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January 6, 2012

Via Electronic Filing

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:

Attached for filing with the Commission is the original Reply Brief 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

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	:	

REPLY BRIEF OF ARMSTRONG TELECOMMUNICATIONS INC.

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DATED: January 6, 2012

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I. STATEMENT OF THE CASE

Verizon's August 27, 2010 refusal to follow the mandates of the Verizon ICAs and Armstrong's access tariff was based upon its position that the Federal Communications Commission ("FCC") had implicitly removed (i.e., preempted) all jurisdiction from this Commission over Voice over Internet Protocol ("VoIP") services and that a going forward rate of $0.0007 per minute selected by Verizon was appropriate. This was clearly not the case, as extensively described in Armstrong's Main Brief and ultimately confirmed by the FCC in its recently issued Report and Order in the long-pending universal service, access, and intercarrier compensation proceeding.[1] After the filing of the parties' Main Briefs, Verizon and Armstrong reached a settlement on all issues regarding Verizon's obligations to pay for Armstrong's switched access services for the "retroactive" period (August 27, 2010 through the December 29, 2011). Disagreement regarding the appropriate rates for inter-carrier compensation between the two companies still exists, however, for traffic delivered after the effective date of the new FCC regulations.

The FCC, in its recently issued *FCC November 18th ICC/USF Order*, has created a new category of calling, which it has labeled "VoIP-PSTN traffic," and declared that all VoIP-PSTN traffic will be compensated at the interstate access rate.[2] The new regulations associated with

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[1] *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, Report And Order And Further Notice Of Proposed Rulemaking released November 18, 2011 ("*FCC November 18th ICC/USF Order*"). See e.g., ¶ 959.

[2] *FCC November 18th ICC/USF Order* at ¶ 944.

this change were published in the Federal Register on November 29, 2011,[3] and become effective on December 29, 2011. Explicitly, the *FCC November 18th ICC/USF Order* has prospective effect only.[4]

Armstrong and Verizon disagree on the impact of the *FCC November 18th ICC/USF Order* upon Armstrong's existing intrastate access tariff and the toll calls sent to Armstrong by Verizon for termination. Armstrong requests that the Commission determine that the FCC's new rule regarding "VoIP-PSTN traffic" does not convert Armstrong's existing intrastate access traffic to the interstate rate and that the intercarrier compensation due Armstrong from Verizon remains according to the intrastate access rates of the underlying ILECs serving the same geographic area.[5]

A full and complete record regarding Armstrong's network has been developed in this case and, therefore, the issue of whether calls that originate or terminate in VoIP, as the FCC has defined that term, is squarely before the Commission for decision, is ripe for resolution.

II. BURDEN OF PROOF

Armstrong maintains, for the reasons fully addressed in its Main Brief, that Verizon

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[3] 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.

[4] *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.").

[5] The new FCC rule affecting what the FCC has labeled "VoIP-PSTN Traffic" appears to be intended to become effective 30 days after release, or by December 29, 2011. Armstrong Main Brief at 47. Armstrong acknowledges that even though it may not terminate traffic via IP-compatible CPE as described later in this brief, some portion of its terminating traffic may have been originated by other LECs in IP and hence, some portion of its terminating traffic would still legitimately be considered VoIP-PSTN traffic.

carries the burden of proof on all issues.[6] On the "prospective rate" issue presented, Armstrong has an effective intrastate access tariff that it believes is not all completely and immediately converted to its interstate rates effective December 29, 2011 (or January 1, 2010). Rather, Armstrong posits that the federal "CLEC Benchmarking" Rule applies.[7] Therefore, to the extent Verizon believes a change to Armstrong's tariff is warranted , it is Verizon's burden, as the challenger to an existing rate, to demonstrate that the change is appropriate.

III. ARGUMENT

A. Summary of Argument

A finding that the *FCC November 18th ICC/USF Order* immediately applies to Armstrong's intrastate access rates requires a finding that Armstrong's traffic is "VoIP-PSTN traffic." Armstrong's Main Brief contains an extensive description of Armstrong's network, which shows, without dispute, that calls neither originate nor terminate in Internet protocol, but rather that the protocol conversion occurring on the Armstrong network is simply an intra-network change to which the customer is completely indifferent. That Armstrong's cable affiliate owns and maintains, as part of its own network, the equipment that makes the intra-networking conversion is well documented in the record of this case.

