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December 6, 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 the Initial Brief of the Verizon Companies, 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. Because the Initial Brief includes certain Proprietary information the Public Version of the Initial Brief is being e-filed, with the Proprietary Version being provided via overnight delivery.

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

Very truly yours,

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

Suzan D. Paiva

SDP/slb

Via E-Mail and Federal Express
cc: The Honorable Dennis E. Buckley

Via E-Mail and First Class U.S. Mail
cc: Attached Certificate of Service

CERTIFICATE OF SERVICE

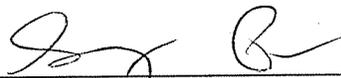
I, Suzan D. Paiva, hereby certify that I have this day served a copy of Verizon's Initial Brief, upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 6th day of December, 2011.

VIA E-MAIL and FIRST CLASS MAIL

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**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.	:	

VERIZON'S INITIAL BRIEF

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Date: December 6, 2011

PUBLIC VERSION

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INTRODUCTION AND ARGUMENT SUMMARY

On November 18, 2011, the Federal Communications Commission (“FCC”) released its long-awaited nationwide intercarrier compensation reform order (“FCC Order”) “mak[ing] clear the prospective payment obligations for VoIP traffic exchanged in TDM between a LEC and another carrier” — which is the kind of traffic in dispute in this case. Those obligations do *not* include payment of intrastate access charges for VoIP traffic. Instead, the FCC set initial default rates for this traffic equal to interstate switched access rates (except for “local” VoIP traffic, which will be subject to reciprocal compensation rates). All rates, VoIP and non-VoIP, interstate and intrastate, will ultimately phase down to “bill-and-keep.” The FCC’s VoIP compensation regime takes effect January 1, 2012, is binding on the parties, and therefore disposes of the issues in this case from that date forward (the “Prospective Issues”). Accordingly, the Commission should dismiss any claims relating to the Prospective Issues in light of the FCC Order.

What remains before the Commission are claims for additional compensation for VoIP traffic by Armstrong Telecommunications, Inc. (“Armstrong”) for the period prior to January 1, 2012, as well as the Verizon companies’ counterclaims asserting that Armstrong has overcharged them for switched access and seeking refunds of overpayments (the “Retroactive Issues”). The VoIP disputes are not unique. The FCC recognized that “the lack of clarity regarding the intercarrier compensation obligations for VoIP traffic has led to significant billing disputes and litigation,” which have led to “a range of outcomes” with regard to what compensation, if any, applies. (FCC Order ¶ 937). Although the FCC fashioned a prospective framework to provide the needed clarity

and “minimize future uncertainty and disputes regarding VoIP compensation,” it left it to the parties to resolve “intercarrier compensation payment obligations for VoIP-PSTN traffic for any prior periods.” (FCC Order ¶ 935). With regard to the Retroactive Issues, the Commission should:

- Recognize that it lacks jurisdiction to decide the Retroactive Issues as a result of the Voice over Internet Protocol Freedom Act (“VoIP Freedom Act”), a state law that prohibits the Commission from entering any order that regulates or has the effect of regulating “VoIP” or “IP-enabled” services. 73 P.S. § 2251.1, et seq. This statute requires the Commission to dismiss the Retroactive Issues, but the Commission certainly may encourage the parties to negotiate a settlement of these competing financial claims on their own. That is what Verizon has sought all along, and the FCC reaffirmed that “good-faith negotiations” remain the “preferable” means to “implement[] carriers’ compensation obligations” for VoIP traffic. (FCC Order ¶ 964).
- Acknowledge that even if the VoIP Freedom Act did not apply, federal law would preclude the Commission from deciding the Retroactive Issues. The Commission cannot set compensation for VoIP traffic even for the retroactive period because it is interstate, information services traffic subject to exclusive federal jurisdiction.
- Even if it (incorrectly) determines that it may address the Retroactive Issues substantively, recognize as the FCC did that this cable VoIP traffic is not ordinary access traffic and should not be treated as such. Under *Palmerton*, the Commission has the discretion to fashion an appropriate remedy “[b]ased on the case-specific evidentiary record,” and “[i]n view of the specific facts that have been presented.” The Commission should not force Verizon to pay up to 10 cents a minute – a rate that would be considered high even for a small rural ILEC – when Armstrong is a cable telephony provider and concedes that during the same time period it routed its own interexchange traffic destined to Verizon in a “least cost” manner that allowed it to minimize its own intercarrier compensation costs. As the Commission recognized in *Palmerton*, such asymmetrical compensation can result in an anticompetitive environment that violates Chapter 30.
- Even if it decides (incorrectly) that it may and should determine the compensation level for the disputed traffic during the retroactive period, find that the \$0.0007-a-minute rate Verizon has already paid is reasonable under the circumstances. Indeed, the record shows that Verizon has paid *more* for the disputed traffic (\$336,197 at the \$0.0007 rate) than Armstrong has paid Verizon in intrastate access charges during the same time period (less than \$10,000) due to its least cost routing practices.

- Consider and account for the fact that Armstrong has been overcharging Verizon for switched access for years in violation of its own tariffs and state law. Armstrong's overcharges to Verizon exceed the amounts Armstrong is claiming Verizon should pay it for the VoIP dispute. From the applicable statute of limitations date Armstrong has billed Verizon nearly \$2 million in violation of 66 Pa. C.S. § 3017(c) and \$6 million for the inappropriate carrier charge that is not supported by its tariff (these claims are overlapping).

Legal issues aside, Armstrong's policy arguments that it is entitled to the traditional access charges of rural ILECs such as Palmerton ring hollow here because Armstrong is a wholesale CLEC intermediary charging access on behalf of a cable VoIP provider that has full regulatory and pricing flexibility and the ability to leverage its cable network to offer television and internet services to the vast majority of its customers. Armstrong cannot claim the same regulatory constraints, pricing limitations and network costs of the ILECs for which the traditional legacy access system was devised. In fact, allowing Armstrong to collect ten-cent-a-minute access rates under the circumstances would do nothing more than force Verizon's customers to subsidize Armstrong's cable affiliate's business and provide the cable affiliate a competitive advantage over the ILECs against which it competes.

STATEMENT OF THE CASE

Armstrong is certified by this Commission as a competitive local exchange carrier ("CLEC") and serves as an intermediary that delivers to and receives from the public switched telephone network ("PSTN") the traffic of its cable affiliate Armstrong Utilities, Inc. ("AUI").¹ While Armstrong claims to serve a very small number of retail customers,

¹ Armstrong St. 1 at 3. Both Armstrong and AUI are wholly owned by the same privately held, western Pennsylvania based company known as the Armstrong Group of Companies. (Armstrong St. 2.0 at 6).

its primary business — by far — is serving as AUI’s wholesale intermediary.² In its role as a “wholesale CLEC,” Armstrong’s *only* customer is AUI.³ Armstrong’s role is integral to assembling the retail VoIP service marketed by AUI; without Armstrong, AUI’s end users could not call, or receive calls from, customers of Verizon or any other provider. Armstrong accepts traffic from AUI and sends it on to other carriers, including Verizon (either directly or indirectly through intermediate carriers, as discussed below) and accepts traffic from other carriers, such as Verizon, which it passes on to AUI to send to its end users. (Verizon St. 1.0 at 9-10).

The [BEGIN PROPRIETARY] [END PROPRIETARY] of AUI’s customers purchase bundles of service that include local and long distance calling plus video and/or internet service.⁴ AUI’s retail voice service is not regulated by this Commission. (Tr. at 47). AUI has not requested and does not have a certificate of public convenience authorizing it to offer public utility service and its voice products are not tariffed. (Tr. at 48). AUI does not file annual financial reports with the Commission and

² Armstrong St. 2 at 10; Verizon Cross Ex. 2 (Armstrong Response to II-19) (disclosing that “Armstrong provides voice service to approximately [BEGIN PROPRIETARY] [END PROPRIETARY] under its Tariff PA PUC No. 1.”); Verizon St. 1.0, Exhibit 1 (Armstrong Response to I-13(2)) (“As of December 31, 2010, AUI provided local telephone service to [BEGIN PROPRIETARY] [END PROPRIETARY] access lines.”) *See also* Verizon Cross Ex. 2 (Armstrong Response to II-2(a) and (b)) (showing a comparatively small amount of “retail CLEC revenue . . . from local services” as compared to switched access revenue).

³ Verizon Cross Exhibit 2 (Armstrong Response to II-18). According to Armstrong, it does not have a written contract or agreement with AUI establishing its obligations as a wholesale CLEC. (Verizon St. 1.0, Exhibit 1 (Armstrong Response to I-1(5))).

⁴ The record shows that [BEGIN PROPRIETARY] [END PROPRIETARY] of AUI’s customers purchase a bundle of local and long distance telephone service together with cable television and/or Internet access. *See* Armstrong Response to Verizon I-13 (Exhibit 1 to Verizon St. 1.0); Armstrong Response to Verizon II-20 (Verizon Cross Ex. 2). Even some portion of the [BEGIN PROPRIETARY] [END PROPRIETARY] of customers that purchase “stand-alone” voice service are receiving unlimited long distance calling as part of their package. Tr. at 63-67 (Armstrong offers a “local only” service but only in one territory).

the end user revenue of this privately-held company is not regulated or reported. (Tr. at 50).

