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October 17, 2011

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street, Filing Room
Harrisburg, PA 17101

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

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Commission is the Motion to Compel of Armstrong Telecommunications Inc. A copy of this document has been served in accordance with the attached Certificate of Service.

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

Very truly yours,

THOMAS, LONG, NIESEN & KENNARD

By: Norman J. Kennard

NJK:tlt
enclosure
cc: Dennis J. Buckley, Administrative Law Judge
Per Certificate of Service

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, MCImetro Access Transmission Services, LLC, d/b/a Verizon Access Transmission Services and MCI Communications Services Inc.	:	C-2010-2216325
	:	C-2010-2216293
Respondents	:	

ARMSTRONG TELECOMMUNICATIONS INC.
MOTION TO COMPEL
VERIZON'S RESPONSE TO
ARMSTRONG SET II-3 DISCOVERY

Armstrong Telecommunications Inc. "(Armstrong"), by and through its counsel in the above-captioned matter, and pursuant to the Commission's regulations at 52 Pa. Code § 5.342(g), moves to dismiss the objection of Verizon Pennsylvania Inc., Verizon North LLC, MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services and MCI Communications Services Inc. ("Verizon") to Armstrong interrogatory Set II, Number 3, and to compel that the interrogatory be answered in full and forthwith following Your Honor's ruling if this motion is granted. In support of this Motion, Armstrong avers as follows:

I. INTRODUCTION

1. On September 30, 2011, Verizon filed its direct testimony in this proceeding.

2. On October 3, 2011, by email sent at 4:20 p.m., Armstrong served its Set II discovery on Verizon, including interrogatories specifically designed to test the substance and

veracity of Verizon's direct testimony. By agreement of counsel, Verizon's answers and objections to Armstrong's Set II discovery were due within five days, or by October 11, 2011.[1]

3. On October 12, 2011, Verizon served its responses and objections to Armstrong's Set II interrogatories. Verizon presented both its answers and objections in one document, and included separate attachments to certain interrogatories that were divided into 17 separate piece parts transmitted in six separate emails.[2] The e-service of these multiple piece parts, including the Objections/Responses, did not commence until 9:21 p.m. the night of October 11, 2011.

4. Both the time and manner of service by Verizon of its responses and objections to Armstrong Set II discovery violated Your Honor's March 21, 2011 Order prescribing that documents are to be e-served by 4:30 p.m. on their due date, and that objections are to be in lieu of answers, and not in addition to answers.[3]

5. Armstrong's Set II-3 interrogatory requested as follows:

> Reference Verizon St. 1.0 at 14. Provide a full and complete copy of the agreement with Bandwidth.com, including any side agreement, letters or understandings.

6. Verizon's Objection/Response to Armstrong II-3 stated as follows:

> OBJECTION:
>
> Verizon objects to this request because it seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence and seeks confidential information regarding Verizon's dealings with third parties. Verizon cited the Bandwidth.com

[1] The 5 days expired on a Saturday, which preceded a three-day holiday weekend, thus rendering the answers due the next business day, which was Tuesday, October 11, 2011. No modification was made to the regulations addressing motions to compel or answers thereto. In the interest of furthering the brevity of discovery actions following the submission of Verizon's direct testimony, as counsel agreed with respect to answers and objections, Armstrong files this motion within 5 days of Verizon's objections/responses rather than the 10 allowed under the Commission's regulations. 52 Pa. Code §5.342(g). Following standard abbreviated procedures, Verizon's answer should be required within 3 days rather than the 5 provided by regulation.

[2] The separation of answers into separately emailed piece parts was designed to transmit individual responses that were excessive in size. Neither the objections nor answers, however, were prepared or served as separate documents, but rather were combined into one document contained in the first transmitted email message at 21:20:58 p.m.

[3] ALJ March 21, 2011 Order at Ordering Paragraphs 3 and 4.

agreement for the limited purpose of showing that other carriers have "entered into a commercial agreement with Bandwidth.com for the exchange of VoIP traffic at $0.0007 per minute," to rebut Armstrong's claim that this is not a valid rate in the industry. Verizon will disclose the pertinent provision demonstrating that fact, below.