The FCC's definition of the new calling category at 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 from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible

[6] Armstrong Main Brief at 12-19.
[7] *FCC November 18th ICC/USF Order* at ¶ 801.

customer premises equipment."[8] This is not what happens on Armstrong's network and, thus, the new rule is not applicable to it.

The FCC Order narrowly specifies a service that "originates from and/or terminates to an end-user customer" in Internet protocol and "requires 'Internet protocol-compatible customer premises equipment.'" Nowhere does the FCC specify that it intends this definition to apply to any particular type of service provider (all cable companies for example). Rather, the definition describes the placement of the technology in the network and, thus, each network must be reviewed before the label can attach. The FCC Order expressly rejects any wider application of the new rule.[9] The new definition is fact specific and, as to Armstrong's network, does not apply.

What does apply to Armstrong is the "CLEC Benchmarking Rule," which, similar to its intrastate counterpart,[10] sets a CLEC's tariffed 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.[11] The FCC has stated this provision 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."[12] Thus, Armstrong will follow the underlying ILEC access rates as they transition downward, rather than adopt a flash-cut immediately to the interstate rate for all of Armstrong's traffic.

Verizon asserts in its Main Brief that, under the new FCC rules, Armstrong must *immediately* reduce all intrastate access compensation to the interstate level. Even though

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[8] *FCC November 18th ICC/USF Order*, Appendix A at 500; *November 29th Federal Register*, 76 Fed. Reg. at 73855 (emphasis added).
[9] *FCC November 18th ICC/USF Order* at ¶ 941 n.1895.
[10] 66 Pa. C.S. § 3017(c).
[11] 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.
[12] *FCC November 18th ICC/USF Order* at ¶ 807.

Verizon is aware of Armstrong's position in this proceeding that its services are not IP-originated or -terminated, Verizon nowhere explains why its interpretation is a fair reading of the FCC's new order as it relates to Armstrong access traffic. Verizon's Main Brief ignores the new definition by failing to set forth any rationale under which it claims application to Armstrong. It simply asserts, in a conclusory fashion, that the FCC order "disposes of the issues" and the Commission should "dismiss" Armstrong's complaint as to the prospective period.[13]

Armstrong disagrees. Simply asserting that the FCC's latest action provides the "needed clarity"[14] is not enough. If the intent of the FCC was to classify *all* traffic to/from Armstrong's cable voice service, or all cable company services, as "VoIP-PSTN traffic," its *November 18th ICC/USF Order* did not do so. Nor is there any indication that it intended its new traffic classification to be so broad.

Instead, the FCC set forth fact-specific definitions. Indeed, the FCC has long recognized that there are meaningful differences between service configurations that often must be addressed on a case-by-case basis (e.g., *Pulver*, *Vonage*, *AT&T IP-in-the-Middle*, *AT&T Calling Card*, *Time Warner*, etc.). Armstrong believes that the information and documentation needed to perform the required analysis of its network and the new FCC definition is squarely before the Commission in this proceeding and that the Commission should make the determination of whether Armstrong's telephony traffic is "VoIP-PSTN traffic," or simply traffic of an ordinary CLEC that happens to use modern technology in the middle of its network.

Armstrong has fully set forth its rationale, analyzing both the "originate/terminate" element of the FCC "VoIP-PSTN" definition, as well as the "customer premises equipment"

[13] Verizon Main Brief at 1.
[14] Verizon Main Brief at 1-2.

aspect, in its Main Brief.[15] On Armstrong's network, the device which converts traffic from IP to traditional TDM[16] signals, and vice versa, the Multimedia Terminal Adapter or "MTA", is owned and operated exclusively within Armstrong's network. It is not owned, controlled or otherwise accessible by the customer. Simply put, the IP-compatible device that supports Armstrong's cable voice service is not customer premise equipment ("CPE") as would be required by the FCC's new rules. As Armstrong's witnesses concisely explained: "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."[17]

Rather than allowing the Commission to consider the record evidence and interpret the application of the new FCC order, Verizon seems inclined, once again, to dispute an issue and argue that it will only pay under its own interpretation. Verizon states that it "intends to comply with" the *FCC November 18th ICC/USF Order* "by compensating Armstrong at the FCC-required rates (interstate access and reciprocal compensation, as applicable)," adding that "[t]his FCC order is binding and cannot be challenged in this forum."[18] Armstrong believes that this Commission, not Verizon, should mandate the applicability of Armstrong's tariff and define its voice service under existing law.

