THOMAS, LONG,
NIESEN & KENNARD
Attorneys and Counsellors at Law

NORMAN J. KENNARD
Direct Dial: 717.255.7627
nkennard@thomaslonglaw.com

September 7, 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 please find the Reply Brief of the Pennsylvania Telephone Association in the above-referenced consolidated proceeding. Copies 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: Norman J. Kennard

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	:	

REPLY BRIEF OF THE PENNSYLVANIA TELEPHONE ASSOCIATION

Norman J. Kennard, Esq. (ID # 29921)
Patricia Armstrong, Esq. (ID # 23725)
Charles E. Thomas, III, Esq. (ID # 201014)
THOMAS, LONG, NIESEN & KENNARD
212 Locust Street, Suite 500
P.O. Box 9500
Harrisburg, PA 17108-9500
Tel: (717) 255-7600
nkennard@thomaslonglaw.com
parmstrong@thomaslonglaw.com
cet3@thomaslonglaw.com

Attorneys for
Pennsylvania Telephone Association

Date: September 7, 2011

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes, Regulations, Texts, Codes

I. PROCEDURAL BACKGROUND

On August 24, 2022, Verizon Pennsylvania Inc. ("Verizon PA") and Verizon North LLC ("Verizon North") (collectively "Verizon") and the Pennsylvania Telephone Association, on behalf of its member rural local exchange carriers ("PTA Companies" or "RLECs") operating in Pennsylvania, filed Main Briefs ("MB") in the above-captioned docket pursuant to the schedule established by Your Honor for this proceeding. The PTA submits this Reply Brief in response to the Brief filed by Verizon.

In the meantime, the parties continue to be engaged in mediation for the purpose of establishing a voluntarily agreed-to interconnection agreement in lieu of the tandem transit tariff at issue in the litigation.

II. SUMMARY OF ARGUMENT

The PTA Companies continue to believe that a tariff is not the proper mechanism to develop tandem transit service and request that the Commission direct the negotiation of an agreement between the parties. Verizon exaggerates claims that the RLECs have not reacted "promptly" to Verizon's first version draft agreement in an attempt to demonstrate RLEC intransigency and justify its decision to file a tariff. This kind of aggressive name calling does not resolve any of the issues. Nor was it demonstrated by Verizon's witness. Most importantly, this tactic is insufficient to overcome the Telecommunications Act's requirement of agreements.

Next, Verizon trivializes and attempts to undercut the RLECs' legitimate need for more accurate billing records. The repeated claim that tandem transit is a one way service is only true if one focuses *solely* on the payment for the service by the originating carrier and ignores the affected public on both ends of the call. Terminating carriers, including the RLECs, rely upon the Verizon billing records (EMI) to render a bill to the originating carrier and Verizon

acknowledges that it does so without agreement or tariff, callously asserting that the RLECs should be happy with what they get.

Verizon does not argue that it cannot provide more accurate billing records, only that it does not want to be required to do so. Verizon has a contractual right contained in all of its interconnection agreements to obtain CPN on "at least 95%" of all incoming calls, including tandem transit calls, which it does not enforce. Adding injury, Verizon, itself, alters call records by replacing the originating number. Whether called "stripping" or "over writing," the result is the same -- unbillable calls. Again Verizon acknowledges that it can remedy the situation, but refuses to do so.

As to the definition of local traffic, it is insufficient to simply use the Telecommunications Act definition, due to post enactment changes in the industry. Specifically, the use of virtual NXX combined with dial-up Internet service providers is a problem for the RLECs and, if not addressed, will leave the RLECs with a high volume of long distance traffic upon which the RLECs would be forced to pay tandem transit. The PTA Companies' objective is to exclude this type of traffic from Verizon tandem charges.

Finally, Verizon contends that the PTA Complainants have been using Verizon's tandem transit service for years without compensating Verizon and therefore have been unjustly enriched.[1] The PTA has previously moved to dismiss this counterclaim continues to so urge here. Moreover, having made this late filed claim of unjust enrichment, Verizon did not provide any evidence to support it.

[1] Verizon MB at 2.

III. ARGUMENT

A. Tandem Transit Service Should Be Provided Based On Negotiated Terms, Not A Tariff

As discussed extensively in the PTA's Main Brief, tandem transit should be the subject of an agreement, not a tariff.[2] The RLECs were fully engaged in the process of negotiating an Agreement when the tandem transit tariffs were filed by Verizon and they continue to actively negotiate an agreement with Verizon. The RLECs continue to believe that a tariff is not the proper mechanism and request that the Commission direct the negotiation of an agreement.