Subject to and without waiving this or its general objections, Verizon responds as follows:

RESPONSE:

Verizon's commercial agreement with Bandwidth.com contains confidentiality provisions that restrict its production to third parties and Verizon will not produce the agreement. However, Verizon is authorized to disclose the following provision:

8.7 Notwithstanding anything else in this Section . . . , each party shall be entitled to disclose to any other party that Bandwidth.com and Verizon have entered into a commercially negotiated agreement for the mutual exchange of Voice Over Internet Protocol Traffic for a term of at least two (2) years and at a rate of $0.0007 per minute of use (and, in the case of 8YY VOIP Traffic, also including an applicable 8YY query charge equal to the rate for 8YY queries as set forth in the effective interstate (FCC) tariff of MCI Metro Access Transmission Services LLC), subject also to certain related interconnection terms.

II. MOTION

7. Verizon's claims of irrelevance and confidentiality must be rejected on the basis that the subject of the agreement sought by Armstrong through discovery was introduced into the proceeding by Verizon itself. Having itself deemed the agreement relevant and subject to (its selective) disclosure, Verizon should not be allowed to shield that same document from Armstrong's or this Commission's review on the directly contradictory grounds that agreement is irrelevant and confidential.

8. Commission regulations permit for the discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action."[4] In discovery, the

[4] 52 Pa. Code §5.321(c).

relevance standard is more relaxed, and "[i]t is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence[,]"[5] although the discovery must still relate to the subject matter of the action, not be privileged, and not be sought in bad faith.[6]

A. The Bandwidth.com Agreement Is Introduced As Relevant In Verizon's Own Direct Testimony

9. As to relevance, Verizon does not explain why the agreement, which *it introduced into the proceeding by its direct testimony,* is suddenly irrelevant for purposes of Armstrong's discovery. Specifically in their direct testimony Verizon's witnesses testified as follows:

> Verizon applied the $0.0007 rate as the most reasonable placeholder for a number of reasons. Contrary to Armstrong's attempts to dismiss this rate as "specious, at best" (Armstrong Direct at 21), the $0.0007 a minute rate is *widely in use in the industry. It is already the default rate for a substantial portion of the traffic that carriers exchange today* (such as intraMTA wireless and ISP-bound traffic), as a result of the FCC's mirroring rule. *Moreover the market is already moving toward a default rate of $0.0007 for VoIP traffic that connects with the PSTN. Earlier this year, Verizon entered into a commercial agreement with Bandwidth.com for the exchange of VoIP traffic at $0.0007 per minute.*[11]
>
> [11] *See* Bandwidth.com Enters into a Groundbreaking Commercial Agreement with Verizon for the Exchange of VoIP Traffic, http://bandwidth.com/about/read/verizonAgreement.thml (Jan.18, 2011) (Exhibit 2 hereto).[7]

10. Verizon's witnesses then proceed to testify about additional circumstances, including another settlement agreement and publicly filed interconnection agreements, where the $0.0007 rate was agreed to as compensation for terminating local and ISP-bound traffic.[8] Clearly Verizon has introduced the Bandwidth.com agreement for purposes that are broader than refuting Armstrong's direct testimony. And, even if used solely for purposes of refuting Armstrong's

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[5] *Id.*
[6] 52 Pa. Code §5.361(a)(1), (2). Verizon does not claim privilege or bad faith, leaving only relevance and confidentiality as grounds asserted for objection.
[7] Verizon Direct Testimony at 14 (emphasis added).
[8] Verizon Direct Testimony at 14-15.

testimony, which it is not, its interjection presumably is still relevant or would not be in Verizon's testimony. Accordingly, Armstrong is entitled to full discovery rights.

