an answer may be filed within 10 days of date of service. However, an answer is not required, except as may be directed by the Commission or the presiding officer.” 52 Pa. Code § 5.61(d).

4. Admitted, except that the Commission’s orders speak for themselves and all characterizations are denied.

5. Denied as stated. Verizon’s amended answers and new matters are dated June 27, 2011, although due to an error in Verizon’s electronic filing they were docketed as filed on June 28, 2011. These pleadings speak for themselves and all characterizations are denied.

6. This paragraph requires no response.

7. This paragraph contains conclusions of law to which no response is required. The cited regulation enumerating the permitted bases for preliminary objections speaks for itself and all characterizations are denied.

8. This paragraph requires no response.

**Answer to Preliminary Objection No. 1: Verizon's New Matter Conforms to this Chapter.**

9. This paragraph contains conclusions of law to which no response is required. Verizon admits that Section 5.101(a)(2) allows a preliminary objection on the ground of “[f]ailure of a pleading to conform to this chapter,” but denies that Verizon’s new matter fails to conform with the procedural rules set forth in Chapter 5 of the Commission’s regulations.

10. The Commission’s regulation at Section 5.62 speaks for itself and all characterizations are denied.

11. Verizon admits that its new matter seeks affirmative relief from the PTA Complainants pursuant to 52 Pa. Code § 5.62(a) for their use of Verizon’s network to transit their local traffic from June 27, 2007, to the present without compensation. Verizon’s new matter speaks for itself and all characterizations are denied.

12. Denied. PTA Complainants contend that Verizon’s new matter fails “to conform to this chapter” because it purportedly fails to allege the “violation of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.” (PTA Preliminary Objections, ¶ 12). This argument is incorrect. Section 5.62(a)(2) requires a new matter seeking affirmative relief to set forth “[t]he provisions of the statutes, rules or orders relied upon.” Verizon did so by alleging that its “forced provision of transit service to the PTA members listed in the Complaint constitutes a ‘service’ as defined in the Public Utility Code [at] 66 Pa. C.S. § 102.”<sup>7</sup> (Verizon New

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<sup>7</sup> 66 Pa. C.S. § 102 provides that: “‘Service.’ Used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities . . . in the performance of their duties under this part to . . . other public utilities . . . as well as the interchange of facilities between two or more of them. . . .”

Matter ¶ 7). The Commission has authority to determine if Verizon has been providing a “service” to the PTA Complainants as defined by the Public Utility Code. If so, the Commission has the authority to determine whether Verizon should be compensated for that service.<sup>8</sup> *See also* 66 Pa. C.S. § 501.

13-14. Denied. PTA Complainants contend that Verizon’s new matter is untimely, on the theory that Verizon was not permitted to assert a new matter seeking affirmative relief unless it did so within 20 days after service of the complaints, pursuant to 52 Pa. Code § 5.61(a). This argument is incorrect for several reasons.

First, Verizon’s answer to the complaints was governed by 52 Pa. Code § 5.61(d), not by 52 Pa. Code § 5.61(a).<sup>9</sup> Section 5.61(d) states that Verizon “may” file an answer within 10 days, not that it “shall” do so within 20 days, and further states that “an answer is not required.” Accordingly, the PTA’s preliminary objections rely upon a regulatory provision that is inapplicable to this case, and PTA’s argument, which turns on the use of the word “shall” in Section 5.61(a), a word that does not appear in Section 5.61(d), is inapposite.

Second, the Commission’s regulation at 52 Pa. Code § 5.91, relating to amendments of pleadings, does not restrict the right to amend an answer, except to say that “no amendment to a pleading may be filed within 5 days preceding the commencement of or during a hearing unless directed or permitted by the Commission or the presiding officer after opportunity for all parties to be heard thereon.” 52 Pa. Code §

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<sup>8</sup> *Richnavsky v. Equitable Gas Company*, Docket No. C-20054209, 2006 Pa. PUC LEXIS 25 (Order entered February 22, 2006, adopting initial decision of ALJ Meehan) (The Commission’s “vesture under the Code includes initial jurisdiction over matters involving public utility rates and compensation for service rendered to customers.”)

<sup>9</sup> *See* Secretarial Letters dated April 25, 2011.

5.91. This amended answer and new matter was not filed within 5 days preceding a hearing. Accordingly, this rule permitted Verizon to amend its answer as of right on June 28, 2011 to include a new matter seeking affirmative relief from the PTA Complainants.

