

Suzan DeBusk Paiva
Assistant General Counsel
Pennsylvania



1717 Arch Street, 3 East
Philadelphia, PA 19103

Tel: (215) 466-4755
Fax: (215) 563-2658
Suzan.D.Paiva@Verizon.com

August 29, 2011

Via Electronic Filing

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

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

Dear Secretary Chiavetta:

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

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

Very truly yours,


Suzan D. Paiva

SDP/slb

Via E-Mail and First Class U.S. Mail

cc: The Honorable Dennis J. Buckley
Cheryl Walker Davis, Office of Special Assistants
Mohan Samuel, Office of Special Assistants
Attached Certificate of Service

Via First Class U.S. Mail

cc: Chairman Robert F. Powelson
Vice Chairman John F. Coleman, Jr.
Commissioner Wayne E. Gardner
Commissioner James H. Cawley
Commissioner Pamela A. Witmer

CERTIFICATE OF SERVICE

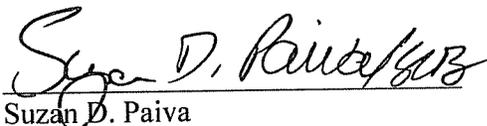
I, Suzan D. Paiva, hereby certify that I have this day served a copy of Verizon's Brief in Support of Verizon's Petition to Suspend, upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 29th day of August, 2011.

VIA E-MAIL and FIRST CLASS MAIL

Norman J. Kennard, Esquire
Thomas, Long, Niesen & Kennard
212 Locust Street, Suite 500
Harrisburg, PA 17108

David Reams Jamieson, Esquire
General Counsel
Armstrong Holdings, Inc.
One Armstrong Place
Butler, PA 16001



Suzan D. Paiva
Pennsylvania Bar ID No. 53853
1717 Arch Street, 3 East
Philadelphia, PA 19103
(215) 466-4755

Attorney for Verizon

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

BRIEF IN SUPPORT OF VERIZON’S PETITION TO SUSPEND

Verizon¹ respectfully requests that the Commission grant the Petition for Interlocutory Review and Answer to a Material Question that Verizon filed on August 19, 2011 (“Petition”). Momentum at the Federal Communications Commission (“FCC”) has substantially increased in recent weeks for an order addressing Voice over Internet Protocol (“VoIP”) compensation that will likely directly affect the resolution of all of Armstrong’s claims here. For example, the FCC is now considering and has set a very short cycle for comments on a broad industry consensus intercarrier compensation reform proposal — that specifically includes a prospective determination by the FCC that intrastate switched access charges do not apply to VoIP. The FCC has confirmed that it is in the “final stage” of its reform process,² and its Chairman has indicated it will

¹ Verizon Pennsylvania Inc. and Verizon North LLC.

² J. Genachowski *et al.*, *Bringing Broadband to Rural America: The Home Stretch on USF and ICC Reform*, FCC blog entry dated August 8th, 2011, available at <http://www.fcc.gov/blog/bringing-broadband-rural-america-home-stretch-usf-and-icc-reform>.

consider an order this fall.³ With the FCC in its “final stage” of deciding the same VoIP compensation issue presented here, suspending this proceeding for a reasonable period of time to await that FCC action is appropriate to avoid potentially conflicting regulatory results and the waste of resources.

Suspending this docket, which is at an early stage, to allow the Commission to factor in the FCC’s pending order – to the extent action is still required following the FCC’s decision – would not result in prejudice or harm to any party. To the contrary, to the extent action will still be required here, ensuring an orderly decision-making process will likely reduce the overall length of this proceeding by eliminating the need to re-do testimony or pleadings in light of the FCC decision. It also will reduce the risk of a premature Commission decision being overturned on appeal or modified on reconsideration.

