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December 6, 2011

Via Hand Delivery

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street – Filing Room (2nd Floor)
Harrisburg, PA 17105-3265

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:

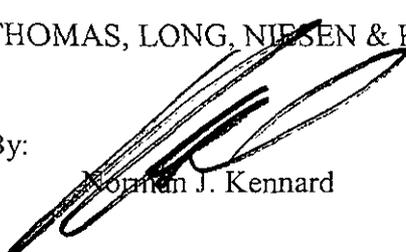
Enclosed for filing with the Commission is the original and three copies each of the Proprietary and Public versions of Armstrong Telecommunications Inc.'s Brief. A copy of this document has been served in accordance with the attached Certificate of Service.

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

cc: Dennis J. Buckley, Presiding Administrative Law Judge

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

**MAIN BRIEF OF
ARMSTRONG TELECOMMUNICATIONS INC.**

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DATED: December 6, 2011

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I. STATEMENT OF THE CASE

A. The Parties' Relationship and Verizon's Submission of a "Dispute"

At issue in this proceeding is the compensation to be paid by two incumbent local exchange carriers ("ILECs"), Verizon Pennsylvania Inc. ("Verizon PA") and Verizon North LLC ("Verizon North") (collectively "Verizon ILECs"); and two of their affiliates, MCImetro Access Transmission Services, LLC d/b/a Verizon Business, a competitive local exchange carrier ("CLEC"), and MCI Communications Services Inc., an interexchange carrier ("IXC") (collectively "MCI") (all companies collectively "Verizon") to Armstrong Telecommunications Inc. ("Armstrong"), a CLEC, for the terminating services provided by Armstrong to Verizon. Verizon is withholding payments at a rate of approximately \$200,000 per month and, as of the date of testimony (September 9, 2011), Verizon had withheld almost \$2.5 million in compensation to Armstrong.¹

Armstrong was certificated as a CLEC and "telecommunication service provider" by this Commission at Docket No. A-311014 in the incumbent service territories of Verizon Pennsylvania, Verizon North, Citizens Telephone Company of Kecksburg, ALLTEL Pennsylvania, Inc. (now Windstream Pennsylvania) and North Pittsburgh Telephone Company (now Consolidated Communications Pennsylvania).² Armstrong operates, *inter alia*, as a wholesale CLEC, responsible for the public switched network interconnections and intercarrier compensation obligations associated with traffic originating from and terminating to its cable company affiliate, Armstrong Utilities, Inc. ("AUI"), which provides various products to end-use customers, including cable telephony services, in competition with Verizon and other ILECs. Armstrong is also certificated as an interexchange carrier by the Commission.

¹ Armstrong Direct Testimony at 2-3.

² Armstrong Direct Testimony at 3.

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The Verizon ILECs voluntarily entered into Interconnection Agreements with Armstrong (“Verizon ICAs”),³ which became effective on June 3, 2005.⁴ Commission approval was granted by Orders entered August 30, 2005:

Based on the foregoing and pursuant to Section 252(e) of TA-96, *supra*, and our *Implementation Orders*, we determine that the Interconnection Agreement and Amendment No. 1 between Verizon North and Armstrong are non-discriminatory to other telecommunications companies not parties to it and that it is consistent with the public interest.⁵

These agreements are currently in effect.⁶ The Verizon ICAs expressly state that the Agreements are consistent with laws existing at the time of execution⁷ and provide for specific reform procedures in the event of a subsequent change in law.⁸ Disputes, including those related to payment, must be made in “good faith.”⁹

Under the Verizon ICAs, traffic exchanged by the parties falls into several defined categories for intercarrier compensation purposes, the most important of which are “Reciprocal Compensation Traffic” and “Exchange Access.” The term “Reciprocal Compensation Traffic” is

³ In all material respects, the two interconnection agreements (Verizon PA and Verizon North) are identical. The Verizon ICAs with Armstrong for Verizon PA and Verizon North are Armstrong Exhibits 8 and 9, respectively.

⁴ Verizon ICAs at §§ 2.1 and 2.2.

⁵ *Joint Petition for Approval of an Interconnection Agreement and Amendment No. 1 Between Verizon North, Inc., and Armstrong Telecommunications, Inc., under Section 252(e) of the Telecommunication Act of 1996*, Docket No. A-311014F7001 (Opinion and Order entered August 30, 2005), slip op. at 6; *Joint Petition for Approval of an Interconnection Agreement and Amendment No. 1 Between Verizon Pennsylvania Inc. and Armstrong Telecommunications, Inc., under Section 252(e) of the Telecommunication Act of 1996*, Docket No. A-311014F7000 (Opinion and Order entered August 30, 2005), slip op. at 6.

⁶ Armstrong Direct Testimony at 6 (citing Verizon ICAs at § 2.3); Armstrong Exhibit 6, Verizon Answer to Armstrong Request For Admission No. 24.

⁷ Armstrong Direct Testimony at 7 (citing Verizon ICAs at § 37.2).

⁸ Armstrong Direct Testimony at 7 (citing Verizon ICAs at § 4.6; “If any legislative, regulatory, judicial or other governmental decision, order, determination or action, or any change in Applicable Law, materially affects any material provision of this Agreement, ... the Parties shall promptly renegotiate in good faith and amend in writing this Agreement in order to make such mutually acceptable revisions to this Agreement as may be required in order to conform the Agreement to Applicable Law. If within thirty (30) days of the effective date of such decision, determination, action or change, the Parties are unable to agree in writing upon mutually acceptable revisions to this Agreement, either Party may pursue any remedies available to it under this Agreement, at law, in equity, or otherwise, including, but not limited to, instituting an appropriate proceeding before the Commission, the FCC, or a court of competent jurisdiction, without first pursuing dispute resolution in accordance with Section 14 of this Agreement.”).

⁹ Armstrong Direct Testimony at 7 (citing Verizon ICAs at § 9.3).

defined by excluding traffic that is not “interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access.”¹⁰ The remaining traffic, most particularly local traffic, is subject to the reciprocal compensation rates also set forth in the ICAs.

In turn, “Exchange Access” is defined by reference to the Telecommunications Act of 1996 (“TCA-96”), which “means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.”¹¹ The term “Switched Exchange Access Service” is also defined as a toll call related service.¹² The calls in question do not meet any of the other ICA categories, including “Internet Traffic”¹³ or “Voice Information Service.”¹⁴ Nor is Armstrong providing “Information Access”¹⁵ to Verizon. Verizon has never claimed otherwise.

As the Armstrong witnesses concluded:

*In other words, the Verizon ICAs define the traffic exchanged between the Verizon ILECs and Armstrong in traditional terms, as either local, reciprocal compensation traffic or exchange access. None of the distinctions made in the Verizon ICAs involve the originating or terminating technology of the call.” There is no definition of IP or VoIP traffic in the agreement and the ICAs do not suggest that there is any special treatment for a call to or from a cable company. The standard toll and local definitions apply, regardless of the technology used to terminate or originate the call.*¹⁶

Rates are also defined in the Verizon ICAs. Tariffed rates are expressly incorporated by reference.¹⁷ “Tariffed rates are the default and are superseded only where different rates are

¹⁰ Armstrong Direct Testimony at 7.

¹¹ Armstrong Direct Testimony at 8 (citing Verizon ICAs, Glossary Attachment at § 2.36); 47 U.S.C. § 153(16).

¹² Armstrong Direct Testimony at 8 (citing Verizon ICAs, Glossary Attachment at § 2.88).

¹³ Armstrong Direct Testimony at 8 (citing Verizon ICAs, Glossary Attachment at § 2.46).

¹⁴ Armstrong Direct Testimony at 8 (citing Verizon ICAs at § 5.1).

¹⁵ Armstrong Direct Testimony at 8 (citing Verizon ICAs, Glossary Attachment at § 2.44).

¹⁶ Armstrong Direct Testimony at 8-9 (emphasis added).

¹⁷ Armstrong Direct Testimony at 9 (citing Verizon ICAs at § 1.1);

specified in the Pricing Attachment.”¹⁸ Tandem reciprocal compensation rates of \$.002439 (Verizon PA) and \$.0079536 (Verizon North) apply to local traffic.¹⁹ Verizon’s tariffed switched access charges apply to toll traffic for both Verizon and Armstrong, and Armstrong’s tariffed rates must mirror Verizon’s switched access rates when operating in Verizon’s incumbent territory.²⁰ To the extent that the charges for a service are not identified in the ICA, then tariff charges apply. The term “tariffs” refers to each party’s own respective tariffs.²¹

Procedures for revising rates are also specified in the Verizon ICAs. The remedy of a party seeking to change the rates is to institute a regulatory proceeding “to obtain a reduction in such Charges and a refund of any amounts paid in excess of any Charges that are reduced.”²² As the Armstrong witnesses observed: “Simply withholding payment, as Verizon has done, is not recognized as an acceptable option.”²³

Armstrong’s approved and effective state switched access tariff is Telephone - PA P.U.C. Tariff No. 5 (“Armstrong’s State Access Tariff”).²⁴ The access “Customer,”²⁵ the various Verizon entities in this instance, employ the switched access services of Armstrong to terminate

¹⁸ Armstrong Direct Testimony at 9 (citing Verizon ICAs, Pricing Attachment at § 1.3 (“The Charges for a Service shall be the Charges for the Service stated in the Providing Party’s applicable Tariff.”); § 1.4 (“In the absence of Charges for a Service established pursuant to Section 1.3 of this Attachment, the Charges shall be as stated in Appendix A of this Pricing Attachment.”); and Appendix A at § 8.4 (“Any traffic not specifically addressed in this Agreement shall be treated as required by the applicable Tariff of the Party transporting and/or terminating the traffic.”)).

¹⁹ Armstrong Direct Testimony at 9 (citing Verizon ICAs, Pricing Attachment at Appendix A).

²⁰ Armstrong Direct Testimony at 9 (citing Verizon ICAs, Pricing Attachment at Appendix A at Footnote 1, § III and § 3).

²¹ Armstrong Direct Testimony at 9 (citing Verizon ICAs, Pricing Attachment at § 2.90).

²² Armstrong Direct Testimony at 10 (citing Verizon ICAs, Pricing Attachment at § 5 (“Regulatory Review of Prices Notwithstanding any other provision of this Agreement, each Party reserves its respective rights to institute an appropriate proceeding with the FCC, the Commission or other governmental body of appropriate jurisdiction: (a) with regard to the Charges for its Services (including, but not limited to, a proceeding to change the Charges for its services, whether provided for in any of its Tariffs, in Appendix A, or otherwise); and (b) with regard to the Charges of the other Party (including, but not limited to, a proceeding to obtain a reduction in such Charges and a refund of any amounts paid in excess of any Charges that are reduced.”)).

²³ Armstrong Direct Testimony at 10.

²⁴ Armstrong Direct Testimony at 10. Armstrong’s State Access Tariff was entered into the record as Verizon Exhibit 5.

²⁵ Armstrong Direct Testimony at 10 (citing Armstrong’s State Access Tariff at Original Page 1-2).

their toll customers' calls.²⁶ "There is no provision in the tariff that limits the application of switched access rates to any technology, TDM, VoIP, wireless or otherwise."²⁷ Armstrong's State Access Tariff separates switched access rates separately by reference to the tariffed rates of each of the underlying incumbent carrier in whose territory Armstrong operates.²⁸

The "Customer," Verizon in this case, is "responsible for ... the payment of all applicable charges pursuant to this tariff."²⁹ Bills are past due after 30 days.³⁰ Armstrong is permitted to discontinue service to Verizon for both non-payment and material breach.³¹ In the event that Armstrong incurs "fees or expenses, including attorney's fees in collecting, or attempting to collect, any charges owed" these are recoverable by Armstrong.³² The Tariff also requires that, in the event of an unresolved billing dispute, "the Customer's remedy is to file a complaint with the Commission," another reasonable and appropriate procedural option not followed by Verizon.³³

With this background, since August 2006, the parties, Armstrong and *all Verizon entities*, have used their respective tariffed switched access rates to provide exchange access services to each other.³⁴ Since May 2007, the Verizon ILECs and Armstrong have compensated each other

²⁶ Armstrong Direct Testimony at 10 (citing Armstrong's State Access Tariff at Original Page 2-1; Rule 2.1.1).

²⁷ Armstrong Direct Testimony at 10.

²⁸ Armstrong Direct Testimony at 10 (citing Armstrong's State Access Tariff at Original Page 12-1 through Page 12-35).

²⁹ Armstrong Direct Testimony at 11 (citing Armstrong's State Access Tariff at Original Page 2-9, Rule 2.3.1(A) and Original Page 2-14, Rule 2.5.1).

³⁰ Armstrong Direct Testimony at 11 (citing Armstrong's State Access Tariff at Original Page 2-16, Rule 2.5.2(E)).

³¹ Armstrong Direct Testimony at 11 (citing Armstrong's State Access Tariff at Original Page 2-19, Rule 2.5.4).

³² Armstrong Direct Testimony at 11 (citing Armstrong's State Access Tariff at Original Page 2-23, Rule 2.5.4(J) ("In the event the Company incurs fees or expenses, including attorney's fees, in collecting, or attempting to collect, any charges owed the Company, the Customer will be liable to the Company for the payment of all such fees and expenses reasonably incurred.")).

³³ Armstrong Direct Testimony at 11 (citing Armstrong's State Access Tariff at Original Page 2-16 ("If the Customer and the Company are unable to resolve the dispute to their mutual satisfaction, the Customer may file a complaint with the Pennsylvania Public Utility Commission in accordance with the Commission's rules of procedures.")).

³⁴ Armstrong Direct Testimony at 11.

for the termination of local traffic at the reciprocal compensation rates specified in the Verizon ICA.³⁵ Verizon concedes that it previously paid.³⁶

Armstrong's bills submitted to Verizon have been calculated and tendered consistent with Armstrong's State Access Tariff and the Verizon ICAs. As Armstrong's witnesses stated:

Armstrong has submitted and continues to submit monthly carrier access bills ("CABS Bills") to Verizon for handling Verizon's traffic that are calculated in accordance and fully consistent with the terms and rates set forth in the Verizon ICAs and Armstrong's State Access Tariff. Since November 2007, Verizon has received monthly CABS Bills for the termination of Reciprocal Compensation Traffic from Armstrong and has paid such CABS Bills with limited disputes, all of which were resolved in Armstrong's favor. Since August 2006, Verizon has received monthly CABS Bills from Armstrong for Verizon's Exchange Access Traffic and has consistently paid CABS Bills without dispute, except in two instances, both of which were resolved by the full payment of the disputed bill by Verizon.³⁷

Then, on August 27, 2010, with no advance warning, Verizon sent Armstrong a letter "taking the unilateral stance that it would no longer pay at the same rates as the parties had been using, but rather, would now pay at a rate of \$0.0007 per minute of use on all traffic."³⁸

Verizon's August 27th letter to Armstrong is short and perfunctory:

Consistent with two recent federal district court rulings, Verizon does not believe that IP-originated or IP-terminated traffic is subject to switched access tariffs or related charges. Accordingly, Verizon disputes your company's intercarrier compensation charges for this type of traffic and has re-rated the intercarrier compensation charges that your company has billed on IP-originated or IP-terminated traffic down to a rate of \$0.0007 per minute of use, which is the most generally accepted rate in the industry. Attachment A to this letter details the billing account numbers, the specific minutes of use that Verizon has re-rated, and the amount of the charges that Verizon is disputing and withholding.

³⁵ Armstrong Direct Testimony at 11.

³⁶ Armstrong Exhibit 6, Verizon Answer to Armstrong Request For Admission No. 5 (Answer: "...is admitted that Verizon generally paid Armstrong's bills for intrastate switched access charges until it asserted the present dispute in August of 2010..."); Armstrong Exhibit 6, Verizon Answer to Armstrong Request For Admission No. 29 (RFA 29: "For the period November 2007 to July 2010, Verizon paid the reciprocal compensation rates as specified in the Verizon ICAs to Armstrong for Verizon Local Traffic." Answer: "...it is admitted that during this period Verizon did not dispute the rate applied.").

³⁷ Armstrong Direct Testimony at 11-12.

³⁸ Armstrong Direct Testimony at 12-13. Verizon's August 27th letter is included in Armstrong Exhibit 1.

Verizon looks forward to entering into a commercial agreement with your company that establishes reciprocal rates, terms, and conditions for the exchange of this traffic, and which will resolve this dispute. Verizon invites your company to contact Earl Hurter at earlhurter@verizonbusiness.com, as soon as possible so we can arrange a meeting to make progress towards a resolution of this matter.

¹ In *PAETEC v. CommPartners, LLC*, No. 08-0397, slip. op. (D.D.C. Feb. 18, 2010), the court ruled that VoIP traffic that undergoes a net protocol conversion from Internet Protocol format to Time Division Multiplexing ("TDM") format is an information service, and that access tariffs do not apply to information services. In *MetTel v. GNAPs*, No. 08-cv-3829, 2010 WL 1326095 (S.D.N.Y. Mar. 31, 2010), the court decided not to apply tariffed switched access charges to VoIP traffic but rather decided that the local exchange carrier was entitled to receive the reasonable value of the benefit it conferred on a VoIP provider, under the equitable theory of unjust enrichment.³⁹

Verizon's dispute was denied by Armstrong email sent August 30, 2010.⁴⁰ On September 3, 2010, Verizon sent a second letter layering on two additional disputes, neither of which is related to Verizon's claimed IP exemption from the ICAs and the access tariffs or the claim that a rate of \$0.0007 applies. "These are two separate billing disputes regarding the calculation of (and not the application of) the switched access rates on toll traffic delivered by Verizon."⁴¹

In sharp and contradictory contrast, "since the beginning of operations and continuing to today, Verizon continues to bill Armstrong reciprocal compensation and tariffed access rates rate at agreed upon levels - bills that Armstrong pays without dispute."⁴²

Verizon has characterized its abrupt and unannounced failure to pay agreed upon rates, and its decision to pay another, much lower rate as a "good faith offer to negotiate."⁴³ Although Verizon continues to send traffic to Armstrong and use its services,⁴⁴ it claims the right to do so

³⁹ Armstrong Direct Testimony at 13-14 and Armstrong Exhibit 1.

⁴⁰ A copy of Armstrong's August 30th dispute denial email and selected follow up communications between the parties is Armstrong Exhibit 2.

⁴¹ Armstrong Direct Testimony at 19.

⁴² Armstrong Direct Testimony at 20 (emphasis in original).

⁴³ See, e.g., Verizon Answer and New Matter at 2-3 ("The Commission recognized in its *Palmerton* decision that a carrier may approach another carrier 'in order to initiate good faith negotiations for a traffic exchange agreement encompassing the subject of IP-enabled traffic.' That is exactly what Verizon has attempted to do here, and the Commission should reject the complaint in order to allow negotiations to proceed." (footnote omitted)).

⁴⁴ Armstrong Direct Testimony at 20.

at the sharply reduced rate of \$.0007 per minute, which it has unilaterally undertaken without the agreement of Armstrong or the approval of this Commission (or other lawful authority).

As Armstrong's witnesses testified: "The \$.0007 rate Verizon pays in lieu of lawful rates has no legitimacy, at least in the current regulatory environment."⁴⁵ They added: "Further, the \$.0007 rate has no economic or historical significance and its origin is specious, at best" and described why.⁴⁶

The \$.0007 rate was clearly a figure designed to drive Armstrong into an unfavorable bargaining position, particularly as it was instantaneously self-enforced by Verizon. The Armstrong witnesses described the effect of Verizon's action:

By holding large sums of Armstrong monies hostage, which grow by approximately \$200,000 monthly, and offering virtually nothing by comparison (13% of the billed amount), Verizon is using its market clout as the largest LEC and toll carrier in Pennsylvania to cash starve Armstrong and, thereby, force concessions.⁴⁷

The August 27th letter states that "Verizon looks forward to entering into a commercial agreement with your company that establishes reciprocal rates, terms, and conditions for the exchange of this traffic, and which will resolve this dispute" and invited further discussion. "We found Verizon, however, to be entrenched in its position."⁴⁸ Armstrong had several conference calls with Verizon regarding their characterization of Armstrong's traffic as "VoIP" and the lowering of payments by 87% to \$.0007. Armstrong explained that its traffic was not VoIP but, rather, was originated and terminated as TDM. "Armstrong was also quite clear that its current

⁴⁵ Armstrong Direct Testimony at 21. As the witnesses also noted, "Access reform is, of course, ongoing at the FCC, but has not yet occurred and, when it does, will likely be prospective only in effect." Subsequently, on November 18, 2011, the FCC released its long-awaited intercarrier compensation and USF reform order. This order eventually moves the industry to "bill and keep" (i.e., zero compensation), but accomplishes this target after, in some cases, nine years of transition. With the limited exception of intraMTA (local) CMRS (wireless) traffic which is set at bill and keep, which is not in issue here, there is no validity to Verizon's claim that \$.0007 per minute, or anything approaching, it is a legitimate rate to use at the present time.

⁴⁶ Armstrong Direct Testimony at 21-22.

⁴⁷ Armstrong Direct Testimony at 20.

⁴⁸ Armstrong Direct Testimony at 22.

access tariffs applied to this traffic.”⁴⁹ Armstrong did indicate that it would consider entering into a so-called “commercial agreement” with Verizon, “but that Armstrong could not accept the \$.0007 rate.”⁵⁰ Verizon proved to be “intractable” on its position:

On December 10, 2010, in response to Armstrong’s indication that it would consider a ‘commercial agreement’ and after being informed that Armstrong would not accept the \$.0007 rate, Verizon proposed the same \$.0007 rate as a ‘counteroffer.’ Armstrong rejected this ‘counteroffer’ and asked that Verizon provide Armstrong with an alternate rate. No such alternate rate was forthcoming.⁵¹

B. Armstrong’s Complaint and Verizon’s New Matter.

On December 16, 2010, Armstrong filed a formal complaint which consists of the following allegations of unlawful activity:

- Count One Refusal to Pay Tariffed Access Charges in Violation of State Law
- Count Two Refusal to Pay Tariffed Access Charges In Violation of Armstrong’s State Access Tariff
- Count Three Attempt To Negotiate A Different Rate Than Specified in Armstrong’s State Access Tariff in Violation of State Law
- Count Four Failure to File Dispute With the Commission in Violation of Armstrong’s State Access Tariff and State Law
- Count Five Refusal to Pay Reciprocal Compensation in Breach of the Verizon ICAs

As relief, Armstrong requests, *inter alia*, that the Commission: grant the complaint; direct that Verizon immediately pay Armstrong all amounts outstanding for the toll and access termination services provided, plus late payment charges, attorney fees and other costs, as specified in Armstrong’s State Access Tariff and the Verizon ICAs; and direct that, in the future, Verizon timely pay Armstrong all amounts for services provided, as well as any other relief as may be just and reasonable.

