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March 16, 2012

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Various Intrastate Switched Carrier Access Tariffs for VoIP Traffic

Docket No. R-2012-2285812	Armstrong Telecommunications, Inc.
Docket No. R-2012-2282908	Core Communications Inc.
Docket No. R-2011-2278283	Frontier Communications of PA, LLC
Docket No. R-2011-2278290	Frontier Communications Commonwealth Telephone Company
Docket No. R-2011-2279479	Metropolitan Telecom. Corp. of PA d/b/a MetTel
Docket No. R-2012-2282660	Pennsylvania Telephone Association
Docket No. R-2011-2279738	Windstream PA, LLC
Docket No. R-2011-2279743	Windstream D&E Systems, Inc.
Docket No. R-2011-2279763	Windstream Conestoga, Inc.
Docket No. R-2011-2279769	Windstream Buffalo Valley, Inc.
Docket No. R-2011-2280166	Talk America Inc. d/b/a Cavalier Business Communications
Docket No. R-2011-2280802	Cavalier Telephone Mid-Atlantic LLC
Docket No. R-2012-2285252	XO Communications Services, Inc.
Docket No. R-2012-2285795	XO Communications Services, Inc.

Dear Secretary Chiavetta:

Armstrong Telecommunications, Inc. ("ATI") is in receipt of your letter dated March 6, 2012 regarding the above captioned matter.

On January 27, 2012, Armstrong Telecommunications, Inc. ("ATI") filed revised tariff pages (Supplement No. 3) to address switched access rates for VoIP-PSTN traffic in its Telephone – PA P.U.C. Tariff No. 5.

On February 17, 2012, Verizon submitted a letter seeking to raise various issues related to intrastate VoIP-PSTN switched access carrier tariff submissions in the above-referenced

Dockets, including that of ATI. The issues raised as to ATI are two -- “Failure to allow for rebuttal of default factor” (Verizon Letter Issue No. 2) and “Improper delay in applying FCC-mandated VoIP-PSTN rate” (Verizon Letter Issue No. 4). Neither have any merit.

1. Accounting for IP on ATI’s Network

ATI operates in Pennsylvania largely as a “wholesale CLEC” in conjunction with its affiliated cable company. The Armstrong cable company network utilizes Internet protocol (“IP”) as a transmission medium in the middle of the call (i.e., IP-in the-middle). This network does not originate or terminate calls in internet protocol, nor is IP-compatible customer premise equipment required in order for an end-use customer to use Armstrong’s services.

Calls on Armstrong’s network neither originate nor terminate in Internet protocol. Rather, calls use the same standard customer premise equipment (“CPE”), including telephone and inside wire, as traditional phone networks. A call is delivered to and accepted from customers in traditional circuit-switched format. The protocol conversion only occurs on the Armstrong network as an intra-networking change to which the end use customer is completely indifferent. The device¹ that converts traffic from IP to traditional TDM² signals, and vice versa, is operated exclusively within Armstrong’s network on its side of the demarcation point.³ The device is not owned, controlled or otherwise accessible by the customer, unlike some other networks. Thus, the device is “Telecommunications Equipment”⁴ and not “Customer Premise Equipment.”⁵

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.⁶

The FCC’s definition of “VoIP-PSTN” traffic is “... 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 customer premises equipment.*”⁷ This is not what happens on Armstrong’s network and, thus, the new rule is not applicable to it.

¹ The Multimedia Terminal Adapter (“MTA”).

² Time Division Multiplexing (“TDM”).

³ 47 C.F.R. § 68.3.

⁴ 47 U.S.C. § 153(45).

⁵ 47 U.S.C. § 153(14).

⁶ *FCC November 18th ICC/USF Order* at ¶ 941 n.1895.

⁷ *FCC November 18th ICC/USF Order*, Appendix A at 500; *November 29th Federal Register*, 76 Fed. Reg. at 73855 (emphasis added); See also 47 C.F.R. § 51.701(b)(3).