Typical of a cable telephony provider, AUI uses “a hybrid network to provide its voice, video and other services,” and this network “relies predominately on Internet Protocol (“IP”) to provide the cable company’s telephony services.” (Armstrong St. 1 at 4). According to Armstrong’s description of AUI’s local telephone service, AUI receives and transmits voice traffic to its retail customers in IP format.⁵ AUI’s VoIP telephony service requires a broadband network connection in the form of a “Multimedia Terminal Adapter” or “MTA” installed at the customer’s home, which Armstrong’s website describes as the device that “connects our broadband network to the telephone wiring inside your home.” (Verizon St. 1.0 at 24 and Exhibit 4).⁶ At the MTA, the customer’s voice (an analog signal) is converted to IP packets for outgoing calls, and the IP packets are converted to analog signals for incoming calls. The signals are carried on AUI’s network in IP, which is necessary to “communicate with AUI’s head-end equipment.” (Armstrong St. 2 at 19). When AUI’s customers call customers of other carriers, AUI converts its IP traffic to TDM protocol before transmitting it to Armstrong, the “middle-man” connecting with Verizon and other carriers.⁷ Likewise, in the case of traffic

⁵ Originally Armstrong admitted that all of the traffic coming from or destined to its cable affiliate AUI, which passes through Armstrong, is originated or terminated in IP format. (Armstrong Answer to Request for Admission 1) (Armstrong Exhibit 7). But shortly before the hearing Armstrong revised its responses to Verizon’s request for admission to deny this conclusion. (Armstrong St. 2.0, Exhibit 10). However, as discussed below, the facts continue to demonstrate that the traffic at issue is IP-originated or IP-terminated, and plainly within the FCC’s prospective compensation regime.

⁶ “AUI’s service configuration relies upon a Terminal Adapter . . . that it owns and installs at the customer’s premises for purposes of converting traditional analog traffic to IP packetized traffic.” (Armstrong St. 2 at 18).

⁷ Time Division Multiplexing, or TDM, is the traditional protocol in which signals are transmitted in a circuit switched network, such as the PSTN. TDM transmits multiple subscribers’ calls along the same transmission medium by allowing switches to create channels within a transmission stream by using successive time intervals for the different signals. Internet Protocol, or IP, transmits

coming from other carriers and destined for AUI's retail customers, Armstrong transmits it to AUI in TDM protocol and AUI converts it to IP to carry the traffic on its own cable network and deliver it to its end users. (Armstrong St. 1 at 4-5; Verizon St. 1.0 at 20-21).⁸

The present dispute commenced on August 27, 2010, when Verizon notified Armstrong that it was disputing Armstrong's claim that it is entitled to be paid its tariffed switched access charges for IP-to-PSTN traffic and PSTN-to-IP traffic. Verizon invited Armstrong to negotiate a commercial agreement to establish reciprocal rates, terms, and conditions for the exchange of this traffic. Pending a negotiated agreement, Verizon has applied a rate of \$0.0007 per minute-of-use to the traffic on Armstrong's invoice and disputed the remainder,⁹ but Verizon has been and remains willing to negotiate a different rate for the retroactive period.¹⁰

information in packets, and is the medium used to transmit data (including voice) over the Internet. The communications industry is gradually shifting from TDM to IP technology, but CLECs and cable providers have generally been able to make this shift more quickly and much less expensively than legacy carriers, like Verizon, that are saddled with extensive TDM networks developed over decades in accordance with regulatory fiat, rather than the principle of maximum operational efficiency. (Verizon St. 1.0 at 20).

⁸ Armstrong exchanges traffic with Verizon in TDM format. (Armstrong St. 1 at 5). As discussed in more detail later, Armstrong does not exchange all of the traffic destined to Verizon's end users directly with Verizon. For traffic originated by AUI and destined to Verizon, Armstrong hands much of the traffic off to third-party carriers rather than transmit it directly to Verizon.

⁹ \$0.0007 is the default rate for a substantial portion of the traffic that carriers exchange today (such as wireless and ISP-bound traffic) as a result of the FCC's mirroring rule. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("ISP Remand Order") ¶ 89. As the FCC explained, "[t]o limit arbitrage opportunities that arose from 'excessively high reciprocal compensation rates,' the Commission adopted a gradually declining cap on intercarrier compensation for ISP-bound traffic, beginning at \$.0015 per minute of use and declining to \$.0007 per minute of use, the current cap. The Commission derived the rate caps from contemporaneous interconnection agreements, in which carriers voluntarily agreed to rates comparable to the rate caps adopted by the Commission." *In re High-Cost Universal Serv. Support*, 24 FCC Rcd 6475 (F.C.C. 2008).

¹⁰ On November 29, 2011 Verizon requested mediation to attempt to resolve at least the retroactive portion of the case, and Armstrong agreed to mediation on November 30.

On September 3, 2010, Verizon registered a second set of disputes with Armstrong by notifying Armstrong that, even if its switched access tariffs applied to the disputed traffic, Armstrong is violating 66 Pa. C.S. § 3017(c) by charging intrastate switched access rates higher than the corresponding ILEC rates and that Armstrong is billing Verizon for switched access rate elements that it does not provide. Verizon attempted to deal reasonably with Armstrong and to avoid litigation by doing exactly what this Commission recognized as prudent and appropriate — approaching Armstrong “in order to initiate good faith negotiations for a traffic exchange agreement encompassing the subject of IP-enabled traffic.”¹¹ Moreover, Verizon has continued to pay Armstrong at a rate of \$0.0007 per minute for the disputed VoIP traffic pending its attempt to engage Armstrong in negotiations. (Verizon St. 1.0 at 14).

Although Armstrong continues to insist that Verizon pay its tariffed intrastate switched access rates for IP-originated and IP-terminated traffic, Verizon generally has not been paid tariffed access charges when Armstrong’s cable VoIP customers place IP-to-PSTN calls to Verizon customers, because Armstrong concedes that it routes the bulk of its traffic that it would classify as intrastate, interexchange indirectly through other carriers. These carriers have not, and are widely known not to have paid switched access charges on this VoIP traffic. They have paid Verizon at much lower rates, some lower than \$0.0007, or nothing. This imbalance in compensation is evident from examining the parties’ intrastate switched access billings to each other. The record shows that Verizon’s intrastate switched access charges to Armstrong for October 2010 and September 2011 were each under \$500 per month, as compared to the over \$200,000 in monthly access

¹¹ *Palmerton Telephone Co. v. Global NAPs South, Inc., etc.*, Docket C-2009-2093336 (Opinion and Order entered March 16, 2010) (“GNAPs/Palmerton Order”) at 35.

charges Armstrong billed Verizon for October 2010, and over \$100,000 in monthly access charges Armstrong billed Verizon for September 2011. (Verizon St. 1.0 at 38).¹² In other words, Armstrong has billed Verizon 200 to 400 times more than Verizon has billed Armstrong on a monthly basis for intrastate switched access during the retroactive period. Since the inception of the dispute and as of Verizon's testimony in this matter, Verizon had paid Armstrong a total of \$336,196 applying the \$0.0007 rate and has disputed the remainder of Armstrong's billings (approximately \$2,153,420). Given that Verizon's billings to Armstrong were approximately \$500 per month during the same period, the amount Armstrong paid Verizon for intrastate switched access is only a fraction of the \$336,196 Verizon paid Armstrong (less than \$10,000).

ARGUMENT

I. Any Prospective Claims Should Be Dismissed Because The FCC's Order Determines The Effective Compensation Regime From January 1, 2012 Forward.

The FCC's November 18, 2011 Order adopted "a prospective intercarrier compensation framework for VoIP traffic that "bring[s] all VoIP-PSTN traffic within the section 251(b)(5) framework," sets "[d]efault intercarrier compensation rates for toll VoIP-PSTN traffic . . . equal to interstate access rates," and sets "[d]efault intercarrier compensation rates for other VoIP-PSTN traffic [at] the otherwise-applicable reciprocal compensation rates."¹³ As the FCC explained, "'VoIP-PSTN traffic' is 'traffic

¹² Armstrong has continued to deliver most of the traffic categorized as "local" (non-interexchange) directly to Verizon. Verizon's reciprocal compensation charges assessed on such traffic are considerably lower than switched access rates. Verizon PA's end office reciprocal compensation rate in its ICA is \$.000987 per minute (only slightly higher than the \$.0007 that it is paying to Armstrong on this type of traffic) and Verizon North's is \$0.0030000. (Verizon St. 1.0 at 38).

¹³ *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.*, WC Docket No. 10-90, etc., Report and Order and Further Notice of Proposed Rulemaking (Rel. Nov. 18, 2011) ("FCC Order") ¶ 933.

exchanged over PSTN facilities that originates and/or terminates in IP format.” (FCC Order ¶ 940). Effective January 1, 2012, therefore, the FCC’s default compensation framework applies to the VoIP traffic exchanged between Verizon and Armstrong. Verizon intends to comply with this order by compensating Armstrong at the FCC-required rates (interstate access and reciprocal compensation, as applicable). The FCC chose “not . . . to leave regulation of intercarrier compensation for intrastate toll VoIP-PSTN traffic entirely to the states,” but rather adopted a “transitional framework for VoIP-PSTN traffic [that] reflects the fact that our comprehensive intercarrier compensation reforms are gradually moving away from jurisdictionalized intercarrier compensation charges that have led to arbitrage and marketplace distortions and reflects the importance of a uniform, predictable transition away from historical intercarrier compensation regimes.” (FCC Order ¶ 951). This FCC order is binding on this Commission and cannot be challenged in this forum.¹⁴ To the extent Armstrong is claiming that it should be paid anything more than what the FCC requires following January 1, 2012, its prospective claims are rendered moot by the FCC’s order and should be dismissed.