⁴⁹ Armstrong Direct Testimony at 23.

⁵⁰ Armstrong Direct Testimony at 23.

⁵¹ Armstrong Direct Testimony at 23.

In answer, Verizon has asserted the defense that the traffic at issue is not subject to the previously agreed-upon compensation, “because it is IP-originated and/or IP-terminated traffic.”⁵² Verizon’s New Matter further avers that tariffed access and ICA-specified reciprocal compensation should not be paid on “IP-originated and terminated traffic.”⁵³ (Count I). Verizon’s New Matter also alleges that Armstrong’s collection of reciprocal compensation and switched access rates is illegal under federal law (Count II) and that Armstrong is “enforcing an asymmetrical compensation scheme,” because certain delivering carriers are not paying Verizon for Armstrong-originated traffic (Count II). Additionally, Verizon raised, as Counts III and IV of its New Matter, two tariff rate disputes regarding the calculation of (and not the application of) the access rates on toll traffic delivered by Verizon.⁵⁴

An initial prehearing conference was held on March 21, 2011. The four separate Armstrong complaints were consolidated pursuant to 52 Pa. Code § 5.81. On April 19, 2011, Armstrong filed a Motion for Partial Summary Judgment on the VoIP legal issues raised by Verizon and Verizon filed a Motion to Dismiss or Stay the proceeding pending action by the FCC. The parties replied to each other’s Motions on May 19, 2011. By Order dated July 18, 2011, the presiding Administrative Law Judge denied both Motions.

On August 19, 2011, Verizon filed a Petition for Interlocutory Review of the ALJ’s denial of its request for stay. Armstrong submitted its Brief in Opposition on August 29, 2011,

⁵² See, e.g., Verizon Answer to Complaint at ¶ 28 (“To the extent any response is required, the traffic at issue is not subject to Armstrong’s state access tariff for intrastate switched access services because it is IP-originated and/or IP-terminated traffic.”); ¶ 30 (“To the extent any response is required, the traffic at issue is not subject to Armstrong’s state access tariff for intrastate switched access services because it is IP-originated and/or IP-terminated traffic.”); and ¶ 39 (“To the extent any response is required, the traffic at issue is not reciprocal compensation traffic because it is IP-originated and/or IP-terminated.”).

⁵³ Verizon New Matter In The Nature Of Counterclaims, No. I (“Attempt to Impose Intrastate Switched Access Charges on VoIP Traffic in Violation of Federal Law” at ¶¶ 19-28) and No. II (“Enforcing an Asymmetrical Compensation Scheme in Violation of the Public Utility Code” at ¶¶ 29-34).

⁵⁴ Verizon New Matter in the Nature of Counterclaim No. III (Charges in Violation of 66 Pa. C.S. § 3017(c); relating to Verizon’s differing costs of termination on the underlying ILECs’ networks and on Armstrong’s network) and No. IV (Charges in Violation of State Tariff and State Law; relating to tandem transit charges).

as did Verizon. On October 14, 2011, Verizon withdraw the Petition for Interlocutory Review, which was granted by Secretarial Letter dated November 8, 2011.

Following the issuance of the ALJ's July 18, 2011 Order denying the Motions, the parties established a schedule for the submission of testimony, the holding of hearings and the submission of briefs, which was approved by the ALJ. Both parties exchanged prepared written Direct Testimony and Armstrong prepared written Rebuttal Testimony. Hearings were held on November 9 and 10, 2011.

The record in this proceeding consists of the following:

- Prepared Joint Direct Testimony of Armstrong (Cipoletti and Starkey) - Armstrong Statement No. 1
- Direct Testimony of Verizon (Vasington and Munsell) - Verizon Statement No. 1.0
- Prepared Joint Rebuttal Testimony of Armstrong (Cipoletti and Starkey) - Armstrong Statement No. 2
- Armstrong Exhibits 1-14
- Verizon Exhibits 1-2 and 4-5
- Armstrong Cross-Examination Exhibits 1-2
- Verizon Cross-Examination Exhibits 1-6
- Armstrong Surrebuttal Exhibit 1

In addition, the transcript consists of 279 pages, which includes the cross-examination of the parties' written prepared testimonies, as well as oral rebuttal by Verizon and oral surrebuttal by Armstrong and the further cross-examination thereof. The record in this proceeding was closed on November 10, 2011.⁵⁵

This Main Brief is submitted by Armstrong in accordance with the schedule proposed by the parties and approved by the ALJ.

⁵⁵ NT at 278.

II. BURDEN OF PROOF

There are eleven separate, yet related, claims made by the parties in this proceeding, five raised by Armstrong and six raised by Verizon. Verizon is charged with the burden of proof on all eleven claims. It has the burden of proof relative to Armstrong's claims, because Verizon's unilateral refusal to pay the rates set forth in Armstrong's approved tariff and the Verizon ICAs necessitated the complaint. Further, Verizon is required to carry the burden of proof on its affirmative claims under the proposition that parties bear the burden of their own proposals and affirmative defenses. Verizon has failed to meet its burden on all eleven claims.

A. The Issues Presented

1. Armstrong's Complaint Issues

The first three Counts of Armstrong's complaint allege that Verizon violated state law and Armstrong's switched access tariff by refusing to pay and attempting to negotiate rates different than those contained in Armstrong's approved switched access tariff in violation of 66 Pa. C.S. §§ 1303 and 1304. In Count Four, Armstrong alleges that, by unilaterally withholding the tariffed rate, instead of seeking remedy from this Commission, Verizon violated state law and Armstrong's switched access state tariff. Finally, in Count Five, Armstrong alleges that Verizon violated state and federal law, by failing to pay reciprocal compensation rates for local traffic Verizon terminated to Armstrong in accordance with the Verizon ICAs.

2. Verizon's Answer and New Matter Issues

In its Answer and New Matter, Verizon raised the following counterclaims:

- (1) The application of rates contained in Armstrong's ICAs with Verizon and Armstrong's Pennsylvania switched access tariff incorporated therein is an illegal

application of state access charges on federal jurisdictional VoIP traffic (the “VoIP claim”);⁵⁶

(2) The application of an “asymmetrical compensation scheme” by which Verizon alleged Armstrong deliberately “rout[es] traffic in such a way to avoid payment of intrastate switched access charges” is “regulatory arbitrage” (the “arbitrage claim”);⁵⁷

(3) The charging of intrastate switched access rates “higher than those charged by the corresponding incumbent” violates state law, including §§ 1312 and 3017(c) (the “higher than the incumbent ILEC claim”);⁵⁸ and

(4) Billing for tandem switched transport rate elements “where Armstrong does not operate a tandem switch”⁵⁹ violates §§ 1303 and 1312 (labeled “tariff billing claim - 1”).

In addition to these counterclaims raised in its pleadings, Verizon introduced, for the first time in testimony, two additional claims:

(5) Armstrong bills Verizon for a carrier common line charge (“CCL”) when, according to Verizon, Armstrong owns no carrier common lines (similar to its claim that Armstrong has no tandem switch, and, thus, labeled “tariff billing claim - 2”);⁶⁰ and

(6) Armstrong bills switched access charges outside Verizon’s service area that are higher than those charged by Verizon in Verizon’s service area, substantially expanding its claim that Armstrong bills switched access rate elements “higher than those charged by the corresponding incumbent” (and thus referred to as the “higher than the Verizon ILEC claim”).⁶¹

B. Armstrong’s Existing Rates

The rates that Armstrong has billed Verizon are existing, Commission-made rates, both as specified in Armstrong’s State Access Tariff and incorporated by reference into the Verizon ICAs. Armstrong’s State Access Tariff has the full force and effect of law and is binding upon

⁵⁶ Verizon Answer and New Matter, Counterclaim 1, paragraphs 19-28.

⁵⁷ Verizon Answer and New Matter, Counterclaim 2, paragraphs 29-34.

⁵⁸ Verizon Answer and New Matter, Counterclaim 3, paragraphs 35-39.

⁵⁹ Verizon Answer and New Matter, Counterclaim 4, paragraphs 40-45.

⁶⁰ Verizon Direct Testimony at 46.

⁶¹ Verizon Direct Testimony at 30.

both Armstrong and its access customers.⁶² Sections 1301 through 1303 of the Public Utility Code provide that a public utility may only charge rates that have been approved by the Commission, appear in a lawfully filed and publicly available tariff, and are in compliance with Commission orders and regulations.⁶³ The Verizon ICAs incorporate the rates contained in Armstrong's switched access tariffs for Verizon's termination of toll traffic to Armstrong.

Stating that the "filed rate doctrine" is mandated by Section 1303, the Commission has explained that:

[c]onsonant with the foregoing provision, it is clear that a utility's lawful rates are the rates specified in that utility's tariff. Furthermore, it is well settled in the law that a public utility and its customer may not fix rates by contract different from rates contained in a filed tariff, and that the filed tariff rate has the force of law and is binding on both the utility and the customer.⁶⁴

These rates "became legal when [the Commission] determined that they could be levied on the ratepayer"⁶⁵ and, thus, constitute Armstrong's "legal rates" as established by Commission orders and determinations.

C. Assignment of the Burden of Proof Under the Public Utility Code

Section 332(a) of the Public Utility Code⁶⁶ residually assigns the burden of proof to "the proponent of a rule or order" where not specifically assigned under Section 315. As set forth

⁶² *Stiteler v. The Bell Telephone Co. of Pa., Inc.*, 379 A.2d 339 (Pa. Cmwlth. 1977) (currently effective tariffs are not mere contracts, but have the full force and effect of law and may be relied upon, and are binding upon, both the utility and its customers).

⁶³ 66 Pa. C.S. §§ 1301, 1302, 1303. Section 1303 of the Code provides that "[n]o public utility shall directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part. ..." This "part" refers to the whole of the Public Utility Code, which includes Section 3017 found in Subpart D of the Code, pursuant to which Armstrong's switched access tariff rates are set.

⁶⁴ *Re Maislin Industries et al.*, 72 Pa.P.U.C. 292, 295 (1990) (citations omitted); *see also Brockway Glass v. Pa. P.U.C.*, 437 A.2d 1067 (Pa. Cmwlth. 1981); *Pennsylvania Electric Co. v. Pa. P.U.C.*, 663 A.2d 281 (Pa. Cmwlth. 1995) (tariff provisions cannot be "waived").

⁶⁵ *Schellhammer v. Pa. P.U.C.*, 639 A.2d 189, 191 (Pa. Cmwlth. 1993) ("*Schellhammer*").

above, Verizon is the party seeking to invalidate Armstrong's State Access Tariff and the Verizon ICAs.

Sections 315(a) and (b) of the Code contain specific assignments of the burden of proof that compel the assignment of the burden to Verizon in this proceeding. Under Section 315(a), the burden of proof is upon the party challenging existing rates.⁶⁷ While Armstrong is the complainant in this proceeding, that role was thrust upon it by Verizon's refusal to present a formal legal challenge to the terms of the ICAs and tariffed rates previously honored by the parties. Instead, Verizon chose to act on its own, simply by refusing to pay the tariffed and contract rates, and imposing instead a rate of its own design. In doing so, Verizon violated by the tariff and the ICAs, as explained elsewhere in this Brief. Thus, Verizon must be assigned the burden of proof as the party challenging existing rates. To do otherwise would allow a party effectively to nullify an existing rate with which it disagreed, and avoid the legal burden of proving its inapplicability or shift it to the injured party which seeks redress.

Section 315(b) also places the burden on Verizon. Section 315(b) assigns the burden of proof "in any case involving any alleged violation by a public utility [in this case Verizon] ... of any lawful determination or order of the commission[.]"⁶⁸ Armstrong seeks to have the Commission compel Verizon to comply with the Commission's lawful determinations and orders⁶⁹ that established Armstrong's "legal rates" and the Verizon ICAs. Said another way, if

⁶⁶ 66 Pa. C.S. § 332(a) ("Except as may be otherwise provided in section 315 (relating to burden of proof) or other provisions of this part or other relevant statute, the proponent of a rule or order has the burden of proof.")

⁶⁷ 66 Pa. C.S. § 315(a); *Schellhammer*, 639 A.2d at 193 (where a complaint involves an existing rate the burden is on the falls upon the customer to prove that the charge is no longer reasonable, distinguishing the general rule under Section 332(a)).

⁶⁸ 66 Pa. C.S. § 315(b); *U.S. Steel Corp. v. Pa. P.U.C.*, 450 A.2d 1073, 1076 (Pa. Cmwlth. 1982) ("*U.S. Steel*") (Although US Steel filed a complaint against Peoples, the complaint alleged Peoples' tariff failed to conform to a Commission order, thus "the burden properly rests with the utility" since "the gravamen of USS' complaint was a failure on the part of Peoples to comply with the provisions of the [Commission's] October 27th order." (emphasis in original)).

⁶⁹ Armstrong Complaint at IV.2, requesting the Commission to compel Verizon to honor the ICAs and tariff

Verizon would have followed the rules instead of unilaterally changing the rate, it would have been the complainant in the case and would have had the burden of proof. To reward Verizon by shifting the burden here would be unfair and improper.

Verizon also bears the burden of proof with respect to those matters raised in its Answer and New Matter. As to four of its six counterclaims, Verizon has clearly challenged the applicability of existing rates on grounds of lack of jurisdiction,⁷⁰ principles of equity,⁷¹ and statutory or contract interpretation.⁷² Verizon's remaining two counts allege that Armstrong bills for tariff elements it does not provide, in violation of Section 1303.⁷³ With respect to these counterclaims, the burden is clearly on Verizon, as the proponent of the rule or order. This Commission has also held that parties bear the burden of proof with respect to their own proposals,⁷⁴ and a party has the burden of proof as to its affirmative defense.⁷⁵

Accordingly, under any scenario, the burden of proving that Armstrong should apply anything but the existing tariffed and ICA rates, in any manner other than how Armstrong has traditionally applied them since 2005 (and as Verizon paid them for five years prior to dispute), is upon Verizon, as the challenger of the existing rates and a proponent of a change in their application.

implemented by Commission order or determination.

⁷⁰ Count I (the "VoIP" claim).

⁷¹ Count II (the "arbitrage" claim).

⁷² Counts III and VI (the "higher than the incumbent ILECs" and higher than Verizon's ILECs" claims).

⁷³ Counts IV and V (the "non-tariffed element" claims).

⁷⁴ *Joint Default Service Plan for Citizens' Electric Company of Lewisburg, PA and Wellsboro Electric Company for the Period of June 1, 2010 through May 31, 2013*, Docket Nos. P-2009-2110798 and P-2009-2110780 (Order entered February 11, 2011).

⁷⁵ *Palmerton Telephone Co. v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates*, Docket C-2009-2093336 (Opinion and Order entered March 16, 2010), slip op. at 21 ("*Palmerton Opinion*").

D. Verizon Failed to Carry its Burden

Verizon must establish facts to support its claims by a preponderance of the evidence. The term “preponderance of the evidence” means that one party has presented evidence which is more convincing, by even the smallest degree, than the evidence presented by the other party.⁷⁶ Upon the submission of evidence sufficient to establish a *prima facie* case, the burden of going forward with the evidence, sometimes called the burden of persuasion, shifts to the opposing party. While the burden of production may shift, the burden of persuasion never leaves the party originally assigned the burden of proof.⁷⁷

The decision of the Commission must also be supported by substantial record evidence.⁷⁸ The term “substantial evidence” has been defined by the Pennsylvania courts as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.⁷⁹

Thus, Verizon must demonstrate the legal relevance of and present evidence sufficient to prove the following allegations: (1) The traffic it terminates to Armstrong is subject to compensation at the \$0.0007 rate rather than the tariffed and ICA specified rates; (2) Armstrong is deliberately pursuing an “asymmetrical compensation scheme” with respect to the termination of Verizon’s traffic and that that behavior warrants imposition of the \$0.0007 rate; and, (3) Armstrong is applying access rates higher than the underlying incumbent in violation of Section

⁷⁶ *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.3d 854 (Pa. 1950).

⁷⁷ *Reidel v. County of Allegheny*, 633 A.2d 1325, 1329 n.11 (Pa. Cmwlth. 1993).

⁷⁸ See, e.g., Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704.

⁷⁹ *Norfolk & Western Ry. Co. v. Pa.R.U.C.*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. Of Review*, 167 A.2d 321 (Pa. Super 1961); *Murphy v. Comm., Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

3017(c). Verizon must also present evidence that Armstrong is improperly billing for elements not provided under its tariff.

Even if Verizon has presented a *prima facie* case, which, as demonstrated in this brief, it has not, Armstrong has soundly refuted Verizon's evidence with its own evidence, which Verizon has not refuted. Having failed to refute this evidence, Verizon's claims must fail and Armstrong's relief be granted.

III. ARGUMENT

What began as a rather straight-forward, albeit ill-conceived, attempt by Verizon on August 27, 2010, to avoid its payment obligations for Armstrong's toll and local termination services by misinterpreting the FCC's *Vonage Decision*, has now become a myriad of claims as Verizon has sought to post-justify its original, erroneous action. In the sections that follow, Armstrong will demonstrate that each of the claims/disputes should be resolved in its favor. This effort, unfortunately, is laborious and technical. In an effort to assist the reader in this effort, Armstrong offers this summary.

Verizon has claimed that this Commission lacks jurisdiction over the disputes at issue because the FCC had, at the time the dispute was first raised, preempted all matters involving VoIP traffic. As Armstrong will demonstrate, Verizon's argument is plainly wrong based on, among other things, a variety of FCC Orders and this Commission's *Palmerton Opinion* and *Sprint Wholesale Order*. Armstrong's arguments regarding these issues are in Section A below.

Verizon claims, on the same legal grounds, that Armstrong is not entitled to be paid terminating access charges because the telephony service offered by Armstrong is "an information service." Again, Verizon's claims are incorrect. As explained, Armstrong's service is a "telecommunications service," which contains an intrastate component that is eligible for access payments. Armstrong's service is not "VoIP" as defined by Verizon or applicable authorities. Verizon's position also ignores the FCC's determination that "IP-in-the-middle" of a call is not a protocol conversion. The most convincing rebuttal, however, is the position Verizon's takes in respect to its own "VoIP" service. Verizon charges *full access rates* on calls terminating to its own FiOS Digital Voice customer base, a service that is admitted by the

Verizon witnesses to be similar, if not identical, to Armstrong's cable voice service. Armstrong's arguments regarding these issues will be found in Section B below.

Verizon further claims that its exercise of self-help was lawful and justified because it is attempting to bring parity reform to the telecommunications industry. As Armstrong will show, Verizon's unilateral non-payment was: (1) directly contrary to its obligations under applicable tariffs and ICAs; and (2) unlawful under both this Commission's orders and the orders of the FCC. Armstrong's arguments regarding these issues are set forth in Section C below.

Verizon also claims that the Commission should find against Armstrong because it is engaging in arbitrage through its participation in the least cost routing market. As set forth below, Armstrong is not engaging in any arbitrage scheme and utilizes least cost routing in the same matter as Verizon and the rest of the telecommunications industry. Armstrong's arguments regarding these issues will be found in Section D below.

Verizon has asked this Commission to award it a refund of access charges assessed by Armstrong because Armstrong's access charges are higher than the incumbent LEC. Verizon's claims in this regard are also misplaced and should not be granted. First, Armstrong's State Access Tariff exactly mirrors the *rates* of the underlying incumbent ILECs tariffs, which and meets the legal requirement of the Pennsylvania Public Utility Code set forth at Section 3017(c). Second, the methodology used by Verizon to attempt to insert a comparison of its own network-specific average *costs* into the statutory framework is inappropriate. Third, its "cost" calculations are fundamentally flawed because, among other things, they fail to use accurate comparisons and ignore important differences in the interconnection between Verizon and Armstrong with the underlying incumbents. Further, as Armstrong will demonstrate, Verizon's claim that Armstrong's rates are too high based on the argument that it should only charge

Verizon rates to Verizon is based on an incorrect reading of the Verizon ICAs. Armstrong arguments regarding the foregoing are delineated in Section E below.

Finally, Verizon argues that Armstrong cannot charge it a common carrier line charge because it does not own the common carrier line. As will be seen below, this argument too fails because Armstrong's tariff does not require that Armstrong own the common carrier line but only provide Verizon access through to the end use customer, but as importantly, also because Armstrong leases the common carrier line over which the traffic at issue is terminated. Armstrong's arguments regarding these issues will be found in Section F below.

A. This Commission Has Jurisdiction Over the Retroactive Aspect of Armstrong's Complaint from August 27, 2010 to December 29, 2011

Verizon decided to unilaterally cease payments by "dispute" letter dated August 27, 2010 without any change in federal law and in disregard of this Commission's prior ruling that it had jurisdiction over in-state calling regardless of whether IP was employed and the Verizon ICAs. As this Commission observed in its landmark *Palmerton Opinion*, the presence of Internet protocol at some point in the traffic stream "is largely immaterial to ... whether this Commission has subject matter jurisdiction and whether the appropriate jurisdictional intercarrier compensation should apply for this common carriage function."⁸⁰ For the retroactive period of time in controversy in this matter (August 27, 2010 to December 29, 2011), the Commission's *Palmerton Opinion*, and its rejection of the Vonage-type analysis, is directly on point.

Verizon's legal arguments to self-justify its behavior are no more than restatements of the Global NAPs' arguments that were soundly rejected in the *Palmerton Opinion*. Verizon argues that:

⁸⁰ *Palmerton Opinion* at 32 (citations omitted).

Under federal law, Armstrong's tariffed intrastate switched access charges do not apply to the VoIP traffic for which Armstrong has invoiced Verizon for two separate reasons, either of which standing alone would be sufficient to exempt it from intrastate access charges. Tariffed intrastate switched access rates do not apply because the traffic at issue is jurisdictionally interstate and because Armstrong is an "information services provider" as the FCC has defined that term.⁸¹

For the first proposition (federal preemption), Verizon cites the FCC's *Vonage Decision*⁸² (the release of which pre-dates execution of the Verizon ICAs by almost one year), arguing that all VoIP traffic is interstate traffic for jurisdictional purposes. Verizon then references two, more recent, federal district court cases, claiming that these decisions (also addressing only nomadic VoIP-originated traffic) "held the federal and state tariffed access charge regimes do not apply to VoIP traffic."⁸³

For the second proposition (information service provider exemption), Verizon claims that a 1983 FCC decision gives end user customers providing "enhanced services" a choice between paying the retail tariffed rate or access charges.⁸⁴ This line of reasoning asserts that, because there is a "net protocol conversion" when the Armstrong cable company converts a call from the TDM protocol to IP, this also converts the upstream exchange of traffic between Verizon and Armstrong to an information service.⁸⁵ Verizon's claims in this regard disregard the facts that: (1) all traffic between Verizon and Armstrong is handed off in TDM protocol; and (2) the traffic is originated at the Armstrong customer's premises in TDM protocol.