The nuance here is that the new "VoIP-PSTN" rule will undoubtedly have some application to Armstrong *if* the carrier on *the other end* of the call (i.e., sending traffic to Armstrong or receiving traffic from Armstrong) could be considered VoIP under the new definition (e.g., Vonage), then Armstrong would, along with all other carriers (ILECs, CLECs,

[15] Armstrong Main Brief at 49-50.
[16] Time Division Multiplexing ("TDM").
[17] Armstrong Rebuttal Testimony at 26.
[18] Verizon Main Brief at 9.

CMRS alike), charge the interstate rate. Armstrong will mirror this effect under the CLEC Benchmarking Rule. And, as the underlying ILECs' access rates move down to interstate parity and, eventually, zero (i.e., bill and keep), Armstrong will move down in tandem.[19] Verizon, however, seems poised to dispute Armstrong's access invoices once again, unless Armstrong *immediately* mirrors its interstate rates for all intrastate traffic. This is the essence of the continuing dispute.

The Commission should address and resolve this interpretational issue as it relates to Armstrong's service in this proceeding. How Armstrong originates/terminates traffic has been squarely presented and addressed in this proceeding from the beginning. As a result, both parties have had the opportunity to develop an extensive record on all relevant issues and facts. Further, the Commission possesses the state statutory authority to do so. The *FCC November 18th ICFC/USF Order* clearly contemplates such a role for the states. All necessary facts have been adduced, the parties were aware of the coming change, and had the opportunity to develop their arguments.

Neither party is "challenging"[20] the FCC's ruling. To the extent either Verizon or Armstrong have "VoIP-PSTN traffic," both parties appear to agree that the FCC's new rules would apply. However, to the extent Armstrong's traffic is not "VoIP-PSTN traffic," those rules do not apply. The extent to which Armstrong's traffic originates/terminates in IP format, and whether such origination/termination is performed by IP-compatible CPE, are clearly open issues in this case with substantial record evidence. As such, the issue should be decided upon the merits of that evidence.

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[19] Under the FCC rules, the ILECs' intrastate access rates will equal their interstate rates on July 1, 2013. This is the transition that Armstrong intends to follow.
[20] Verizon Main Brief at 9.

B. Armstrong's Traffic Is Not "VoIP-PSTN" and the Better View Is That the CLEC Benchmarking Rule Applies

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.[21] 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.*[22]

The *FCC November 18th ICFC/USF 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).[23]

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[21] 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.

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

[23] *FCC November 18th ICC/USF Order* at ¶ 940 (emphasis added).

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 or "IP-enabled services."[24]

The facts established by Armstrong on the record in this proceeding are that traffic originating and/or terminating to the customers of Armstrong's cable affiliate, AUI, using Armstrong's exchange access facilities and arrangements with AUI, are not "VoIP-PSTN traffic" as defined by the FCC. Armstrong's experts could not have been more clear about this issue. They not only explained the nuances of the Armstrong network, but provided detailed schematics identifying the components of the Armstrong network required to convert traditional analog signals into IP format (and *vice versa*), and likewise identified the specific CPE that is required of a customer to use the service (i.e., a standard, traditional inside wire, wall jacks and an analog telephone).[25]

Armstrong's witnesses made clear that AUI's customers specifically do not need ("require") IP-compatible CPE to use the AUI service because all conversions are accomplished by Armstrong equipment located, owned and operated within its network. Simply put, the facts on this record are that Armstrong traffic does not "originate and/or terminate in IP format," nor does it "require Internet protocol-compatible customer premises equipment" - thereby failing two of the three fundamental components of "VoIP-PSTN traffic" as defined by the FCC.[26]

As described by the Armstrong witnesses (and consistent with these rules),[27] equipment used on the customer side of the demarcation point is CPE, while equipment used on the carrier

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[24] *FCC November 18th ICC/USF Order* at ¶ 941 n.1895.
[25] Armstrong Rebuttal Testimony at 25 (*e.g., see* Diagram 3).
[26] *FCC November 18th ICC/USF Order*, ¶ 940. The third component is that the traffic be "exchanged over PSTN facilities." Verizon and Armstrong do exchange traffic over PSTN facilities.
[27] Armstrong notes that CPE has meaning only in relation to 47 C.F.R. § 68.

side is carrier network equipment. The only evidence in this record as to the location of the MTA was provided by the Armstrong witnesses, unequivocally establishing that the MTA is used on the Armstrong (carrier) side of the demarcation point:[28]