II. The Commission Lacks Jurisdiction Under State Law To Address Armstrong’s Claims For The Retroactive Period.

The Commission lacks jurisdiction to hear Armstrong’s demand to be paid intrastate switched access rates for traffic exchanged during the retroactive period. The Commission cannot entertain Armstrong’s complaint because the Legislature removed its jurisdiction over this matter in Pennsylvania’s VoIP Freedom Act, 73 P.S. § 2251.1, et

¹⁴ To the extent Armstrong wishes to challenge the FCC’s Order, it must bring such challenge to the United States Courts of Appeal and is barred by the Hobbs Act from attempting to challenge the order before this Commission. 28 U.S.C. § 2342. See *Vonage Holding Corp. v. Minn Pub. Utils. Comm’n*, 394 F.3d 568 (8th Cir. 2004).

seq., which “establishe[s] the Commission’s jurisdictional boundaries over VoIP or IP-enabled services.”¹⁵ The Legislature determined that “services using Internet protocol technology” should remain free of “regulations governing traditional telephone service.” 73 P.S. § 2251.2. The VoIP Freedom Act thus broadly removed all Commission jurisdiction over issues related to “IP-enabled” and “VoIP” services by providing that “[e]xcept as set forth in sections 5 and 6, notwithstanding any other provision of law, no department, agency, commission or political subdivision of the Commonwealth may enact or enforce, either directly or indirectly, any law, rule, regulation, standard, order or other provision having the force or effect of law that regulates, or has the effect of regulating, the rates, terms and conditions of VoIP service or IP-enabled service.” 73 P.S. § 2251.4.

As “a creature of statute,” this Commission “has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication” and must act within, and cannot exceed its jurisdiction.¹⁶ “The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. A doubtful power does not exist. Such tribunals are extra judicial. They should act within the strict and exact limits defined.”¹⁷

Because the traffic for which Armstrong seeks payment from Verizon here is “IP-enabled” or “VoIP” within the meaning of this state statute, and because none of the exceptions in sections 5 or 6 of the statute apply to preserve jurisdiction, this Commission

¹⁵ *GNAPs/Palmerton Order* at 25-26.

¹⁶ *Feingold v. Bell of Pennsylvania*, 383 A.2d 791, 794 (Pa. 1977). *See also Loma, Inc. v. Pennsylvania Public Utility Commission*, 682 A.2d 424 (Pa. Cmwlth. 1996).

¹⁷ *Process Gas Consumers Group v. Penn. Pub. Util. Comm’n*, 511 Pa. 88 (Pa. 1986) (quoting *Green v. Milk Control Commission*, 340 Pa. 1, 3, 16 A.2d 9, 9 (1940) *cert. denied* 312 U.S. 708, 61 S.Ct. 826, 85 L.Ed. 1140 (1941)).

lacks jurisdiction to address this case by virtue of 73 P.S. § 2251.4 and must dismiss Armstrong's complaint.

A. The Traffic At Issue Is Subject To The VoIP Freedom Act.

The VoIP Freedom Act restricts this Commission from entering any order that regulates or has the effect of regulating, the rates, terms and conditions of "VoIP" or "IP-enabled" services. 73 P.S. § 2251.4. Those terms are defined in the statute as follows:

"Internet Protocol-Enabled Service" or "IP-Enabled Service." Except as provided in the definition herein of "Voice-over-Internet protocol service," a service, capability, functionality or application provided using Internet protocol or any successor protocol that enables an end user to send or receive a communication in Internet protocol format or any successor format, regardless of whether the communication is voice, data or video.

"Voice-Over-Internet Protocol Service" Or "VoIP Service." A service that:

- (1) enables real-time, two-way voice communications that originate or terminate from the user's location in Internet protocol or any successor protocol;
- (2) uses a broadband connection from the user's location; and
- (3) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

73 P.S. § 2251.3.

The Commission has already found that the cable telephony service provided by Armstrong's cable affiliate is an "IP-enabled" and "VoIP" service governed by the VoIP Freedom Act, and therefore agreed with Armstrong's own argument that the Commission lacks jurisdiction over service complaints involving Armstrong's cable telephony service. *See Sandra Brown v. Armstrong Digital Services, Inc., d/b/a Armstrong Telephone*, C-2008-2079810, 2009 Pa. PUC LEXIS 211 (ID of ALJ Corbett, May 12, 2009), adopted as the Commission's final order June 30, 2009 (agreeing with Armstrong that "Armstrong

Telephone provides VoIP telephone service that this Commission does not regulate” by virtue of the VoIP Freedom Act); *see also* Tr. at 46-47 (“Armstrong Digital Services used interchangeably with AUI and provides the same service).¹⁸

The record here confirms that the VoIP Freedom Act governs Armstrong’s services. As Armstrong itself describes the cable telephony services at issue here, its cable affiliate provides “voice communications that allow its subscribers to make local and long distance calls” through a “hybrid network” that “relies predominately on Internet Protocol (“IP”) to provide the cable company’s telephony services.” (Armstrong St. 1 at 4). This cable telephony service enables the customer to place calls to and receive calls from the “public switched telephone network” or “PSTN.” (*Id.* at 5). As Armstrong explains on its website, its cable telephone service requires the installation of a “Multimedia Terminal Adapter” at the customer’s home, which is a piece of equipment that “connects our broadband network to the telephone wiring inside your home.” (Verizon St. 1.0 at 24, n. 26 and Exhibit 4). Armstrong admits that this “Terminal Adapter” is “installed at the customer’s premises.” (Armstrong St. 2 at 18; Tr. at 81). This device provides the broadband connection in the form of an interface with Armstrong’s IP network that is used “for purposes of converting traditional analog traffic to IP packetized traffic” and vice versa. (Armstrong St. 2 at 18). The signals must be converted to IP in order to be carried on the network of Armstrong’s cable affiliate. (*Id.* at 19) (the signals must be in IP “to communicate with AUI’s head end equipment.”)

¹⁸ In a self-serving change in position, Armstrong now denies that its services are “VoIP” or “IP enabled” services under the VoIP Freedom Act. (Verizon Cross Ex. 6; Tr. at 88-89). How Armstrong describes the service is irrelevant, as the Commission must apply the plain language of the statute to the facts of this case to conclude that Armstrong’s cable telephony service is covered by the Act.

The VoIP Freedom Act applies to Armstrong's traffic either if it is "IP-enabled" or if it is "VoIP." Armstrong's service qualifies under both definitions. It is "IP enabled" because it is a "service, capability, functionality or application provided using Internet protocol or any successor protocol that enables an end user to send or receive a communication in Internet protocol format or any successor format." 73 P.S. § 2251.3 (definition of "IP-enabled" service). And it is a "VoIP" service under this statute because it "enables real-time, two-way voice communications" that "originate or terminate from the user's location in Internet protocol" and uses "a broadband connection" (*i.e.*, the Terminal Adapter) "from the user's location." 73 P.S. § 2251.3 (definition of "VoIP" service).¹⁹ Further, Armstrong's cable telephony service "permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network." 73 P.S. § 2251.3 (definition of "VoIP" service).

B. The Act's Exceptions Do Not Apply.

Because Armstrong's cable telephony service is an IP-enabled or VoIP service under the VoIP Freedom Act, the Commission lacks jurisdiction to issue any order that regulates or has the effect of regulating the rates, terms or conditions of that service unless the issue falls under one of the narrow exceptions set forth in 73 P.S. § 2251.5 or 2251.6. No such exception applies here.

¹⁹ Armstrong seems to place some significance on whether the Terminal Adapter is owned by the retail customer or owned by Armstrong. (Armstrong St. 2 at 23; Tr. at 79). Such ownership is irrelevant for purposes of applying Pennsylvania's VoIP Freedom Act. This statute merely requires that a "VoIP" service "uses a broadband connection from the user's location"; it is not relevant whether the piece of equipment that provides the "broadband connection" is owned by the customer versus the provider. Armstrong concedes that the equipment is placed at "the user's location." (Armstrong St. 2 at 18; Tr. at 81). And to qualify as "IP enabled" a service need only "us[e] Internet protocol or any successor protocol that enables an end user to send or receive a communication in Internet protocol format or any successor format." No broadband connection is required.

The exception in Section 2251.6(1)(iv) cited in *GNAPs/Palmerton* does not apply because Armstrong is not a “local exchange telecommunications company.” Section 2251.6(1)(iv) states that “[n]othing in this act shall be construed to modify . . . [t]he authority of a Commonwealth department, agency or commission to enforce applicable Federal or State statutes or regulations relating to . . . [s]witched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company.” 73 P.S. § 2251.6(1)(iv). But the present case is materially distinguishable from *GNAPs/Palmerton* on this issue. The express terms of Section 2251.6(1)(iv) allow for the exception only in the case of “[s]witched network access rates or other intercarrier compensation rates for interexchange services *provided by a local exchange telecommunications company.*” (emphasis added). Although the term “local exchange telecommunications company” is not defined in the VoIP Freedom Act itself, it is defined under Chapter 30 of the Public Utility Code as “[a]n *incumbent carrier* authorized by the commission to provide local exchange telecommunications services.” 66 Pa.C.S. § 3012 (emphasis added).²⁰ This Commission has recognized that Chapter 30’s defined term “local exchange telecommunications company” only includes ILECs and does not “include[] CLECs.”²¹

²⁰ In the absence of a definition in the VoIP Freedom Act, Pennsylvania’s Statutory Construction Act requires the Commission to look to Chapter 30’s definition, directing that “[w]hen the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters . . . *other statutes upon the same or similar subjects.*” 1 Pa.C.S. § 1921(c)(5) (emphasis added). It is well-established that “[w]here a court needs to define an undefined term, it may consult definitions in statutes.” *H.E. Rohrer, Inc. v. Zoning Hearing Bd. of Jackson Twp.*, 808 A.2d 1014 (Pa. Cmwlth. 2002). See also *Tink-Wig Mt. Lake Forest Prop. Owners Ass’n v. Lackawaxen Twp. Zoning Hearing Bd.*, 986 A.2d 935 (Pa. Commw. Ct. 2009); *Adams Outdoor Adver., L.P. v. Zoning Hearing Bd.*, 909 A.2d 469 (Pa. Commw. Ct. 2006).