⁸¹ Verizon New Matter at ¶ 20.

⁸² *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 F.C.C.R. 22404, ¶ 13 (2004) ("*Vonage Decision*").

⁸³ Verizon New Matter at ¶ 20 (citing *Paetec Communications, Inc. v. CommPartners, LLC*, Civil Action No. 08-0397 (JR) (D.D.C. Feb. 18, 2010) ("*Paetec*"); *Manhattan Telecommunications Corp. v. Global NAPs, Inc.*, 1296 No. 08 Civ. 3829 (JSR) (S.D.N.Y. Mar. 31, 2010) ("*Manhattan Telecommunications*").

⁸⁴ Verizon New Matter at ¶ 23 (citing *MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶¶ 77, 83 (1983)).

⁸⁵ Verizon New Matter at ¶ 24 (citing *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 F.C.C.R. 21905, ¶ 104 (1996) ("*Non-Accounting Safeguards Order*") and 47 U.S.C. § 153(20)).

Finally, only acknowledging the Commission's *Palmerton Opinion* in passing, Verizon argues that this directly on-point holding stands not for the comprehensive proposition that traditional compensation rules apply absent other agreement between the parties, but that such compensation applies only where the carrier is refusing to pay anything at all. Here, since Verizon offered to pay next to nothing (\$0.0007/MOU) or 13% of the full charges, it argues that the *Palmerton Opinion* has no application.⁸⁶ Moreover, even were it applicable, Verizon further argues that the *Palmerton Opinion* is simply wrong, and the Commission has misinterpreted the *Vonage Decision*.⁸⁷

None of these arguments is persuasive, as each is either inaccurate or inapplicable. First and foremost, any argument that Pennsylvania's traditional jurisdiction over intrastate calls can be *implicitly* preempted cannot be sustained. Calls within Pennsylvania are this Commission's statutory domain as delegated by the General Assembly. In pursuit of that duty, the Commission has been actively engaged in the regulation of intrastate access tariffs and other compensation arrangements since the divestiture of AT&T in 1984 and in intercarrier settlements decades before that.

Absent clear and unambiguous preemption by the FCC or Congress, state law applies. The United States Supreme Court has held that: "Where ... the field that Congress is said to have pre-empted has been traditionally occupied by the States 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"⁸⁸ To be effective, preemption must be clear. The "concepts of federalism and state sovereignty make clear that in discerning whether

⁸⁶ Verizon New Matter at ¶ 26.

⁸⁷ *Id.* ("Moreover, under federal law, VoIP traffic is jurisdictionally interstate and tariffed intrastate switched access rates do not apply.").

⁸⁸ *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707, 715 (1985) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citations omitted)).

Congress intended to preempt state law, there is a presumption *against* preemption. Specifically, the Pennsylvania Supreme Court has stated that it will not be presumed that a federal statute was intended to supersede the exercise of the power of the state *unless there is a clear manifestation of intention to do so.*⁸⁹ That such a federal action occurred can not even be arguably maintained until after the FCC's November 18, 2011 Order becomes effective, which has not occurred as of the submission of this brief.

Even as to the cases cited by Verizon, all of which relate to the characteristics of the much different *nomadic* VoIP, the FCC had never ruled that intrastate access charges may not be applied. In the *Vonage Decision*, the FCC granted Vonage's petition to preempt the order of the Minnesota PUC, which sought to regulate Vonage's retail services as a state public utility.⁹⁰ The FCC found the end user service to be "jurisdictionally mixed" and not capable of being accurately separated into intrastate and interstate components.⁹¹ The FCC determined that Minnesota's retail regulation of Vonage as a public utility "would thwart federal [policy] objectives."⁹² Based almost solely on the locational ambiguity of *nomadic* VoIP, the FCC declared that end user nomadic VoIP services could be regulated only by the federal government.

Importantly, the FCC, in its *Vonage Decision*, expressly eschewed any implication that either intercarrier compensation or separation of toll traffic between state and interstate was affected:

... we anticipate addressing other critical issues such as universal service, intercarrier compensation, section 251 rights and obligations, numbering, disability access, and consumer protection in [the *IP-Enabled Services Proceeding*].⁹³

⁸⁹ *Dooner v. DiDonato*, 971 A.2d 1187, 1194 (Pa. 2009) (citations omitted) (emphasis added).

⁹⁰ *Vonage Decision* at ¶ 3.

⁹¹ *Id.* at ¶ 19.

⁹² *Id.* at ¶ 14.

⁹³ *Id.* at ¶ 44 (emphasis added).

Indeed, one FCC Commissioner was openly critical of the failure to address compensation issues in the *Vonage Decision*:

Where this Order falls short is its *failure to account in a meaningful way for essential policy issues, including universal service, public safety, law enforcement, consumer privacy, disabilities access, and intercarrier compensation, and the effect of our preemption here.*⁹⁴

Further, the FCC has declined to change the industry practice of using the telephone number's address to route traffic and render jurisdictionally separated bills (local, intrastate toll and interstate toll).⁹⁵

Just ten months prior to Verizon's August 2010 dispute letter, the FCC again acknowledged that it had not revised the compensation rules for VoIP or preempted the application of state access charges. Rather, the FCC ruled that state commissions should act on the basis of "existing law":

... that the lack of regulatory direction from the Commission regarding these issues does not, in fact, stand as a legal obstacle to the PUCT's resolution of the arbitration....We emphasize that the PUCT should not wait for Commission action to move forward. Rather, the PUCT must proceed to arbitrate this interconnection agreement in a timely manner, relying on existing law.⁹⁶

Importantly, "existing law" in Pennsylvania at the time of Verizon's August 27, 2010 repudiation was directly contrary to its actions. Verizon's legal theory was soundly rejected in this Commission's *Palmerton Opinion* when previously raised by Global NAPs:

⁹⁴ *Id.*, Concurring Statement of Commissioner Jonathan Adelstein (emphasis added).

⁹⁵ *Regulation of Prepaid Calling Card Services*, 21 F.C.C.R. 7290, ¶ 32 and n.89 (2006); *In the Matter of Petition of WorldCom, Inc. et al, Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 F.C.C.R. 27039, ¶¶ 286, 301 (2002) ("The parties all agree that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time."); *Starpower Communications, LLC v. Verizon South Inc.*, 18 F.C.C.R. 23625, ¶¶ 16-17 (2003) (intercarrier compensation to be on the basis of the telephone number NPA-NXX).

⁹⁶ *Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, 24 F.C.C.R. 12573, ¶¶ 9-10 (2009).

The *overwhelming weight of legal authority* of Pennsylvania and federal law, as well as the relevant decisions of other state utility regulatory commissions and courts of appropriate jurisdictions that have dealt with a large number of intercarrier compensation disputes involving GNAPs, *leads to the inescapable conclusion that the FCC Vonage decision is not relevant or material* on matters pertaining to the intercarrier compensation dispute before us.... The FCC *Vonage* decision plainly does not, nor was it intended to, address the issue of whether intercarrier compensation applies for the use of Palmerton's PSTN facilities when terminating VoIP calls.⁹⁷

Although the FCC has not yet formally proceeded with any jurisdictional classification of interconnected VoIP calls, it still expects state utility regulatory commissions to deal with and resolve intercarrier compensation disputes that may implicate interconnected VoIP... Finally, the FCC fully expects state utility regulatory commissions to address intercarrier compensation issues that involve intrastate traffic and access matters.⁹⁸

As the Commission correctly observed, the FCC has not acted and "...we do not need and cannot afford to wait and speculate whether the FCC will reach some sort of coherent and sustainable conclusion to its IP-enabled services and intercarrier compensation reform proceedings, when this might happen, and what the FCC's conclusions might be."⁹⁹

Verizon has acknowledged before the FCC a much different view from its preemption claims made in this case,¹⁰⁰ expressly conceding that the FCC has not acted.¹⁰¹ The FCC in its

⁹⁷ *Palmerton Opinion* at 24-25 (emphasis added).

⁹⁸ *Palmerton Opinion* at 43 (citing generally *Petition of UTEX, supra*, and *North County Communications Corp. v. MetroPCS California, LLC*, 24 F.C.C.R. 3807 (2009)).

⁹⁹ *Palmerton Opinion* at 26.

¹⁰⁰ *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208 ("*FCC NPRM Docket*"), Comments of Verizon and Verizon Wireless filed April 1, 2011 ("Verizon 4/1 Comments") at 3-4 ("The lingering absence of a Commission decision on VoIP compensation has produced a chaotic environment in which carriers are forced to engage in perpetual disputes over the proper compensation for this traffic. The situation is marked by endless lawsuits, administrative complaints, and financial uncertainty that significantly detracts from important priorities such as the broader deployment of broadband and the advanced services that ride over it."). Verizon does not note that its own behavior has triggered some of this litigation.

November 18th ICC/USF Order disavowed the notion that lies at the center of Verizon's case here; that it had previously preempted states, and summarily dismissed Verizon's position to the contrary:

Some commenters contend that, under the analysis of the Vonage Order, VoIP services are subject to exclusive federal jurisdiction. [footnote citing Verizon comments] As a threshold matter, the Vonage Order addressed a retail VoIP service. By contrast, VoIP-PSTN intercarrier compensation typically involves the exchange of traffic between two carriers [and] not the retail VoIP service itself.¹⁰²

The FCC has affirmed the obvious. Verizon has no basis to claim its action of August 27, 2010 was justified under then-existing law.

Nor is the rationale of the FCC's *Vonage Decision* applicable here. The Eighth Circuit noted the significant factual differences in the appeal of the FCC's *Vonage Decision*.¹⁰³ When the New York Commission objected to the implication that the FCC may have also preempted regulation over cable company IP-based voice services, the FCC in its brief asserted that it had not done so and the issue would be ripe on appeal only if or when the court was "presented with an order preempting state regulation of fixed VoIP service providers."¹⁰⁴ The Eighth Circuit agreed:

¹⁰¹ *FCC NPRM Docket*, Verizon 4/1 Comments at 8 ("The Commission, however, has never determined 'the appropriate intercarrier compensation framework' for VoIP traffic that originates or terminates on the PSTN. In particular, the Commission has not yet decided whether legacy intercarrier compensation rules—such as tariffed switched access charges—apply to VoIP traffic. As the Commission acknowledges, this lack of clarity has led to disputes and litigation before federal courts and state commissions. Many of these disputes were initially stayed pending the Commission's resolution of the intercarrier compensation rules for VoIP. But, in more recent cases, several courts and state commissions have made clear that they are no longer willing to postpone their decisions until the Commission acts.") (citations omitted).

¹⁰² *FCC NPRM Docket*, Report and Order and Further Notice of Proposed Rulemaking (released November 18, 2011) at ¶ 959 (emphasis added) ("*FCC November 18th ICC/USF Order*").

¹⁰³ *Minn. Pub. Util. Comm'n v. F.C.C.*, 483 F.3d 570, 575 (8th Cir. 2007) ("*Vonage Appeal*") ("*Fixed VoIP [telephone] service describes the use of the same technology, that is, converting a voice communication into digital packets before transmitting it to another location, but in a way where the service is used from a fixed location. For example, cable television companies offer VoIP service to their customers, but when they do so the ensuing transmissions use the cable running to and from the customer's residence. As a result, the geographic originating point of the communications can be determined. Thus, when VoIP is offered as a fixed service rather than a nomadic service, the interstate and intrastate portions of the service can be more easily distinguished.*").

¹⁰⁴ *Id.* at 582.

The [FCC's *Vonage Decision*] order only suggests the FCC, if faced with the precise issue, would preempt fixed VoIP services. Nonetheless, the order does not purport to actually do so and until that day comes it is only a mere prediction... Indeed, as we noted, the FCC has since indicated VoIP providers who can track the geographic end-points of their calls do not qualify for the preemptive effects of the *Vonage* order.¹⁰⁵

Thus, the *Vonage Decision* is not determinative of cable VoIP in any manner. Indeed, in confirmation of the fact that the *Vonage* line of cases does not apply to fixed, cable IP network enabled services, New Hampshire,¹⁰⁶ Vermont,¹⁰⁷ Maine¹⁰⁸ and Missouri¹⁰⁹ regulate them as public utilities.

Nor does the so-called Enhanced Service Provider ("ESP") exemption apply here. Verizon's argument actually turns the ESP exemption on its head by arguing that Armstrong should be classified as an ESP, thereby negating Verizon's access obligations. Yet, even if Verizon were right that Armstrong is an ESP (and it is not), Verizon's argument still would not hold. As an ESP, it is Armstrong who would be afforded additional rights under the exemption, not Verizon. Verizon would still be subject to access charges. Further, even if Verizon were an ESP (and it is not), such classification would only afford it the right to connect to the network via local exchange, rather than access, services. Yet, Verizon does not interconnect with Armstrong

¹⁰⁵ *Id.*

¹⁰⁶ *Petition for an Investigation into the Regulatory Status of IP Enabled Voice Telecommunications Services Order Finding Jurisdiction and Requiring Limited Regulation*, N.H. Pub. Utils. Comm'n Docket No. DT 09-044, 291 P.U.R.4th 377 (2011) ("*New Hampshire PUC Order*"), slip op. at 36.

¹⁰⁷ *Investigation Into Regulation of Voice Over Internet Protocol ("VoIP") Services*, Vt. Pub. Serv. Bd. Docket No. 7316 (Board Order Re Phase I entered October 28, 2010) ("*Vermont Comcast Order*"), slip op. at 12 (Findings ¶ 30).

¹⁰⁸ *State of Maine Public Utilities Commission Investigation into Whether Providers of Time Warner 'Digital Phone' Service and Comcast 'Digital Phone' Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service*, Me. Pub. Utils. Comm'n Docket No. 2008-421, 285 P.U.R.4th 492 (2010) ("*Maine PUC Order*").

¹⁰⁹ *Comcast IP Phone of Missouri v Missouri PSC*, Case No. 06-4233-CV-C-NKL, Not reported in F.Supp.2d (W.D. Mo. 2007), slip op. at 8 ("Accordingly, the Court finds that Congress did not intend for VoIP services to be completely unregulated. And, unless preempted or faced with a contrary decision from a relevant federal agency, a state agency may interpret a federal statute and apply its dictates. Therefore, ... the MoPSC has jurisdiction to decide whether Digital Voice is a telecommunications service.").

via local exchange services -- it connects via access services and, as such, whether an ESP or not, Verizon is still subject to access charges.

The IP preemption and ESP exemption arguments are no more than a smoke screen. The appropriate *focus of this proceeding is upon the nature of the service being provided to Verizon by Armstrong (exchange access service), not the protocols used by a third entity somewhere else on the call to serve the end user. Exactly on point, in Time Warner, a case involving a cable voice service provider and its desire to obtain PSTN connectivity through a wholesale CLEC*¹¹⁰ (like Armstrong), the FCC ruled that:

We further conclude that the statutory classification of the end-user service, and the classification of VoIP specifically, is not dispositive of the wholesale carrier's rights under section 251... The Act defines "telecommunications" to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." The Act defines "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Finally, any provider of telecommunications services is a "telecommunications carrier" by definition under the Act.¹¹¹

It made no difference to the FCC that the traffic delivered to or from the wholesale CLEC might use Internet protocol.

In the Pennsylvania Commission's 2006 *Sprint Wholesale* case, issued just months before *Time Warner*, this Commission addressed the very same issues and ruled that it would certificate

¹¹⁰ "TWC purchases wholesale telecommunications services from certain telecommunications carriers, including MCI WorldCom Network Services, Inc. (MCI) and Sprint Communications Company, L.P. (Sprint), to connect TWC's VoIP service customers with the public switched telephone network (PSTN). MCI and Sprint provide transport for the origination and termination on the PSTN through their interconnection agreements with incumbent LECs." *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, 22 F.C.C.R. 3513, ¶ 2 (2007) ("*Time Warner*").

¹¹¹ *Time Warner* at ¶ 9-10.

Sprint to provide transit and interconnection services provider, even where the underlying, final technology might be interconnected VoIP:¹¹²

We excerpt a pertinent explanation taken from Sprint's Exceptions with which we agree:

The mere fact that [Blue Ridge] uses Internet Protocol – a particular technology adopted by most of the cable industry for placing voice traffic onto a hybrid fiber coax network – does not render Sprint's service an Internet service. In fact, Sprint's service does not use the Internet... The service Sprint will be providing is in no way associated with Internet access service. Blue Ridge telephone customers do not even need to subscribe to Internet service to receive this voice service.¹¹³

Global NAPs' legal error, repeated now by Verizon here, is "focusing on the protocols used rather than on the overall transportation function that, in and of itself, legally and technically constitutes a common carrier telecommunications service *irrespective* of the technical protocol classification of the traffic being carried,"¹¹⁴ as the Commission held in the *Palmerton Opinion*.

Our *Sprint* Order noted with approval Sprint's position that the "mere fact that Sprint uses Internet Protocol – a particular technology adopted by most of the cable industry for placing voice traffic onto a hybrid fiber coax network – does not render Sprint's service an internet service." The Commission's *Core* and *Sprint* decisions were paralleled by the federal *Time Warner* declaratory ruling that was issued by the FCC in March 2007.¹¹⁵

Ignoring the substance and consistency of the foregoing FCC and Commission Orders, indeed, even their existence, Verizon insists that the salient precedent consists only of two recent federal district court decisions purportedly holding that "the federal and state tariffed access

¹¹² *In re Sprint Communications Co. L.P.*, 101 Pa.P.U.C. 895 (2006) ("*Sprint Wholesale*").

¹¹³ *Id.* at 19 (citing Sprint Exceptions at 23).

¹¹⁴ *Palmerton Opinion* at 8-9 ("This telecommunications service is clearly provided by a common carrier telecommunications utility that has been duly certificated to operate as such by this Commission within specific areas of the Commonwealth.").

¹¹⁵ *Palmerton Opinion* at 11 (citation omitted).

charge regimes do not apply to VoIP traffic.”¹¹⁶ Neither of these cases is either binding or persuasive.

The *Paetec* opinion by the District of Columbia is an unreported case and, therefore, is not citable precedent. It is completely silent on CommPartners’ operation and does not analyze any of the factual underpinnings necessary to reach a decision. The decision wrongly rules that all VoIP calls are an information service with no analysis of the telecommunications nature of CommPartners’ delivery of the traffic to Paetec under the *Time Warner* decision. The Opinion is completely at odds with the FCC’s acknowledgement, in the *Vonage Decision* and *UTEX* case,¹¹⁷ that it had not preempted the application of access charges to interconnected VoIP. Notably, the *Paetec* opinion has now also been rejected by the FCC.¹¹⁸

In addition to the FCC, at least three state commissions, Pennsylvania, New Hampshire¹¹⁹ and Iowa,¹²⁰ have also rejected the D.C. District Court’s conclusions. As this Commission opined in the *Palmerton Reconsideration Order*:

Not surprisingly, *Paetec* is another case decided by a federal court that, in the admitted absence of definitive action by the FCC, comes down on the side of exemption from access charges for VoIP traffic. This is, however, no different

¹¹⁶ Verizon New Matter at ¶ 21 (citing *Paetec*, *supra*, and *Manhattan Telecommunications*, *supra*).

¹¹⁷ *Petition of UTEX*, *supra*.

¹¹⁸ *FCC November 18th ICC/USF Order* at ¶ 956, n.1953 (“In any event, we are not bound by those prior decisions, and find our statutory analysis above to be most appropriate.”).

¹¹⁹ The New Hampshire PUC also refused to revise its original Order although Global NAPs raised the *Paetec* Memorandum Order. *Joint Petition Of Hollis Telephone et al. for Authority to Block the Termination of Traffic from Global NAPs Inc.*, N.H. Pub. Utils. Comm’n Docket No. DT 08-028, Order No. 25,088 (Reconsideration Order dated April 2, 2010), slip op. at 3.

¹²⁰ *Sprint Communications Company L.P. v. Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom*, Iowa Utilities Board Docket No. FCU-2010-0001 (Order issued February 4, 2011) (“*Sprint v. Iowa Telecom Order*”), PUR slip op. *20 (“Although the FCC has not completed its work in the *IP-Enabled Services NPRM*, it indicated there were numerous issues to be considered in classifying VoIP services as either information services or telecommunications services. *Paetec* reduces that multitude of considerations identified by the FCC to a single-pronged test. Under *Paetec*, all that needs to happen for a service to be classified as an information service (and thus be subject to federal jurisdiction) is a net protocol conversion. However, in 1998, the FCC declined to render such a broad and definitive conclusion about net protocol conversion in its Stevens Report to Congress. *Paetec* in 12 pages does what the FCC never completed in the *IP-Enabled Services* docket, and does so without acknowledging any distinction between various types of IP-Enabled services previously identified by the FCC.” (citation omitted)). Sprint was ordered to pay access charges for cable company traffic delivered to various Iowa LECs.

from the arguments set forth by Global NAPs, previously. There is nothing novel in *Paetec* that would incline us to reconsider the [*Palmerton Opinion*].¹²¹

The second case relied upon by Verizon, *Manhattan Telecommunications*, is likewise misapplied. Therein, Global NAPs was found liable, in equity, to pay interstate tariffed rates. Notably, the Court did not find interconnected VoIP to be an information service or exempt from access charges. The Court simply “declines to enter the [regulatory] melee and attempt to apply the filed rate doctrine,” and, instead, cuts to the heart of the matter -- finding that, under federal equity, Global NAPs should pay the federal rate. This decision shapes no precedent whatsoever for either Verizon’s proposed usurpation of state access charges or its unilateral rate of 7/100th of a penny.

An inordinate amount of time has been spent in this proceeding debating the nature of Armstrong’s cable affiliate’s end user services. It simply does not matter. Armstrong, in its role as wholesale CLEC, is a telecommunications service provider, regardless of the technology used to terminate and originate the underlying calls.¹²² Armstrong is a “telecommunications carrier” certified by the Commission that provides wholesale CLEC services under the FCC’s *Time Warner* Decision, and this Commission’s *Sprint Wholesale* Order.