> A. (Starkey) . . . Because the AUI equipment that does the protocol conversion is in this network, you can't move it.
>
> Q. (Paiva) The piece of equipment that you're referring to is the terminal adaptor, correct?
>
> A. Yes.
>
> Q. And you say it's in AUI's network but it is actually at the customer's home, correct?
>
> A. It is at the customer's home just like a NID would be. That's one of the reasons I put the NID on here. The NID, the network interface device, is the demarcation point between -- and that's as Vonage was describing in Exhibit 4 there -- that's the demarcation point between the telephone network and the customer's network, the inside wire and the CPE they may have there. ... the terminal adapter sits on the telephone network side of the NID and then hooks into the inside wire that is owned by the customer on the other side. That's very different, and it's the distinction that makes the difference with respect to the Vonage service because it makes it part of the AUI network. And the reason that makes a distinction and the reason the FCC described it is because since the Computer 2 and 3 orders back in the early eighties when they were defining telecommunications service versus information service - - they called them something different, they called them enhancers I basically - - but they described inner networking conversion as not being a protocol conversion, as not constituting an information service. And those are networking conversions within a network. And that's exactly what happens in the AUI network. Inside the network, there's a conversion.

This testimony (and substantial corroborative rebuttal testimony of the Armstrong witnesses) was not refuted by Verizon.[29]

The terms "originate" and "terminate" hold specific, precedential meaning. Under the FCC's long-held "end-to-end analysis," a call originates at "the end point at the inception of a

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[28] NT at 80-82.

[29] *E.g., see* Armstrong Rebuttal at 14, 17, 18, *etc.*

communication" and terminates at "the end point at its completion."[30] In short, a call from Verizon's long distance customer, routed by Armstrong's terminating access service to an AUI subscriber, terminates at the customer's telephone (in analog format) - it does not, under any description used by the FCC, "terminate" within the Armstrong network. If it did, the subscriber would be unable to access the communication (because the communication would have terminated/ended within the Armstrong network).

Verizon may argue that, under this construction, a call would never "terminate" in IP format because the human ear requires an analog interpretation, thereby negating the effect of the FCC Order. This would not be true. For example, the Vonage "Digital Voice" device that accomplishes the IP/analog conversion is owned and managed by the customer (not the carrier), and is IP-compatible CPE.[31] Thus, the *FCC November 18th ICC/USF Order* has clearly mandated interstate access charges for all Vonage-type VoIP. Similarly, to the extent a cable operator delivered calls to its subscriber in IP format and, thereafter, requires the customer to use an IP device or CPE that provides the IP/analog conversion, that cable operator would also be terminating VoIP-PSTN traffic. However, as discussed in detail in Armstrong's evidence, that is not how Armstrong operates.[32] These differences that exist between networks is exactly why the analysis is designed by the FCC to be network specific.

Armstrong's MTA (the device that converts the IP signals to TDM) is a part of its network, it is not CPE. The Act defines two types of equipment at 47 U.S.C. § 153:

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[30] *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 Memorandum Opinion and Order, Adopted: November 9, 2004, Released: November 12, 2004 ("Vonage Order").

[31] Armstrong Rebuttal Testimony at 12-20; Armstrong Main Brief at 27-28, 40-41.

[32] For example, some cable operators require their subscribers to lease, or otherwise procure, the MTA device that accomplishes the IP/analog conversion. Armstrong does not, choosing instead, to maintain and manage that functionality within its own network.

> 47 U.S.C. § 153(14) CUSTOMER PREMISES EQUIPMENT - The term "customer premises equipment" means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.
>
> 47 U.S.C. § 153(45) TELECOMMUNICATIONS EQUIPMENT - The term "telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).

Per these definitions, equipment cannot be simultaneously defined as customer premises equipment and telecommunications equipment - it must be one, or the other.[33] Clearly, the MTA, regardless of whether it is physically attached to the customer's premise, is "telecommunications equipment...used by [Armstrong] to provide telecommunications services" to its subscribers.

Likewise, the MTA is located on the *carrier* side of the "demarcation point" separating the carrier's network from the customer's equipment. The FCC defines "demarcation point" as follows:

> 47 C.F.R. § 68.3 *DEMARCATION POINT (ALSO POINT OF INTERCONNECTION).* As used in this part, the point of demarcation and/or interconnection between the communications facilities of a provider of wireline telecommunications, and terminal equipment, protective apparatus or wiring at a subscriber's premises.