²¹ *Petition of MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services for a Waiver of the Commission’s Regulations at 52 Pa. Code §§ 53.58 and 53.39 to Permit Detariffing of Services to Enterprise and Large Business Customers*, Docket No. P-2009-2082991 (Opinion and Order entered June 3, 2009) (“*MCI Detariffing Order*”) at 6. CLECs and cable

Thus, the switched network access services in *GNAPs/Palmerton* were those of a “local exchange telecommunications company”: Palmerton. See *GNAPs/Palmerton Order* at 26, 31, 34 (recognizing that Palmerton was an “incumbent” carrier). Here there is no dispute that Armstrong is a CLEC, not an ILEC. (See Armstrong Complaint § 3; CLEC Certification Orders entered at Docket A-311014).²² Accordingly, Armstrong is a CLEC, not a “local exchange telecommunications company” excepted from the VoIP Freedom Act under Section 2251.6(1)(iv).²³

C. The VoIP Freedom Act Applies To Wholesale Services.

In response to Verizon’s motion to dismiss, Armstrong argued that 73 P.S. § 2251.4 only prohibits Commission regulation of “retail” VoIP services, not regulation of wholesale or carrier-to-carrier matters involving VoIP or IP-enabled services. That is just

telephony providers come under the term “alternative service provider,” which is defined as “[a]n entity that provides telecommunications services in competition with a local exchange telecommunications company.” 66 Pa. C.S. § 3012. The Commission has recognized that “Act 183 of the new Chapter 30 has differentiated the definition of an ILEC as a ‘local exchange telecommunications company,’ and that of a CLEC as an ‘alternative service provider.’ 66 Pa. C.S. § 3012. Thus, the new statute makes an express distinction between the two classes of providers of local exchange telecommunications services.” *MCI Detariffing Order* at 6.

²² It is not unreasonable that the Legislature preserved Commission jurisdiction over the access charges of incumbent carriers but not over switched access charges for cable telephony providers such as Armstrong. Rural ILECs have historically argued that they depend on contributions from switched access charges to subsidize local rates. But any associated policy considerations would only apply to ILECs, not to CLECs such as Armstrong.

²³ Because the VoIP Freedom Act only preserves authority “to enforce applicable Federal or State statutes or regulations,” and not tariffs, the Commission determined that, by virtue of the exemption at Section 2251.6(1)(iv), it had jurisdiction in the *GNAPs/Palmerton* case to enforce 66 Pa. C.S. § 3017(b), which states that “[n]o person or entity may refuse to pay tariffed access charges for interexchange services provided by a local exchange telecommunications company.” *GNAPs/Palmerton Order* at 26. This statutory provision, too, only applies to “local exchange telecommunications company” switched access charges, and not to CLEC switched access charges, and so provides no basis to address Armstrong’s claims (even if VoIP traffic otherwise fell within the statute, and it does not). The VoIP Freedom Act also contains an exception preserving jurisdiction “to enforce applicable Federal or State statutes or regulations relating to rates, terms or conditions of protected services provided under tariffs which are subject to approval by the Pennsylvania Public Utility Commission.” 73 P.S. § 2251.6(1)(v). However, “protected services” are defined under 66 Pa.C.S. § 3012 only to include specific “telecommunications services provided by a local exchange telecommunications company,” and so this exception also does not apply to Armstrong’s switched access rates for the same reason, because Armstrong is a CLEC.

wrong. The statute does not distinguish between retail and wholesale “rates, terms and conditions”; it refers broadly to enforcing “either directly or indirectly, any law, rule, regulation, standard, order or other provision having the force or effect of law that regulates, or has the effect of regulating, the rates, terms and conditions of VoIP service or IP-enabled service.” 73 P.S. § 2251.4. Thus, by its plain terms this language encompasses disputes over intercarrier compensation for the origination or termination of VoIP or IP-enabled traffic. Moreover, if the Commission granted Armstrong’s request to apply the intrastate access rate regime to calls delivered to or originated from VoIP subscribers, the Commission would, in fact, be regulating the retail VoIP service. An integral part of the retail VoIP service Armstrong offers includes the ability to make calls to and receive calls from Verizon’s (and others’) networks.

Interpreting the VoIP Freedom Act as only preempting Commission regulation of retail VoIP disputes would violate the basic rules of statutory construction. The exception set forth in Section 2251.6(1)(iv) preserving jurisdiction for certain “intercarrier compensation” issues would have been unnecessary if the statute did not extend to intercarrier compensation disputes in the first place. Thus, Armstrong’s argument would violate the basic statutory construction principle against creating meaningless surplus language under Pennsylvania law. *Key Savings & Loan v. Louis John, Inc.*, 379 Pa. Super. 226, 232, 549 A.2d 988, 992 (1988) (the individual provisions of a statute must be interpreted to give effect to the entire statute because the legislature is presumed to have intended to avoid mere surplusage); *see also Habecker v. Nationwide Ins. Co.*, 299 Pa. Super. 463, 445 A.2d 1222 (1982). Indeed, this Commission itself recognized that the jurisdictional restrictions of the VoIP Freedom Act must be

considered with regard to disputes over intercarrier compensation when it recognized in the *GNAPs/Palmerton* order that this statute “establishe[s] the Commission’s jurisdictional boundaries over VoIP or IP-enabled services.” *GNAPs/Palmerton Order* at 25-26.

It makes perfect sense that the Legislature did not intend to permit AUI to claim the benefits of regulation in the form of Commission-enforced intercarrier compensation when AUI has been freed from the obligations and costs of answering to the Commission with respect to its retail services. Indeed, Armstrong concedes the lack of Commission jurisdiction over AUI, agreeing that: AUI’s retail voice service is not regulated by this Commission; AUI has not requested and does not have a certificate of public convenience authorizing it to offer public utility service; AUI’s voice products are not tariffed; and AUI does not report its retail end user revenue to the Commission. (Tr. at 47-50). As discussed above, AUI has even taken advantage of the VoIP Freedom Act to avoid having this Commission address its retail customers’ service complaints. Having set up its business in a manner that avoids regulation, AUI should not be permitted, through Armstrong, to try to take advantage of benefits of regulation. There is no dispute that AUI, which is not regulated by this Commission, could not itself collect access charges on the traffic it sends to and receives from Verizon’s end users — and could not even invoke the Commission’s jurisdiction to bring such a claim since it is not a “public utility.” But the Armstrong family of companies is trying to have it both ways — shielding its cable affiliate from regulation of its VoIP telephony services by inserting itself between that affiliate and the PSTN, and at the same time seeking the benefits of regulation to try to collect access charges on IP traffic exchanged with the PSTN.

III. The Commission Lacks Jurisdiction Under Federal Law To Address Armstrong's Claims For The Retroactive Issues.

As discussed above, the FCC Order establishes a default rate that applies in the absence of an agreement for the type of traffic at issue here on a prospective basis commencing January 1, 2012. Accordingly, the only issues left for the parties to resolve are their competing financial claims for the retroactive period. If the Commission determines that it may proceed to address Armstrong's Retroactive Issues notwithstanding the VoIP Freedom Act – which it should not for the reasons discussed above – the Commission should recognize that this traffic is interstate, information services traffic that is subject to exclusive federal regulation and cannot be subjected to intrastate access charges.

Applying the facts of record to the law in this area demonstrates that Armstrong's cable VoIP traffic is interstate in jurisdiction. The FCC's *Vonage Order*, upheld by the Eighth Circuit, found that *all* VoIP services having certain "basic characteristics" are "practical[ly] inseverab[le]": that is, they cannot practically be split into separate interstate and intrastate components.²⁴ Although the FCC ruled only on Vonage's "nomadic" VoIP service, because that was the service before it, it made clear that "other types of IP-enabled services having basic characteristics similar to" Vonage's service — a class the FCC expressly recognized included "cable companies" and other "facilities-based providers" — would also be jurisdictionally interstate.²⁵ The "basic

²⁴ *Memorandum Opinion and Order, Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC. Rcd 22404 (2004) ("Vonage Order"), *petitions for review denied, Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007) ¶ 32.

²⁵ *Id.* ¶¶ 25 n.93, 32. Indeed, the FCC cited an array of submissions from cable providers and their trade associations demonstrating that cable companies' VoIP offerings share these basic characteristics. *See id.* ¶ 32 n.113. For example, the FCC pointed to Cox Communications' statement that cable VoIP

characteristics” that render VoIP services interstate in nature include that the service requires a “broadband connection;” uses IP-compatible equipment; and “includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically.” *Vonage Order* ¶ 32. There is no dispute that AUI’s VoIP telephony service requires a broadband network connection in the form of the MTA, which is a piece of IP-compatible equipment that enables AUI’s customers to make IP calls. (Verizon St. 1.0 at 24 and Exhibit 4; Tr. at 79). And AUI’s calling features are inextricably intertwined with other computing and information service functions as part of a single integrated service offering. For example, according to its website, AUI allows customers to access their voice mail and more through online account management, to route Caller ID information through a traditional Caller ID device or television, and receive notifications of incoming calls on their television screen. (Verizon St. 1.0 at 27, Exhibit 4). And AUI and its customers also do not distinguish between “local” and “long distance” calls, because Armstrong charges a flat rate for all calling. (Verizon St. 1.0, Exhibit 4).