“[T]here are two distinct services being provided when a Verizon toll call terminates to a cable company’ end user: (a) the end user is being provided voice service from the cable company, while (b) Verizon is being provided terminating switched access service from Armstrong. While the two services might be provided simultaneously, they are two distinct services for which different rates and regulations apply.”¹²³ The service at issue in this

¹²¹ *Palmerton Telephone Co. v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates*, Docket C-2009-2093336, (Opinion and Order entered August 3, 2010), slip op. at 15-16 (“*Palmerton Reconsideration Order*”).

¹²³ Armstrong Rebuttal Testimony at 10.

proceeding, the one for which Verizon has challenged this Commission's jurisdiction and the appropriate rates, is the latter - Armstrong switched access service. This is where the focus should be, as it was in *Time Warner*, *Sprint Wholesale* and the *Palmerton Opinion*.

Armstrong's Access Tariff is technology agnostic. "Switched Access Service" is defined as follows:

Switched Access Service, which is available to Customers for their use in furnishing their services to end-users, provides a two-point communications path between a Customer's premises and an end-user's premises. It provides for the use of common terminating, switching and transport facilities. Switched Access Service provides the ability to originate calls from an end-user's premises to a Customer's premises, and to terminate calls from a Customer's premises location to an end-user's premises.¹²⁴

The service(s) provided by Armstrong to Verizon, the access "Customer," "clearly meets this definition," as Armstrong's witnesses have stated:

... Verizon is provided by Armstrong a two-point communications path between its POP and the end-users to whom it was intending to deliver traffic. Further, Armstrong accomplished that two-point communications path using common terminating, switching and transport facilities. Finally, there can be no dispute that Verizon was able to originate and/or terminate calls to the premises of the end-users it intended to reach. In receiving from Armstrong all of these features and functions, Verizon was provided switched access service in complete harmony with Armstrong's tariff.¹²⁵

"Armstrong's tariff defines its switched access service simply as providing a "two-point communications path" between an IXC's premises and the premises of the end-user. Clearly, by using the relatively standard broad terminology of a 'two-point communications path' the tariff is purposefully agnostic as to the underlying technology that might be used to construct such a path."¹²⁶

¹²⁴ Armstrong Rebuttal Testimony at 27 (citing PAPUC Tariff No. 5 at Section 4, Page 4-1).

¹²⁵ Armstrong Rebuttal Testimony at 27.

¹²⁶ Armstrong Rebuttal Testimony at 28.

MCImetro, now a Verizon company, had no problem with acting as a telecommunications carrier and charging access when it was in Armstrong's position, as recently as two years prior to its subsequent August 2010 challenge of Armstrong. MCI d/b/a Verizon Business, one of the complainants here now challenging access charges, was the wholesale CLEC for Armstrong's cable company affiliate.¹²⁷ In February, 2005, the cable company entered into an agreement with MCI to provide wholesale telecommunication services similar to the services that Armstrong provides today. MCI provided all tandem and local end office connectivity, 911 connectivity, database services for call name, 800 queries and local number portability. MCI also provided all long distance services and operator and directory assistance services. In 2005, Verizon announced that it would acquire MCI. The companies were unable to reach an extension agreement thereafter, "primarily as a result of pricing" and, in February 2007, the parties began unwinding their relationship. The number porting process was completed in May 2008.¹²⁸ Nonetheless, during the nearly three years under which the complainant MCI (Verizon Business) served as Armstrong's CLEC, at no time did it raise issues about how Armstrong's cable affiliate provided voice services, or the extent to which those services might be "information services" rather than "telecommunications services."

Finally, discriminating among different technologies by applying different rates for the same services, as this Commission previously recognized, is poor public policy:

We find that strict reliance on these traffic protocols for these calls places the legal and technical analysis in this matter on a legally unsustainable course. This approach also has the capacity of creating undesirable regulatory policy results.¹²⁹

If certain competing telecommunications carriers pay intercarrier compensation for VoIP traffic termination, while others take the position that they may avoid such payments for the termination

¹²⁷ Armstrong Rebuttal Testimony at 9.

¹²⁸ Armstrong Rebuttal Testimony at 10.

¹²⁹ Palmerton Opinion at 6-7.

of similar traffic, “there can be an anticompetitive environment that artificially and inimically transmits inaccurate price signals to end-user consumers of telecommunications and communications services.”¹³⁰ It further observed that one of the statutory policy directives in Chapter 30 of the Public Utility Code mandates this Commission to “[p]romote and encourage the provision of competitive services by a variety of service providers *on equal terms*.”¹³¹

Simply put, Verizon’s August 27, 2010 “dispute” letter and its repudiation of its obligations under Armstrong’s tariff and the applicable ICAs is completely unjustified on grounds of federal preemption.

B. Armstrong’s Retail Voice Service is Not an “Information Service”

1. The End User Voice Service is Not IP Originated or IP-Terminated and Does Not Undergo a Net Protocol Conversion

Not simply relying upon these erroneous legal arguments, Verizon’s witnesses attempted to describe the nature of Armstrong’s network and the services it offers, based upon review of websites, not any discovery or review of Armstrong’s network. Verizon then claimed that calls originating and terminating on Armstrong’s cable affiliate network undergo a “net protocol conversion,” and, thus, are not “telecommunications services” at all, but, instead, are “information services” to which no switched access charges should apply.¹³² Verizon’s arguments center on two erroneous assumptions: (1) traffic terminated or originated by Armstrong to/from Verizon undergoes a “net protocol conversion;” and (2) an “integrated suite” of services is offered.¹³³ Armstrong disagrees with both of these assertions.

¹³⁰ *Palmerton Opinion* at 45 (citing Docket No. C-2009-2093336 (Order entered May 5, 2009), slip op. at 8-9).

¹³¹ 66 Pa. C.S. § 3011(8) (emphasis added).

¹³² Verizon Direct Testimony at 26.

¹³³ Verizon Direct Testimony at 26.

There is no “net protocol conversion.” While Armstrong’s cable affiliate does accept the call in time division multiplexing (“TDM”) signaling as it is received from Verizon and convert it to IP, this is done only for the purpose of transport within its own network. The call is then converted back to TDM on the Multimedia Terminal Adaptor (“MTA”), equipment owned by the cable company and located on its side of the network demarcation point, before being delivered to the end user customer and received on an analog hand set.¹³⁴ The identical backward conversion is accomplished in its network after accepting the signal in analog format from the end-user. “In sum, the call is received by Armstrong in traditional circuit-switched format and is terminated to the end-user customer in that same format, specifically so that the customer can use standard inside wire and telephone equipment to use the service.”¹³⁵

The service being offered by Armstrong and its cable affiliate is the same as the service discussed by the FCC in its *AT&T IP-in-the-Middle* decision,¹³⁶ in which AT&T, much like Verizon here, contended that, because a portion of the call was transmitted using IP, that the call should be exempt from access charges. The FCC strongly disagreed:

Users of AT&T’s specific service obtain only voice transmission with no net protocol conversion, rather than information services such as access to stored files. More specifically, AT&T does not offer these customers a “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information;” therefore, its service is not an information service under section 153(20) of the Act. End user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T’s traditional circuit-switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T. To the extent that protocol conversions associated with AT&T’s specific service take place within its network, they appear to be “internetworking” conversions, which the Commission has found to be telecommunications services. We clarify,

¹³⁴ Armstrong Rebuttal Testimony at 26; *see also* Armstrong Exhibit 10 (Armstrong’s Supplemental Responses to Verizon Request for Admissions).

¹³⁵ Armstrong Rebuttal Testimony at 26.

¹³⁶ *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 F.C.C.R. 7457 (2004) (“*AT&T IP-in-the-Middle*”).

therefore, that AT&T's specific service constitutes a telecommunications service.⁵⁴

⁵⁴ This determination is consistent with the Commission's tentative conclusion in the *Stevens Report* that phone-to-phone IP telephony bears the characteristics of telecommunications service. *Stevens Report*, 13 FCC Rcd at 11544, para. 89. AT&T's specific service meets the four conditions that the Commission stated "it tentatively intend[ed] to refer to" as phone-to-phone IP telephony. *Stevens Report*, 13 FCC Rcd at 11543-44, para. 88 (other footnotes omitted).¹³⁷

The FCC in the *AT&T IP-in-the-Middle* decision specifically addresses access charges and their applicability when IP is introduced into the communications path. The FCC identified three significant facts about AT&T's service:

We emphasize that our decision is limited to the type of service described by AT&T in this proceeding, i.e., an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end-users due to the provider's use of IP technology. Our analysis in this order applies to services that meet these three criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport.¹³⁸

The traffic at issue in this proceeding, as Armstrong's witnesses testified, meets each of the three criteria identified by the FCC as material to its ruling that access charges apply:

... AUI's end-users use their existing, ordinary CPE (i.e., inside wire and a standard telephone) to access telephone service. They do not require specialized CPE. Likewise, calls to/from AUI end-users originate and terminate on the PSTN. They use standard telephone numbers and interconnections between certified telecommunications carriers to make and receive telephone calls. Indeed, that is a critical role played by the Armstrong CLEC (i.e., to provide AUI subscribers connectivity to/from the PSTN). Finally, as described above, there is no enhanced functionality provided to the end-user via the use of the IP protocol used to transmit their messages between the end-user's premises and the AUI head-end.¹³⁹

¹³⁷ *AT&T IP-in-the-Middle* at ¶ 12.

¹³⁸ *AT&T IP-in-the-Middle* at ¶ 1.

¹³⁹ Armstrong Rebuttal Testimony at 23.

The protocol conversions undertaken by Armstrong are “internetworking conversions” which have been determined to be telecommunications services, as described by the FCC in its *Non-Accounting Safeguards Order*.¹⁴⁰

We note that, under Computer II and Computer III, we have treated three categories of protocol processing services as basic services, rather than enhanced services, because they result in no net protocol conversion to the end-user. These categories include protocol processing: 1) involving communications between an end-user and the network itself (e.g., for initiation, routing, and termination of calls) rather than between or among users; 2) in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE); and 3) *involving internetworking (conversions taking place solely within the carrier’s network to facilitate provision of a basic network service, that [*21958] result in no net conversion to the end-user)*.¹⁴¹

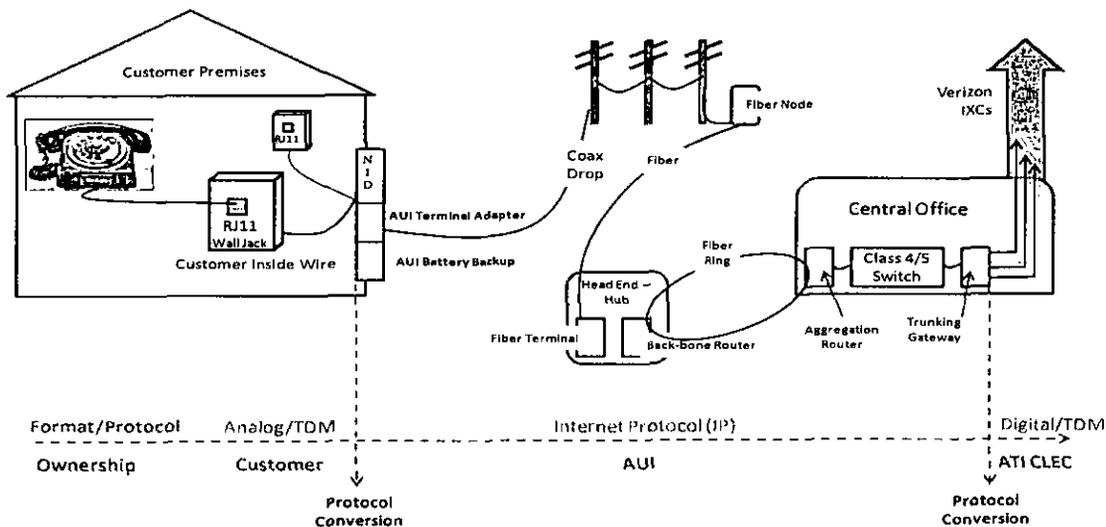
This same internetworking conversion occurs on the Armstrong network. The diagram below is a schematic of protocol conversions by Armstrong:¹⁴²

¹⁴⁰ *Amendment to Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorization Thereof; Communications Protocols Under Section 64.702 of the Commission’s Rules and Regulations*, 2 F.C.C.R. 3072, 3081-82, ¶¶ 64-71 (1987) (“*Computer III Phase II Order*”); *Non-Accounting Safeguards Order*, 11 F.C.C.R. 21905, 21957-58, ¶ 106.

¹⁴¹ *Non-Accounting Safeguards Order* at ¶ 106 (emphasis added).

¹⁴² Armstrong Rebuttal Testimony at 25.

Diagram 3: Protocol Conversion



As the Armstrong witnesses explained (using an outgoing call to illustrate; i.e., working from the left side of the diagram to the right side):

... the first protocol conversion would take place at the cable company's Terminal Adapter. The call (represented by the dotted line at the bottom of the diagram), which originates in analog format via the customer's standard telephone equipment, is converted by AUI's Terminal Adapter to an IP format. The call is transmitted in that same IP format across the AUI network to the trunking gateway located in the central office. At the trunking gateway the transmission is converted again, this time from an IP format back to the more traditional TDM (digital) format in which the call was originated. The call is then transmitted by Armstrong to the intended third-party carrier (e.g., Verizon), in standard TDM format. Both protocol conversions happen inside the AUI network and are undertaken solely for purposes of interworking within the AUI network. No additional features, functions or services are made available to the end-user via the conversion of the signal to IP format in the middle of the AUI transmission (just as AT&T added no discernable features or functions when it introduced IP to the middle of its service, which the FCC ultimately determined was a telecommunications service).¹⁴³

¹⁴³ Armstrong Rebuttal Testimony at 26.

“As a result, the service provided by Armstrong to Verizon (i.e., transmission from Verizon's IXC Point of Presence - “POP” - to the end user customer) is a basic telephone service (i.e., exchange access), not an enhanced (information) service.”¹⁴⁴

Three other State Commissions have very thoroughly reviewed the operations of cable company telephony networks similar to Armstrong's and concluded that no net protocol conversion occurs in these types of network arrangements. The Vermont Public Service Board (“PSB”) found that Comcast's Digital Voice service “does not originate and terminate in IP,” since the cable company's terminal adapters “convert the call into IP (originating caller) and back from IP (terminating caller) to a signal that can be recognized and processed by the callers' telephone sets.”¹⁴⁵ The Vermont PSB ruled, therefore, that there has been no federal preemption as information service (under *Vonage* or any other order) and that Comcast's service may be regulated as a public utility under state law.¹⁴⁶ The New Hampshire PUC similarly found, in August, that cable phone service employs an analog phone and that the FCC has not preempted

¹⁴⁴ Armstrong Rebuttal Testimony at 26. (“We note here that one of the primary definitional distinctions between a ‘telecommunications service’ on the one hand, and an ‘information service’ on the other, is that a telecommunications service transmits information ‘without change in the form or content of the information as sent and received.’ (47 U.S.C. § 153(20) and (46)). In other words, while an information service changes the actual information (in terms of form and/or content) being transmitted between end users (indeed, that is one reason it is often referred to as an ‘enhanced’ service), telecommunications services do not change the form/content. The AUI cable telephony service does not change either the form or the content of the communication between end users, it simply passes along the same voice communication from originating party to terminating party without any enhancement.”)

¹⁴⁵ *Vermont Comcast Order* at 12 (Findings ¶ 30). Apparently, Comcast terminal adaptor is leased to the customer. *Id.* at 12 (Findings ¶ 29). In Armstrong's case, the adaptor is company property and the customer has no ownership interest whatsoever in the device, further removing the customer from the conversion of TDM-originated call to IP. NT at 78-79.

¹⁴⁶ *Vermont Comcast Order* at 38 (“Until such time as the FCC issues an order that resolves the classification issue, it follows that Comcast has failed to show in this first phase of our investigation that we are demonstrably preempted from regulating VoIP pursuant to our state-law jurisdiction.”) As noted previously in this Brief, the *FCC November 18th ICC/USF Order* also declines to rule that IP traffic is not telecommunications.

state level, utility regulation of Comcast's voice service product.¹⁴⁷ Maine went so far as to find that the cable voice service provided by Comcast and Time Warner are affirmatively "telecommunications" services and subject to state regulation.¹⁴⁸

Nor does Armstrong's cable voice service provide an "integrated suite" of capabilities such that it should be declared an "information service." As Armstrong witness Starkey explained, "this is one more difference between the Vonage DirectVoice service and the AUI service."¹⁴⁹ The FCC provides insight into what it means by "a suite of integrated capabilities and features" in the *Vonage Order* as follows:

... the geographic location of the end-user at any particular time is only one clue to a jurisdictional finding under the end-to-end analysis. The geographic location of the "termination" of the communication is the other clue; yet this is similarly difficult or impossible to pinpoint. *This "impossibility" results from the inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously, none of which the provider has a means to separately track or record.*¹⁵⁰

As Mr. Starkey explained: "AUI subscribers are not provided, via the AUI telephone service, the ability to 'utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of

¹⁴⁷ *New Hampshire PUC Order* at 46 ("Fixed cable voice service is a direct substitute for traditional landline phone service. From a user's perspective, the fundamental characteristics of cable voice service are essentially identical to those of traditional telephone service. End users of both cable voice service and POTS use a traditional handset, listen for a dial tone, send and receive voice communications converted to and from analog signals, interconnect with the PSTN, are fixed in geographic location, assigned a NANPA-conforming telephone number, and are provided portability for that number.").

¹⁴⁸ *Maine PUC Order*, 285 P.U.R.4th at 506-07 ("In the absence of any action from the FCC, we make the independent finding that the VoIP services offered by TWC and Comcast meet the definition of 'telecommunications' ... The signaling multi-frequency tones generated by the [customer's telephone] touchpad are then 'digitized' (converted into a series of 1s and 0s) by a piece of proprietary equipment called an eMTA that TWC (or Comcast) supplies to its customer for this purpose ... The eMTA then communicates with a 'soft switch' located elsewhere on TWC's (or Comcast's) network by transmitting the 'digitized' telephone number to the 'soft switch' and obtaining from the 'soft switch' the internet protocol (IP) ...").

¹⁴⁹ Armstrong Rebuttal Testimony at 19.

¹⁵⁰ *Vonage Decision* at ¶ 25 (Emphasis added).

communications simultaneously.”¹⁵¹ AUI telephone subscribers are provided the same traditional calling features that Verizon or any other LEC would provide, including 3-way calling, voice mail, caller ID. Armstrong’s Voice Service can be used on a stand-alone basis without broadband. Because the AUI telephone service does not provide a subscriber with access to the Internet, it cannot be used to access different websites or utilize multiple Internet-driven (or other computer processing) services simultaneously as discussed by the FCC.

The simple fact is that the AUI telephone service is “dramatically different” from the Vonage DirectVoice service which the FCC considered in its *Vonage Order*. “Even when bundled with AUI’s Internet service, or if the customer was using another provider’s Internet service, an AUI customer cannot exercise a suite of integrated capabilities through his or her phone. To access a website, the customer must use the Internet service, not AUI’s telephone service.”¹⁵²

2. Verizon Continues to Bill Access for its Own IP-Based Voice Services

Verizon has focused considerable attention on the end user services offered by Armstrong’s cable affiliate in an effort to avoid paying access charges. Yet, Verizon is offering a similar, if not identical product but is not rating and billing other carriers consistent with the arguments it raises against Armstrong. The fact that Verizon does not believe that the rules it unilaterally seeks to impose upon Armstrong should apply to its own IP-based services is a devastating refutation to the merits of its actions and the arguments it asks the Commission to adopt.

¹⁵¹ Armstrong Rebuttal Testimony at 19.

¹⁵² Armstrong Rebuttal Testimony at 20.

Both MCI¹⁵³ and the Verizon ILECs¹⁵⁴ offer IP-based voice products. Significantly for purposes of evaluating the merits of Verizon's refusal to pay tariffed and ICA-specified rates Verizon, Verizon does not distinguish between its own IP and TDM traffic for intercarrier compensation purposes.¹⁵⁵ *Verizon, including both MCImetro and the ILECs, follow the exact same rating of calls (as local or toll and, then, inter or intrastate) that Armstrong does in billing Verizon.*¹⁵⁶ There is no segmenting of incoming calls directed to traditional circuit switched voice and FiOS Digital Voice customers for intercarrier compensation purposes.¹⁵⁷

Verizon has no process in place and, apparently, no ability to separate calls on its network that originate/terminate as FiOS Digital Voice from those that would be considered traditional TDM-based calling.¹⁵⁸ Verizon's witnesses confirmed that there is no tracking mechanism in this regard for intercarrier compensation purposes.¹⁵⁹ Any carrier delivering a toll call destined for a Verizon customer, whether a FiOS Digital Voice or a TDM-based customer, is charged the same terminating access rates from the same tariff or agreement.¹⁶⁰

It lends no credibility to Verizon's argument that, with glaring inconsistency, it collects access charge revenues on its own IP-enabled voice product while at the same time refusing to pay Armstrong on grounds of the same underlying technology and package of services. The

¹⁵³ Verizon Direct Testimony at 25 ("Verizon Business offers VoIP Services."); NT at 125, 139.

¹⁵⁴ In the case of the Verizon ILECs, the FiOS platform and "Digital Voice" service has been steadily rolled out in Pennsylvania, as its TDM-based, traditional circuit switched voice service is now offered to a diminishing customer base. While its legacy ILEC network still originates a "majority" of the calls on its network, Verizon could not (or would not) quantify beyond that how much of its traffic is now "IP-originated." NT at 134. Verizon PA serves more than 4.9 million customer accounts in Pennsylvania. NT at 130. At present, the FiOS service is "available to more than 1.4 million Pennsylvania homes [and businesses]." NT at 131.

¹⁵⁵ NT at 127-28. In response to question of how Verizon ILECs rate these calls, Verizon witness states: "I believe they rate them -- I'm not aware of any unique rating for calls t[o] or from FiOS Digital Voice customers. Q. So the rules associated with rating for ICC purposes are the same? A. As I testified, I'm not aware of any differences. Q. So it's the same? A. (Munsell) If I'm not aware of any differences, they would be the same."

¹⁵⁶ NT at 125 (MCI), 129 (Verizon ILECs) and 146.

¹⁵⁷ NT at 129.

¹⁵⁸ NT at 129-130.

¹⁵⁹ NT at 130.

¹⁶⁰ NT at 128.