Armstrong cannot argue that it needs or uses any subsidy from the legacy switched access regime to subsidize a rural ILEC network or to otherwise advance any universal service goals. Access charges were created at divestiture as a way to make up the subsidy that had previously flowed to the local incumbent telephone companies from the long lines operation, because local rates were still constrained by regulators. But cable companies like Armstrong were never subject to any of that regulation and are now just opportunistically attempting to extract an unnecessary subsidy.⁴ Moreover, in contrast to the *GNAPs/Palmerton* case, here Armstrong is receiving interim payments

³ *FCC Won’t Consider USF-ICC Order at September Meeting*, TR’s State NewsWire (Aug. 18, 2011).

⁴ This is particularly true for Armstrong, which in some locations is charging intrastate access rates of nine cents a minute or more.

from Verizon, and Verizon stands ready to negotiate a commercial agreement setting the reciprocal terms and conditions for the mutual exchange of VoIP traffic.

Far from causing prejudice or harm, a suspension would enhance settlement prospects by allowing the parties to redirect their efforts toward the negotiation of such a commercial agreement. The FCC has confirmed that it has not yet determined the compensation regime for VoIP, acknowledging that disputes like this one have therefore arisen – and it has specifically endorsed the use of commercial VoIP agreements to manage the resulting regulatory uncertainty. Armstrong, however, so far has been unwilling to enter into negotiations with Verizon for such an agreement. Instead, Armstrong is attempting unilaterally to impose intrastate switched access rates on Verizon in contravention of the FCC’s guidance and despite the fact that the FCC has not yet determined the compensation arrangement for VoIP – a question the FCC intends to resolve this fall.

BACKGROUND

In this proceeding Armstrong requests prospective and retroactive relief in the form of a determination by this Commission that Verizon is required to pay Armstrong’s intrastate switched access rates for functions that Armstrong claims it provides under its state access tariff. *See* Complaint, ¶¶ 27-39. Verizon’s position is that Armstrong’s state access tariff does not apply to the traffic in dispute because, *inter alia*, it is VoIP.

Verizon has been paying Armstrong an interim rate of \$0.0007 for the disputed traffic, and Verizon has proposed to enter into negotiation with Armstrong for a commercial agreement setting forth reciprocal terms for the mutual exchange of such traffic – that is, an agreement that would require Armstrong to pay the same rate to Verizon that Verizon

pays to Armstrong. The parties agree that all of the traffic in dispute originates or terminates on Armstrong's cable VoIP network.⁵

On February 9, 2011, the FCC initiated a comprehensive Notice of Proposed Rulemaking (“NPRM”)⁶ to address intercarrier reform and USF reform. The FCC stated that it “has never addressed whether interconnected VoIP is subject to intercarrier compensation rules and, if so, the applicable rate for such traffic.”⁷ It observed that “[t]his uncertainty has led to numerous billing disputes and litigation and may be deterring innovation and the introduction of new services.”⁸ With the number of VoIP compensation disputes growing, the FCC announced its intention to “expeditiously” address the VoIP compensation issue.⁹

Verizon filed a Motion to Dismiss or Stay Armstrong's Complaint in this docket on April 19, 2011 (“Verizon Motion”). Verizon argued for dismissal on the ground that the Commission does not have authority under Pennsylvania law to adjudicate compensation issues involving VoIP traffic terminated or originated by CLECs.¹⁰

Verizon argued, alternatively, that if the Commission decides not to dismiss Armstrong's

⁵ See Armstrong Reply to New Matter, Docket No. 2010-2216205 et al. (filed Jan. 31, 2011), ¶ 4 (admitting that all traffic that originates or is destined to the end-user customers of its cable affiliate is “originated and terminated in IP-Protocol”).

⁶ See *Connect America Fund; a National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers; Developing a Unified Intercarrier Compensation Regime, etc.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, WC Docket No. 10-90, etc. (Feb. 9, 2011) (“NPRM”) (*available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/FCC-11-13A1.pdf).

⁷ NPRM ¶ 604.