11. Thus, Verizon itself placed the Bandwitdth.com agreement directly into relevance, by using it to support its claim that "it is already the default rate for a substantial portion of the traffic that carriers exchange today [and] the market is already moving toward a default rate of $0.0007" as evidenced by the Bandwidth.com agreement.[9] Moreover, rather than placing the agreement into evidence and allowing it to speak for itself, Verizon has attached to its testimony as Exhibit 2, an apparent media announcement which self-proclaims the Bandwidth.com agreement as "a Groundbreaking Commercial Agreement with Verizon for the Exchange of VoIP Traffic" which "applies to traffic that originates from or terminates to a VoIP end user, provid[ing] the companies with cost certainty for the traffic they exchange[.]"[10]

12. In its objection, Verizon claims that it "cited the Bandwidth.com agreement for the limited purpose of showing that other carriers have 'entered into a commercial agreement with Bandwidth.com for the exchange of VoIP traffic at $0.0007 per minute,' to rebut Armstrong's claim that this not a valid rate in the industry."[11]

13. As asserted above, however, Verizon's direct testimony goes much further, declaring the agreement "groundbreaking" and evidence of a "market" movement of a rate "widely used in the industry." This is a much broader use of the Bandwidth.com agreement than Verizon professes in its objection. Moreover, in its objection, Verizon misstates Armstrong's opposition to the $0.007 rate as "not a valid rate in the industry." Armstrong did not object to Verizon's unilaterally changed and self-imposed $0.0007 rate for compensation to Armstrong for termination of Verizon's traffic because it is "not a valid rate in the industry." Rather, as

[9] *Id.*
[10] Verizon Direct Exhibit 2.
[11] Verizon October 12, 2011 Objection/Response to Armstrong October 3, 2011 Set II, No. 3.

Armstrong's testimony clearly demonstrated, Armstrong objected to that rate primarily because $0.0007 is neither supported by Armstrong's tariff nor its interconnection agreements with Verizon, which documents form the basis for the exchange of and compensation for point-to-point voice calls between Armstrong and Verizon. While Armstrong also described the $0.0007 rate as lacking economic or historical significance outside the context of ISP-bound or out-of-balance traffic,[12] that was neither the primary basis for Armstrong's opposition, nor Verizon's primary purpose for citing to the Bandwidth.com agreement. As Verizon's direct testimony clearly indicates, Verizon cites to the Bandwidth.com agreement as evidence to support its own theory of the case that $0.0007 has become a default rate used in a growing market trend. As such, Verizon's direct testimony has clearly exceeded the scope of Armstrong's limited description of the historical and economic significance of the $0.0007 rate for termination of ISP-bound traffic, and should be subject to full discovery.[13]

14. It is inherently prejudicial, unfair, and a denial of Armstrong's due process to allow Verizon, as a party to the agreement, to characterize the content of the agreement and the $0.0007 rate, the rate that is at the heart of the underlying dispute, as a "default rate" to which the "market is already moving" while precluding Armstrong from having the opportunity to review the agreement and its contents directly and draw and present its own conclusions. As even Verizon's objection/response to Set II-3 indicates, the Bandwidth.com agreement's use of the $0.0007 rate is "subject also to certain related interconnection terms."[14] Those interconnection terms are directly relevant to Verizon's and Bandwidth.com's agreement on compensation, and must be disclosed to put the compensation in proper context.

[12] Armstrong Direct Testimony at 21.

[13] It is also entirely possible that Bandwidth.com is an ISP to which the application of the $0.0007 rate would be appropriate. It is entirely inappropriate, however, to limit Armstrong's efforts to develop facts necessary to identify the scope of traffic exchanged between Verizon and Bandwidth.com, by allowing Verizon to rely on that agreement but then refuse to disclose it to Armstrong.

[14] Verizon Objection/Response, citing to Section 8.7.

15. Armstrong cannot legitimately assess the viability of the Bandwidth.com agreement or the $0.0007 rate in that agreement as proper evidence of a rate applicable to Armstrong without full review of all the agreement's terms, including but not limited to all related interconnection terms. Without such opportunity, Armstrong is left with only Verizon's interpretation and characterizations, and denied access to facts that would allow it to verify the applicability of that agreement to the dispute and the traffic at issue herein. Armstrong would be foreclosed from cross-examining Verizon's on veracity of its claims with respect to that agreement and that rate, and Your Honor and the Commission denied a full record on which to assess Verizon's claimed market trend of the $0.0007 rate.