Verizon disclaims that an interconnection agreement should be required and argues that tariffing of tandem transit service should be permitted on the grounds that the RLECs' failure to "promptly" negotiate an agreement forced Verizon to file a tariff:[3]

> Verizon attempted to negotiate commercial arrangements with the RLECs to cover these services, but the RLECs preferred the status quo that resulted from their interconnection with Verizon prior to the advent of local competition; receiving a service for free. As a result, Verizon was forced to file the tariffs at issue so that it may begin charging the RLECs the same rates that are paid by CLECs and wireless carriers for this service.[4]

While a convenient argument for lawyers, this view lacks any factual basis. This self-serving "we were forced" version of events is an insufficient basis to reject the Telecommunications Act's preference for negotiated agreements. Nor is it factually correct.

Mr. D'Amico, the witness presented to support Verizon's "factual" claims regarding the negotiations, provided no credible support. He agreed that his testimony is conjecture and is not

---

[2] PTA MB at 6-11.

[3] Verizon MB at 17 ("When the RLECs did not promptly provide a substantive response to this draft, Verizon was left in the position of continuing to provide Tandem Transit Traffic Service to them without any compensation and without the prospect of an immediate commercial agreement. Verizon was forced to file a tariff and exercised its legal right to do so in April of 2011."). There is no explanation of what "promptly" means to Verizon or why a commercial agreement was needed "immediately."

[4] Verizon MB at 1.

fact-based.[5] Mr. D'Amico was not involved in any of the discussions between the parties and has only a "high level of understanding on this."[6] Where he stated that the RLECs "did not respond,"[7] he was simply referring to the time lapse between the January 13, 2011 original Verizon contract presentation and the April 11, 2011 responsive, redrafted interconnection agreement by the PTA.[8] During the intervening time between January 13th and April 11th, he does not know the specifics of any phone calls, discussions or emails between the PTA and Verizon.[9]

Moreover, Verizon's inflammatory version of the negotiations is factually incorrect:[10]

- On November 15, 2010 Verizon sent a letter to the PTA Companies asking for a transit rate.
- There were several joint calls in December 2010.
- In January 2011, Verizon proposed an off-the-shelf ICA designed for CLECs that contained what the RLECs believed were far more cumbersome terms and addressed far more that just transit service.
- The RLECs immediately suggested that the Parties meet to work out a term sheet and then develop an ICA around the term sheet.
- Verizon refused to participate in such an approach, so the RLECs proceeded to modify Verizon's January 13th draft interconnection agreement. It advised Verizon that it was doing so.
- Throughout the weeks that this modification was being performed, RLEC counsel and others repeatedly reported to Verizon the status of that effort and a responsive draft was promised to Verizon in early April, but Verizon then proceeded to file the subject tariffs.
- The PTA companies thereafter waited three months for a reply from Verizon to their April 11, 2011 re-drafted agreements. When it did respond, Verizon sent a non-redlined draft to the PTA Companies.

---

[5] NT at 40.
[6] NT at 43.
[7] Verizon St. 1.0 at 32.
[8] NT at 42.
[9] NT at 43-44.
[10] PTA St. 1 at 8. Mr. Zingaretti's version of the negotiation events was not contested by Verizon.

In short, Verizon is unfairly blaming the negotiation process and the RLECs' participation as a means to overcome the legal framework requiring interconnection agreements that was described in the PTA's Main Brief. Verizon does not claim that the RLECs are negotiating in bad faith; it simply complains that the RLECs have not reacted "promptly" or even "immediately." Verizon's invented complaints are untrue and self-serving. Most importantly, they are insufficient to overcome the Telecommunications Act's requirement of agreements.

B. Verizon's Tandem Transit Tariffs Are Improperly Filed and Should Be Rejected

As the PTA set forth in testimony and its Main Brief,[11] Verizon filed its tandem transit tariff as a noncompetitive service,[12] but did not do so as part of the *annual* tariff filing for noncompetitive services. Unless the tariffs apply to competitive services, such a rate increase is limited to Verizon's annual Chapter 30 rate adjustment.[13]

The issue was the subject of testimony by Verizon[14] and the PTA,[15] yet the issue was not addressed by Verizon in its Main Brief. As the party with the burden of proof, Verizon has the duty to "completely address, to the extent possible, every issue raised by the relief sought and the evidence adduced at hearing."[16] This Verizon has not done and, as a result, Verizon's tariff filing should be rejected as improperly filed.