⁸ *Id.*

⁹ *Id.* ¶ 614. At the same time the FCC confirmed the appropriateness of the sort of commercial agreements for the mutual exchange of VoIP traffic that Verizon has negotiated with other carriers, and that Verizon seeks to negotiate with Armstrong. It made clear that nothing in the NPRM “should be read to encourage, during the pendency of this proceeding, unilateral action to disrupt existing commercial arrangements regarding compensation for interconnected VoIP traffic.” *Id.* Armstrong, however, has declined to enter into negotiations with Verizon for such a commercial agreement.

¹⁰ See Verizon Motion ¶¶ 17-39.

complaint, it should exercise its discretion over scheduling matters to hold it in abeyance pending a decision by the FCC on the question of how providers should compensate one another for the exchange of VoIP traffic.¹¹ On the same date, Armstrong filed a motion for partial summary judgment seeking a ruling that Verizon must pay the full amount of Armstrong's invoices for terminating and originating traffic.

On July 18, 2011, Administrative Law Judge Dennis J. Buckley issued an order ("ALJ Order") denying Verizon's request for a suspension on the grounds that potential FCC action was "too speculative" and "tentative, at best."¹² The ALJ Order also rejected Verizon's motion to dismiss as premature, as well as denied Armstrong's motion for summary judgment. The ALJ made clear that the proceeding will involve a significant evidentiary component because there are "many unresolved factual issues."¹³

Accordingly, if not suspended, the case will necessitate the expenditure of significant resources by the Commission and the parties.

As discussed below, new developments at the FCC since the issuance of the ALJ Order indicate that likely FCC action is neither "speculative" nor "tentative." Thus, Verizon respectfully requests that the Commission suspend the docket to conserve resources in anticipation of FCC action.

¹¹ *Id.* ¶¶ 5-6, 31-49.

¹² ALJ Order at 10.

¹³ ALJ Order at 15; *see also id.*, Conclusion of Law No. 7.

DISCUSSION

I. ALL RELEVANT CONSIDERATIONS SUPPORT GRANTING VERIZON'S PETITION.

A. The FCC's Stated Intention to Act this Fall Is Not "Tentative" or "Speculative."

Momentum at the FCC for a prompt decision has substantially increased since the ALJ Order characterized the prospect of FCC action as too "tentative" and "speculative."¹⁴ At the end of July, Verizon and numerous other companies and carrier associations filed with the FCC a consensus framework for intercarrier compensation and USF reform comprised of complementary proposals for rate-of-return and price-cap carriers.¹⁵ An important element in that overall framework is a prospective determination by the FCC that intrastate switched access charges do not apply to VoIP.¹⁶ Unlike past developments at the federal level that did not result in concrete FCC action in the face of highly splintered industry advocacy, there is now a broad industry consensus on an overall framework that includes specific rules for VoIP compensation.

The FCC has set a very short cycle for comments on the consensus framework (as well as a plan submitted by the State Members of the Federal-State Universal Service Joint Board), which will end this month. The FCC has confirmed that it is in the "final

¹⁴ Judge Buckley indicated that he prefers that Verizon bring the issue directly to the Commission rather than seek reconsideration of the ALJ Order in light of these recent developments.

¹⁵ See Letter from AT&T, Verizon, CenturyLink, Frontier, FairPoint, Windstream, USTelecom, National Telecommunications Cooperative Association, OPASTCO, and Western Telecommunications Alliance, to FCC Commissioners, FCC Docket Nos. WC 10-90, et al. (July 29, 2011); *America's Broadband Connectivity Plan*, filed with the FCC by Verizon, AT&T, CenturyLink, Windstream, Fairpoint, and Frontier on July 29, 2011 ("ABC Plan").

¹⁶ See ABC Plan, Attachment 1, p. 10.

stage” of its reform process,¹⁷ and it promptly denied requests for short extensions of the August comment period.¹⁸ The FCC Chairman indicated that the FCC will consider an order “before the leaves fall from the trees.”¹⁹ By all accounts, then, there is strong momentum for FCC action on VoIP compensation this fall.