The FCC explained the term CPE when it promulgated the definition of “interconnected VoIP”:

The term “IP-compatible CPE” refers to *end-user equipment that processes, receives, or transmits IP packets. Users may in some cases attach conventional analog telephones to certain IP-compatible CPE* in order to use an interconnected VoIP service. For example, IP-compatible CPE includes, but is not limited to, (1) terminal adapters, which contain an IP digital signal processing unit that performs digital-to-audio and audio-to-digital conversion and have a standard telephone jack connection for connecting to a conventional analog telephone; (2) a native IP telephone; or (3) a personal computer with a microphone and speakers, and software to perform the conversion (softphone).⁸

On the Armstrong network, there are no terminal adapters that “have a standard telephone jack connection” or non-analog phones or personal computers. The IP-conversion device is not plugged into the wall (“a standard jack connection”) and the customer interface does not use computers. The user does not do anything with the “IP-compatible” device, since it is part of the Armstrong network.

By way of contrast, some companies do pass ownership and control of the IP-compatible device to the customer. Other state commissions have expressly found that, on the Comcast and Time Warner networks, the IP-compatible device is actually owned and/or physically operated by the customer. For example, the New Hampshire Commission recently found that the cable operations of Comcast and Time Warner are very different than Armstrong’s here:

*The cable operator provides telephone-specific hardware to customers subscribing to cable telephone service. This additional hardware, called an “embedded multi-media terminal adapter” or eMTA, includes a standard telephone jack with the same physical and electrical characteristics as a telephone jack from a traditional telephone company such as FairPoint Communications or any one of the RLECs. The customer then plugs in a standard, traditional telephone or a telephone wire that is connected to multiple standard telephones.*⁹

In Vermont, Comcast leases the device to the customer, who is responsible for inserting into the customer’s inside wire (i.e., again, on the customer side of the demarcation point): “Comcast IP refers to the CPE used in connection with its CDV service as an eMTA (embedded multimedia terminal adaptor). *Comcast IP leases eMTAs to customers for a monthly fee.* The customer’s

⁸ *In the Matter of IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 04-36 and WC Docket No. 05-196, First Report and Order released June 3, 2005 (“*VoIP 911 Order*”) at footnote 77 (emphasis added). The final regulations are set forth at Appendix B.

⁹ *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), slip op. at 6 (record citation omitted, emphasis added).

eMTA is connected to the Comcast network via the customer's inside cable wiring.”¹⁰ Armstrong believes that this is also Comcast’s practice in Pennsylvania.

The issue of whether ATI’s traffic is VoIP-PSTN is currently being contested by Verizon in a complaint case now pending before ALJ Dennis Buckley.¹¹ The matter has been the subject of hearings and all briefing and other pleadings are complete. ATI does not seek to re-litigate its position here and will comply with any order of the Commission at that docket.

Under ATI’s tariff methodology, however, the state-wide Pennsylvania PVU factor is offered to *all* interstate traffic based upon the ratio of VoIP to ILEC subscriptions set forth in the FCC Wireline Competition Bureau *Local Competition Report*. In doing so, ATI gives approximately 19.6% of *all* intrastate traffic (Report dated October 2011), including all Verizon traffic a discount to the federal access rate.

Moreover, the tariff expressly preserves the opportunity for Verizon to rebut the statewide average PVU at Rule 2.12.4(1) which states that:

As an alternative to the benchmark PVU rate specified in subsection [2.3.4](D)(1) above, the Customer may request that the Telephone Company negotiate an agreement specifying alternative compensation for VoIP-PSTN Traffic, including the use of a verifiable customer specific PVU.

This approach is fully consistent with the FCC’s November 18th Order,¹² which held that carriers may use tariffs but “remain free to negotiate interconnection agreements specifying alternative compensation for that traffic instead.”¹³

Moreover, Verizon has not yet explained how it is adversely affected. Under ATI’s proposed tariff, Verizon will receive an automatic discount on 19.6% of its delivered intrastate traffic rated at the interstate tariff level effective upon the date the intrastate tariff becomes effective. Verizon recently submitted, but has yet to support, a claim of a 26% PVU. Until verified and then incorporated into an agreement, there is no basis upon which ATI or the Commission PSC can conclude that the automatic 19.6% discount is anything other than a windfall to Verizon.

¹⁰ *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), slip op. at 11 (Findings 27 and 28).

¹¹ *Armstrong Telecommunications, Inc. v. Verizon Pennsylvania Inc., Verizon North LLC, MCI Metro 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.

¹² *FCC November 18th ICC/USF Order* at ¶ 961 (Stating that it was allowing tariffs but only “as part of an overall transition from current intercarrier compensation regimes - which rely extensively on tariffing specifically with respect to access charges—and a new framework more amenable to negotiated intercarrier compensation arrangements.”).

¹³ *FCC November 18th ICC/USF Order* at ¶ 960.