---

[11] See PTA MB at 14-16.
[12] Under 66 Pa. C.S. § 3016, a carrier may declare a retail "nonprotected" service as competitive. No such declaration, however, has been filed by Verizon.
[13] *See* Verizon PA's Alternative Regulation Plan, Part 1, Price Stability Mechanism; Verizon North's Alternative Regulation Plan, Part 3, Price Stability Plan; 66 Pa. C.S. § 3015.
[14] Verizon St. 1.0 at 9; Verizon St. 1.1 at 24-25.
[15] PTA St. 1 at 21-22.
[16] 52 Pa. Code § 5.501(a)(3) ("The party with the burden of proof shall, in its main or initial brief, completely address, to the extent possible, every issue raised by the relief sought and the evidence adduced at hearing.").

C. Tariffed Transit Service, As Proposed By Verizon, Fails To Address Incoming Tandem Transit Calling

The PTA's Main Brief extensively discusses the problem created by and Verizon's refusal to address the quality of *incoming* tandem transit traffic billing data.[17] There are two principal problems with Verizon's tandem transit service from the perspective of the terminating carrier -- both are billing issues. The terminating carrier relies upon the Verizon billing records (EMI) to render a bill to the originating carrier.[18]

Where those billing records are not accurate or missing critical information, such as the Calling Party Number ("CPN"), originating carriers are either not billed accurately or not billed at all. Verizon's Main Brief claims that the RLECs should be satisfied with the level of detail they receive currently and have raised the subject matter of billing for the sole purpose of "attempting to hijack this proceeding."[19] This kind of trivialization of the subject more effectively demonstrates Verizon's indifference to and its hostility to finding a remedy.

Verizon attempts to undercut the RLECs' legitimate desire for accurate billing records in several ways. First, conceptually, Verizon claims that tandem service is a one-way (outgoing) offering for calls generated by the RLECs and that incoming calls transited to the tandem are a "completely different service offering..."[20] Moreover, Verizon claims it is already providing the RLECs billing records according to established (but unnamed) "industry standard guidelines."[21]

As was extensively discussed in the PTA's Main Brief,[22] tandem transit is a two-way service offering. But, under Verizon's view, their tariff only addresses outgoing traffic, so there is no need to tariff terms of service for calls received from the tandem. Rather, Verizon prefers

---

[17] See PTA MB at 6-7.
[18] NT at 94-95.
[19] Verizon MB at 14.
[20] Verizon MB at 14.
[21] Verizon MB at 14, citing Verizon St. 1.0 at 28.
[22] PTA MB at 17-19.

to provide call detail records according to its own terms "rather than a tariff or a contract."[23] There should be no question that Tandem Transit calls pass both ways. Verizon's publically-offered, but non-tariffed Access Tandem Connection ("ATC") service provides transiting from the service provider *to both Verizon and non-Verizon* end offices. In marketing this ATC service, Verizon states that the service allows the purchaser to ***send and receive*** traffic to third parties. "So purchasers of ... ATC service ... are buying a 2-way product, but the RLECs are only receiving a 1-way service"[24] under Verizon's tariffs. A purchaser of tandem transit service should have access to accurate records reflecting both sides of this equation. This is yet another reason why Verizon's tariffs are inappropriate for tandem transit service.

Verizon does not argue that it cannot provide more accurate billing records, only that it does not want to be required to do so. In is an exaggeration of the PTA Companies' position to argue that "they want Verizon to guarantee the contents of call detail records ..."[25] Actually, the PTA Companies want Verizon to do a better job of collecting call detail records for third-parties and cease the practice of "stripping" out the CPN.

Verizon's Main Brief misses the point when it states that it "generally" passes along call detail received from the originating carriers and, if the detail is incomplete, that is "probably" due to the actions of the originating local service provider.[26] In point of fact, Verizon has a contractual right contained in all of its interconnection agreements to obtain CPN on "at least 95%" of all incoming calls, including tandem transit calls.[27] Yet, Verizon makes little or no

[23] Verizon MB at 14.
[24] PTA St. 1 at 15-16.
[25] Verizon MB at 14.
[26] Verizon MB at 15, citing Verizon St. 1.1 at 28.
[27] PTA MB at 21-23.

attempt to enforce CPN adherence by other originating providers.[28] There is no process in place for a terminating carrier to even complain about the lack of CPN.[29]