B. The FCC Order Is Likely to Directly Affect the Resolution of All of Armstrong’s Claims.

The ALJ Order characterized Verizon’s request for a suspension as based on “hoped-for preemption.” ALJ Order at 10. While an FCC decision on preemption could indeed be determinative of all of Armstrong’s claims, virtually any FCC decision on VoIP compensation can be expected to affect the parties’ factual, policy, and legal presentations as well as this Commission’s resolution of this proceeding.

As a starting point, FCC action could directly affect state commission authority in ways that would be dispositive here. The FCC is actively considering the question of whether VoIP is an “information service” under federal law²⁰ – and an affirmative answer to that question would be determinative with respect to Armstrong’s claims because it would mean that federal jurisdiction over VoIP is exclusive. Even if the FCC does not reach that dispositive question or if it answers it in the negative, the analysis and determinations supporting its decision would nevertheless affect the legal and factual issues to be litigated and evaluated in this case. For example, an FCC decision adopting

¹⁷ J. Genachowski *et al.*, *Bringing Broadband to Rural America: The Home Stretch on USF and ICC Reform*, FCC blog entry dated August 8th, 2011, *available at* <http://www.fcc.gov/blog/bringing-broadband-rural-america-home-stretch-usf-and-icc-reform>.

¹⁸ Order, *Connect America Fund*, WC Docket Nos. 10-90 *et al.* (adopted Aug. 8, 2011).

¹⁹ *FCC Won’t Consider USF-ICC Order at September Meeting*, TR’s State NewsWire (Aug. 18, 2011).

²⁰ NPRM ¶ 73 (stating that “[t]o date, the Commission has not classified interconnected VoIP service as either an information service or a telecommunications service,” and requesting comment on that issue).

the industry consensus proposal would render moot Armstrong's request for prospective relief²¹ because under that proposal the FCC – rather than this Commission – would establish the going-forward rate for all VoIP traffic.

Also, although the industry consensus proposal takes no position on retroactivity, the FCC sought comment on and is considering whether its VoIP compensation decision should have “retroactive effect.”²² Moreover, even absent specific FCC findings on how to resolve retroactivity issues, what the FCC actually says regarding VoIP compensation can be expected to substantially inform how any remaining Armstrong claims would be litigated and evaluated. For example, one important policy issue that Verizon has raised here is whether Armstrong should be prohibited from engaging in an asymmetrical arbitrage scheme by insisting that Verizon and other providers pay *it* access charges, even while it routes its traffic in ways that allow it to avoid paying access charges to Verizon or other providers. That “tails we win, heads you lose” scenario is one that the FCC has specifically flagged,²³ and its treatment of that issue is clearly relevant to the outcome of this proceeding.

Accordingly, the determination the FCC intends to issue will be critically important to the VoIP compensation issue raised by Armstrong's complaint. This Commission would clearly benefit from testimony and briefing in this proceeding that can appropriately factor in the FCC's order.

²¹ See Complaint, Relief Request No. 4.

²² NPRM ¶ 614.

²³ NPRM ¶ 610.

C. Suspending this Proceeding for a Reasonable Period Would Avoid Wasting Commission and Party Resources.

If this Commission were to require the parties to proceed immediately to the filing of testimony and a hearing, this proceeding promises to be controversial, complex, and vigorously litigated, with the outcome likely challenged on reconsideration and appeal (including challenges based on the inadequacy of the record in light of the FCC's determination), requiring an additional expenditure of resources.