In other words, the demarcation point is located with the "facilities of a provider of wireline telecommunications," on the one side, and the customer's phone (terminal equipment), protective apparatus, and inside wire, on the other. Because the MTA is part of Armstrong's facilities, it is on the Armstrong side of the demarcation point (and, hence, "telecommunications equipment"). It cannot also be CPE.

This position is perfectly consistent with the FCC's past decisions related to "information services." As discussed in Armstrong's testimony, the FCC has long held that "protocol

[33] *See* 47 U.S.C. § 273 which provides Bell operating companies divergent authority as it relates to "CPE" versus "telecommunications equipment."

processing ... involving internetworking technology (conversions taking place solely within the carrier's network to facilitate provision of a basic network service, that result in no net protocol conversion to the end user)"[34] is representative of a telecommunications service. In other words, the extent to which the protocol conversion is done within the carrier's network, or by the customer via CPE, has always been an important distinction - one which the FCC has now carried forward in its *FCC November 18th ICC/USF Order* defining "VoIP-PSTN traffic." Because any IP conversion is done *within* the Armstrong network, and not by CPE, Armstrong's service is not an "information service," nor is it "VoIP-PSTN traffic" as the FCC defines that term.

At hearing, Verizon indicated that it intended to rely upon 47 C.F.R. § 68.105 and § 76.5(mm) to support its theory that Armstrong's MTA is CPE.[35] The first does not address what is CPE, but only the location of the "minimum point of entry" and the physical location on a building of the demarcation point. This rule does, however, support Armstrong's view that the "telecommunications equipment" may be located on a customer premise without becoming "customer premise equipment." The second is irrelevant as it identifies the demarcation point for cable television systems, not telecommunications.

Verizon may also argue, although it did not do so in its Main Brief, that even though the MTA is owned by Armstrong and part of Armstrong's network, because it is located at the customer premises, it is CPE. In other words, CPE is defined by its location, not the party that owns/controls it. Such an argument would reverse one half century of FCC precedent. The term "CPE" as used by the FCC has specific historical meaning which draws a bright-line (i.e., a

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[34] *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*, CC Docket No. 96-149, released December 24, 1996 ("*Non-Accounting Safeguards Order*"), ¶ 106.

[35] NT at 196. Although these references were not discussed in Verizon's Main Brief.

"demarcation point") between terminal equipment (CPE) used by customers and equipment used by carriers within their networks. Indeed, 47 C.F.R. § 68.105 reference alluded to by the Verizon witnesses at the hearing is specifically designed to differentiate between customer equipment and carrier equipment. That is to say, it recognized that Armstrong's telecommunications equipment may be placed upon the customer's premises without become CPE.

The distinction between a carrier's network and CPE can be traced as far back as 1956 to the landmark "Hush-A-Phone" case, in which the United States Court of Appeals rejected, for the first time, AT&T's attempt to restrict CPE supplied by customers for use with the AT&T network.[36] Building on the Court's ruling, the FCC for the next 50 plus years has regularly and continuously differentiated between CPE and a carrier's network. For example, prior to 1969, AT&T owned all equipment used to make or receive telephone calls, including the telephones it leased to subscribers for their use. In 1969 the FCC eliminated AT&T tariff language that prohibited customers from attaching CPE to the network,[37] and in 1976 it adopted Part 68 of its rules requiring that customer-provided equipment meet certain standards so as not to cause harm to a carrier's telecommunications network (again indicating a distinction between CPE on the one hand, and a carrier's network on the other).[38]

Importantly, as part of the Modified Final Judgment (1982) which divested AT&T from the Regional Bell Operating Companies ("RBOCs"), ownership of CPE previously owned by the

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[36] *See Hush-A-Phone Corp. v. United States*, 238 F. 2d 266 (D.C. Cir. 1956).

[37] *In the Matter of Use of the Carterfone Device in Message Toll Service*, 13 FCC 2d 420 (1968), reconsideration denied, 14 FCC 2d 571 (1969) ("Carterfone").