In surrebuttal testimony,[30] and again on recross, Verizon's witness claimed that it "has no control over what the originating party sends...and I guess that I would characterize that as impossible."[31] These claims, again repeated in Main Brief,[32] are exaggerated and simply reflective of the fact that Verizon wants to be paid to provide tandem transit service, but doesn't want to bear any responsibility for ensuring that the traffic meets contractual standards. Under Verizon's view, it provides a conduit and bears no responsibility for what flows through it, even though it, exclusively, has the ability to do so.[33]

Moreover, Verizon, itself, alters call records by replacing the originating number with zeros.[34] This precludes the RLECs from determining the correct jurisdiction applicable to tandem transit calls and rendering an accurate bill. In Main Brief citing its witness, Verizon claims that it "does not strip" call detail, but acknowledges that it places zeros in the originating number field, over writing the CPN.[35] Whether called "stripping" or "over writing," the result is the same -- unbillable calls

Verizon attempts to minimize the problem as occurring only in "limited situations."[36] There is no record support for such a claim. The Verizon witness does not know what portion of the traffic flowing across the tandem is affected by the insertion of a fictitious billing number in

---

[28] NT at 117 ("Q. Does Verizon enforce that provision? A. We try to. The FCC I believe has tried to as well, but you know, sometimes either we don't have the ability to enforce it or there's so many bodies, you can only look at so many, you know, carriers, you know.").
[29] NT at 124.
[30] Verizon St. 1.1 at 22 (Ensuring carrier compliance "would impose impossible obligations...")
[31] NT at 122 and 123 ("...impossible for Verizon to control traffic").
[32] Verizon MB at 15, citing Verizon St. 1.1 at 16 ("not in a position to force other carriers...").
[33] The PTA Companies, as ILECs, have no ability to require an interconnection agreement with a CLEC. The Telecommunications Act presumes that the CLEC will seek interconnection, which they do, but of Verizon only.
[34] PTA MB at 23-24.
[35] Verizon MB at 16.
[36] Verizon MB at 16.

lieu of the CPN.[37] Nor is Verizon willing to discuss the remedy.[38] Verizon's strategy is to refuse to address the problem, while at the same time insisting on RLEC trunk modifications so that matters which are of concern to Verizon and its billing issues are resolved.

D. The Tariff Definition of Local Service Must Be More Specific

The PTA Companies are also concerned about the incomplete tariff definitions proposed by Verizon, as was discussed in Main Brief.[39] Verizon's response is that the definition presented in the tariff is the same as is used in negotiated interconnection agreements and it is unaware of any problem.[40]

As Mr. Zingaretti described, the Telecommunications Act definition, now fifteen years old, has become dated "as the market has evolved, [and] new definitions have been attached to those terms as a result of changes in the industry."[41] Specifically, the use of virtual NXX ("VNXX") numbering practices, under which a carrier obtains a telephone number in one local calling area but then assigns it to a different area which would be a toll call, is a problem for the RLECs.[42] Combined with dial-up internet traffic, the cost in tandem transport to the toll location under the fiction that the call is local, is controversial in the industry and the RLECs do not want to pay tandem transit for long distance calls.[43] Administrative Law Judge Salapa, in two cases still pending before the Commission, has ruled that dial-up calling using virtual NXX to obtain

[37] NT at 104.
[38] PTA MB at 23-24.
[39] See PTA MB at 25-27.
[40] Verizon MB at 13.
[41] NT at 182.
[42] NT at 184.
[43] NT at 185.

"local" transport to a toll location is exchange access and not local service.[44] The PTA Companies' objective is to exclude this type of traffic from Verizon tandem charges.

E. Rule 3.5.1 of Verizon's Tandem Transit Tariffs Required The RLECs To Separate Traffic Because Verizon Will Not Make Software Changes On Its Network And, Then, Gives Verizon The Ability To Unilaterally Force Changes On the RLECs' Networks

The PTA Companies, in Main Brief, addressed their concerns over the liberal grant of authority over network changes conferred upon Verizon by the tariff.[45] The PTA Companies asked that network changes be mutually agreed to. Verizon's Main brief addresses this issue of mutuality not at all.[46]

F. The Verizon North Tandem Transit Rate is Unsupported and Should Be Rejected

Verizon PA proposes to charge a rate of $0.001362 per minute-of-use and Verizon North proposes a much higher rate of $0.0047856 per minute-of-use.[47] In Main Brief, the PTA did not oppose the Verizon PA rate, but did contest the Verizon North rate as unsupported and argued that the Verizon North rate should be set at the Verizon PA rate.[48] Verizon's rebuttal is to claim that the rate has been agreed to in negotiated interconnection agreements and is comparable to another carrier's rate.[49] This is legally insufficient and *Mobilfone* is of limited precedential