Similarly, Armstrong’s cable VoIP service is “information service” traffic under federal law. Under long-standing federal precedent, a service that offers the capability to perform a “net protocol conversion” — in this case, the conversion from IP to TDM

providers’ network design permits them to “offer a single, integrated service that includes both local and long distance calling and a host of other features that can be supported from national or regional data centers and accessed by users across state lines” to indicate that this service was also inseparable. *Id.* The FCC also cited a filing from the National Cable & Telecommunications Association, which explained that “[c]able VoIP offers consumers an integrated package of voice and enhanced features that are unavailable from traditional circuit-switched service” *Id.* As the FCC explained, the “integrated capabilities and features” characteristics of VoIP “are not unique to [Vonage’s service], but are inherent features of most, if not all, IP-based services.” *Id.* ¶ 25 n.93.

protocol or *vice versa* — satisfies the federal definition of information service.²⁶ The traffic at issue undergoes a net protocol conversion, because it either begins in IP format and ends in TDM, or it begins in TDM format and ends in IP. In the U.S. Supreme Court’s words, that “net protocol conversion” is what enables communication “between networks that employ different data-transmission formats.” *National Cable & Telecomms. Ass’n v. Brand X Internet Svcs.*, 545 U.S. 967, 977 (2005). Armstrong’s witness argues that there is no “net protocol conversion” as that term was used in the *Vonage* decision because (1) AUI’s service does not use the public internet, and (2) the customer’s voice is converted to IP packets by a piece of equipment (the MTA) that is at the customer’s home but that Armstrong claims is “owned” by Armstrong rather than by the customer. (Tr. at 79). Neither of these attempted distinctions is relevant. The fact that AUI’s traffic is carried on a private cable IP network rather than the public internet has no bearing on whether there is a net protocol conversion. The United States Supreme Court defines a net protocol conversion as the “ability to communicate between networks that employ different data-transmission formats,” a description that clearly applies to the communication between Verizon’s TDM network and AUI’s IP network. *Brand X*, 545 U.S. at 977. Armstrong’s self serving claim that AUI, rather than the end user, “owns” the Terminal Adapter placed at the customer’s home is also irrelevant. What matters is that the traffic enters the network in one protocol and exits in another.

Another way of determining whether a service qualifies as an information service is whether it offers consumers an integrated suite of capabilities — not merely voice communication, but advanced features such as voicemail, online account configuration

²⁶ See, e.g., *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm’n*, 461 F. Supp. 2d 1055, 1082 (E.D. Mo. 2006). See also *National Cable & Telecomms. Ass’n v. Brand X Internet Svcs.*, 545 U.S. 967, 977 (2005).

and management, and find-me/follow-me and other single-number/multiple-phone services — that allow consumers to “generat[e], acquir[e], stor[e], transform[], process[], retriev[e], utilize[e], or mak[e] available information via telecommunications.”²⁷

Because those capabilities are offered as part of a single, integrated, any-distance service — and cannot practicably be broken apart into component pieces — these services at a minimum “combine both telecommunications and information components” and as a result “are treated as information services.”²⁸

AUI’s VoIP services offer an integrated suite of capabilities. Its customers can take advantage of the benefits of IP technology — for example through integrated calling and messaging features and capabilities that allow them to manage their communications preferences and functions using their phone, computer or television. AUI’s telephone service comes with features such as Call Waiting, Caller ID and Voice Mail “at no extra cost.” (Verizon St. 1.0 at 24 and Exhibit 4). A primary feature of its bundled telephony and television service advertised prominently on AUI’s website is “Caller ID over TV.” (*Id.*) AUI also advertises that customers can “check voice mail and more with online account management.” (*Id.*) Taken together, these features, functions, and capabilities go well beyond those available with traditional circuit-switched telephone services and are tightly integrated and intertwined with the other capabilities enabled by a cable VoIP provider’s IP network, thereby offering a wide array of capabilities for “generating, acquiring, storing, transforming, processing, retrieving, utilizing and making available information via telecommunications.”

²⁷ 47 U.S.C. § 153(20).

²⁸ See *PAETEC Communications, Inc. v. CommPartners, LLC*, No. 08-cv-397, 2010 WL 1767193 (D.D.C. Feb. 18, 2010) at *6.

IV. If The Commission Reaches The Retroactive Issues, It Should Find That Verizon Has Already Adequately Compensated Armstrong Under The Facts Presented.

A. The Commission Should Not Apply Armstrong's Intrastate Switched Access Rates To The Disputed Traffic.

Even if the Commission concludes that it has jurisdiction over Armstrong's claim to be paid more for the retroactive period, the Commission is not required to and should not force Verizon to pay Armstrong's full intrastate access rates on this traffic. Rather, the Commission should encourage the parties to negotiate a reasonable resolution of their competing financial claims regarding the traffic exchanged during this period. This Commission has recognized that it is acceptable for a carrier, upon receipt of "billing invoices" charging tariffed switched access rates for VoIP traffic, to approach another carrier "in order to initiate good faith negotiations for a traffic exchange agreement encompassing the subject of IP-enabled traffic," which is exactly what Verizon did in this case and what Armstrong has resisted. (*GNAPs/Palmerton Order* at 35). The FCC's Order similarly encourages negotiation over litigation, "reaffirm[ing]" that "good faith negotiations generally are preferable to tariffing as a means of implementing carriers' compensation obligations." (FCC Order ¶ 964). Indeed, the FCC Order's establishment of VoIP compensation obligations for the prospective period provides renewed impetus for the parties to settle their remaining differences about the retrospective period. In this regard, Verizon requested, and Armstrong has agreed to, mediation to promote meaningful settlement discussions.

If the Commission, nevertheless, proceeds to a litigated resolution, Verizon should not be forced to pay Armstrong's intrastate access rates for the disputed traffic for that period. Armstrong's cable VoIP traffic is *not* traditional intrastate, interexchange

traffic and, even aside from the legal issues precluding imposition of a state measure of compensation for this traffic, it would be bad policy and inequitable to force Verizon to pay a cable company legacy switched access rates that approach 10 cents a minute in some locations — multiples of Verizon's rate and among the highest access rates in the country — for this traffic.

There is no good policy reason to allow a cable operation such as Armstrong to have charged and collected the kind of legacy switched access rates it proposes here for VoIP traffic. The access regime was devised at the time of the AT&T divestiture in the 1984 timeframe as a way to replace part of the subsidy that historically flowed from higher priced long distance services to local services that had been priced artificially low by regulators. But cable companies, like CLECs, never had their telephony rates set by the regulators, nor have they been subject to other retail pricing constraints or service obligations that applied to traditional wireline carriers. CLECs also have the opportunity to use the most efficient mix of technologies and network configurations possible, and should be able to operate at least as efficiently as the incumbent carriers with their legacy networks. Armstrong itself is simply an intermediary flowing traffic to and from the cable VoIP provider AUI, which is not regulated by this Commission and is able to pick and choose the customers and locations it serves, enjoys full pricing and regulatory flexibility to recover its costs from its retail customers, and is able to use of its existing cable television facilities to provide telephone service. Allowing it also to collect ten-cent-a-minute access rates would do nothing more than force Verizon to subsidize AUI's business and provide AUI a competitive advantage of the ILECs against which it competes.

Furthermore, the record shows that forcing Verizon to pay Armstrong's full intrastate switched access rates for the retroactive period would lead to exactly the "asymmetrical approach to compensation" for VoIP traffic that the FCC sought to avoid. One of the concerns driving the FCC's decision not to impose the legacy intrastate switched access regime on VoIP traffic prospectively was its recognition that there is "evidence of asymmetrical revenue flows for traffic exchanged between a traditional wireline LEC [*i.e.*, Verizon] and a VoIP provider [*i.e.*, AUI], with the VoIP provider (or its LEC partner [*i.e.*, Armstrong]) collecting access charges, for example, but refusing to pay them," which industry members argued presents an "economically irrational arbitrage opportunity" that will lead to results that are "discriminatory, inimical to the interests of consumers, and at war with the public interest."²⁹ Like the FCC, this Commission also disfavors asymmetrical arrangements where a carrier collects access rates but avoids paying them, because they result in "an anticompetitive environment that artificially and inimically transmits inaccurate price signals to end-user consumers of telecommunications and communications services" and violate Chapter 30's directive to "[p]romote and encourage the provision of competitive services by a variety of service providers *on equal terms* throughout all geographic areas of this Commonwealth."³⁰

When Verizon examined Armstrong-originated traffic, it found that while Armstrong was billing Verizon its very high intrastate switched access rates (which in some

²⁹ 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") ¶ 610). (*available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/FCC-11-13A1.pdf)

³⁰ *Palmerton Telephone Company v. Global NAPs South, Inc., etc.*, Docket C-2009-2093336 (Opinion and Order on Reconsideration entered August 3, 2010) ("GNAPs/Palmerton Recon Order") at 13-14 (quoting 66 Pa. C.S. § 3011(8)) (emphasis in original).

locations are over already five times higher than Verizon's own rates), Armstrong has been routing its traffic through other carriers so that it is not billed and does not pay Verizon's intrastate access charges. Verizon conducted a traffic study for the period from August 13 to August 21, 2010. This study showed that Armstrong is sending nearly all of its traffic it categorizes as intrastate, interexchange traffic to Verizon through other carriers,³¹ rather than routing this traffic directly to Verizon. Of all of Armstrong's traffic it categorizes as intrastate interexchange destined for Verizon end users, [BEGIN PROPRIETARY] [END PROPRIETARY] was delivered by [BEGIN PROPRIETARY] [END PROPRIETARY]. Armstrong directly delivered just [BEGIN PROPRIETARY] [END PROPRIETARY]. The only other carrier delivering 1% or more was [BEGIN PROPRIETARY] [END PROPRIETARY].³² (Verizon St. 1.0 at 33). An updated traffic study using data for the period July 1 to July 31, 2011 confirmed that Armstrong's traffic continues to be delivered in this manner. Of all of the traffic Armstrong categorizes as intrastate, interexchange sent to Verizon during that period, [BEGIN PROPRIETARY] [END PROPRIETARY] was delivered by [BEGIN PROPRIETARY] [END PROPRIETARY] and [BEGIN PROPRIETARY] [END PROPRIETARY] was delivered by [BEGIN PROPRIETARY] [END PROPRIETARY]. Armstrong directly delivered just [BEGIN PROPRIETARY] [END PROPRIETARY]. (*Id.*) Verizon's findings are not surprising because they reflect

³¹ Armstrong directly delivered most of the minutes that (if they were not VoIP) would be classified as "local" and subject to reciprocal compensation.