Third, even if it is determined that Verizon should have asserted its new matter with its initial answer within 10 days of service of the complaints, or that Verizon required leave of the Commission before amending its answer on June 28, 2011, Verizon respectfully requests that such leave be provided at this time. The Commission's regulations "shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable. The Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties." 52 Pa. Code § 1.2(a). The PTA Complainants have had the opportunity to answer the substance of Verizon's new matter, and to raise other preliminary objections. Dismissing the new matter as untimely would do nothing more than require Verizon to file separate complaints against the RLECs raising the same claims, to which the RLECs would file separate answers and likely raise the same substantive objections. This procedure would only complicate and render more expensive the resolution of this interrelated set of disputes, contrary to 52 Pa. Code § 1.2(a).

**Answer to Preliminary Objection No. 2: The Commission Has Jurisdiction to Consider Whether the PTA Complainants Should to Pay for Tandem Transit Service They Have Used.**

15-18. Denied. The PTA Complainants next argue that Verizon's new matter is "deficient in that the Commission lacks subject matter jurisdiction" to require the PTA

Complainants to compensate Verizon for the transit services they used.<sup>10</sup> However, the Commission has jurisdiction to require compensation for a service within its jurisdiction; such compensation is necessary to avoid “unjust enrichment” of the party that used the service.<sup>11</sup> As the Commission has explained, its authority to determine the proper compensation in a situation where services within its jurisdiction have been provided without payment derives from various sections of the Public Utility Code, including the authority to prevent discrimination in rates and services (66 Pa. C.S. § 1304, 1502), to ensure just and reasonable service (66 Pa. C.S. § 1501), and to enforce the “intent” of the Public Utility Code (66 Pa. C.S. § 501).<sup>12</sup>

19-21. Denied. The PTA next argues that “Verizon’s pleading fails to demonstrate that it sufficiently satisfies the requirements to prevail on an unjust enrichment claim.” (PTA Preliminary Objections ¶ 19). This is a substantive argument that is not appropriate for preliminary objections. The moving party must accept all well-pleaded, material facts of the other party, as well as every inference fairly deducible from

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<sup>10</sup> The PTA contends that Verizon is seeking “damages,” which are outside the Commission’s authority to award. This contention is incorrect. Verizon is merely seeking payment for services rendered, something that is clearly within this Commission’s authority to require. “Damages” that are outside this Commission’s authority are compensation for negligence or breach of contract, such as loss of earnings, loss of credit, loss of reputation, lost business, reimbursement for expenses incurred, and the like. *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 5 (Pa. 1977) (PUC lacked jurisdiction to award punitive and compensatory damages for lost business).

<sup>11</sup> *See, e.g., Cefalo v. Pennsylvania Gas and Water Company*, Docket No. C-881680, 1989 Pa. PUC LEXIS 123; 69 Pa. PUC 265 (Opinion and Order entered July 7, 1989) (“it is clear to us that the interests of justice will best be promoted by allowing the ‘back-billing’ of a commercial customer who has knowingly received and used the public utility service for which, due to mutual inadvertence and due to the negligence of the public utility, the said ratepayer paid nothing. A contrary result would unjustly enrich Complainant at the expense of the other ratepayers.”); *Rogers v. PECO Energy Company*, Docket No. C-00003599, 2001 Pa. PUC LEXIS 2 (Opinion and Order entered January 12, 2001) (the complainant has a ‘duty to pay for services rendered’ and “[a]ny other result would unjustly enrich the Complainant, and would burden the remaining consumer base.”)

<sup>12</sup> *Re Duquesne Light Company Investigation*, Docket No. 243, 1977 Pa. PUC LEXIS 151; 50 Pa. PUC 555 (Opinion and Order entered March 8, 1977) (“[w]here equitable considerations and extenuating circumstances are involved, clearly it is the intent of the Legislature that the Commission devise a fair, just, and equitable solution which adequately protects the rights of all parties without causing any undue harsh or adverse effects upon any of the parties.”)

those facts, for the purposes of disposition of the motion.<sup>13</sup> In considering preliminary objections, any doubt must be resolved in favor of the non-moving party.<sup>14</sup> Verizon alleged all of the elements of a claim for unjust enrichment, including “benefits conferred on” the PTA Complainants by Verizon, “acceptance and retention of such benefits” by the PTA Complainants “under such circumstances that it would be inequitable for [the PTA Complainants] to retain the benefit without payment of value.”<sup>15</sup> It is for the Commission to determine based on the evidentiary record whether Verizon can prove these allegations. In other words, Verizon has the right to present evidence to attempt to prove this element of its claim and dismissal on preliminary objections is not appropriate.