16. Relevant evidence is evidence that tends to make a fact at issue more or less probable and advances the inquiry in some degree. Clearly Verizon believes the agreement is relevant to the subject matter of the proceeding, or it would not have testified to it or attached as an Exhibit a self-serving media release describing it. If Verizon is allowed full access to the agreement to claim its relevance for purposes of supporting its claims and attempting to bind Armstrong to the same rate, Armstrong is entitled to full access to the agreement for purposes of defending its claim that the $0.0007 rate is not applicable to the traffic exchanged between Armstrong and Verizon.

B. Verizon Has Waived Any Claimed Confidentiality Of The Agreement By Selectively Disclosing Its Terms In Testimony And Discovery

17. With respect to confidentiality, Verizon has waived that claim by directly introducing the agreement into evidence in its direct case to support its theory that Armstrong's traffic is VoIP traffic, presumably just like the traffic at issue in the Bandwidth.com agreement, subject to a $0.0007 termination rate, exactly like the compensation at issue in the

Bandwidth.com agreement. Verizon cannot reclaim confidentiality by selectively disclosing only one provision of the entire agreement, section 8.7, which Verizon and Bandwidth.com purportedly agreed upon between them to selectively disclose apparently in the event either party desired to use the agreement for some purpose other than the exchange of and compensation for traffic between just those two parties, as Verizon now seeks to use the agreement against Armstrong.

18. Moreover, if disclosed to Armstrong, Armstrong is properly restricted to the confidential use of the agreement for the expressly limited purpose of this proceeding by the Protective Order Your Honor approved at the parties' request in the March 21, 2011 Order. While Armstrong understands the confidential nature of agreements between LECs and other carriers, as Armstrong itself has such agreements, Armstrong has not attempted to foist upon Verizon the terms of its agreements with these other carriers and then refused to provide the agreements for Verizon's review. Rather, by proceeding with its complaints against Verizon, Armstrong is merely attempting to enforce against Verizon the terms of Armstrong's agreements *with Verizon*, the contents of which both parties have and both parties may argue applicable facts and law. Verizon should be held to the same standards. Having introduced the Bandwidth.com agreement into the proceeding as evidence to prove its case that the $0.0007 rate is the appropriate termination compensation rate applicable to Armstrong's traffic, it should be compelled to produce that agreement for Armstrong's complete review so that Armstrong, too, is able to present the applicable facts and argue the relevant law.

III. CONCLUSION

19. Verizon cannot introduce the agreement into its direct testimony, whether to refute Armstrong's direct testimony and/or to further its own theory of its case, and then claim it is irrelevant. Similarly, Verizon cannot introduce a media press release describing the agreement and selectively quote from it, and then proclaim the substance of the agreement itself is confidential.

Wherefore, for the aforementioned reasons, Armstrong contends that Verizon itself has both made the Bandwidth.com agreement relevant to this proceeding and waived any claim Verizon may have had with respect to its confidentiality by selectively disclosing the terms of the agreement. For these reasons, Verizon's objection to Armstrong Set II-3 should be overruled and a response compelled.

Respectfully submitted,

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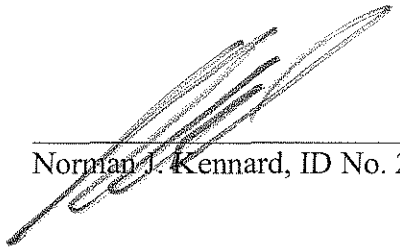
Attorneys for
Armstrong Telecommunications, Inc.

Dated: October 17, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 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:

Suzan DeBusk Paiva, Esquire
Verizon
1717 Arch Street, 3rd Floor
Philadelphia, PA 19103



Norman J. Kennard, ID No. 22921