[38] *Interstate and Foreign Message Toll Telephone, First Report and Order*, 56 FCC 2d 593, modified on reconsideration, 58 FCC 2d 716 (1976), Second Report and Order, 58 FCC 2d 736 (1976), *aff'd sub. nom. North Carolina Utilities Comm'n v. FCC*, 522 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977)

RBOCs was transferred from that point forward to RBOC customer ownership.[39] Since its initial determinations in this regard, the FCC has from time to time opined as to whether one piece of equipment or another should be considered CPE or telecommunications equipment, relying almost exclusively upon the extent to which the customer provides/controls the equipment (as opposed to its use as part of the carrier's network).[40]

Verizon may ask this Commission to ignore this substantial precedent and infer that the FCC used terminology like "CPE" loosely in defining VoIP-PSTN traffic, or, that equipment is defined by the FCC as CPE primarily because it resides at the customer's premises. However, nothing in the *November 18th ICC/USF Order* supports that view, and decades of treatment by the FCC refute it. None of the rules recited above by Armstrong in support of its position were revised in the *FCC November 18th ICC/USF Order.*

The more reasoned approach is to take the FCC at its word(s) and evaluate Armstrong's service based upon the FCC's express definitions, not sweeping generalizations. When analyzed thusly, Armstrong contends it is irrefutable that its traffic is not VoIP-PSTN traffic and that, rather than an immediate phase-down of its rates to interstate levels for all traffic, 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 CLEC Benchmarking Rule.[41]

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[39] *U.S. v. American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub. nom. Maryland v. U.S.*, 103 S. Ct. 1240 (1983).

[40] *E.g., see In the Matters of: Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)., and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof; Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, FCC 85-397, *Notice of Proposed Rulemaking* (Adopted July 25, 1985) (See ¶¶ 148-149).

[41] 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.

C. The Commission Has Both State and Federal Authority to Decide Whether Armstrong's traffic is "VoIP-PSTN"

1. The VoIP Freedom Act Does Not Remove Commission Jurisdiction

Verizon has previously argued[42] that the collection of tariffed access charges by Armstrong violates the Pennsylvania "Voice-Over-Internet Protocol Freedom Act"[43] which proscribes regulation of "the rates, terms and conditions of VoIP service or IP-enabled service."[44] It presumably will continue to do so in asserting that the Commission may not address the prospective period either. There are three aspects of the VoIP Freedom Act, all of which Verizon must demonstrate, and none of which it has proved.

First, the traffic network must either be providing "VoIP service" or "IP-enabled service" to be governed by the VoIP Freedom Act. Verizon is unable to effectively claim either label as those terms are explicitly defined in the Act.

- "Internet protocol-enabled service" or "IP-enabled service" is "a service, capability, functionality or application provided using Internet protocol or any successor protocol that *enables an end user to send or receive a communication in Internet protocol* format or any successor format, regardless of whether the communication is voice, data or video.
- "Voice-over-Internet protocol service" or "VoIP service" is "[a] service that:
  (1) enables real-time, two-way voice communications that *originate or terminate from the user's location in Internet protocol* or any successor protocol;
  (2) *uses a broadband connection* from the user's location; *and*
  (3) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.[45]

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[42] Armstrong Main Brief at 11-17.
[43] 73 Pa. C.S. § 2251.1 *et seq.* ("VoIP Freedom Act").
[44] 73 Pa. C.S. § 2251.4. ("Except as set forth in sections 5 and 6, notwithstanding any other provision of law, no department, agency, commission or political subdivision of the Commonwealth may enact or enforce, either directly or indirectly, any law, rule, regulation, standard, order or other provision having the force or effect of law that regulates, or has the effect of regulating, the rates, terms and conditions of VoIP service or IP-enabled service.").
[45] 73 Pa. C.S. § 2251.3.

The first definition does not apply because the end user does not "send or receive a communication in Internet protocol." The use of IP in the network is completely unrelated to the manner in which the customer uses the network. This technological distinction has been addressed previously.

Nor is the second definition applicable. Verizon's initial mistake is to misrepresent Armstrong's network. For the most part, in its Main Brief, when describing Armstrong's network, Verizon appropriately relies upon the factual testimony presented by Armstrong's witnesses on that topic. However, on the one critical issue that completely discredits Verizon's legal theory, Verizon simply ignores the Armstrong testimony. As to whether a broadband connection is required, it relies instead upon a generalized description on the cable company's customer website where it states that its telephone service "connects to our broadband network to the telephone wiring inside your home."[46] Verizon then argues that there is "no dispute" that AUI's telephone service "requires a broadband network connection...."[47]

Armstrong does, in fact, dispute this point. Its witnesses specifically and extensively testified that the cable company's voice service does not rely upon a customer's "broadband connection." Instead, the Armstrong-owned MTA that exists within the Armstrong network converts the network's IP format into standard analog format, which is then transmitted to the customer via the narrowband, analog equipment (both inside wire and telephone) inside the customer's home.[48] On this exact point, the cable customer is not required to subscribe to

[46] Verizon Main Brief at 12 (citing Verizon Exhibit 4).
[47] Verizon Main Brief at 19.
[48] As described in Armstrong Rebuttal Testimony at 17.