Armstrong and Verizon digital services are provided by the same basic means. A FiOS Digital Voice Service customer plugs a traditional telephone into the wall, just as an Armstrong customer does.¹⁶¹ FiOS Digital Voice Service is enabled by an “optic call network terminal” (“ONT”)¹⁶² that converts traditional phone signals into IP (just as the Armstrong multimedia terminal adaptor - “MTA”) does. Both services may be used to receive and call other telephone numbers on the PSTN.¹⁶³

When asked to review features of Verizon’s Digital Voice service, the Verizon witnesses agreed that customers can: manage the service on a home computer; obtain live voice mail screening; screen call logs; see Caller ID on TV; review voicemail by email notification; sync calendars to the phone; and manage the phone on-line; manage home phones from the TV,¹⁶⁴ the very same features upon which they concluded (incorrectly) that Armstrong voice is an “information service.”¹⁶⁵ Indeed, Verizon’s website boasts that: “[W]e have leapfrogged the cable companies who like to trumpet their Caller ID on TV features ... but now we’re taking phone and TV integration to a whole new level,” in a release that described “an integrated set of innovative features that go beyond traditional telephone service.”¹⁶⁶

Finally, after being confronted with multiple web site advertisements of FiOS Digital Voice Service, each describing its enhanced capabilities, the Verizon witnesses conceded that, under their application of the definitions used, “... we believe that FiOS Digital Voice is an information service.”¹⁶⁷ Yet, in direct contradiction of this admission, Verizon continues to charge the same intercarrier compensation for calls to/from its Digital Voice customers as it does

¹⁶¹ NT at 141.

¹⁶² The witnesses do not know whether the ONT is company equipment or purchased/leased by the subscriber. NT at 140-141.

¹⁶³ NT at 142.

¹⁶⁴ NT at 142-144.

¹⁶⁵ Verizon Direct Testimony at 26; NT at 135.

¹⁶⁶ Armstrong CX Exhibits 1 and 2.

¹⁶⁷ NT at 145.

for its TDM-based calling, all the while withholding payment to Armstrong (with whom it has an agreement to pay full access rates).¹⁶⁸

Verizon has not publically disclosed its belief that FiOS Digital Voice service is an “information service” and, even in this case, Verizon created more of a puzzle to be solved rather than providing a disclosure.¹⁶⁹ Verizon’s witnesses explained that they expected others to figure it out also:

WITNESS VASINGTON: We have said that we were not re-rating our own bills but that it was our expectation that the carriers with whom we were disputing application of access charges would similarly agree to pay us at a comparable reciprocal rate to what we were paying pending the outcome of commercial negotiation.¹⁷⁰

In other words, after engaging in payment self-help against other IP-based network operators, it was Verizon’s “expectation” that these other IP-based network operators would reduce these access payments to Verizon and Verizon would accept such lesser amount. Of course, there is no such representation in any of the dispute correspondence or discussions,¹⁷¹ but according to Verizon it would have come up at some point in the discussions.

This secretive approach leaves the industry, including the TDM-based carriers, with no knowledge of the fact that, under Verizon’s legal interpretation, Verizon is only entitled to \$.0007 per minute for calls destined for Verizon’s FiOS Digital Voice customers, a distinct disadvantage to them and a revenue preserving strategy for Verizon:

¹⁶⁸ NT at 144. ((Vasington) “I guess I don’t understand, if your question is, do we both offer an integrated set of innovative features that go beyond traditional telephone service, the answer is yes. Do our folks on the web site believe ours are better than generally offered by cable companies, the marketing people who wrote that up do believe that.”).

¹⁶⁹ NT at 145. (“Q. Have you told anybody that you think your FiOS Digital Voice service is information service? Have you told anybody that anyplace? Have you filed with the FCC, the PA PUC? A. (Vasington) In response to discovery in this case, we have identified that there is traffic that is IP-based that comes from FiOS Digital Voice customers, and since in this case we have said [under cross-examination] that VoIP is an information service, then we’ve certainly told you that we believe that FiOS Digital Voice is an information service.”).

¹⁷⁰ NT at 146.

¹⁷¹ Armstrong Exhibit 2.

Q. What about the companies that still originate in circuit switched TDM? Have you offered not to charge them [terminating] access for incoming calls for FiOS Digital Voice service?

A. (Vasington) I don't know.

Q. You're not aware of any instance?

A. (Vasington) I'm not aware.

Q. Are you aware of that, Mr. Munsell?

A. (Munsell) No, I'm not.

Q. So Verizon has made the offer selectively to carriers that it also believes are using an IP-based network exclusively and not disclosed it to the TDM world; is that correct?

A. (Vasington) Where we've been able to identify what we believe to be IP traffic that exceeds a certain threshold dollar figure, we have disputed the payment of access charges.¹⁷²

“The payment of access charges ...,” but not the receipt of access charges. While it has been raising disputes in the IP world, refusing to pay on traffic that was the functional equivalent of its own, Verizon continues to tender full access bills for its own IP traffic.¹⁷³

In view of these facts of record, clear admissions by its own witnesses, it is inconceivable that Verizon can plausibly maintain that Armstrong’s integrated service product is not due access charges, while simultaneously arguing that its own identical service is entitled to that revenue. If Armstrong is an “information service” and not entitled to access, then Verizon owes millions of dollars in refunds to the entire industry - nationwide. The better view is that the underlying technology does not matter, as Armstrong has explained. The services offered are telecommunications and should be subject to the same compensation rules.

¹⁷² NT at 146-147.

¹⁷³ NT at 147.

3. The Subsequent Change in the FCC's View of "Cooperative Federalism"

In the *FCC November 18th ICC/USF Order*, the FCC has recognized a separate category of calling - "VoIP-PSTN traffic" - and declared that all such toll traffic would be compensated at the interstate access rate.¹⁷⁴ The new regulations associated with this change were published in the Federal Register on November 29, 2011,¹⁷⁵ and become effective on December 29, 2011.¹⁷⁶ The *FCC November 18th ICC/USF Order* has prospective effect only. The FCC expressly took no position on intrastate compensation due prior to that time and made no claim to retroactively preempt Pennsylvania's traditional jurisdiction.¹⁷⁷

The new 47 C.F.R. § 51.701 (b)(3) defines "VoIP-PSTN" traffic as:

... telecommunications traffic exchanged between a LEC and another telecommunications carrier in Time Division Multiplexing (TDM) format *that originates and/or terminates in IP format* and that otherwise meets the definitions in paragraphs (b)(1) or (b)(2) of this section.^[178] Telecommunications *traffic*

¹⁷⁴ *FCC November 18th ICC/USF Order* at ¶ 944.

¹⁷⁵ 76 Fed. Reg. 73840 (November 29, 2011) (to be codified at 47 C.F.R. pts. 0, 1, 20, 36, 51, 54, 61, 64, and 69 ("November 29th Federal Register"), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-11-29/pdf/2011-30378.pdf>.

¹⁷⁶ Except for §§ 1.21001(b) through (d); 1.21002(c) and (d); 1.21004(a); 51.907(b)(1), (c)(1), and (d) through (h); 51.909(b)(1), and (c) through (k); 51.911(b) and (c); 51.915(e)(5) and (f)(7); 51.917(e)(6) and (f)(3); 51.919; 54.304; 54.312(b)(3); 54.313(a)(7) through (a)(11); 54.313(b) through (h); 54.314; 54.320(b); 54.1003; 54.1004(a), (c), and (d); 54.1005(a) and (b); 54.1006(a) through (e); 54.1007(a) and (b); 54.1008(d) and (e); 54.1009(a) through (c); 54.1010; 61.3(bbb)(2); and 69.3(e)(12), which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC has stated that it will publish a document in the Federal Register announcing the effective date for those sections.

¹⁷⁷ *FCC November 18th ICC/USF Order* at ¶ 945 ("Our intercarrier compensation framework for VoIP-PSTN traffic will apply prospectively, during the transition between existing intercarrier compensation rules and the new regulatory regime adopted in this Order, and is subject to the reductions in intercarrier compensation rates required as part of that transition. We do not address preexisting law, including whether or how the ESP exemption might have applied previously, and we make clear that, whatever its possible relevance historically, the ESP exemption is not relevant or applicable prospectively in determining the intercarrier compensation obligations for VoIP-PSTN traffic."); *see also id.* at n.1874 ("This Order does not address intercarrier compensation payment obligations for VoIP-PSTN traffic for any prior periods.").

¹⁷⁸ 47 C.F.R. § 51.701(b)(1) or (b)(2) include the following:

- (1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (*see* FCC 01-131, paragraphs 34, 36, 39, 42-43); or
- (2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

*originates and/or terminates in IP format if it originates from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment.*¹⁷⁹

The Order confirms this definition:

The prospective intercarrier compensation regime we adopt for a LEC's exchange of VoIP traffic with another carrier focuses on what we refer to as "VoIP-PSTN" traffic.... 'VoIP-PSTN traffic' is 'traffic exchanged over PSTN facilities that originates and/or terminates in IP format.'¹⁸⁹²

¹⁸⁹² Joint Letter at 3. See also ABC Plan, Attach. 1 at 10. Some commenters question the scope of traffic that "originates and/or terminates in IP format." See, e.g., CRUSIR August 3 PN Comments at 20; Level 3 August 3 PN Comments at 12-13. Although our prospective VoIP-PSTN intercarrier compensation is not circumscribed by the definition of "interconnected VoIP service" in section 3(25) of the Act (referencing section 9.3 of the Commission's rules) or the definition of "non-interconnected VoIP service" in section 3(36) of the Act, nonetheless, informed by those definitions, *we believe it is appropriate to focus on traffic for services that require 'Internet protocol compatible customer premises equipment.'* See 47 U.S.C. § 153(25) (referencing 47 C.F.R. § 9.3); 47 C.F.R. § 9.3 (subpart (3) in the definition of "interconnected VoIP"); 47 U.S.C. § 153(36)(A)(ii) (discussing services that "require[] Internet protocol compatible customer premises equipment"). Sections 3(25) and 3(36) of the Act were adopted in section 101 of the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 103(b), 124 Stat. 2751 (2010).¹⁸⁰

Specifying that the service "require 'Internet protocol-compatible customer premises equipment,'" the FCC Order expressly rejects the suggestion that the "VoIP-PSTN" rules be applied to a broader classification of IP-related traffic, such "IP-enabled services."¹⁸¹

For "VoIP-PSTN traffic," the FCC Order sets forth a new rate regime:

- Default charges for "toll" VoIP-PSTN traffic will be equal to interstate access rates applicable to non-VoIP traffic, both in terms of the rate level and rate structure;
- Default charges for other VoIP-PSTN traffic will be the otherwise-applicable reciprocal compensation rates...¹⁸²

¹⁷⁹ FCC November 18th ICC/USF Order, Appendix A at 500; November 29th Federal Register, 76 Fed. Reg. at 73855 (emphasis added).

¹⁸⁰ FCC November 18th ICC/USF Order at ¶ 940 (emphasis added).

¹⁸¹ FCC November 18th ICC/USF Order at ¶ 941 n.1895.

¹⁸² FCC November 18th ICC/USF Order at ¶ 944; see also November 29th Federal Register, 76 Fed. Reg. at 73861, ("§ 51.913 Transition for VoIP-PSTN traffic. (a) Access Reciprocal Compensation subject to this subpart exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format shall be subject to a rate equal to the relevant interstate access charges specified by this subpart. Telecommunications traffic originates and/or terminates in IP format if it originates from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment.").

The effective date of the change in compensation for “VoIP-PSTN traffic” is not expressly identified in either the Order or the regulations, but arguably may be on December 29, 2011, the effective date of the regulations (Federal Register publication date plus 30 days).

For its part, Armstrong has always followed and will continue to follow the law of intercarrier compensation as it evolves. The 759 page *FCC November 18th ICC/USF Order* was only recently issued. As of the submission of this Brief, the FCC Order is not effective. The Order is subject to reconsideration and may be revised or clarified. The FCC’s attempt to preempt the states’ rate setting function for intrastate calling is controversial and, likely, will be resolved only on appeal. The FCC’s ruling may be stayed.

It would preliminarily appear, however, given the definition of “VoIP-PSTN traffic,” that the FCC has made no changes to the application of intercarrier compensation as it would apply to Armstrong’s cable voice service. As described previously, traffic on Armstrong’s network does not “originate and/or terminate in IP format.” Calls originate/terminate in standard analog format with a customer’s standard analog telephone. The conversion to IP takes place at the MTA, which is a component of Armstrong’s network, and is not customer premises equipment (“CPE”).¹⁸³ Likewise, the MTA is located on the carrier side of the “demarcation point” separating the carrier’s network from CPE.¹⁸⁴ In other words, Armstrong customers do not require “Internet protocol-compatible customer premises equipment,” the basis upon which the FCC chose to define VoIP-PSTN traffic for which it adopts disparate termination rates.¹⁸⁵ Thus, because any IP conversion is performed within the Armstrong network, and not by CPE,

¹⁸³ See 47 U.S.C. § 153(14) (defining “customer premises equipment”) and § 153(45) (defining “telecommunications equipment”).

¹⁸⁴ See 47 C.F.R. § 68.3.

¹⁸⁵ *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 21905, 13 F.C.C.R. 11230, ¶ 106 (1996) (“*Non-Accounting Safeguards Order*”).

Armstrong's service is not an "information service," nor is it "VoIP-PSTN traffic," as the FCC defines those terms.

The better approach is that Armstrong follow the ILECs' rates down at the same time and in the same magnitude as the FCC intends for all carriers under the "benchmarking rule." Under the current federal practice for interstate switched access rates, similar to the intrastate rule, CLECs tariff interstate access charges at a level no higher than the tariffed rate for such services offered by the incumbent LEC serving the same geographic area (the "benchmarking rule"),¹⁸⁶ which the FCC has stated will continue under the transition to bill and keep: "Application of our access reforms will generally apply to competitive LECs via the CLEC benchmarking rule";¹⁸⁷

... we do not find a sufficient basis for creating a separate transition for competitive LECs. Moreover, the transition periods of six and nine years are sufficiently long to permit advance planning and represent a careful balance of the interests of all stakeholders. As a result, we conclude that a uniform approach for all LECs is preferable and do not find compelling evidence to depart from the important policy objectives underlying the CLEC benchmarking rule. Further, new arbitrage opportunities could arise and increased regulatory oversight would be necessary were we to abandon the CLEC benchmarking rule.¹⁸⁸

Armstrong expects that this issue will arise as a matter of industry and individual compliance with the FCC's new rules and Armstrong reserves the right to further refine its position on these new rules as that compliance unfolds.

C. Verizon's August 27, 2010 Unilateral Refusal to Pay Armstrong's Existing Legal Rates was Unlawful

1. Verizon Had Legal Remedies Available to It

If Verizon were seeking to lawfully challenge the intercarrier compensation rates applicable to its termination of traffic to Armstrong, Verizon had available to it several valid

¹⁸⁶ 47 C.F.R. § 61.26; see also *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 F.C.C.R. 9925, ¶ 3.

¹⁸⁷ *FCC November 18th ICC/USF Order* at ¶ 807.

¹⁸⁸ *FCC November 18th ICC/USF Order* at ¶ 808.

legal remedies. It could have provided Armstrong notice that it was terminating the ICAs,¹⁸⁹ It could have sought renegotiation of the ICAs.¹⁹⁰ It could have brought the disputed ICA terms before this Commission, the FCC, or a court.¹⁹¹ It could have instituted a regulatory proceeding “to obtain a reduction in such Charges and a refund of any amounts paid in excess of any Charges that are reduced.”¹⁹² It could have filed a complaint against Armstrong’s switched access tariff, as the tariff requires.¹⁹³ Verizon elected not to employ any of these methods and, instead, it exercised self-help by unilaterally reducing its payments to Armstrong by 87% to a rate of its own choosing,¹⁹⁴ the same rate that it was advocating the FCC to adopt.

Verizon urged that the FCC “should” implement a rate of \$.0007/minute,¹⁹⁵ recognizing that this is not currently the case.¹⁹⁶ And, most importantly for our purposes here, even under Verizon’s view as expressed to the FCC, the \$.0007/minute rate would be a “default rate” that

¹⁸⁹ Verizon ICAs at §§ 2.1 and 2.2.

¹⁹⁰ Verizon ICAs at § 2.3.

¹⁹¹ Verizon ICAs at § 14.

¹⁹² Verizon ICAs, Pricing Attachment at § 5 (emphasis added.)

¹⁹³ Armstrong’s State Access Tariff at Original Page 2-16 (“If the Customer and the Company are unable to resolve the dispute to their mutual satisfaction, the Customer may file a complaint with the Pennsylvania Public Utility Commission in accordance with the Commission’s rules of procedures.”).

¹⁹⁴ Armstrong Direct Testimony at 20.

¹⁹⁵ Comments of Verizon and Verizon Wireless filed before the FCC April 18, 2011 at the *FCC NPRM Docket* (“Verizon 4/18 Comments”) at 4 (“The Commission should immediately adopt a single low default rate of \$0.0007 per minute prospectively for all VoIP traffic that connects with the PSTN at either end-point of a call.”).

¹⁹⁶ Verizon 4/1 Comments at 4 (“Swift action setting a low default rate for VoIP traffic will provide carriers and investors with needed certainty and allow for more efficient deployment of broadband and advanced services.”).

applies in the *absence* of an agreement.¹⁹⁷ It did not argue that the \$.0007 rate should disrupt compensation already agreed to in *existing* interconnection agreements.¹⁹⁸

Verizon's unilateral, self-executing action violated both the ICAs and the applicable Commission-approved tariffs. Self-help to decrease the rates paid, while requiring that Armstrong continue to provide network services at unauthorized rates, is unlawful and unfair.¹⁹⁹ Even were Verizon's change to the compensation rate accompanied by a "good faith" offer to negotiate, as Verizon adamantly maintains,²⁰⁰ it was still improper.

Verizon may not unilaterally substitute a different rate without Armstrong's consent or approval of lawful authority. By-passing the remedies available under the ICAs, the tariff, and the Public Utility Code, and implementing a self-invented new rate through payment self-help is not a legal option. Until the legal rates under the ICAs and tariff are lawfully changed, no party may exercise self-help and unilaterally implement its own preferred rates.

The Commission's lawful orders authorizing Armstrong to implement the ICAs and the tariffs "shall remain conclusive upon all parties affected thereby, unless set aside, annulled or

¹⁹⁷ Verizon 4/1 Comments at 5-6 ("Most important, the Commission should hold that intercarrier compensation rates for VoIP traffic should be established in the first instance not through top-down, one-size-fits-all regulation, but through negotiated, commercial agreements between interconnecting carriers. A market-based approach, relying on negotiated, commercial agreements, is the best long-term solution to ensuring the efficiency of the communications markets in the face of rapid technological change. Indeed, negotiated agreements have proven successful in a variety of circumstances - most notably in the Internet itself. If providers are unable to reach a commercial agreement, however, the Commission should also establish a default rate of \$.0007 per minute for the origination and termination of VoIP traffic on the PSTN, under its exclusive jurisdiction over VoIP services.").

¹⁹⁸ Verizon 4/1 Comments at 11 ("All traffic that connects with the PSTN and is not covered by voluntary commercial agreements—regardless of carrier or of the distance it travels—should be subject to a default terminating rate of \$.0007 per minute for traffic delivered to the terminating carrier's serving end office.").

¹⁹⁹ Also, despite its own self-implemented reduction in payments to Armstrong, Verizon continues to bill, and Armstrong continues to pay, either a tariffed access rate or a contractual reciprocal compensation rate for traffic originated by Armstrong cable customers and terminated to Verizon, and as discussed in Section IV.B.2., Verizon charges access for its own Digital Voice service.

²⁰⁰ Verizon Answer and New Matter at 2-3.

modified upon judicial review.”²⁰¹ Verizon is obligated to pay Armstrong these “legal rates”²⁰² until its newly raised theory that a different termination rate applies is resolved.

Verizon’s unilateral actions violate the very underpinnings of contract law.

It is a well-settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party....

The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated.²⁰³

Failure to require parties to abide by the terms of validly negotiated contracts encourages fraud. “Needless to say, such a holding would also serve to shake the very foundations of contract law and the sanctity of a bargain made between two parties dealing at arm's length.”²⁰⁴ Tariffs, similarly, are contracts that bind the utility (Armstrong) and its customers (including Verizon as an access customer).²⁰⁵ Parties may not simply choose to disregard a contract or tariffed rate in favor of a self-effectuated lower rate. Payment pending dispute is the legitimate path, and the course previously taken by Verizon when it challenged CLEC rates on some prior occasions.²⁰⁶

²⁰¹ 66 Pa. C.S. § 316.

²⁰² *Schellhammer*, 639 A.2d at 191.

²⁰³ *Dermott v. Jones*, 69 U.S. 1 (1864).

²⁰⁴ *Brown v. Hall*, 435 A.2d 859 (Pa. 1981). Indeed, the notion that one may simply be relieved of contractual obligations at will not only shakes the foundations of contract law, but also “is very injurious to good morals, to a lively sense of obligation, to the sanctity of contracts, and to the character of [a reviewing] court.” *Warwick Iron Co. v. Morton*, 23 A. 1065 (Pa. 1892).

²⁰⁵ *Brockway Glass Co.*, *supra*.

²⁰⁶ Armstrong Direct Testimony at 23-24; *Verizon Pennsylvania Inc., Verizon North Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, Verizon Select Services, Inc., Verizon Global Networks, Inc., MCI Metro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services and MCI Communications Services, Inc. v. Penn Telecom, Inc.*, Docket No. C-20066987 (Order entered August 29, 2008); *Verizon Pennsylvania Inc., Verizon North Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance,*

2. The Commission Has Consistently Disallowed Self-Help

The Commission has repeatedly and consistently rebuked parties, particularly certificated carriers, that have taken the resolution of controversy into their own hands. In an early carrier-to-carrier proceeding under the new TCA-96 regulatory environment, the Commission admonished the utility:

... we find that M&SH acted inappropriately by executing a self-help remedy ... [B]oth parties were advised to seek a formal resolution through appropriate means (i.e. formal complaint, Alternative Dispute Resolution mediation, Emergency Order). M&SH choose not to utilize these procedures in place at the Commission and instead executed a self-help remedy that jeopardized access to the Internet.²⁰⁷

Ironically, the effect of the *Level 3/Marianna* Order is to preclude Armstrong from exerting “service denial self-help” upon Verizon, even in the face of Verizon’s “payment refusal self-help”:

When faced with the question of whether ILECs should have the obligation to complete calls if underlying intercarrier arrangements for such calls do not compensate the ILECs in a proper manner, we conclude that all carriers are obligated to complete calls where it is technically feasible to do so regardless of whether they believe that the underlying intercarrier compensation arrangements for completion of calls are proper.²⁰⁸

The Commission affirmed the unacceptability of payment refusal self-help in 2003 when it found Verizon acted improperly under its ICA with Core by exercising self-help to unilaterally

Verizon Select Services, Inc., Verizon Global Networks, Inc., MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services and MCI Communications Services, Inc. v. CTSI, LLC, Docket No. C-20077332 (Order entered August 29, 2008); *Verizon Pennsylvania Inc., Verizon North Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, Verizon Select Services, Inc., Verizon Global Networks, Inc., MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services and MCI Communications Services, Inc. v. CTC Communications Corporation et al.*, Docket Nos. C-20077672 et seq. (Recommended Decision June 3, 2010).