---

[44] *Petition of Core Communications, Inc. for Arbitration of Interconnection Rates, Terms and Conditions with Windstream Pennsylvania, Inc. pursuant to 47 U.S.C. § 252(b)*, Docket No. A-310922F7004, Recommended Decision of ALJ David A. Salapa released January 9, 2008; and *Petition of Core Communications, Inc. for Arbitration of Interconnection Rates, Terms and Conditions with The United Telephone Company of Pennsylvania d/b/a Embarq Pursuant to 47 U.S.C. §252(b)*, Docket No. A-310922F7002, Recommended Decision of ALJ David A. Salapa dated October 19, 2007.

[45] PTA MB at 27-32.

[46] Verizon's Main Brief does reflect its witness' agreement with the PTA that the two-way trunking requirement be made express. Verizon MB at 10, citing Verizon St. 1.1 at 10.

[47] Verizon St. 1 at 10.

[48] See PTA MB at 33-34.

[49] Verizon MB at 8, citing *Mobilefone.*

value. Benchmarking was used in that proceeding to verify cost results (which Verizon has not presented here). Nor was comparison of rates the *only* basis for rate setting.

G. Unjust Enrichment Does Not Apply and Is Not Supported on the Record

Verizon contends that the PTA Complainants have been using Verizon's Tandem Transit Traffic service for years without compensating Verizon and therefore have been unjustly enriched.[50] The PTA has previously moved to dismiss this counterclaim and continues to so urge here. Second, PTA submits that there is no evidence supporting Verizon's claim for unjust enrichment produced in the record.

As PTA submitted in its Answer to Verizon New Matter and Preliminary Objections, Verizon's late filed Amended Answer and New Matter fails to conform to and comply with established commission regulations, specifically §§ 5.62 and 5.61(a) of the Commission's Regulations, 52 Pa. Code § 5.62 and 5.61(a). 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"

In addition to failing to conform its pleading to the requirements of Section 5.62, Verizon's New Matter also failed to comply with the timing requirements imposed under Section 5.61(a).

[50] Verizon MB at 2.

Section 5.61(a) specifically provides that answers (and new matter) "shall be filed with the Commission ***within 20 days*** after the date of service."[51]

The PTA's complaints were served upon Verizon by first class mail on April 22, 2011. Consequently, Verizon's answer to the complaints, including any new matter it wished to raise, was due to be filed no later than May 16, 2011.[52] 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 failure to raise new matter in a timely manner, when it had a full opportunity and obligation to do so, precludes it from pursuing such new matter and related affirmative relief. Accordingly, Verizon's late-filed and procedurally defective New Matter must be dismissed.

This Commission also lacks subject matter jurisdiction to order the relief requested. Verizon 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 post-dated from June 27, 2007 through the effective date of the tariffs,[53] the recovery of which is premised on the theory of unjust enrichment resulting from a contract implied in law. Unjust enrichment is, in essence, an equitable doctrine.[54] The Commission has no jurisdiction to adjudicate claims styled as a common law tort cause of action or as a request for equitable relief.[55] It is well established that the Commission lacks the authority to award damages.[56]

---

[51] 52 Pa. Code § 5.61(a) (emphasis added).
[52] Twenty days from the date of service, plus three days. *See* 52 Pa. Code § 1.56.
[53] Verizon PA/Verizon North Amended Answers and New Matter at 20.
[54] *Styer v. Hugo*, 619 A.2d 347 (Pa. Super. 1993), *aff'd*, 637 A.2d 276 (Pa. 1994).
[55] *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).
[56] *Pa. P.U.C. v. UGI Utilities, Inc.*, Docket No. M-2010-2138591 (Order entered October 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.").

Verizon's New Matter cites no statute, rule, regulation or order upon which relief can be granted.[57] Nowhere has Verizon alleged 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.

Actually the relief requested constitutes illegal and impermissible retroactive rate making. It is axiomatic that a tariff is not effective and may not be applied until filed with and accepted by the Commission. The Verizon transit tariffs were not filed until April 5, 2011, with an effective 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 is attempting to impose these tariffed rates retroactively for a four-year period of time prior to the effective date of the tariffs. Pennsylvania has a long-standing policy against retroactive ratemaking.[58] 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.

The theory of unjust enrichment, or the doctrine of quasi-contract, has been described by the Superior Court as follows:

> 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

[57] *See* 52 Pa. Code § 5.62(a)(2).
[58] *Popowsky v. Pa. P.U.C.*, 642 A.2d 648 (Pa. Cmwlth. 1994).