Absent a Commission order suspending the proceeding, it is likely that various rounds of prefiled testimony will be required in September and October and, assuming discovery disputes can be resolved efficiently, a hearing is likely to be scheduled for November. Suspending that schedule, and waiting until the FCC acts ("before the leaves fall from the trees"), would allow the FCC's action to be accounted for in the testimony and pleadings filed, and would potentially save substantial party and Commission resources without substantially affecting the timing of the ultimate resolution of this case. The schedule could be resumed after the FCC acts, and testimony and hearings could be completed within a couple of months, allowing for whatever remains of the matter to be briefed and presented to the Commission early next year. At the same time, having some certainty from the FCC regarding the federal law aspects of this dispute may well help facilitate settlement discussions and avoid the need for further expenditure of Commission resources.²⁴

²⁴ In light of the FCC's pending decision in the NPRM, parties affected by the Commission's recent decision in the rural incumbent local exchange carrier access investigation ("Access Order") asked this Commission for a stay until the FCC's determinations could be considered there. *See* Opinion and Order, Docket No. C-2009-2098380 *et al* (adopted Aug. 11, 2011). As Verizon has explained, the Access Order is just a baby-step toward long-overdue reform of those carriers' extremely high access rates and should be implemented without delay because there is little risk of conflicting regulatory results. And perhaps more importantly, the Access Order – a final order – was issued after an extensive evidentiary record had been fully developed, briefed, and considered by the Commission, so

A reasonable suspension would also conserve resources litigating and evaluating the fact-intensive issues raised by Verizon's New Matter No. IV, which involves Armstrong's improper attempt to charge for switched transport rate elements that it is not authorized to provide under the terms of its state access tariff. *See* Verizon New Matter ¶¶ 40-45. That new matter is only relevant to the extent it is determined that Armstrong's state tariff applies to VoIP traffic, so any developments that narrow or clarify that threshold question will determine whether and to what extent there is a need to develop and brief a record regarding this new matter.

D. A Limited Suspension Would Not Result in Undue Delay or Prejudice.

A suspension of the schedule will not create harm or prejudice. The scheduling modifications needed to accommodate FCC action are not major, and a more orderly decision-making process ultimately would save time and resources. In fact, the overall length of this proceeding may be reduced by eliminating the need to re-do testimony or pleadings in light of the FCC decision, and by reducing the risk the Commission's initial decision will be overturned on appeal or modified on reconsideration based on its inability to properly factor in the relevance of the FCC action. It is undisputed that Verizon is continuing to compensate Armstrong at the rate of \$0.0007 pending negotiation of a commercial agreement. That fact distinguishes this proceeding from the *GNAPs/Palmerton* case, where GNAPs was paying nothing to Palmerton.²⁵ As Verizon

it was appropriate to move forward with implementation with the understanding that it could be revisited if and to the extent future coordination with federal reforms becomes appropriate. *See* Verizon's Answer to Petition for Reconsideration and Stay, Docket No. I-00040105 (filed Aug. 10, 2011). Here those same considerations militate in the *opposite* direction – there is a substantial chance of conflicting regulatory results and this case is at an early stage.

²⁵ *Palmerton Telephone Company v. Global NAPs South, Inc., etc.*, Docket C-2009-2093336 (Opinion and Order entered March 16, 2010) ("*GNAPs/Palmerton*"), at 32.

has explained to this Commission²⁶ and to the FCC, the rate of \$0.0007 is a common rate for a substantial amount of traffic that carriers exchange today, including VoIP traffic.²⁷

Unlike Palmerton, Armstrong cannot argue that it needs or uses any subsidy from the legacy switched access regime to subsidize a rural ILEC network or to otherwise advance any universal service goals. Extending the legacy access regime to cable companies like Armstrong makes no sense and would be bad policy. Access charges were created at divestiture as a way to make up the subsidy that had previously flowed from the long lines operation because local rates were still constrained by regulators, but cable companies were never subject to any of that regulation and are now just opportunistically attempting to extract an unnecessary subsidy. There is no legitimate reason to authorize a cable VoIP provider like Armstrong to receive substantial legacy switched access subsidies intended to support *ILECs'* legacy regulatory burdens.