²⁰⁷ *Level 3 Communications, LLC v. Marianna & Scenery Hill Telephone Company*, Docket No. C-20028114 (Order entered August 8, 2002), slip op. at 4 (“*Level 3/Marianna*”).

²⁰⁸ *Level 3/Marianna*, at 4. The Commission most recently affirmed this precedent when it held Palmerton Telephone Company could not exert self-help by terminating service to Global NAPs despite Global NAPs failure to pay for services rendered. *Palmerton Telephone Co. v. Global NAPs South, Inc. et al.*, Docket C-2009-2093336 (Order entered May 5, 2009), slip op. at 3 (“*Palmerton Order on Material Question*”).

withhold payment.²⁰⁹ The ALJ, in a decision adopted by the Commission, stated the following with respect to Verizon's actions under the ICA:

Verizon's argument is somewhat convoluted, but it may be summarized easily enough. Verizon contends that Section 2.4 authorizes it to take unilateral action because it does not prohibit it, and because, in Verizon's opinion, negotiations were not necessary.

I agree with Core on this issue. This section clearly does not authorize unilateral action on the part of either party. Were the Commission to adopt Verizon's point of view here, a party to this, or to any similar agreement, could justify unilateral action simply by claiming, in essence, that they were right and there was nothing to talk about.²¹⁰

Similarly, the ICAs between Armstrong and the Verizon ILECs do not authorize Verizon's self-help, although Verizon, once again, claims this privilege.

Another carrier-to-carrier dispute brought before the Commission involved Verizon and a wireless carrier that had unilaterally reduced its payments and then stopped paying altogether under its ICA with Verizon. The wireless carrier petitioned the Commission for emergency relief to prevent Verizon from terminating the carrier's services for nonpayment. The Commission reversed the wireless carrier's self-help, compelling it to place into escrow or obtain a surety bond of the net disputed amount and to pay Verizon going forward charges billed per the ICAs until the intercarrier compensation dispute was resolved.²¹¹

The Commission also prohibited Verizon from terminating service to the wireless carrier, as it had proposed under the applicable ICA, without any Commission review. Finding "[t]he issues of nonpayment for breach of interconnection agreement. The right to terminate service under the interconnection agreement are all issues best brought before this Commission through

²⁰⁹ *Re Core Communications, Inc., Respondent: Verizon Pennsylvania, Inc.*, 98 Pa.P.U.C. 272 (2003) ("Core/Verizon").

²¹⁰ *Id.* (citations omitted). Verizon's discontinuance of payment was found to comport with the change of law provision under the applicable ICA.

²¹¹ *Buffalo-Lake Erie Wireless Systems Co., LLC Petition for Emergency Order*, Docket No. P-2009-2150008 (Ratification Order entered January 14, 2010).

the formal complaint process[.]”²¹² the Commission directed Verizon not to terminate service for 30 days from the Order entry date.

Just a few months later, in *Palmerton v. Global NAPs*, the Commission similarly ruled that that “GNAPs’ non-payment of intrastate carrier access charges to Palmerton cannot be condoned as a matter of law and as a matter of sound regulatory policy.”²¹³

Most recently the Commission addressed another payment dispute between Core and Verizon wherein Verizon again ceased paying Core for traffic termination despite a several year history of payment. Describing “Verizon’s decision to engage in a ‘self-help’ remedy and unilaterally cease all payments to Core for intercarrier compensation” as a substantial legal question,²¹⁴ the Commission reiterated its disdain for self-help, finding that Verizon’s conduct, in “unilaterally deciding to withhold payment to Core for the traffic at issue . . . appears to violate the spirit, if not the letter, of the Commission-approved ICAs between the Parties[.]” a violation that would in turn violate TCA-96.²¹⁵ “[D]isfavor[ing] carriers from engaging in ‘self-help’ to unilaterally resolve intercarrier compensation disputes[.]”²¹⁶ the Commission required Verizon to continue to make payments to Core.

Commission precedent in other industries also precludes customers from exercising self-help:

“However, what LTV has done is use the labels of ‘improper charges’ and ‘disputed amounts’ as a means of implementing a self-help mechanism to recover those amounts which it alleged it has been overcharged, and for which it has requested the Commission to order refunds. In effect, LTV has taken upon itself the role of adjudicator of its complaints. In withholding payment for current service on the basis of alleged past overcharges, LTV has determined the

²¹² *Buffalo-Lake Erie*, Slip copy at 3.

²¹³ *Palmerton Opinion* at 26.

²¹⁴ *Core Communications, Inc. v. Verizon Pennsylvania Inc., Verizon North LLC*, Docket No. P-2011-2253650 (Order Entered September 23, 2011), slip op. at 12 (“*Core/Verizon Material Question Order*”).

²¹⁵ *Core/Verizon Material Question Order* at 16.

²¹⁶ *Core/Verizon Material Question Order* at 18.

appropriateness of obtaining refunds, and the amounts thereof, without providing Duquesne a hearing. ...”

As properly pointed out by ALJ Meehan, there is no statutory or regulatory provision, either explicit or implicit, conferring a right of a customer to refuse to pay bills for current service as a means of recovering past alleged overcharges. ... Should it ultimately be determined in this proceeding that LTV is entitled to a refund, such amount will be ordered repaid, together with interest at the legal rate.²¹⁷

Although not binding for state purposes, the FCC and federal courts have found that self-help refusals to pay access charges violate two sections of the federal Communications Act: (1) Section 201(b), which prohibits “unreasonable practices;”²¹⁸ and (2) Section 203, which prescribes tariffs. In *MCI Telecommunications Corp.*, the FCC explained the latter reference:

Section 203(c) of the Act specifically forbids carriers from charging or collecting different compensation than specified in an effective tariff. Tariffs which are administratively valid operate to control the rights and liabilities between the parties. Rates published in such tariffs are rates imposed by law. Withdrawal from this position would invite unlawful discrimination.... We cannot condone MCI’s refusal to pay the tariffed rate for voluntarily ordered services.²¹⁹

The FCC noted that its “finding that self-help is not an acceptable remedy does not leave MCI without recourse.”²²⁰ It directed MCI to Sections 206-209 of the Communications Act “which set forth a complaint procedure to be used by persons who believe that a carrier is violating the Act.”²²¹

The FCC has stated repeatedly and unequivocally that “the law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties....”²²² The FCC has further stated that:

²¹⁷ *LTV Steel Co., Inc. v. Duquesne Light Co.*, 72 P.U.R.4th 605, 611 (1986) (“*LTV Steel*”).

²¹⁸ *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 55 (2007); *MGC Communications, Inc. v. AT&T Corp.*, 14 F.C.C.R. 11647 (1999).

²¹⁹ *MCI Telecommunications Corp., et al.*, 62 F.C.C.2d 703, 705-706, ¶ 6 (1976) (footnotes omitted) (“*MCI Telecommunications Corp.*”).

²²⁰ *Id.* at 706, ¶ 7.

²²¹ *Id.*

²²² *Tel-Central of Jefferson City, Mo., Inc. v. United Tel. of Mo., Inc.*, 4 F.C.C.R. 8339, ¶ 9 (1989) (“*Tel-Central*”). See also *Communique Telecommunications, Inc. DBA Logcall*, 10 F.C.C.R. 10399, 10405, ¶ 36 (1995).

[A] customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations.²²³

The FCC has applied this rule in other contexts as well. Challenges to carrier's certification may not be used as a basis to refuse payment, the challenge to which must be brought under Communications Act Section 208.²²⁴ In establishing CLEC rates at parity, the FCC deemed tariffed rates to be conclusively reasonable and expressly noted that the IXCs may not challenge tariffed rates using self-help by simply refusing to pay tariffed access charges.²²⁵

Verizon claims it was under no contractual obligation to pay charges that it disputed.²²⁶ There are several flaws in this line of argument. First, the basis upon which Verizon refuses to pay was not a typical "dispute,"²²⁷ rather it was a sudden and fundamental objection to a material term of the parties' ICAs and Armstrong's tariff under which Verizon sought to invalidate the "meeting of the minds" embodied in the ICA and commenced to enforce a new payment policy that was unendorsed by anyone else. The issues raised by Verizon are no mere dispute over calculations. The issue was one of a self-implementation of Verizon's regulatory advocacy positions in lieu of obtaining prior regulatory affirmation of those views.

While Verizon relies on certain language in the ICAs which provide that undisputed amounts are to be paid by the due date (inferring that disputed amounts are not required to be paid), Section 9.3 of the ICA also provides that parties paying disputed amounts will not have

²²³ *Business WATS, Inc. v. AT&T Co.*, 7 F.C.C.R. 7942, ¶ 2 (1989) (citing *MCI Telecommunications Corp.*, 62 F.C.C.2d at 705-06). See also *Nat'l Communications Ass'n v. AT&T Co.*, No. 93 CIV. 3707, 2001 WL 99856 (S.D.N.Y. 2001) (citing *Tel-Central*, *supra*, and *MCI Telecommunications Corp.*, *supra*).

²²⁴ *Bell Atlantic-Delaware v. Frontier Communications Services, Inc.*, 15 F.C.C.R. 7475, 7478-80 (2000).

²²⁵ *In re Access Charge Reform*, Seventh Report and Order, 16 F.C.C.R. 9923, 9932, ¶ 23 (2000).

²²⁶ Verizon Direct Testimony at 13, 29-32.

²²⁷ In addressing disputes, the ICA refers to disputes over an "amount billed." Armstrong Ex. 8 at § 9.3. As a further example, Verizon described as a "simple billing dispute" subject to resolution under the ICA one that questions "the validity and accuracy of Core's bills pursuant to the Parties' contracts." *Core/Verizon Material Question Order*, slip opinion at 11. Fundamentally changing the factual and legal foundation that formed the basis for the parties' agreement in the first place is not a "simple billing dispute" of an "amount billed."

waived disputes or rights to refunds, clearly indicating that disputed amounts should be paid subject to refund. The language upon which Verizon relies, however, also refers to Section 14 of the ICA, Dispute Resolution, which in turn requires a party to follow legal remedies, including renegotiation or regulatory proceedings. As was the case in *Core/Verizon*, Verizon claims it may exert self-help because the ICA does not prohibit it. As was also the case in *Core/Verizon*, this view should be rejected.

Verizon points to Section 2.5.6 of the tariff that excuses the imposition of late payment charges on unpaid disputed amounts. However, multiple provisions of the tariff require payment of amounts in full subject to the complaint process.²²⁸ The tariff clearly does not excuse payment of amounts under dispute; it merely excuses the imposition of late payment charges if amounts are in dispute.

Self-help significantly erodes not just individual parties' confidence in their established contractual relations, but also this Commission's authority over regulated entities, services, and tariffs. If not reversed, Verizon's exercise of self-help will validate an economic and market hierarchy in which Pennsylvania's largest (and the nation's second largest) ILEC, its substantial affiliated toll carrier, and its business dominant CLEC,²²⁹ the powerful and resource-rich Verizon

²²⁸ See, e.g., § 2.5.2 ("Unless otherwise specified herein, bills are due and payable upon receipt."); § 2.5.2(E) ("Amounts not paid within 30 days after the date of invoice will be considered past due."); § 2.5.2(F) ("If the Customer and the Company are unable to resolve the dispute to their mutual satisfaction, the Customer may file a complaint with the Pennsylvania Public Utility Commission in accordance with the Commission's rules of procedures."); § 2.5.4(A) ("Upon nonpayment of any amounts owing to the Company, the Company may, by giving requisite prior written notice to the Customer discontinue or suspend service without incurring any liability."); and § 2.5.4(H)(1)(d) ("The Company may discontinue service pursuant to this subsection 2.5.4(H)(1)(a-f) if: (d) the Customer has been given written notice by the Company of any past due amount (which remains unpaid in whole or in part) ... ; or ... (f) the Customer uses, or attempts to use, service with the intent to avoid the payment, either in whole or in part, of the tariffed charges for the service by: (ii) using tricks, schemes, fake or invalid numbers, ... or (v) any other fraudulent means or devices[.]").

²²⁹ Unlike Verizon's CLEC that largely serves enterprise customers, Armstrong testified that its customer base is about 94% residential, and that even the business customers it serves are primarily very small, with on average fewer than 3 access lines each. NT at 259.

entities at play here, may lawlessly exert power over and financially weaken smaller entities, those that seek to compete with Verizon.

It is up to *this Commission, not Verizon*, to resolve this regulatory dispute. Verizon's action to *unilaterally* reduce, by 87%, its terminating compensation to Armstrong must be decisively rejected. The Commission cannot allow powerful competitors to do as they please in the competitive marketplace and face consequences only if injured parties seek redress before the applicable regulatory bodies. Without penalties, a decision in Armstrong's favor simply requires Verizon to pay what it should have paid all along. If penalties are imposed, then a disincentive to unlawful behavior is created.

As a deterrent to such unlawful self-help in the future, the Commission should impose: (1) A penalty on Verizon under Section 3301 of the Code;²³⁰ (2) Collection of attorneys' fees and other costs as provided in the ICAs and Armstrong's tariff;²³¹ and (3) Interest and/or late payment charges as provided in the Verizon ICAs and tariff.²³²

In consideration of the *Rosi* factors, as well as the fact that Verizon has become a recidivist non-payment self-helper, and Verizon's unrepentant disregard of this Commission's

²³⁰ The Commission's seminal case on the establishment of relevant factors for consideration in calculation and assessment of penalties is *Rosi v. Bell Atlantic PA, Inc. et al.*, 94 Pa.P.U.C. 103 (2000) ("*Rosi*"). In *Kaufman v. Verizon Pennsylvania, Inc.*, 103 Pa.P.U.C. 529 (2008) ("*Kaufman*"), the Commission applied these standards, as subsequently set forth in the policy statement at 52 Pa. Code § 69.1201, in determining a penalty against Verizon for service deficiencies. Factors substantially at play in this proceeding are the seriousness of Verizon's conduct in asserting self-help, its serious impact on Armstrong which compelled Armstrong to undertake the substantial time and expense of litigation to force Verizon's compliance with prior Commission determinations and orders, the intentional nature of Verizon's conduct, Verizon's lack of effort to remediate its behavior, the need for this Commission to deter future exercise of self-help by Verizon and other carriers. This Commission has acknowledged that "[p]enalties are imposed by the Commission, in part, in order to discourage utilities from committing similar violations in the future, and are meant to protect the public at large." *Id.* See also *Smolsky v. Global Tel*Link Corp.*, Docket No. C-20078119 (Order entered January 15, 2009), slip op. at 5 (imposing "serious penalties" upon a company that litigated in bad faith in part by "resort[ing] to self-help" by unilaterally redacting discovery without seeking a protective order under the Commission's regulations in order "to deter future violations").

²³¹ Armstrong Ex. 8, Glossary at § 2.17; Armstrong's State Access Tariff at Original Page 2-23, Rule 2.5.4(J) ("In the event the Company incurs fees or expenses, including attorney's fees, in collecting, or attempting to collect, any charges owed the Company, the Customer will be liable to the Company for the payment of all such fees and expenses reasonably incurred.").

²³² Armstrong Ex. 8, §§ 2.17 and 9.4; Armstrong State Access Tariff (Verizon Ex. 5) §§ 2.5.4(J), 2.5(F), 2.5.6(A).

Palmerton Opinion, Armstrong urges the Commission to impose a fine of \$1,000/day for each day that Verizon has exercised self-help and unilaterally ignored tariffed and contract rates in favor of a self-effectuated \$0.0007 rate. This fine should be imposed from August 27, 2010 until the date Verizon pays Armstrong all that is owed and begins complying with the rules in effective relative to the Verizon ICAs and Armstrong's switched access services.

D. Both Parties Use Least Cost Routing, Which Verizon Concedes is Not Arbitrage

1. Both Parties Participate in the LCR Market For Indirect Interconnection

Armstrong, when it is the originating carrier, delivers its traffic to Verizon, as the terminating carrier, both directly and indirectly. Armstrong directly delivers all local traffic (and some intraLATA toll traffic) to Verizon, "because it has the existing network (local trunks and some toll trunks) to do so."²³³ On the other hand, "[m]ost of Armstrong's toll traffic is delivered by Armstrong to a third party wholesale IXC, who is then responsible for ensuring delivery to Verizon. Armstrong is not physically interconnected with Verizon in most areas of the state for toll calling and, therefore, physically relies upon wholesale IXCs for indirect call delivery."²³⁴ The volumes are about 45/55 (direct/indirect) on average and vary over time.²³⁵

As Armstrong's witnesses described: "[T]he vast majority of carriers in the industry, including Verizon, use third party carriers to deliver traffic" to the terminating carrier.²³⁶ The reasons are straight forward:

The nation's communications network has grown too vast and complex for any one carrier to be connected to all other carriers. Carriers regularly rely upon the networks and services of other carriers to overcome their network shortcomings.

²³³ Armstrong Rebuttal Testimony at 42.

²³⁴ Armstrong Rebuttal Testimony at 42.

²³⁵ Armstrong Rebuttal Testimony at 50.

²³⁶ Armstrong Rebuttal Testimony at 42.

The degree to which an originating LEC hands off traffic to a third party IXC for ultimate delivery is based, in large measure, on the size of the originating carrier's network. A very large carrier like Verizon with a huge network, which includes all of the state's tandems ("super switches") through which almost all carriers interconnect in Pennsylvania, will deliver much of its own traffic itself. Smaller carriers, like Armstrong, routinely hand off calls to third parties who have larger networks, so that those calls can reach their ultimate destination in areas where Armstrong has no network. Most, if not all, of the wholesale CLECs serving cable companies follow this same model.²³⁷

Interexchange carriers (including those used by Armstrong and Verizon) employ least cost routing ("LCR") techniques to direct traffic choosing various routes and underlying carriers depending upon various time-of-day, volume and other applicable discounts.²³⁸ LCR techniques may result in more than one carrier being involved in the carriage of the call. In these circumstances, the terminating carrier (e.g., Verizon) in this instance, would be handed a call by a carrier other than the one to whom the originating carrier (e.g., Armstrong) initially delivered it. The originating carrier does not control whether the toll provider with whom it contracts delivers the traffic to the terminating carrier or hands it off to another carrier for delivery. Nor does the terminating carrier know the identity of the carriers involved in the chain of delivery, except the final delivering carrier.²³⁹

2. Both Armstrong and Verizon Do Business With Reputable Carriers and Do Not Hand Off to Bad Actors

As to this indirect traffic, Armstrong hands off its traffic to **(Begin Proprietary)**

²³⁷ Armstrong Rebuttal Testimony at 40-41. According to Verizon's traffic studies, the mix of Armstrong delivered traffic is about 45/55 (direct/indirect) on average and varies over time. In the original one week traffic study (week of August 13-21, 2010), Armstrong directly delivered 38% of the total traffic in the study directly to Verizon, with the remaining 62% being delivered by IXCs. A second study, the results of which were presented in Verizon's testimony, was performed for the period July 1-31, 2011. During that period, 46% of all Armstrong-originated traffic bound for Verizon was delivered to Verizon directly by Armstrong. Armstrong Rebuttal Testimony at 50. As the Armstrong witnesses states: "Again, we believe that these results are in line with what we would expect from any other carrier who attempts to use reputable carriers to terminate its traffic." Armstrong Rebuttal Testimony at 50.

²³⁸ Armstrong Rebuttal Testimony at 44.

²³⁹ Armstrong Exhibit 4, Verizon Answer to Armstrong Interrogatories Set I – 22 and 34.

(End Proprietary).²⁴⁰ The choice of which wholesale IXC to use “is based upon LCR principals, as well as quality and reliability.”²⁴¹ As the Armstrong witnesses explained: “Such carriers are a natural fit for Armstrong to entrust call delivery... The simple fact is that Armstrong does business with reputable, certificated carriers that provide cost effective service and who are expected to run their own business competently and legally.”²⁴²

For example **(Begin Proprietary)**

(End Proprietary).

(End Proprietary). Its services have won numerous awards and have been recognized in important categories such as network performance, quality and value.

*Verizon itself employs intermediate carriers to deliver its originated traffic,*²⁴³ some of the same carriers with whom Armstrong also does business. Verizon hands of its originated traffic to **(Begin Proprietary)** **(End Proprietary)**, and “two other carriers whose agreements prohibit their identification.”²⁴⁴

In testimony, Verizon presented the results two studies of Armstrong-originated traffic that is delivered to Verizon: (a) By Armstrong itself; and (b) By wholesale IXCs during two limited study periods.²⁴⁵ From this data, Verizon then proceeds to unfairly characterize a few of

²⁴⁰ Armstrong Rebuttal Testimony at 43.

²⁴¹ Armstrong Rebuttal Testimony at 42.

²⁴² Armstrong Rebuttal Testimony at 43.

²⁴³ Armstrong Exhibit 6, Verizon Answer to Armstrong Request For Admission No. 81 (Answer: “Verizon admits that it has agreements with some carriers to deliver its originating traffic for termination, as described in response to Armstrong I-40.”).

²⁴⁴ Armstrong Rebuttal Testimony at 43 referencing Armstrong Exhibit 4, Verizon Answer to Armstrong Interrogatories Set I-40.

²⁴⁵ One week in August 2010 and the month of July 2011 the results of which are described at Verizon Direct Testimony, p. 33.

the IXCs as being “widely-known-not-to pay.”²⁴⁶ Verizon attempts to imply that, therefore, Armstrong has done something wrong; that Armstrong uses non-(or low) paying carriers to try to avoid Verizon's access charges, while insisting that Verizon pay its own.²⁴⁷ There are numerous flaws in attempting to draw such conclusions from any traffic study.