2. The New Tariff Rates Become Effective on the Date that the Tariff Was Approved and *After a Proper PVU is Submitted*

Verizon seeks retroactive effect of the ATI tariffs back to January 1, 2012 and further asks that it be permitted to submit its PVU with application back to that date. Verizon identifies no legal requirement to do so and ignores basic proscriptions against retroactive ratemaking. No other IP-based carrier has objected to the tariff effective date of the new rates. Moreover, many carriers have *already* submitted letters specifying a customer specific PVU, including Comcast and Level 3.

Rates change in tariffs on a prospective, and not retroactive, basis. Both the regulated company and its customers are entitled to be advised of rate changes *before* they occur. This is a two-way street, protecting both the company and its customers. Retroactive rate making is not advised and, indeed, is proscribed under Pennsylvania law. Tariffs are contracts that bind the utility and its customers.¹⁴ Tariffs approved by the PUC include schedules of rates,¹⁵ and all rules, regulations, practices or contracts involving rates and have the force of law.¹⁶ Section 1303 of the Public Utility Code prohibits charges outside of the tariff.¹⁷

The FCC directed that carriers accomplish changes in their intrastate rates by filing revised intrastate tariffs with the State commissions. There is nothing in the FCC Order indicating that it did not fully expect that state review, even suspension, would occur and that state law applicable to tariff changes would apply.

This said, the real issue presented by Verizon is not the effective date of the rate change, but whether Verizon has demonstrated an entitlement to it. The FCC's new regime establishes and requires states to oversee a two-year phase down to interstate access rate levels for intrastate access rates. The only *exception to this rule* is where the traffic, as a factual matter, is shown to meet the definition of "VoIP-PSTN" traffic. There is no automatic entitlement to this lower rate.

Verizon only recently made a carrier specific PVU claim and, in doing so, offered no justification for a state wide PVU of 26%. The methodology used to arrive at a claim to an

¹⁴ *Brockway Glass Co. v. Pennsylvania Public Utility Comm'n*, 63 Pa. Commw. 238, 437 A.2d 1067 (1981) ("*Brockway Glass*").

¹⁵ "The term "rate," as used in the Pennsylvania Public Utility Code, includes "any rules, regulations, practices classifications or contract affecting such compensation...." 66 Pa. C.S. § 102 (Definition of "Rate").

¹⁶ *AT&T Communications, Inc. v. Pennsylvania Public Utility Comm'n*, 130 Pa. Commw. 595, 568 A.2d 1362 (1990).

¹⁷ 66 Pa. C.S. § 1303. "No 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." *Re Maislin Industries et al.*, Docket No. P-980204 at 295 (Opinion and Order entered March 20, 1990) ("... 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."); *See Brockway Glass, supra*; *see also, Pa. Elec. Co. v. Pa. Public Utility Comm'n*, 663 A.2d 281 (Pa. Cmwlth. 1995) (tariff provisions cannot be "waived").

interstate discount for intrastate traffic is no where explained or provided. This is in violation of the ATI tariff provision which requires that the carrier specify the manner in which the PVU is calculated and verified. See Tariff Rule 2.3.4(D)(2). Further, the Verizon letter claiming the 26% PVU does not identify the Verizon companies to whom the PVU applies. Certainly, the Verizon ILECs, CLECs and IXCs operating in Pennsylvania do not originate the exact same amount of VoIP traffic.

As this Commission well knows, there are numerous "bad actors" in the industry, carriers like Global Naps, CommPartners and Infotelcom, who misrepresent the nature of their traffic in order to engage in access arbitrage. There is no doubt that the FCC's VoIP-PSTN rule offers these carriers a further chance to unfairly game the system. Therefore, the FCC agreed with the terminating carrier that verification was appropriate and, indeed, necessary.

Simply stated, until a carrier explains its methodology for a greater than statewide average discount and pursues an agreement as required in ATI's tariff, it is not entitled to a greater VoIP discount. Verizon has no special dispensation in this regard.

C. The Informal Consultative Process

ATI is willing to engage the Staff of the Bureau of Technical Utility Services in the informal consultative process described in the Secretarial Letter of March 6, 2012.

Thank you for you attention to this matter. Should you or any member of the Commission Staff have any questions of comments, please do hesitate to contact me at your convenience.

Very truly yours,

THOMAS, LONG, NIESEN & KENNARD

By:


Norman J. Kennard

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