22-23. Denied. The PTA Complainants contend that Verizon’s unjust enrichment claim is barred “by the doctrine of laches due to its unreasonable and unjustified delay in pursuing such relief,” or that the Commission should enter a judgment of “non pros” based on the same claimed delay. These are not proper grounds for a preliminary objection.<sup>16</sup> As the PTA itself points out, the grounds for preliminary objections are limited to those set forth in 52 Pa. Code § 5.101. The defenses of laches and non pros require the PTA Complainants to establish certain facts, including that any delay was unreasonable and that they suffered prejudice.<sup>17</sup> It is thus not possible to

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<sup>13</sup> *County of Allegheny v. Commw. of Pa.*, 490 A.2d 402 (1985); *Commw. of Pa. v. The Bell Telephone Co. of Pa.*, 551 A.2d 602 (Pa. Commw. 1988).

<sup>14</sup> *Dept. of Auditor General, et al. v. State Employees’ Retirement System, et al.*, 836 A.2d 1053, 1064 (Pa. Commw. 2003) (*citing*, *Boyd v. Ward*, 802 A.2d 705 (Pa. Commw. 2002)).

<sup>15</sup> *Braun v. Wal-Mart Stores, Inc.*, 2011 PA Super 121 (Pa. Super. Ct. 2011).

<sup>16</sup> Verizon requests compensation from the applicable statute of limitations period of June 27, 2007. Accordingly, PTA Complainants are already protected by the statute of limitations from the assertion of any stale claims.

<sup>17</sup> *Pennsylvania Public Utility Commission v. West Penn Power Company*, Docket No. C-21608, 1993 Pa. PUC LEXIS 164 (Opinion and Order entered December 1, 1993).

conclude that Verizon's new matter is "legally insufficient" at the preliminary objection stage based on those claims. In any event, Verizon's claim for unjust enrichment continues to accrue every day that the PTA Complainants transit traffic through Verizon's network without paying for this service.

24. This paragraph requires no response, but to the extent any is required it is denied.

**Answer to Preliminary Objection No. 3: Verizon's New Matter States a Cause of Action.**

25. Denied. This objection is merely a restatement of arguments made in the first and second preliminary objections to which Verizon responded above. The PTA Complainants' assertion that "the parties' arrangements were such that no compensation whatsoever was required" is a factual claim that they would have to prove, not proper grounds for a preliminary objection.

**Answer to Preliminary Objection No. 4: Requiring the PTA Complainants to Compensate Verizon for Transit Service That They Used Is Not Retroactive Ratemaking.**

26-28. Denied. The PTA Complainants argue that Verizon's request to be compensated for their past use of its network to transit their local traffic amounts to a request for "retroactive ratemaking." (PTA Preliminary Objections ¶ 26). But the rule against "retroactive ratemaking" prohibits the Commission from setting future rates above or below cost to account for recovery or refund relating to past periods.<sup>18</sup>

Verizon's future rates proposed in its tariffs do not assume the recovery of past costs. Rather, Verizon separately requests payment for unpaid rendered services. Indeed, if

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<sup>18</sup> *Popowsky v. Pa. PUC*, 164 Pa. Commw. 338, 344 (Pa. Commw. Ct. 1994) ("The rule against retroactive ratemaking prohibits a public utility commission from setting future rates to allow a utility to recoup past losses or to refund to consumers excess utility profits.")

recovery of payment for past services rendered were “retroactive ratemaking,” the Commission could never permit a rebilling as it does routinely.<sup>19</sup> Under the doctrine of unjust enrichment, the PTA Complainants should be required to pay “the value of the benefit conferred.”<sup>20</sup> Verizon requested that this value be calculated based on the rates proposed in its tariffs because these are the same rates other carriers paid for transit during the period at issue.

### III. CONCLUSION

WHEREFORE, for the foregoing reasons Verizon respectfully requests that the PTA’s preliminary objections be denied.

Date: July 28, 2011



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<sup>19</sup> See, e.g., *Cefalo v. Pennsylvania Gas and Water Company*, Docket No. C-881680, 1989 Pa. PUC LEXIS 123; 69 Pa. PUC 265 (Opinion and Order entered July 7, 1989); *Re Duquesne Light Company Investigation*, Docket No. 243, 1977 Pa. PUC LEXIS 151; 50 Pa. PUC 555 (Opinion and Order entered March 8, 1977).

<sup>20</sup> *Lackner v. Glosser*, 892 A.2d 21, 34 (Pa. Super 2006).

**CERTIFICATE OF SERVICE**

I, Suzan D. Paiva, hereby certify that I have this day served a copy of Verizon's Answer to Preliminary Objections of the Pennsylvania Telephone Association, 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 28<sup>th</sup> day of July, 2011.

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

Norman J. Kennard, Esquire  
Patricia Armstrong, Esquire  
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