³² For the purpose of these calculations, Verizon only included calls destined for its own end users; it excluded "transit" traffic (traffic that comes into Verizon's network but is destined to be terminated by a carrier other than Verizon). But a substantial portion of Armstrong's access transit traffic is also being delivered indirectly by other carriers. Verizon also excluded traffic that would be classified as interstate access, but again a substantial portion of that traffic is being delivered indirectly by other carriers. (Verizon St. 1.0 at 33).

what Armstrong itself has admitted in discovery, which is that it hands off traffic destined to be terminated by Verizon to the same carriers from which Verizon receives the traffic. (Verizon St. 1.0 at 34 and Exhibit 1 (Armstrong Response to Verizon I-5); Armstrong St. 2 at 41).³³ The two carriers from which the bulk of Armstrong's intrastate, interexchange traffic was received are widely known in the industry not to have paid tariffed switched access charges on VoIP traffic.³⁴ In fact, it is no secret that both carriers have Commission-approved provisions in their interconnection agreements that provide for alternative payments for VoIP traffic pending the FCC's resolution of the applicable compensation rules. (Verizon St. 1.0 at 34).

Verizon does not suggest that Armstrong's traffic routing practices violate the law. The point is that Armstrong took advantage of the industry's growing recognition that intrastate access charges should not apply to VoIP traffic to lower its own cost structure, so it cannot credibly claim that access charges should apply when traffic flows in the opposite direction. Armstrong clearly benefited from sending its traffic through carriers that do not pay intrastate access charges on VoIP traffic, admitting that this approach is less costly.

³³ The study also showed small amounts of Armstrong-originated traffic being delivered to Verizon by a number of other carriers. If Armstrong did not hand traffic off to those carriers directly, then it is likely that these carriers somehow acquired the traffic "downstream," possibly from the first carrier or from the customer if the end-user was dialing around Armstrong to use another IXC. The bulk of the traffic, however, was coming from carriers Armstrong identified as recipients of its traffic. (Verizon St. 1.0 at 34).

³⁴ [BEGIN PROPRIETARY] [END PROPRIETARY], which delivers most of Armstrong's interexchange traffic, has for a long time disputed the application of tariffed switched access charges to VoIP traffic. It pays Verizon a rate of [BEGIN PROPRIETARY] [END PROPRIETARY] for VoIP traffic. [BEGIN PROPRIETARY] [END PROPRIETARY], which historically had withheld switched access charges from Verizon, has entered into an agreement under which it now pays Verizon [BEGIN PROPRIETARY] [END PROPRIETARY]. (Verizon St. 1.0 at 34). As Armstrong explained in its testimony, these "pay and dispute" processes to handle the exchange of VoIP traffic pending a definitive order from the FCC were memorialized in amendments to these carriers' interconnection agreements, which were approved by this Commission. (Armstrong St. 2 at 52-53).

(Armstrong St. 2 at 42) (conceding that “the choice of which wholesale IXC to use” to deliver toll traffic destined to Verizon “is based upon [least cost routing] principles, as well as quality and reliability.”) These carriers can give Armstrong a break on call termination costs because they are not paying tariffed intrastate access rates to Verizon (or other carriers) on Armstrong’s VoIP traffic.

The record shows that Armstrong’s routing practices have resulted in asymmetric billing of switched access charges as between Armstrong and Verizon for the same type of traffic during the retroactive time period. Verizon’s intrastate switched access charges to Armstrong for October 2010 and September 2011 were each under \$500 per month, as compared to the over \$200,000 in monthly access charges Armstrong billed Verizon for October 2010, and over \$100,000 in monthly access charges Armstrong billed Verizon for September 2011, (Verizon St. 1.0 at 38), showing that Armstrong has billed Verizon 200 to 400 times more than Verizon has billed Armstrong on a monthly basis for intrastate switched access during the retroactive period. And even at the rate of \$0.0007 that Verizon applied pending resolution of the dispute, Verizon has paid Armstrong \$336,196 for the disputed traffic, while Armstrong has paid Verizon only a fraction of that amount in switched access charges for Armstrong traffic delivered to Verizon during the same period. Yet Armstrong is asking this Commission to force Verizon to pay another \$2.5 million to Armstrong for the same period.³⁵

³⁵ With respect to traffic Armstrong categorizes as “local” (non-interexchange) traffic, Armstrong continues to deliver most of that traffic directly, presumably because Verizon’s reciprocal compensation charges assessed on such traffic are considerably lower than switched access rates. Verizon PA’s end office reciprocal compensation rate in its ICA is \$.000987 per minute (only slightly higher than the \$.0007 that it is paying to Armstrong on this type of traffic) and Verizon North’s is \$.0030000. (Verizon St. 1.0 at 38).

The asymmetrical advantage Armstrong receives by routing traffic in a way that avoids Verizon's access charges is directly relevant to the Commission's evaluation of Armstrong's claim for payment of intrastate switched access charges from Verizon. Armstrong has engineered a one-way flow of subsidies and profits from Verizon's customers to Armstrong's cable telephony business.³⁶ Whatever cost might be associated with any call termination functions Armstrong provides, it cannot be more than a tiny fraction of the 10 cents a minute it charges in some areas. The vast majority of the money Armstrong takes in with these excessive rates is pure, unjustified subsidy or profit. Requiring other carriers and consumers in other parts of Pennsylvania to subsidize Armstrong's and its affiliate's cable telephony business is unfair and inimical to the efficient competition that produces maximum consumer benefits. This situation gives AUI an artificial competitive advantage and creates an undue prejudice to competitors, such as Verizon, which results in consumers not receiving the full benefits of an efficient, non-manipulated market.

In light of these facts, the Commission should reject Armstrong's demand for the automatic application of its intrastate switched access rates to the disputed traffic during the retroactive period. Instead it should encourage the parties to "initiate good faith negotiations for a traffic exchange agreement encompassing the subject of IP-enabled traffic" during this period. (*GNAPs/Palmerton Order* at 35). But if the Commission must determine the compensation due to Armstrong, it should find that Verizon has already paid Armstrong adequate compensation for the functions it has provided, as discussed below. In no event

³⁶ The record shows that nearly all of Armstrong's intrastate revenue is from access charges to other carriers, some portion of which it passes back to AUI through a "netting" process. Verizon Cross Ex. 2 (Armstrong Answer to II-2) (detailing sources of intrastate revenue); Verizon Cross Ex. 3 (Armstrong Answer to III-5).

should the Commission adopt a rate higher than the interstate access rate level the FCC adopted as the initial default rate going forward.

B. Verizon Is Due Refunds For Armstrong's Switched Access Overcharges.

If the Commission considers the Retroactive Issues and attempts to apply intrastate switched access rates to the traffic at issue, it must also address Armstrong's misapplication of those rates. Armstrong has overcharged Verizon in several different ways in violation of the law and its tariffs, so any required payments to Armstrong must be off-set by credits to Verizon to account for these overcharges.

1. Armstrong Charges Rates Higher Than The Corresponding ILEC In Violation Of State Law.

Armstrong has been charging Verizon rates that violate the statutory rate cap at 66 Pa. C. S. §3017(c), which forbids any CLEC from "charg[ing] access rates higher than those charged by the incumbent local exchange telecommunications company in the same service territory."³⁷ This Commission has already held that if a CLEC has charged access rates in violation of Section 3017(c) then it must provide a refund pursuant to 66 Pa. C.S. § 1312(a) going back four years.³⁸

Armstrong bills different rates for each ILEC territory in which its cable affiliate, AUI, serves customers. (Verizon St. 1.0 at 42). In the territories of ILECs other than Verizon PA and Verizon North in which its cable affiliate operates, Armstrong's bills to Verizon far exceeded even those ILECs' already quite high per-minute access rates.

³⁷ While there is an exception if "such carrier can demonstrate that the higher access rates are cost justified," Armstrong has not attempted to argue that its "costs" justify charging higher access rates than the rural ILECs.

³⁸ *Verizon Pennsylvania Inc. v. CTSI*, Docket No. C-20077332 (Opinion and Order entered August 29, 2008) ("CTSI Order"); *Verizon Pennsylvania Inc. v. Penn Telecom Inc.*, Docket No. C-20066987 (Opinion and Order entered August 29, 2008) ("Penn Telecom Order").

(Verizon St. 1.0 at 42).³⁹ And these territories make up a significant portion of the traffic at issue: Armstrong reports that [BEGIN PROPRIETARY] [END PROPRIETARY] of AUI's customers are located in rural ILEC territory. (Tr. at 263). Moreover, not only do these rates exceed the corresponding ILEC rates, but they are multiples higher than even Armstrong's own rural ILEC affiliates charge for switched access.⁴⁰

Armstrong does not deny that that its charges to Verizon have exceeded the ILECs' per-minute charges during the retroactive period. Instead, Armstrong dismisses the matter as irrelevant, claiming that no examination of its charges is necessary because its individual tariffed rate elements are the same as those of the underlying ILEC. (Armstrong St. 2 at 57). However, the Commission's inquiry must include an examination of how rates are applied, not just how they are listed in a tariff. If – as the record shows here – Armstrong is applying the tariffed charges differently from the underlying ILEC in a manner that results in significantly higher charges to the access customer, it is violating the statute that prohibits “charg[ing] access rates higher than those charged by the incumbent local exchange telecommunications company in the same service territory.” 66 Pa. C.S. § 3017(c).