First, Verizon admits that the traffic studies it performed do not identify the carriers with whom Armstrong does business.²⁴⁸ The study simply identifies the delivering carrier, which Verizon characterizes (some of) them as being “well-known” non-payers and then implicitly seeks to consign their unpaid liabilities to Armstrong.²⁴⁹ Verizon only implies that Armstrong has assisted in the avoidance by intermediate carriers of compensation to which Verizon is otherwise entitled. Without knowing (or even asking) the identity of the interexchange carriers to whom Armstrong sends traffic²⁵⁰ and also knowing that Armstrong would not know which carriers actually deliver each of its calls, Verizon nevertheless claimed in its New Matter and

²⁴⁶ “These carriers [those delivering the traffic] are widely known in the industry not to pay tariffed switched access charges on VoIP traffic.” Verizon Direct Testimony at p. 34.

²⁴⁷ Verizon Direct Testimony at 34-35.

²⁴⁸ Armstrong Exhibit 6, Verizon Answer to Armstrong Request For Admission No. 57 (Answer: “Verizon admits that the traffic study itself does not identify the carriers to which Armstrong initially handed off the traffic destined to be terminated by Verizon, which may or may not be the same ones that delivered the traffic.”).

²⁴⁹ However, as noted subsequently, the majority of this is not unpaid, it is paid according to agreement between those carriers and Verizon at different rates. Thus, there is no unpaid liability to shift.

²⁵⁰ Armstrong Exhibit 6, Verizon Answer to Armstrong Request For Admission No. 52 (RFA 52: “Verizon, as the terminating carrier, is unable to identify the interexchange carrier(s) to whom Armstrong initially hands off Armstrong Indirect Toll Traffic.” Answer: “Verizon admits that it has received Armstrong-originated traffic from other carriers. Based on the information that is transmitted with the call, Verizon does not know if this is the carrier to which Armstrong initially handed off the traffic.”); Verizon Answer to Armstrong Request For Admission No. 61. (RFA 61: “Before refusing to pay Armstrong's August 2010 switched access bills, Verizon did not ask Armstrong to identify the interexchange carriers to whom Armstrong directly hands off Armstrong Indirect Toll Traffic.” Answer: “Subject to and without waiving the objection, admitted.”); and Verizon Answer to Armstrong Request For Admission No. 62 (RFA 62: At the time of filing its counter complaint, Verizon did not ask Armstrong to identify the interexchange carriers to whom Armstrong directly hands off Armstrong Indirect Toll Traffic.” Answer: “Subject to and without waiving the objection, admitted. However, had Armstrong accepted Verizon's request to negotiate, rather than precipitously filing a complaint with this Commission, the parties would have had the opportunity to discuss these issues.”).

elsewhere in its pleadings that Armstrong should know that Verizon is not being paid by certain carriers.²⁵¹

The proper measure is of those carriers to whom Armstrong hands off traffic, not the carrier to whom it has been handed down stream. Verizon refused to identify how much traffic in total is delivered to Verizon by the IXCs to whom Armstrong directly hands off. The Armstrong witnesses explained the shortcomings of not having this information also: “So we do not know whether Armstrong’s traffic mix is any different from any other originating carrier. We seriously doubt that what Armstrong is doing is any different from any other small to mid-sized carrier with a finite network.”²⁵²

Second, Verizon could not back up its claims of “widely-known-not-to-pay” for those IXCs to whom Armstrong passes off its traffic. When Armstrong requested Verizon to provide copies of all disputes between it and **(Begin Proprietary)** **(End Proprietary)**, Armstrong’s primary IXC and one which Verizon characterized as a “widely known” non-payer,²⁵³ Verizon objected first as to relevance (though it raised the issue) and then as to confidentiality. Verizon later provided, however, “over 150 pages of what was largely useless information, being mostly in undecipherable internal table format with unexplained codes and numbers. There are no copies of documentation exchanged, dispute letters, rejection letters, escalation e-mails or any other correspondence typically found between the parties to a dispute

²⁵¹ See Verizon New Matter at ¶ 30 (“Armstrong ... routes traffic in such a way to avoid the payment of intrastate switched access charges for the IP-originated and IP-terminated traffic that it sends to other local exchange carriers, including Verizon.”) and ¶ 33 (“Armstrong ... avoids paying switched access charges by routing its traffic to Verizon and other local exchange carriers through wholesale providers that do not pay access charges on such traffic.”).

²⁵² Armstrong Rebuttal Testimony at 49.

²⁵³ NT at 165.

such as those found at Armstrong Exhibit 2. *The only letters attached are the Verizon letters disputing the access billings of that carrier, not disputes of Verizon billings.*”²⁵⁴

Third, even were it to matter, the mix of “bad actor” delivered traffic contained in the two studies is no different than any other carrier. Less than 2-3% of Armstrong-originated traffic is delivered by the “bad actors” so named by Verizon. Armstrong’s witness affirmatively stated that “this is in line with general industry experience.”²⁵⁵ As Armstrong’s witnesses further explained:

... Verizon's study only shows that Armstrong operates like every other carrier in industry (including Verizon) when it uses IXCs to carry its out-of-network toll traffic. Indeed, because Verizon refuses to provide any comparable information with regard to how other carriers operate (or terminate on its network) its study has little, if any, value in identify Armstrong as an outlier in the industry (indeed, Armstrong is not).²⁵⁶

Moreover, “Verizon has not studied any other originating carrier’s traffic (including cable company-originated) and, therefore, there is no basis to claim that Armstrong’s traffic routing is any different than any other cable company or ILEC.”²⁵⁷

Clearly, there are some “bad actors” among the LCR carriers. As the Armstrong witnesses explained: “There is a class of carriers that misrepresent the nature of their traffic and engage in arbitrage. We do not do business with them and do not believe that Verizon does either. These include **(Begin Proprietary)** **(End Proprietary)**.”²⁵⁸ The Armstrong witnesses conceded that some of its traffic could be delivered by one of these bad actors to Verizon.²⁵⁹

²⁵⁴ Armstrong Rebuttal Testimony at 55 (emphasis added).

²⁵⁵ Armstrong Rebuttal Testimony at 49.

²⁵⁶ Armstrong Rebuttal Testimony at 48.

²⁵⁷ Armstrong Rebuttal Testimony at 48.

²⁵⁸ Armstrong Rebuttal Testimony at 44.

²⁵⁹ Verizon’s traffic studies showed that less than 3% was from the so called “bad actors” in the first study and less than 2.0% in the second study. Armstrong Rebuttal Testimony at 50.

All wholesale IXCs (including those used by Armstrong and Verizon) employ least cost routing techniques to direct traffic (i.e., choosing various routes and underlying carriers depending upon various time-of-day, volume and other applicable discounts). Least cost routing techniques used by multiple carriers often result in more than one carrier being involved in the carriage of any given call. In these circumstances, the terminating carrier, Verizon, would be handed a call by a carrier other than the one to whom the originating carrier, Armstrong, initially delivered it. In this circumstance, the originating carrier (Armstrong) does not control whether the wholesale IXC with whom it contracts actually delivers the traffic or hands it off to another carrier for delivery.²⁶⁰

Fourth, the same is equally true of Verizon-originated traffic delivered to Armstrong. “Armstrong undertook a study of traffic delivered to it by carriers it believes employ undesirable business practices and found Verizon-originated traffic being delivered by at least two of the “bad actors”: **(Begin Proprietary)** **(End Proprietary).**”²⁶¹ This is consistent with the traffic study undertaken in the *Palmerton v. Global NAPs* proceeding, where a considerable portion of Palmerton’s traffic incoming from Global NAPs was Verizon-originated.²⁶² The Verizon witnesses do not dispute that there is Verizon-originated traffic in the traffic streams delivered to Armstrong by Global NAPs.²⁶³

This does not mean that Verizon does business with these bad actor carriers any more than when they deliver Armstrong-originated traffic to Verizon, as Armstrong’s witnesses explained:

First, we would note that Verizon has refused to identify two of the carriers to whom it directly transmits traffic. As such, we do not know whether or not Verizon delivers traffic directly to any of these carriers. That being said, even if Verizon does not directly transmit traffic to these carriers, Verizon-originated traffic may still be handed to these carriers indirectly, by an IXC that is chosen by a Verizon customer as the preferred interexchange carrier. It is also highly likely that one of the least cost, wholesale IXCs with whom Verizon directly contracts business, re-routed the traffic to one of these “bad actors.” Again, the originating

²⁶⁰ Armstrong Rebuttal Testimony at 44.

²⁶¹ Armstrong Rebuttal Testimony at 44-45.

²⁶² Mr. Munsell, Verizon’s witness here, studied this traffic and affirmed that the calls did originate from Verizon ILEC customers Armstrong Rebuttal Testimony at 45.

²⁶³ NT at 162 (“I don’t dispute that.”).

LEC, whether it be Armstrong or Verizon, has no way of knowing to whom the call is handed off once it leaves their network.²⁶⁴

On cross-examination, the Verizon witnesses conceded that *neither Armstrong nor Verizon* does business with any of the “bad actors.”²⁶⁵ As with Armstrong, Verizon wouldn’t know how Global NAPs became involved in the delivery of its calls either.²⁶⁶

Finally, the payment habits of the LCR IXCs do not define the payment obligations of the industry. Verizon is not refusing to pay any other LEC’s access bills because their traffic is found in the stream delivered by non-paying carriers.²⁶⁷ “Our conclusion is that Verizon’s traffic analysis does nothing to support its claim that Armstrong attempts to avoid Verizon access charges on traffic originated by its end users,”²⁶⁸ the Armstrong witnesses explained.

3. The Originating Carrier is Not Liable for Non-Payment by the Delivering IXC

Verizon claims that Armstrong, by simply participating in the indirect LCR delivery market, is engaged in a conspiracy to deny it access charges (i.e., arbitrage),²⁶⁹ because *some* of Armstrong’s traffic, a *de minimus* amount, is delivered by some bad IXC actors. This blame shifting argument fails as a matter of law. “It is industry protocol, and certainly the case per Armstrong’s approved tariff, that the IXC terminating the call to the terminating LEC is

²⁶⁴ Armstrong Rebuttal Testimony at 45.

²⁶⁵ NT at 160-161.

²⁶⁶ NT at 162-163 (“Q. Well, how did it get in the traffic stream? You said you don’t dispute that there was Verizon originated calls in the traffic stream. How did it get in there? A. (Munsell) That I can’t say. Q. I’m sorry? A. (Munsell) I cannot tell you how it got there. If we do not deliver it to GNAPS, I would have no way to know how it got there. Q. It’s not that you won’t. You can’t. You don’t know how. There’s no way to do that; correct? A. (Munsell) There’s nothing in the signaling that would tell you the different carriers involved in the different legs of the call.”).

²⁶⁷ Armstrong Rebuttal Testimony at 49 referencing Armstrong Exhibit 6, Verizon Answer to Armstrong Request For Admission No. 68.

²⁶⁸ Armstrong Rebuttal Testimony at 49.

²⁶⁹ Verizon New Matter Complaint, Count II.

responsible for paying termination charges.”²⁷⁰ Verizon’s witness expressly agreed with this, at least where Verizon is the originator:

Q. Does Verizon in your opinion have any obligation to be sure that none of [its] originated traffic gets into Global NAPs' hands because it won't pay the terminating carrier?

A. (Munsell) I don't believe Verizon has the obligation to make sure that doesn't happen. Verizon has taken I think appropriate steps to make sure that we don't directly send any traffic to GNAPs. Absent that, I don't think we can be the telephone police to see that it never ends up there anyway.²⁷¹

Both Armstrong and Verizon agree that liability for payment of the terminating carriers' access rates is that of the delivering carrier, not the originating carrier.²⁷² Verizon has expressly conceded that Armstrong does not owe Verizon for any IXC underpayment on its traffic. Verizon has never billed Armstrong for any amounts unpaid by third party delivering carriers²⁷³ or otherwise attempted in any way to collect from Armstrong.²⁷⁴ Verizon has never sought to collect from any originating carrier access charges not paid by the third party delivering carrier,²⁷⁵ including Armstrong.²⁷⁶ Nor has Verizon, as an originating LEC, ever been presented with such a bill.²⁷⁷ Verizon has no idea of the amounts of access charges either paid or unpaid on Armstrong-originated traffic²⁷⁸ and has refused to undertake such a calculation claiming that

²⁷⁰ Armstrong Rebuttal Testimony at 46.

²⁷¹ NT at 163-164.

²⁷² Armstrong Exhibit 4, Verizon Answer to Armstrong Interrogatories Set I – 45. The interrogatory asks “State whether Verizon asserts that Armstrong is legally liable for access bills not paid by an intermediate carrier delivering Armstrong-originated traffic.” Verizon’s response is: “No, Verizon is not making that assertion in this proceeding.”; *see also*, Armstrong Exhibit 6, Verizon Answer to Armstrong Request For Admission No. 79 (RFP 79: “Verizon does not assert that Armstrong is legally liable for switched access billings not paid by interexchange carriers delivering Armstrong Indirect Toll Traffic.” Answer: “Subject to and without waiving the objection, Verizon is not making that assertion in this case.”).

²⁷³ Armstrong Exhibit 6, Verizon Answer to Armstrong Request For Admission No. 77.

²⁷⁴ Armstrong Exhibit 4, Verizon Answer to Armstrong Interrogatories Set I - 37.

²⁷⁵ Armstrong Exhibit 4, Verizon Answer to Armstrong Interrogatories Set I - 41.

²⁷⁶ NT at 161.

²⁷⁷ Armstrong Exhibit 4, Verizon Answer to Armstrong Interrogatories Set I - 44.

²⁷⁸ Armstrong Exhibit 4, Verizon Answer to Armstrong Interrogatories Set I - 16 and 17.

this would be “unduly burdensome,”²⁷⁹ even though Verizon believes that these amounts are material to its dispute with Armstrong.

When asked about its right to collect compensation from the carriers identified in the traffic study as delivering Armstrong-originated traffic, Verizon divided them into two classes – those that have agreements and those that do not. Generally, Verizon states that for those carriers that have “no agreement with Verizon ... Verizon follows normal dispute resolution and collection activity.”²⁸⁰ No documents were provided by Verizon documenting its collection efforts despite a request to provide “full and complete copies of any and all documents related thereto.” In a supplemental answer, Verizon identifies two carriers as disputing and not paying (one of which is Global NAPs), neither of whom is doing business with Armstrong.²⁸¹ Certainly, Verizon knows how to sue Global NAPs for collection, although it has apparently chosen not to do so in Pennsylvania.²⁸²

In fact, Armstrong is not aware of Verizon having brought any access compensation enforcement actions before the Commission. As the Iowa Utilities Board recently observed in rejecting a similar argument by Sprint, the lack of “complaints from other carriers objecting to

²⁷⁹ *Id.*

²⁸⁰ Armstrong Exhibit 4, Verizon Answer to Armstrong Interrogatories Set I – 38; and Armstrong Exhibit 6, Verizon Supplemental Answer (by S. Paiva Letter dated April 14, 2010) to Armstrong Request For Admission No. 56 (Answer: “The carriers identified in the traffic study that dispute Verizon’s switched access bills are identified in Verizon’s supplemental response to I-18 (those with pay and dispute agreements) and I-38 (those that otherwise do not pay).”).

²⁸¹ Armstrong Exhibit 4, Verizon Answer to Armstrong Interrogatories Set I – 38; Armstrong Exhibit 5, Armstrong Answer to Verizon Interrogatory Set I-6; Armstrong Exhibit 7, Armstrong Answer to Verizon Request For Admission Nos. 9, 10, 12 and 13 (Armstrong “denied” that it hands any traffic off to Global NAPs South, Inc., CommPartners, LLC, Sprint Communications Company L.P., InfoTelecom, LLC or a company known to be affiliated with them.); and Armstrong Exhibit 7, Armstrong Answer to Verizon Request For Admission Nos. 6, 8 and 11 (Armstrong “admitted” that it hands off traffic off to Level 3 Communications, LLC, XO Communications Services, Inc, AT&T Communications of Pennsylvania, LLC or a company known to be affiliated with them.).

²⁸² Global NAPs is currently in receivership to collect Verizon New England debts. *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91 (2nd Cir. 2006); *Global NAPs, Inc. v. Verizon New England*, Civil Action Nos. 02-12489-RWZ, 05-10079-RWZ, Not reported in F.Supp.2d (D.Mass. 2006); Additional actions between Verizon and Global NAPs include *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. 2006); and *Verizon New York, Inc. v. Global NAPs, Inc.*, 463 F.Supp.2d 330 (E.D.N.Y. 2006).

payment of intrastate access charges on VoIP traffic or seeking payment of unpaid charges on that traffic, as one might expect if large amounts of access services are not being paid for” lead to the conclusion that the claim of non-payment when made by Sprint could not be supported.²⁸³

4. In Any Event Verizon is Paid What it Bargained for on at Least 95% of Armstrong-Originated Traffic

Significantly, for the majority of the Armstrong-originated traffic in the traffic studies, Verizon concedes that it has agreements with the delivering IXCs.²⁸⁴ 95% or more of Armstrong-originated traffic delivered to Verizon is subject to pre-existing written agreements.²⁸⁵ Thus, “[w]here Verizon claims low compensation rates, Verizon has actually contracted with those carriers at those rates. In other words, to the extent that Verizon does not receive full access charges, it is because Verizon has voluntarily agreed to something different (presumably in return for other consideration of some other type).”²⁸⁶

There is no question that Armstrong consistently pays (and continues to do so) on traffic that it directly delivers, representing 38% and 46% of total deliveries in the first and second studies respectively.²⁸⁷

As to indirect deliveries, the third party carrier delivering the most sizeable portion of Armstrong-originated traffic (41% of the total in the original study) is certainly reputable and no “bad actor.”²⁸⁸ **(Begin Proprietary)**

²⁸³ *Sprint v. Iowa Telecom Order* at 36-37.

²⁸⁴ Armstrong Exhibit 4, Verizon Answer to Armstrong Interrogatories Set I – 38 (“For those carriers that have entered into an agreement with Verizon for a process to pay and dispute for traffic identified as VoIP, Verizon bills switched access rates and the customer remits payment at the rate agreed to in the agreement for all minutes of use identified as VoIP; the difference between what was billed and what was paid is held as disputed and is not subject to collection activity.”).

²⁸⁵ Armstrong Exhibit 4, Verizon Answer to Armstrong Interrogatories Set I-38.

²⁸⁶ Armstrong Rebuttal Testimony at 52.

²⁸⁷ Armstrong Rebuttal Testimony at 50.

²⁸⁸ Armstrong Rebuttal Testimony at 52 (referencing Armstrong Exhibit 4, Verizon Answer to Armstrong Interrogatories Set I - 32).

²⁹⁰ (End Proprietary).

With respect to another carrier that Verizon subsequently sought to put in the “widely known” category, (Begin Proprietary)

,,291

²⁹² (End Proprietary)

Although Verizon did not seek to malign any other IXC, with (Begin Proprietary)

²⁸⁹ Armstrong Exhibit 4, Verizon Answer to Armstrong Interrogatories Set I - 18.

²⁹⁰ Armstrong Exhibit 4, Verizon Answer to Armstrong Interrogatories Set I -- 18; ICA at Attachment A (Definitions). “Because the (Begin Proprietary)

” (End

Proprietary) Armstrong Rebuttal Testimony at 53.

²⁹¹ Armstrong Rebuttal Testimony at 53, citing Carrier and Verizon North ICA at section 7.2.2. Expressly “provided that such rates shall not exceed Verizon’s tariffed interstate terminating switched access rates (as such rates may be in effect or modified from time to time)”.

²⁹² Carrier and Verizon ICAs at section 7.8.

(End Proprietary).

Verizon makes no claim that any of the carriers with whom Armstrong does business are violating these agreements. The natural effect of Verizon's offering of pricing discounts to selected carriers has had the natural effect of attracting customers to those IXCs, as Mr. Munsell, a Verizon witness, conceded:

Q. ... is it surprising to Verizon that Level 3 would pass along some of these savings to its carrier customers?

A. (Munsell) I'm not surprised.

Q. is it surprising that **(Begin Proprietary)** **(End Proprietary)** ability to now publish lower delivery [rates] for Verizon destined traffic would attract customers like Armstrong to do business with them?

A. (Munsell) No, that doesn't surprise me.²⁹⁴

In summary, there is no basis for Verizon to complain about the wholesale IXCs to whom Armstrong routes its calls. The entire premise of "widely-known-not-to-pay" is a fiction and basic misrepresentation of the marketplace generally, as well as Verizon's experience specifically.

5. Verizon Has Admitted That its Arbitrage Claims Against Armstrong are Inaccurate and Designed Simply to Create Bargaining Leverage

Using least cost routing, Verizon's witnesses finally agreed upon cross-examination, is not an "immoral or an economically irrational thing, it's a perfectly rational thing for any provider to do..."²⁹⁵ They further conceded that, when Verizon sends traffic through its own

²⁹³ Armstrong Exhibit 4, Verizon Answer to Armstrong Interrogatories Set I-18.

²⁹⁴ NT at 185-186.

²⁹⁵ NT at 178.

“widely-known-not-to-pay” carrier, it too engages in arbitrage “[i]n the technical sense of the term.”²⁹⁶

The Verizon witnesses agree that Verizon is entitled to engage in an industry pay-back. Because Verizon has voluntarily negotiated lower rates (and ostensibly received benefits for doing so), it is now seeking to force the same thing on the entire industry, one company at a time. As its witnesses explained it: “Verizon is simply “trying to react to that industry development [of nonpayment of VoIP] by protecting ourselves in response, I think that what we we’re trying to do is put everybody on a similar footing where we can negotiate commercial rates and pending that we would pay a reciprocal rate.”²⁹⁷

As with Verizon’s claim to the unapproved \$.0007, this is mere opportunism. Verizon has refused to compensate Armstrong according to its ICAs and tariffs and is searching for a justification. The Commission should not be fooled, Verizon’s efforts in this regard are NOT aimed at moving the industry toward an inter-carrier mechanisms that pursues some high minded public-policy objective. Its objective is to reduce its expenses.

Verizon has not offered to reciprocate to all carriers that receive traffic through its own “widely-known-not-to-pay” IXC and, therefore, admits that, technically, it is also engaging in arbitrage.²⁹⁸ Verizon has focused its \$.0007 self-help measures only upon carriers that it perceives as serving a subset of its primary competitors, i.e., carriers offering services similar to the flagship FiOS Digital Voice services.²⁹⁹ In short, it is clear that arbitrage has nothing to do

²⁹⁶ NT at 180.

²⁹⁷ NT at 179.