> benefitted 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*.[59]

In the instant matter, Verizon was not and presently is not entitled to any compensation for the provision of such service. Verizon cites no obligation 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. Verizon provided transit service because it was necessary to form a mutually advantageous relationship with the CLECs for indirect interconnection.

Verizon never made any prior claim, until this case, seeking transit charges for the service provided. One of the necessary components of unjust enrichment is "not the mere fact that one party benefits from the act of another...there must also be an injustice in permitting the benefit to be retained without compensation.[60] Likewise the *Braun* case cited by Verizon establishes that unless there is injustice if recovery for enrichment is denied, will unjust enrichment be found.[61] However, the *Lackner* Court denied the unjust enrichment claim because the plaintiff had never requested nor made any attempt to claim the monies due previously - exactly the same facts as are in the instant case. Here, there was never any 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. Verizon's attempt to

---

[59] *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)).

[60] See *Meehan v. Cheltenham*, 410 Pa. 446, 189 A.2d 593 at 596 (1963), cited by Verizon.

[61] *Braun* v. *Wal-Mart Stores, Inc.*, 2011 Pa.Super. 121 (2011) [Verizon in its brief, page 20 cites *Lackner v. Glosser*, 892 A. 2d 21 (Pa Super 2006) for the proposition that their claim for unjust enrichment should be predicated on the value of the benefit received.

bring the unjust enrichment into the Commission's sphere of authority is ineffective. In *Cefalo*[62] there was an already approved tariff in effect and the customer, inadvertently, had not been billed.[63] Likewise in *Rogers*,[64] also cited by Verizon, the Commission ordered the customer to pay for tariffed gas and electric services finding "that the $876.37 balance reflects actual charges for gas and electric utilized by the Complainant." Again, unlike the *Rogers* case, there is no applicable tariff here and no basis upon which monies were due to Verizon. Under no circumstances is Verizon entitled to claim that the RLECs were unjustly enriched in connection with the use of Verizon's transit service.

Finally, even assuming arguendo that this 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 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 party's detriment, that complaining party will be precluded from proceeding with his claim."[65] Here, Verizon waited at least fifteen 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 to its failure to pursue the matter in a timely fashion.

---

[62] *Cefalo v PG&W*, 69 PaPUC 265 (1989).
[63] Moreover in *Cefalo*, there was no actual measured usage, and the Commission directed PG&W to only recover the minimum bill.
[64] *Joseph Rogers v PECO Energy*, Pa. P.U.C. Docket No. C-00003599, Opinion and Order entered January 12, 2001.
[65] *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).

In conclusion, to the extent the Commission has jurisdiction over this matter, to now say that the RLECs should compensate Verizon for its own short comings is unfair, unjust, and unreasonable.

IV. CONCLUSION

Wherefore the PTA and its member companies request that this Commission:

1. Reject Verizon's attempt to tariff a service which has been and continues to be the product of a negotiated interconnection agreement and require the RLECs and Verizon to negotiate an interconnection agreement.

2. In the alternative, if this Commission accepts that a tariff can be filed by Verizon, it deny the tariff as unlawfully filed or, if lawfully filed, require Verizon to revise the tariff to correct for the issues identified by the PTA in its Main Brief.

Respectfully Submitted,

By_____

Norman J. Kennard, Esquire, ID # 29921
Patricia Armstrong, Esquire, ID # 23725
Charles E. Thomas, III, Esquire, ID # 201014
THOMAS, LONG, NIESEN & KENNARD
212 Locust Street, Suite 500
Harrisburg, PA 17108-9500
Tel: (717) 255-7600
nkennard@thomaslonglaw.com
parmstrong@thomaslonglaw.com
cet3@thomaslonglaw.com

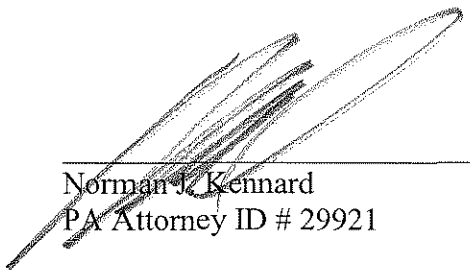
Attorneys for
Pennsylvania Telephone Association

Date: September 7, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2011, I did serve a true and correct copy of the foregoing upon the persons below via electronic mail and first class mail as follows:

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



Norman J. Kennard
PA Attorney ID # 29921