broadband service, as the company offers stand-alone voice service without any broadband or television subscriptions necessary.[49]

Verizon's argument actually misuses the language of the VoIP Freedom Act's definition of "VoIP Service" and the requirement that the service "*use* a broadband connection from the user's location" for " real-time, two-way voice communications." While it is true that an Armstrong customer *may* also have an Armstrong broadband (Internet) connection to his/her home, the facts are clear that the customer does not "use" that connection for its Armstrong voice services and broadband service is not required to obtain voice service.[50] The fact that the network may also be used for broadband is irrelevant. Traditional TDM-based telephone companies regularly provide both voice and (DSL-based) broadband services simultaneously over the same copper wires. No one would suggest that DSL service somehow makes that telephone service an information service - yet that, in a nutshell, is the illogical extension of Verizon's argument.

Armstrong's witnesses, the only witnesses in this case with first hand knowledge of Armstrong's affiliate's network, specifically were asked by Verizon whether the 'VoIP Freedom Act" definitions applied to the Armstrong cable affiliate's network. They responded "no."[51] There is no other record evidence on this point. The finding of fact that Verizon critically needs to support its case is missing.

Armstrong candidly acknowledges that it has revised its position with respect to how calls are originated from and terminated to the end use customers of its affiliate cable company AUI. Initially, Armstrong held a position based upon a general understanding that the cable

[49] Armstrong Rebuttal Testimony at 6-7.
[50] The Armstrong cable company provides stand alone voice service. Neither broadband nor cable TV service is required. NT at 6-7.
[51] NT at 88-89.

company's services originated and terminated in Internet protocol.[52] Upon receipt of Verizon's direct testimony and further discovery (Verizon Set II), Armstrong reviewed in greater detail the cable company's provision of services and determined that, as a factual matter, calls do not originate/terminate in IP, but are only converted to and from Internet protocol only *on* the cable company network.[53] Armstrong supplemented this with further legal research and discovered the cases recited in the Main Brief, where state commissions have determined that cable VoIP is not, in fact, "IP-originated."[54] Therefore, Armstrong revised its admissions and served them upon Verizon prior to filing testimony.[55]

Armstrong is not attempting to have it "both ways," as Verizon accuses.[56] Armstrong's Chief Financial Officer, Bryan Cipoletti, readily conceded that this may well mean that Armstrong's cable company is subject to regulation by the Commission.[57] So, for example, the Commission would now entertain the *Sandra Brown* complaint.[58] Armstrong has never changed its description of its network, only developed more detailed information about it. In view of that new information, Armstrong has presented a more accurate representation view of its cable company's business and the legal definitions applicable to it.

The second hurdle that Verizon must clear under the "VoIP Freedom Act" is to demonstrate that the access exemption does not apply. The Act expressly does not affect the Commission's jurisdiction over:

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[52] NT at 89.
[53] Armstrong Exhibit 10 ("After further investigation in preparing responses to Verizon Set II discovery, Armstrong again confirmed that IP is used by Armstrong's cable affiliate only within its own network. Therefore, while it remains true that Armstrong's cable affiliate maintains an IP-based network, calls are neither originated by nor terminated to the customer in IP. It also remains true, as previously admitted, that: all voice traffic on Armstrong's network is in TDM format; all voice traffic exchanged between Verizon and Armstrong is in TDM format; and all voice traffic exchanged between Armstrong and its cable affiliate is in TDM format.")
[54] See discussion in Armstrong Main Brief at 40-41.
[55] Armstrong Exhibit 10.
[56] Verizon Main Brief at 17.
[57] NT at 89.
[58] Verizon Main Brief at 11.

> Switched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company...[59]

On its face, the exemption applies. Armstrong is a "telecommunications company" and provides "local exchange service" on both a retail and wholesale basis. Verizon argues, by reference to another title of Pennsylvania Consolidated Statutes, Title 66, that the term "local exchange telecommunications company"[60] is limited to an ILEC.[61] This definitional handicap is no where reflected in Title 73. Nor is there any indication that the General Assembly either intended to adopt one or restrict it to a definition in another act and another title. In the *Palmerton Opinion*,[62] the Commission, in ruling whether the service was "switched network access,"[63] and did not limit its ruling to ILECs only. The common usage of the terms should be applied.[64]