²⁹⁸ Q. Unless Verizon offered every LEC that receives its toll traffic (from the widely known not to pay carrier with whom Verizon does business) a price break when delivering their own traffic to Verizon an amount equal to which that carrier pays that LEC when receiving Verizon traffic “then Verizon would also be engaging in arbitrage, correct? A. (Vasington) The net result would be arbitrage, yes.” NT at 182.

²⁹⁹ Verizon has focused its payment objections upon carriers that “we believe to be IP traffic that exceeds a certain threshold dollar figure, we have disputed the payment of access charges.” NT at 146.

with it, and that is why Verizon is unable to make a convincing demonstration against Armstrong.

Verizon's self-help approach makes a growing problem worse -- it does not help to solve it. Non-payment problems are manifest in the industry, something which the FCC has agreed to remedy in its most recent order. While engaging generic change, Verizon has also become a very large, one-company wrecking crew, forcing rate concessions out of frustration with the regulatory process and to obtain expense reductions to which it deems itself entitled. This whole line of accusation is misdirected at Armstrong.

In conclusion, there is no basis in law to hold the originating carrier liable for calls delivered by a third party interexchange carrier. Verizon's attempt to offset, by amounts it has not calculated, the charges it lawfully owes to Armstrong by receivables for which Armstrong has no liability, is utterly devoid of merit and has no basis in law. Armstrong continues to pay the Verizon ICA reciprocal compensation and Verizon access charges for its directly delivered traffic. On indirect traffic, Armstrong employs reputable carriers that abide by the rules and pay according to terms that Verizon voluntarily agreed to, passing some of the savings on to Armstrong. Verizon also delivers its traffic via third party IXCs and, when it does, selects carriers and operates in the exact same way as Armstrong. This entire Verizon argument concluded the Armstrong witnesses in an understated fashion "strikes us as substantially misguided."³⁰⁰

³⁰⁰ Armstrong Rebuttal Testimony at 55.

E. Armstrong's Tariffed Access Rates Already Mirror Those of the Underlying ILECs

In its Answer and New Matter, Verizon claimed that Armstrong charged intrastate access rates that were “higher than those charged by the corresponding incumbent,”³⁰¹ violating Section 3017(c) of the Code. Verizon expanded that claim in testimony, asserting that Armstrong violates the ICAs because an even more stringent provision that would have Armstrong charge Verizon’s access rates *outside* of Verizon’s territory.³⁰² In essence, Verizon contends Armstrong agreed to Verizon’s access rate levels no matter where Armstrong is serving. This is incorrect. Armstrong mirrors the rates of the underlying ILEC where Armstrong serves and never agreed to a preferential uniform state-wide rate for Verizon.

Verizon claims that Armstrong owes it in excess of \$4.5 million dollars. Its principal basis for this significant claim is that Armstrong’s access rates are higher than what the underlying ILECs charged Verizon on an average per minute basis. Not only is this comparison patently wrong (as demonstrated by Mr. Cipoletti),³⁰³ the comparison is derived from data extracted from the two MCI companies, entities that represent less than 50% of the traffic sent to Armstrong for termination. Based on Verizon’s wholly inadequate and completely unsupported analysis, the Commission should find that Verizon must pay Armstrong’s access billings as issued, regardless of strength or weakness of Armstrong’s legal arguments set forth below. Simply put, Verizon has not submitted any credible evidence to support its claim for refund, while Armstrong’s invoices, as submitted to Verizon, are the only measure by which the amount of access payments due Armstrong can be computed.

³⁰¹ Verizon Answer and New Matter, Counterclaim 3.

³⁰² Verizon Direct Testimony at 9, 30-31.

³⁰³ See Armstrong Surrebuttal Exhibit 1.

As noted above, Verizon's analysis of the alleged overcharges centers on Verizon reviewing invoices it has received from the underlying ILECs and then converting the charges presented on such invoices to a composite per minute average cost.³⁰⁴ The average of billed charges is not the statutory standard. Section 3017(c) of the Code provides that "[n]o telecommunications carrier providing competitive local exchange telecommunications service may charge *access rates* higher than those charged by the incumbent local exchange telecommunications company in the same service territory unless such carrier can demonstrate that the higher access rates are cost justified."³⁰⁵

Section 3017(c) neither sets *composite per minute average billed charges* as the standard, nor imposes upon Armstrong the obligation to develop and mirror an average cost per minute. The reason for this is clear, not all rates are prescribed on a per minute basis, variables in transport distance and other factors will result in different, averaged rates, even when two carriers may charge exactly the same per element rates. Those differences are legitimate because they capture differences in the configuration and cost of the access arrangement. The tariff rates of the underlying ILECs are publicly available and have been replicated by Armstrong in its own tariff. They provide a practical basis from which Armstrong can develop (mirror or not exceed) those ILECs' rates as required in the statute. Verizon has not proven that Armstrong's rates, which "exactly mirror" the corresponding ILECs' rates,³⁰⁶ violate that provision.

Further, Verizon's interpretation of the ICA would preempt not just the statute, but also Armstrong's state access tariff, the same tariff whose rates are specifically incorporated within

³⁰⁴ Verizon Direct Testimony at 40-42.

³⁰⁵ 66 Pa. C.S. § 3017(c) (emphasis added).

³⁰⁶ Armstrong Rebuttal Testimony at 57.

the ICA.³⁰⁷ If the intent of Verizon's ICA language was to bypass the statute and tariff, it should have been written more clearly.³⁰⁸

Further, as Armstrong demonstrated, an "average cost per minute" is merely the mathematical result of a calculation that takes the sum of all charges and divides it by the total minutes of use. While the average may be developed from bills that use the actual tariffed rates, the tariffed rates are not synonymous with Verizon's computed average costs per minute.

The impossibility of calculating an accurate average was demonstrated by Verizon's own analysis. Verizon's underlying support did not use actual rates, but rather used inaccurate proxies. Verizon only analyzed one month's data for only two of the four Verizon companies (the MCI entities) to calculate the ILECs' average per minute cost, but extrapolated that to apply backwards to all 48 months used by Verizon to calculate a refund for all Verizon entities.³⁰⁹ For Armstrong, however, it changed this input and calculated a cost for each month studied, but again only based upon bills tendered to the MCI entities.³¹⁰ The values contained in Verizon's chart of average per minute costs of these ILECs³¹¹ did not correlate to the 48 month average Verizon identified, however, and Armstrong was unable to replicate it.³¹² These exercises in frustration make clear why mirroring on an "average cost per minute" framework could never work as a practical matter.

Average cost calculated by dividing the total invoice amount by total access minutes will change and fluctuate by customer and month as the inputs change and fluctuate. Further, the

³⁰⁷ Armstrong Rebuttal Testimony at 38, citing the ICA's Pricing Attachment at 1.5 in which charges in the Appendix A Pricing Attachment are "automatically superseded by any applicable Tariff Charges."

³⁰⁸ "Under the rule of *contra proferentem*, any ambiguous language in a contract is construed against the drafter and in favor of the other party if the latter's interpretation is reasonable." *Core/Verizon*, 98 Pa.P.U.C. 272, at *16 (citing Restatement (Second) of Contracts § 206).

³⁰⁹ NT at 197-202 and 209.

³¹⁰ Armstrong Rebuttal Testimony at 58-59.

³¹¹ Verizon Direct Testimony at 42.

³¹² Armstrong Rebuttal Testimony at 59.

inputs will vary from ILEC to ILEC, depending on each ILEC's network configuration.³¹³ For example, in Verizon's analysis of its monthly bill from Armstrong, the average cost of termination in Consolidated's territory fluctuated by 4.3¢, or almost 50%.³¹⁴ Verizon's access costs paid to the terminating ILECs will behave the same way; swinging monthly. The use of a single month for the underlying ILECs ignores this fluctuation and, therefore, is not a true average. Thus, Verizon's calculation of the incumbent's average charges is not only contrary to the statute and other provisions of the ICA, but also unworkable and inaccurate.

Verizon's basic methodology is flawed on a number of levels. First, by limiting its analysis to only the MCI entities, Verizon cannot then simply extrapolate the results to all of the Verizon entities.³¹⁵ Moreover, by using a 48 month average to calculate the MCI entities' costs to terminate on Armstrong, and comparing that to an arbitrary one month of the underlying RLECs, Verizon's calculations fail as a matter of accuracy, consistency and statistical significance.

However, more fundamentally, Verizon's calculations implicitly assume that all rate elements are applied equally and all factors that affect access billing are the same. This is not accurate. Interconnection arrangements, tariffs, traffic and network configurations all differ, and likewise, impact any average rate calculation compared between carriers.

Verizon's claim that Armstrong must charge Verizon's rates outside Verizon's territory is also inaccurate as evidenced in the language of the contract itself and by Verizon's own behavior. First, Verizon has never asserted this position in other cases in which it challenged the rates of CLECs operating in some of the same territories as Armstrong.³¹⁶ While Verizon twice

³¹³ Armstrong Rebuttal Testimony at 59.

³¹⁴ Armstrong Rebuttal Testimony at 59.

³¹⁵ The Verizon ILEC traffic is much greater than the Verizon MCI traffic -- by 60% (991/617). NT at 199.

³¹⁶ Armstrong Rebuttal Testimony at 37.

in the past raised that issue with Armstrong at the dispute level, it twice withdrew the dispute and paid the bills as presented.³¹⁷

Further, the ICA does not require Armstrong to charge access rates no higher than Verizon's irrespective of the territory in which the traffic is terminated (i.e., without recognition of the incumbent carrier in those territories). Rather, the ICA provides that Armstrong's charges will not exceed Verizon's charges for Verizon's *comparable services*. As the largest ILEC in Pennsylvania, Verizon's services are not comparable outside Verizon's territory, particularly in the territories of rural ILECs in which Armstrong serves.

The Verizon ILECs operate only in their own incumbent territories and do not have access rates that apply to services provided in rural ILEC territories. Armstrong's capital investment in purely rural areas is higher than it would be if Armstrong, like Verizon, were to serve predominantly (80%) urban and suburban areas.³¹⁸ While Verizon attempts to bootstrap a statewide effect by restricting Armstrong to rates no higher than Verizon's for comparable services, Armstrong's services are not geographically, economically, or in any other fashion "comparable" to Verizon's. Mirroring Verizon's state-wide rates in Armstrong's rural footprint would attribute Verizon's lower cost non-rural service territory cost characteristics to Armstrong. The Commission has already rejected this attempt by Verizon to have its own access rates set as applicable across the state in the *RLEC Access Charge Investigation* and should reject it here as well.³¹⁹

Finally, the fact that Verizon itself did not interpret the contract in that manner and did not raise the issue until September 2011, well after Verizon presented its flawed "average cost per minute" analysis, seriously undermines Verizon's own credibility on the issue. Verizon's

³¹⁷ Armstrong Rebuttal Testimony at 40.

³¹⁸ Armstrong Rebuttal Testimony at 38.

³¹⁹ Armstrong Rebuttal Testimony at 38-39.

belated attempt to raise the issue after the close of pleadings is simply an effort to raise as many issues as possible to see what gains traction. Or, as ALJ Schnierle recognized in the *Core/Verizon* case, “to manufacture an ambiguity where none exists.”³²⁰

F. Armstrong Appropriately Bills the Carrier Common Line Charge and the Tandem Switching Issue is Resolved

In its Answer and New Matter, Verizon claimed that Armstrong inappropriately charged for tandem switched transport rate elements “where Armstrong does not operate a tandem switch.”³²¹ Verizon then further expanded its dispute of Armstrong’s provision of tariff elements in testimony, asserting that Armstrong bills Verizon for a carrier common line charge (“CCL”) when, according to Verizon, Armstrong has no CCL.³²² As presented in prefiled testimony, Armstrong refuted each of Verizon’s tariff element claims as relying on incorrect interpretations of Armstrong’s tariff. Following further exploration of the tandem issues both on and off the record, Armstrong believes that while Verizon’s position on the CCL remains inaccurate, the issue of tandem switched transport charges has been resolved.

1. The Carrier Common Line Charge

Prior to filing its testimony on September 30, 2011, Verizon had never before challenged Armstrong’s inclusion of the CCL into its tariffs and bills, and has not to date filed any dispute over the charge under the terms of the ICAs or Armstrong’s tariffs.³²³ Notwithstanding the 11th hour nature of the claim, Armstrong demonstrated that Verizon’s challenge is invalid because it is based upon Verizon’s incorrect interpretation of Armstrong’s tariff.

³²⁰ *Core/Verizon*, 98 Pa.P.U.C. 272, at *19.

³²¹ Verizon Answer and New Matter, Counterclaim 4.

³²² Verizon Direct Testimony at 46.

³²³ Armstrong Rebuttal Testimony at 65.

Verizon contends that Armstrong the CLEC does not “provide” the CCL in accordance with its tariff. As Verizon stated, “[u]nder 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.”³²⁴ This, Verizon contends, means that “local services ‘provided by the Company’ . . . must be provided by Armstrong itself, not another company such as its affiliate AUI.”³²⁵ Because the traffic at issue in this dispute³²⁶ is “destined to end users served by AUI” and because “Armstrong does not provide local service to the customers for which it is charging Verizon switched access” then, in Verizon’s conclusion, “there are no ‘Company-provided common lines’ and therefore no basis for Armstrong to charge Verizon ‘for the use of End Users’ Company-provided common lines.’”³²⁷

Distilled, Verizon’s argument is that Armstrong must actually own the CCL (the “local loop,” or the facilities that connect the end user with the central office providing local switching) which in turn must serve Armstrong customers. However, neither of these interpretations is supported by the tariff or industry practice.

Armstrong’s tariff, with respect to the CCL provides as follows:

6. CARRIER COMMON LINE

6.1 General

The Company will provide Carrier Common Line Access Service to Customers in conjunction with Switched Access Service provided in Section 4 of this tariff. Carrier Common Line provides for the use of *End-users’ Company-provided common lines* by Customers for access to such End-users to furnish Intrastate Communications.³²⁸

³²⁴ Verizon Direct Testimony at 46.

³²⁵ Verizon Direct Testimony at 47.

³²⁶ Verizon incorrectly states that Armstrong has no local service customers of its own. As Armstrong demonstrated, it does. However, since Verizon is disputing the assessment of a CCL on the service provided by Armstrong to AUI, Verizon’s error – with respect to its CCL argument – is not pertinent.

³²⁷ Verizon Direct Testimony at 47.

³²⁸ Armstrong Switched Access Tariff, Section 6.1 (Verizon Ex. 5) (emphasis added).

Two terms are critical: “provided” and “End-users.” To provide something is commonly understood and required no formal definition (and none appears) in the tariff. “Provide” means to supply or make available.³²⁹ It requires no specific ownership or control. Thus Armstrong must only make the CCL available to Verizon, which it does as the wholesale CLEC serving AUI.³³⁰

“End-user” is a telecommunications term of particular significance defined in Section 1 of the tariff as follows:

End-user: Any individual, association, corporation, governmental agency or any other entity other than an Interexchange Carrier which subscribes to intrastate service provided by an Exchange Carrier.

In turn, Exchange Carrier is defined as follows:

Exchange Carrier: Any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service.³³¹

What is evident from those definitions is this: (a) an “End-user” is an entity that subscribes to intrastate service provided by *any* “Exchange Carrier,” not restricted to Armstrong as Verizon interprets the tariff; and (b) an “Exchange Carrier” is any entity that provides local exchange telephone service, again not restricted to Armstrong. AUI provides local exchange telephone service and hence, per Armstrong’s tariff, its subscribers are End-users.³³² Therefore, when Armstrong makes available to Verizon access to the common lines of those End-users, for which Armstrong itself pays its cable affiliate,³³³ Armstrong is providing a CCL service to Verizon per its tariff and is entitled to charge for that service.

³²⁹ *Merriam-Webster Collegiate Dictionary* (11th ed.), at <http://www.merriam-webster.com/dictionary/provide>.

³³⁰ Armstrong’s Diagram 4 in its Rebuttal Testimony illustrates the real facilities that Armstrong makes available to Verizon. These real facilities, access to which Verizon is paying no other party, have real costs that provide Verizon real benefits in their ability to terminate or originate traffic to/from its customers. It is extremely common in the competitive market for carriers not to own, but rather to lease loops, precisely the arrangement Armstrong has with AUI. Armstrong Rebuttal Testimony at 62-64.

³³¹ Armstrong Rebuttal Testimony at 61.

³³² Armstrong Rebuttal Testimony at 61.

³³³ Armstrong Rebuttal Testimony at 8, 63.

Verizon also challenges Armstrong's application of a CCL on policy grounds, namely, that Armstrong, as a CLEC, does not carry the same legacy burdens as ILECs and, therefore, ought not to be able to recover the same support through the CCL as do incumbents.³³⁴ As Armstrong witness Starkey testified, however, the rules reflect the policy set by both the FCC and the Commission. That policy acknowledged that it is appropriate for CLECs to be able to mirror the tariffed access rates of the ILECs with which they competed. Until those rules are changed, each carrier should be required to follow the rules.³³⁵

2. Tandem Switched Transport Rate Elements

Verizon also contends that Armstrong charges for tandem switched transport rate elements that should only apply when Armstrong uses its own tandem switch to provide switched access service.³³⁶ Since, as Verizon claims, "Armstrong does not operate a switch," and "does not own the tandem switch in the situation for which it seeks to bill these rates to Verizon," it is not authorized under its tariff to charge for tandem switched transport rate elements.³³⁷ Finally, Verizon claims that "Company" under Armstrong's tariff refers to Armstrong alone, and therefore the term "Telephone Company" also refers to Armstrong alone, and not some other carrier.³³⁸

As with the CCL, Verizon incorrectly interprets Armstrong's tariff. Nothing in Armstrong's tariff requires that Armstrong "own" or "operate" the tandem switch. Under its tariff, it is within Armstrong's sole discretion to determine which facilities will be used in providing two-way voice frequency transmission to Verizon. As Armstrong's tariff provides:

³³⁴ Verizon Direct Testimony at 7.

³³⁵ NT at 251, 275.

³³⁶ Verizon Direct Testimony at 44.

³³⁷ Verizon Direct Testimony at 45.

³³⁸ Verizon Direct Testimony at 45.

*Switched Transport is a two-way voice frequency transmission path composed of facilities determined by the Telephone Company. The two-way voice frequency transmission path permits the transport of calls in the originating direction (from the end-user end office switch to the customer designated premises) and in the terminating direction (from the customer designated premises to the end office switch), but not simultaneously. The voice frequency transmission path may be comprised of any form or configuration of plant capable of and typically used in the telecommunications industry for the transmission of voice and associated telephone signals within the frequency bandwidth of approximately 300 to 3000 Hz.*³³⁹

Since, in Armstrong's discretion, the transmission path "may be comprised of any form or configuration of plant capable of and typically used in the telecommunications industry," Armstrong need not "own" or "operate" the tandem in order to assess tandem switched transport rates. Armstrong's tariff allows it to assess tandem switched transport rates "upon customers for the use of transport from a service wire center to an end office that is switched at a Telephone Company access tandem."³⁴⁰ The terms "Company" and "Telephone Company" are used separately in the tariff and are not interchangeable. "Company" is defined to mean Armstrong. "Telephone Company," however, is not defined, and hence is not restricted to Armstrong. Under Armstrong's tariff, therefore, a "Telephone Company access tandem" is not specifically an Armstrong Tandem. Rather, like the CCL, it can be any tandem that Armstrong makes available. Armstrong may make it available in any number of ways, including but not limited to ownership or operation. In fact, Armstrong may make tandem services available through lease, which is precisely what it does. Like other carriers typically do, Armstrong uses tandem switching capacity offered by Neutral Tandem for purposes of access tandem and transit functions.³⁴¹ The tariff requires only that Armstrong provide the services, which it does. Verizon does not pay

³³⁹ Armstrong Rebuttal Testimony at 66, citing Armstrong Telecommunications, Inc., PA P.U.C. Tariff No. 5, Original Page 4-3, Section 4.2.3(A) (emphasis added).

³⁴⁰ Armstrong Rebuttal Testimony at 67.

³⁴¹ Armstrong Rebuttal Testimony at 65.

twice for the service. It pays it only once – to Armstrong – the carrier that is providing the tandem services.

This issue, however, is resolved. On examination of the issue both through cross-examination of Verizon witness Munsell and subsequent off-the-record discussions, resolution of the tandem switched transport rate issue was settled. For its part, Verizon agreed that there is no dispute over billing of the tandem switched transport rate element, leaving only the issue of the separate tandem switching element.³⁴² Armstrong, for its part, acknowledged its error in application of tandem switching access charges for intrastate, intraLATA calls, and has agreed to provide an \$80,000 credit to Verizon.³⁴³

Accordingly, as to Verizon's claims that Armstrong has misapplied its tariff by billing for elements it does not provide, it appears the only issue requiring a Commission ruling is the CCL.

³⁴² NT at 238 (There is no dispute about Armstrong's billing of the tandem transport rate element).

³⁴³ NT at 247-48.

IV. CONCLUSION

Wherefore, Armstrong requests that the Commission enter an Order:

1. Granting the Complaint filed by Armstrong;
2. Denying the New Matter Counterclaims of Verizon;
3. Directing that Verizon shall immediately pay to Armstrong all amounts outstanding that have been billed by Armstrong to Verizon for intrastate services, including both access and reciprocal compensation charges, as well as late payment charges and penalties, excluding a credit of \$80,000 to be provided by Armstrong;
4. Directing that Verizon pay Armstrong's costs of this litigation, including attorney and consulting fees;
5. Directing that Verizon pay a fine equal to \$1,000 for every day that it has refused to pay Armstrong's bills for access and/or reciprocal compensation, commencing with August 27, 2010 and ending upon Verizon's compliance with paragraph 3 above;
6. Directing that, in the future, Verizon, should it dispute bills for access and/or reciprocal compensation submitted to it by Armstrong, shall not withhold payment as part of the dispute process, but shall pay such amounts subject to refund; and
7. Marking the record at this docket closed.

Respectfully submitted,

By _____

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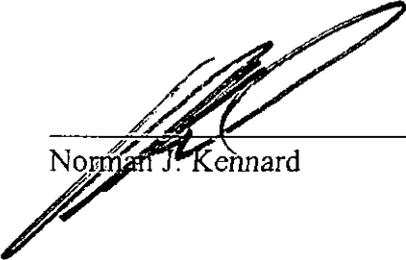
*Attorneys for
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DATED: December 6, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of December, 2011, served a true and correct copy of the foregoing upon the person below via first class and electronic mail as follows:

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Norman J. Kennard

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