The record demonstrates that the difference between Armstrong's charges and the ILECs' is driven primarily by the application of the carrier charge rate element. This rate

³⁹ Armstrong confirmed in discovery that it has charged Verizon higher rates on a per-minute basis than the corresponding ILEC charges. (Verizon St. 1.0 at 42-43 and Exhibit 1). And the corresponding ILEC charges themselves are inflated. In fact, this Commission recently determined that the access rates of these RLECs must be reduced because they are not reasonable even for rural ILECs, much less for a cable telephony CLEC like Armstrong. *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers and The Pennsylvania Universal Service Fund*, Docket No. I-00040105 (Opinion and Order entered July 18, 2011) at 199-20 (“the totality of the evidentiary record strongly suggests that the existing high levels of the intrastate CC rate element for certain RLECs are clearly unsustainable.”)

⁴⁰ Armstrong North charges Verizon about [BEGIN PROPRIETARY] [END PROPRIETARY] a minute and Armstrong Pennsylvania charges Verizon less than [BEGIN PROPRIETARY] [END PROPRIETARY] a minute, in contrast to Armstrong's charges to Verizon, which range from [BEGIN PROPRIETARY] [END PROPRIETARY] cents a minute. (Verizon St. 1.0 at 43)

element is tariffed as a per-line, per month charge, but as Armstrong's witness explained, Armstrong converts it to a charge on the customer's bill in a manner that he acknowledged results in a higher effective per-minute or per-month charge than the ILEC's. (Tr. at 257-58).⁴¹ Armstrong's witness conceded that one reason Armstrong's charges to carriers like Verizon are higher than the ILECs' charges is because Armstrong generally has a smaller amount of access minutes relative to the number of lines it serves in those territories. (*Id.*). But at least one reason for a smaller pot of minutes sharing in the carrier charge is the fact that Armstrong does not collect a carrier charge from its own cable affiliate, AUI, when AUI is the originating carrier (*i.e.*, the end-user's preferred long distance carrier for outgoing calls). As Armstrong explained in response to discovery, **[BEGIN PROPRIETARY]**

[END PROPRIETARY] (Verizon Cross Ex.

2, Armstrong Response to II-6). AUI clearly originates the bulk of the access traffic to which the carrier charge applies since the vast majority if not all of Armstrong's voice products are all-inclusive packages of local and long distance calling.⁴² Instead of charging AUI for its fair share of the carrier charge, Armstrong has been foisting a larger share of this

⁴¹ **[BEGIN PROPRIETARY]**

[END PROPRIETARY]

⁴² The record shows that **[BEGIN PROPRIETARY]** **[END PROPRIETARY]** of Armstrong's customers purchase a bundle of local and long distance telephone service together with cable television and/or Internet access. See Armstrong Response to Verizon I-13 (Exhibit 1 to Verizon St. 1.0); Armstrong Response to Verizon II-20 (Verizon Cross Ex. 2). Even some portion of the **[BEGIN PROPRIETARY]** **[END PROPRIETARY]** of customers that purchase "stand-alone" voice service are receiving unlimited long distance calling as part of their package. Tr. at 63-67.

charge on Verizon and other carriers, resulting in excessive per-minute charges in violation of Section 3017(c).⁴³

The unrefuted record evidence shows that since January 10, 2007 (four years prior to the filing of Verizon's new matter in the nature of a counterclaim) through July of 2010 Armstrong misapplied its tariff such that it unlawfully overcharged Verizon (and Verizon paid) \$1.608 million in violation of this statute, exclusive of interest. (Verizon St. 1.0 at 43). Even after Verizon began disputing Armstrong's bills in August of 2010, Armstrong's bills continue to reflect the same overcharge error discussed above. Of the amount Armstrong has billed Verizon since this dispute commenced, \$330,167 represents charges above the corresponding ILEC rate. (Verizon St. 1.0 at 44).

The Commission has already made clear in prior cases that if a CLEC is found to have charged excessive access rates in violation of 66 Pa. C.S. § 3017(c), such overcharges are unlawful and must be refunded pursuant to 66 Pa. C.S. § 1312(a). In two other complaint cases brought by Verizon against CLECs violating this statute, the Commission stated that the issue of refunds "shall be adjudicated under 66 Pa. C.S. § 1312 regarding the determination of unjust and unreasonable rates and the issuance of refunds," and that such refund should be "together with interest at the legal rate." (CTSI 8/29/08 Order at 13; PTI 8/29/08 Order at 18). These decisions are consistent with Commonwealth Court precedent on the issue, which overwhelmingly supports the issuance of a refund order under these

⁴³ Nothing requires Armstrong to undertake a convoluted mathematical exercise to convert the carrier charge, much less to exclude AUI's originating minutes or otherwise to perform the calculation in a way that results in excessive access charges that violate Section 3017(c). In fact, Armstrong's witness conceded that many CLECs simply tariff a per-minute charge that does not require any monthly mathematical calculation and does not exceed the ILEC's effective per-minute charge. (Tr. at 267).

circumstances.⁴⁴ By its plain terms, Section 1312(a) does not require a finding of “bad faith” or other culpable or malicious conduct in order to require a refund of overcharges. To the contrary, the statute states that “[i]n making a determination under this section, the commission need not find that the rate complained of was extortionate or oppressive.” 66 Pa. C. S. § 1312(a). To issue a refund order, the Commission need only find that the charges themselves – not Armstrong’s conduct – were “unjust or unreasonable.” *Id.* If it finds that Armstrong’s charges violated the statute at Section 3017(c) or violated Armstrong’s tariff, the Commission by definition will have found those access rates to be unjust and unreasonable.⁴⁵ The purpose of the statute is to protect customers from paying money that they should not have been required to pay.⁴⁶

⁴⁴ See *Equitable Gas Co. v. Penn. Pub. Util. Comm’n*, 106 Pa. Commw. 240, 258, 526 A.2d 823, 832 (1987); *Emporium Water Co. v. PUC*, 859 A.2d 20, 24 (Pa. Commw. 2004); *Pa. Gas & Water Co. v. Pa. Public Util. Com.*, 470 A.2d 1066, 1073, 79 Pa. Commw. 416, 430 (Pa. Commw. Ct. 1984).

⁴⁵ While the decision to issue a refund under Section 1312(a) is “discretionary,” it is not a “punishment” to be dispensed only if the Commission finds that the company acted in bad faith. *Emporium Water*, 859 A.2d at 24 (affirming a Commission refund order). Although this Commission has discretion under Section 1312(a) with respect to ordering a refund, it would be an abuse of that discretion to deny the refund without a sound legal and factual basis to do so. The Commonwealth Court has viewed the Commission’s discretion to refrain from awarding a refund to require specific evidence that the utility’s financial viability would be in jeopardy from making the refund, such as “any imminent financial collapse or service failure that would justify retaining the ratepayer’s money.” *Id.* (“Although the Utility properly points out that the Commission’s authority to order refunds pursuant to Section 1312(a) of the Code is discretionary, . . . the Utility did not present any evidence of any imminent financial collapse or service failure that would justify retaining the ratepayer’s money.”) Armstrong has produced no such evidence.

⁴⁶ While never actually denying that it charges higher per-minute rates than the ILECs, Armstrong’s counsel suggested on cross examination that the Commission should not order a refund because it would be difficult to determine the precise per-minute rate for the underlying ILEC in order to compute the difference. (Tr. at 215-16). But if this argument were taken to its natural but absurd conclusion, then Armstrong could allocate its carrier charge so as to impose any per-minute rate and no matter how far it exceeds the ILEC’s charges the Commission would have no recourse, rendering Section 3017(c) effectively meaningless. The Commission has many options under which to fashion a remedy here. It can and should accept Verizon’s un rebutted calculation of the overcharges. Alternatively, it could in the compliance phase direct the relevant ILECs to provide their average rate per minute. See, e.g., COMAR 20.45.09.03 (Maryland rule regarding calculation of the rate cap). It could also simply order Armstrong to rebill Verizon at a rate no higher than the corresponding ILEC rate and allow the parties to attempt to work out the math. See, e.g., *Verizon v. Penn Telecom, Inc.*, Docket No. C-20066987 (Initial Decision of ALJ Weismandel, December 14, 2007) (“Complainant is entitled to be rebilled for intrastate switched access charges billed by respondent from November 30, 2004, at a rate that is no higher than that of the ILEC in whose service territory respondent rendered

The fact that Armstrong was applying a tariffed carrier charge – albeit in a flawed manner – is not a defense to a refund. Refunds under Section 1312(a) are not limited to cases where rates are untariffed, or in excess of tariffed rates. To the contrary, Legislature gave the Commission broader authority, stating that the Commission may direct a refund where the rate collected was “unjust or unreasonable, *or* was in violation of any regulation or order of the commission, *or* was in excess of the applicable rate contained in an existing and effective tariff of such public utility.” 66 Pa. C.S. § 1312(a). The plain language of Section 1312(a) allows the Commission to direct a refund if it finds that the rate collected was “unjust or unreasonable,” (in this case it was in violation of a statutory limitation), even if the rate was tariffed.⁴⁷ The statute also allows for an award of interest on the refund.⁴⁸

2. Armstrong Charges Verizon For Tandem Switching Functions It Does Not Provide.

The intrastate switched access charges billed by Armstrong to Verizon include charges for access rate elements that Armstrong could not provide to Verizon even if the tariff applied (which it does not). In particular, Armstrong imposes charges for tandem

the service.”) What the Commission should *not* do is accept Armstrong’s contention that its noncompliance must be ignored because it is too difficult to calculate the refund that is due.