Finally, Verizon cannot plausibly maintain the third gate of the "VoIP Freedom Act" either - that by regulating Armstrong under its existing wholesale certificate and tariffs, the Commission is also regulating "the rates, terms and conditions" of retail service.[65] This "indirectly-regulating-VoIP-services" has been repeatedly rejected. This Commission ruled, when Global NAPs asserted the same thing:

> ...we are not dealing here with the retail services of an interconnected albeit nomadic VoIP service provider. Neither are we trying to apply regulation that

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[59] 73 Pa. C.S. § 2251.6 ("Powers and duties retained").
[60] 66 Pa. C.S. § 3012 (Definition of "local exchange telecommunications company").
[61] Verizon Main Brief at 14.
[62] *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).
[63] *Palmerton Opinion* at 26
[64] Chapter 30, which contains the specific definition of "local exchange telecommunications company" that Verizon seeks to extend to Title 73, is an "ILEC-specific" piece of legislation intended to impose (network modernization) and revise (alternative ratemaking) obligations on ILECs that did *not* apply to CLECs. Because of its ILEC-targeted subject matter, it specifically had to distinguish between ILECs and CLECs, thus the ILEC/CLEC definitional distinction. There is no evidence of legislative intent to make such a distinction in Title 73.
[65] Verizon Main Brief at 16.

> would have had the potential of touching the intrastate retail operations of an interconnected nomadic VoIP provider...[66]

As further demonstration of the Commission's jurisdiction, subsequent to the enactment of the Act, the Commission has continued to find that wholesale CLECs serving cable companies are jurisdictional telecommunications carriers and has certificated them and approved their tariffs.[67] Verizon cannot collaterally attack Armstrong's certificate and tariffs by invoking the underlying cable company.

2. The *FCC November 18th ICC/USF Order* Clearly Contemplates an Interpretive Role for the States

While the FCC has established the category of "VoIP-PSTN," it has left implementation to the states. The *FCC November 18th ICC/USF Order* clearly contemplates a compliance role for the states, noting that:

> [S]tates will play a critical role implementing and enforcing intercarrier compensation reforms. In particular, state oversight of the transition process is necessary to ensure that carriers comply with the transition timing and intrastate access charge reductions outlined above. Under our framework, rates for intrastate access traffic will remain in intrastate tariffs. As a result, to ensure compliance with the framework ... state commissions should monitor compliance with our rate transition; review how carriers reduce rates to ensure consistency with the uniform framework[.][68]

Implementation and enforcement necessarily involves interpretation. To suggest anything less essentially reduces the role of the state Commission to no more than a rubber stamp of Verizon's

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[66] *Palmerton Opinion* at 27; See also *Palmerton Opinion* at 29 ("Again, in contrast to the *Vonage v. NE PSC* federal court decisions, this Commission is not dealing here with jurisdictional traffic allocations that relate to the retail operations, services, and revenues of a nomadic VoIP provider.").

[67] *Application of Comcast Business Communications, LLC d/b/a Comcast Long Distance for expanded Authority to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier to the Public in the Commonwealth of Pennsylvania in the Service Territories of Windstream Pennsylvania, Inc. et al.*, Docket Nos. A-2008-2029089, A-2008-2029091, A-2008-2029092, and A-2008-2029093 (Order entered July 18, 2008) ("CBC proposes to provide "Local Interconnection Service" (LIS) which acts as a gateway to the public switched telephone network for local qualifying cable-based voice over Internet protocol (VOIP) service providers in these rural territories.").

[68] *FCC November 18th ICC/USF Order* at ¶ 813; See also ¶¶ 776, 790, 803 and 812 (" ...states will play a key role in implementing the framework we adopt today. In particular, states will oversee changes to intrastate access tariffs to ensure that modifications to intrastate tariffs are consistent with the framework and rules we adopt today.").

view. This, however, also engenders an interpretive role to the Commission, but only if it agrees with Verizon's view.

IV. CONCLUSION

Wherefore, Armstrong requests that the Commission enter an Order finding that:

1. Armstrong's traffic is not "VoIP-PSTN traffic";

2. Armstrong intrastate access rates are not immediately reduced to the interstate level; and

3. Armstrong's current intrastate switched access rates remain in effect until lowered by virtue of the FCC's CLEC Benchmarking Rule.

Respectfully submitted,

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DATED: January 6, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of January, 2012, 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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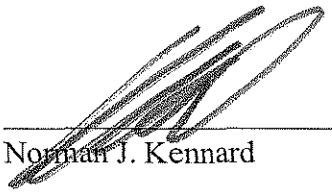

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