E. A Limited Suspension Would Enhance Settlement Prospects.

Far from causing prejudice, suspending this proceeding would permit the parties to pursue negotiation on a potential commercial agreement that would resolve their VoIP dispute. Verizon's consistent position has been that it seeks to negotiate a mutually beneficial commercial agreement for the mutual exchange of VoIP traffic, i.e., one that works in both directions and does not permit Armstrong to engage in asymmetrical arbitrage. As discussed above, the FCC has specifically indicated that in the face of

²⁶ See Verizon's Answer to Armstrong's Motion for Partial Summary Judgment at 8-10.

²⁷ Indeed, the FCC is actively considering whether to establish \$0.0007 the rate that should apply to all VoIP traffic (NPRM at ¶ 616), a determination that is clearly relevant to Armstrong's claims that this rate is "virtually nothing" (Armstrong SJ Motion at 2) and that it has "no economic or historical significance" (*id.* at 52-53).

present uncertainty regarding VoIP compensation, it is appropriate for parties to enter into such commercial agreements.

Yet despite the FCC's clear statement that it has not determined the compensation regime for VoIP – and that it intends to do so this fall – Armstrong seeks unilaterally to impose *its* switched access charges on Verizon even while it *avoids* paying switched access on traffic going the other direction. It is unfortunate that to date Armstrong has declined to enter into negotiations on a reciprocal commercial agreement, and instead has favored litigation. But now more than ever is the time for parties with VoIP compensation disputes to engage in serious negotiation aimed at settling such disputes in mutually beneficial ways. Suspending the schedule for a reasonable period of time would permit the parties to repurpose their efforts and resources to that task.

II. OTHER BODIES HAVE ALREADY RECOGNIZED THE IMPORTANCE OF FACTORING IN THE FCC'S DETERMINATIONS ON VOIP.

At least three federal courts suspended their own consideration of VoIP compensation disputes pending the FCC's decision where the principal issue is whether tariffed switched access rates apply to VoIP calls. *See CenturyTel of Chatham, LLC v. Sprint Communs. Co. LP*, 2011 U.S. Dist. LEXIS 7132 (W.D. La. Jan. 24, 2011) (staying case for one year, following which “if any party is not satisfied that the FCC has made substantial progress toward deciding the matter, the party may file a motion to vacate the stay with this Court”); *Pac-West Telecomm, Inc. v. MCI Communications Servs., Inc.*, 2011 WL 1087195 (E.D. Cal. Mar. 23, 2011) (explaining that “opining on the compensation of VoIP technology . . . require[s] the expertise of the FCC,” and that “efficiency requires staying this case . . . for six months in light of the 2011 NPRM”); *CBeyond Comm., LLC v. MCI Communications Servs., Inc.*, Civ. No. 1:11 cv-0693-TCB

(N.D. Ga. May 19, 2011) (staying the case until the earlier of six months or FCC action, because a “stay will promote the interests of justice and judicial economy by preventing the parties and the Court from expending significant resources on discovery and litigation of issues that will likely be mooted or resolved by the FCC’s action on the NPRM”).

These decisions to suspend ongoing VoIP proceedings were issued earlier this year. As discussed above, the momentum for a decision at the FCC has only increased in recent months – making a suspension even more appropriate now.

CONCLUSION

For the foregoing reasons, Verizon respectfully requests that the Commission grant Verizon’s Petition for Interlocutory Review and Answer to a Material Question. It is appropriate for this Commission to exercise its discretion over scheduling matters to suspend this proceeding for a reasonable period of time until the FCC’s determinations on VoIP compensation can be appropriately considered.

Respectfully submitted,


Suzan D. Paiva (Atty ID No. 53853)
Verizon

1717 Arch Street, 3rd Floor
Philadelphia, PA 19103
Telephone: 215-466-4755
Facsimile: 215-563-2658
E-mail: Suzan.D.Paiva@verizon.com

Dated: August 29, 2011

Counsel for Verizon