⁴⁷ As the Commonwealth Court explained in rejecting Equitable Gas’s opposition to a refund, the fact that a rate was tariffed does not preclude a refund if the rate is ultimately found to have been unjust and unreasonable. “While it is true that ‘Commission-made’ rates cannot be retroactively changed, this doctrine is inapplicable to the case at bar. ‘Commission-made’ rates are those rates which are implemented subsequent to an exhaustive evidentiary presentation of the utility’s expenses and their reasonableness, the fair value of the utility’s property used and useful in the public service, and the return on that value to be received by companies who are subject to similar economic risks.” *Equitable Gas Co. v. Pennsylvania Public Utility Com.*, 106 Pa. Commw. 240, 259, 526 A.2d 823 (1987). Like Equitable Gas, Armstrong cannot “validly expect” that its intrastate switched access rates “were insulated from retroactive modification” because they “were not stamped with antecedent PUC approval. . . . No final determination as to reasonableness had been made by the PUC. Therefore, it was not error for the PUC to re-examine the . . . rates to determine justness and reasonableness *Equitable*, 106 Pa. Commw at 259, 526 A.2d at 831.

⁴⁸ Based on the “legal rate” of interest is 6 percent per annum, the record shows that based on Armstrong’s past overcharges of \$1.6 million discussed above, interest in the amount of \$114,533 should also be paid to Verizon. (Verizon St. 1.0 at 44). 66 Pa. C.S. §1312(a); 41 P.S. § 202. *See Duquesne Light Co. v. Pa. Public Util. Com.*, 117 Pa. Commw. 28, 36 (Pa. Commw. Ct. 1988).

switching that under Armstrong's tariff would apply only when Armstrong uses its own tandem switch to provide switched access service. *See, e.g.*, Armstrong Tariff Pa. PUC No. 5, Section 4.2.3(A)(3) (Verizon St. 1.0, Exhibit 5). Nothing in Armstrong's tariff authorizes it to bill tandem switching where Armstrong does not operate a tandem switch, much less if Verizon's traffic is not even being switched at the tandem. (Verizon St. 1.0 at 44-46). At the hearing Armstrong's witnesses conceded that "if tandem switching were not performed . . . you shouldn't reasonably charge tandem switching." (Tr. at 93). Verizon's witness testified that Armstrong was charging tandem switching on every minute of traffic delivered by Verizon at an office where there was direct trunking and the traffic could not have been switched at a tandem – even Neutral Tandem's tandem switch, since Armstrong concedes it does not have its own tandem. (Tr. at 115). Ultimately, Armstrong's witness agreed that "charging tandem switching in that circumstance is a mistake and should not be charged," and agreed that Verizon was due a credit for tandem switching charges. (Tr. 247-48).

3. Armstrong Charges Verizon A Carrier Common Line Charge Even Though It Has No Carrier Common Lines.

Armstrong is charging Verizon for a Carrier Common Line Service that it does not provide under the terms of its tariff. Section 6.1 of Armstrong's access tariff provides that "[t]he Company will provide Carrier Common Line Access Service to Customers in conjunction with Switched Access Service provided in Section 4 of this tariff."

Armstrong's Pa. P.U.C. Tariff No. 5, Section 6.1 (Verizon St. 1.0. Exhibit 5). Under this provision, Armstrong has been billing Verizon for the Carrier Common Line at the rates set forth in its tariff Sections 12.1.17, 12.2.16, 12.3.15, 12.4.13, 12.5.14, 12.6.13. (*Id.*) Those rates range from a low of 58 cents per line, per month in Verizon territory to a high of \$11.18 per line per month in Citizens' territory. (Verizon St. 1.0 at 46). Armstrong's

tariff defines the “Carrier Common Line” as the facility that “provides for the use of End Users’ Company-provided common lines by Customers for access to such End Users to furnish Intrastate Communications.” Armstrong’s Pa. P.U.C. Tariff No. 5, Section 6.1 (Verizon St. 1.0, Exhibit 5). Under the plain language of the tariff, a “Company-provided” common line must be provided by Armstrong itself, not another company such as its affiliate AUI. *See* Section 1 (“[a]s used in this Tariff, Company shall refer to the facilities-based offerings of the Competitive Local Exchange Carrier (CLEC) operations of ARMSTRONG TELECOMMUNICATIONS, INC., which is the issuer of this tariff.”) This is consistent with Section 5.1 of the tariff, which provides that “The Company” — in other words, Armstrong — will provide End User Access Service (End User Access) to end users who obtain local exchange service from the Company under its general and/or local exchange tariffs. End User Access provides for the use of an End User Common Line (EUCL).” Armstrong’s Pa. P.U.C. Tariff No. 5, Section 5.1 (*Id.*) Under the tariff, the End User is charged for use of the common line “[w]hen the end user’s local service is provided by the Company.” *Id.* Section 5.1.4. It is clear that local services “provided by the Company” means that the service must be provided by Armstrong itself, not another company such as its affiliate AUI.

Armstrong concedes that it does not “physically own the facilities that constitute the end user’s common line.” (Armstrong St. 2 at 60). In fact, all of the traffic at issue here is destined to end users served by AUI and the facilities Armstrong considers to be the “common line” are AUI’s, not Armstrong’s. (*Id.* at 62). Because Armstrong does not provide local service to the customers for which it is charging Verizon switched access (they are served by AUI) there are no “Company-provided common lines” and therefore

no basis in the tariff for Armstrong to charge Verizon “for the use of End Users’ Company-provided common lines.” Armstrong’s Pa. P.U.C. Tariff No. 5, Section 6.1 (Verizon St. 1.0, Exhibit 5).

As the FCC explained in its recent order, prior to January 1, 2012 (when the FCC’s new VoIP compensation rules take effect) a CLEC operating as a wholesale partner to a cable VoIP provider was not permitted to charge for switched access functions that the CLEC itself did not provide. (FCC Order ¶ 970) (“[W]e recognize that under the [FCC’s] historical approach in the access charge context, when relying on tariffs, LECs have been permitted to charge access charges to the extent they are providing the functions at issue.”) The applicable federal rule prior to January 1, 2012 was explained in a 2004 FCC order as follows: “our long-standing policy with respect to incumbent LECs is that they should charge only for those services that they provide” and “[w]e believe that a similar policy should apply to competitive LECs.”⁴⁹ Beginning January 1, 2012, CLECs, such as Armstrong, acting as wholesale intermediaries for cable VoIP providers will be able to charge for access functions provided by the retail cable partner, but of course they will be required to charge interstate access rates under the FCC’s new rules. With regard to the retroactive period, however, Armstrong is bound by the plain language of its tariffs – which is fully consistent with the federal rule on this issue applicable at that time – only to charge for Carrier Common Line service where Armstrong itself owns and provides the common line.

⁴⁹ *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc. for Temporary Waiver of Commission Rule 61.26(d) To Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, CC Docket No. 96-262, CCB/CPD File No. 01-19, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9118-19, para. 21 (2004) (*Eighth Report and Order*).

Armstrong has overcharged Verizon by \$4.58 million for Carrier Common Line service from January 10, 2007 through the beginning of the dispute in August of 2010. Of the \$2.25 million that Armstrong has billed Verizon for intrastate switched access since August of 2010, \$1.48 million is attributable to the Carrier Common Line charge.

4. Armstrong Violates Its ICAs By Charging Verizon Rates Higher Than Verizon's Rates.

Armstrong's interconnection agreements with the Verizon ILECs, Verizon PA and Verizon North, forbid Armstrong from billing those carriers switched access rates higher than Verizon's own charges. Section 3 of the Pricing Attachments to the ICAs provides that:

ATI Prices

Notwithstanding any other provision of this Agreement, the Charges that ATI bills Verizon for ATI's Services shall not exceed the Charges for Verizon's comparable Services, except to the extent that ATI's cost to provide such ATI's Services to Verizon exceeds the Charges for Verizon's comparable Services and ATI has demonstrated such cost to Verizon, or, at Verizon's request, to the Commission or the FCC.

Armstrong concedes that for AUI end users outside Verizon ILEC territory Armstrong has been charging Verizon rates far in excess of the Verizon ILECs' access rates.⁵⁰ Even if the Commission finds that Armstrong was entitled to charge intrastate switched access rates during the retroactive period, the amounts Armstrong seeks to collect from the Verizon ILECs would have to be reduced accordingly and Verizon would be entitled to a refund for past overcharges.⁵¹ All of the minutes of use for which Armstrong billed Verizon PA or

⁵⁰ And even with Verizon's comparatively lower access charges, Armstrong still routes virtually all of its traffic that would be categorized as intrastate switched access through other carriers in a manner that avoids paying Verizon's access charges, as discussed in more detail above.

⁵¹ Armstrong claims this provision only applies to rates charged for traffic in Verizon's incumbent territory, (Armstrong St. 1 at 9) but this interpretation is not supported by the plain language of the

Verizon North in excess of what these carriers bill for the comparable service would have to be re-rated at a level no higher than Verizon's rates.⁵²

CONCLUSION

For the foregoing reasons, the Commission should dismiss the Prospective Issues in light of the FCC's Order and should dismiss the Retroactive Issues for lack of jurisdiction, while encouraging the parties to negotiate an amicable resolution to the competing financial claims. If the Commission reaches the substance of the Retroactive Issues, however, it should not impose Armstrong's legacy intrastate switched access charges but rather should rule that Verizon has already paid Armstrong adequate compensation for the limited services Armstrong provided during the retroactive period or otherwise fashion an appropriate remedy based on the case-specific evidentiary record and accounting for Verizon's refund claims.

contract. Armstrong is limited to Verizon's rates charged for comparable service no matter where in the state the service is offered.

⁵² As discussed above Armstrong is precluded by a Pennsylvania statute from charging rates higher than the corresponding ILEC. But in the case of Verizon PA and Verizon North it has agreed to an additional restriction in its ICAs, prohibiting it from charging rates higher than Verizon's even if the underlying ILEC charges higher rates than Verizon.

Respectfully submitted,



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