

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation Regarding Intrastate Access	:	
Charges and IntraLATA Toll Rates of Rural	:	
Carriers, and the Pennsylvania Universal	:	I-00040105
Service Fund	:	

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ORDER DISPOSING OF MOTIONS

DOCKETED
JAN 30 2006

The purpose of this Order is to: (1) dispose of the motion of the wireless carriers for a finding that the Commission cannot require their contribution to the Pennsylvania Universal Service Fund, and (2) decide the motion of the Rural Telephone Company Coalition (RTCC), Office of Trial Staff (OTS) and Office of Consumer Advocate (OCA) to stay these proceedings pending the outcome of the federal investigation, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33, Further Notice of Proposed Rulemaking (released March 3, 2005).

HISTORY OF THE PROCEEDINGS

On December 20, 2004, the Commission entered an Order in the above-captioned case instituting an investigation into whether there should be further intrastate access charge reductions and intraLATA toll rate reductions in the service territories of rural incumbent local exchange carriers. In-person prehearing conferences were held on Wednesday, February 16, 2005, and April 21, 2005. The following parties entered appearances and were represented by counsel: Office of Small Business Advocate (OSBA); Office of Consumer Advocate (OCA); Rural Telephone Company Coalition (RTCC); United Telephone Company of Pennsylvania d/b/a/ Sprint; Qwest Communications Corporation (Qwest); Nextel Communications Inc., and Omnipointe Communications Inc. and Voicestream Pittsburgh LP d/b/a T-Mobile; MCImetro Access Transmission Service (MCI); AT&T Communications of Pennsylvania, LLC (AT&T); Cingular Wireless and Verizon Wireless; Verizon Pennsylvania Inc. and Verizon North Inc.

(Verizon); and Office of Trial Staff (OTS). The Order directs the Office of Administrative Law Judge to conduct appropriate proceedings “including but not limited to, a fully developed analysis and recommendation on the following questions:

- (a) Whether intrastate access charges and intraLATA toll rates should be further reduced or rate structures modified in the rural ILECs’ territories.
- (b) What rates are influenced by contributions to and/or disbursements from the Fund?
- (c) Should disbursements from the Fund be reduced and/or eliminated as a matter of policy and/or law?
- (d) Assuming the Fund expires on or about December 31, 2006, what action should the Commission take to advance the policies of this Commonwealth?
- (e) If the Fund continues beyond December 31, 2006, should wireless carriers be included in the definition of contributors to the Fund? If included, how will the Commission know which wireless carriers to assess? Will the Commission need to require wireless carriers to register with the Commission? What would a wireless carrier’s contribution be based on? Do wireless companies split their revenue bases by intrastate, and if not, will this be a problem?
- (f) What regulatory changes are necessary to 52 Pa. Code §§ 63.161-63.171 given the complex issues involved as well as recent legislative developments?

The first Motion deals solely with subsection (e).

The first part of the second prehearing conference consisted of oral argument regarding the motion of the Wireless Carriers for a determination that the Commission lacks jurisdiction to require CMRS providers to contribute to the funding of a Pennsylvania Universal Service Fund, and for bifurcation or certification for immediate Commission review. This Order disposes of that Motion. Coincidentally, the second part of the prehearing conference concerned scheduling the proceeding and included discussion regarding whether or not the case should be stayed pending the outcome of the federal proceeding, which is the subject of the second motion, filed after the prehearing conference and also decided in this Order.

DISCUSSION

Motion for Determination that the Commission Lacks Jurisdiction to Require CMRS Providers to Contribute to the Funding of a PA USF

The Motion recommends that the Commission view the first part of the question, “Assuming the Fund expires on or about December 31, 2006, should wireless carriers be included in the definition of contributors to the Fund?” as a “threshold” issue which, when answered as they recommend, as a “no,” eliminates the need to address the rest of the paragraph. In the Motion, the wireless carriers state:

For example, if CMRS Providers were to have PA USF funding obligations, they would, at a minimum, want the record developed on whether there is a need in fact for funding from a PA USF to advance and preserve universal service. The record also may need to establish facts to support the determination of the relative levels of contributions by the CMRS providers. Absent a legal obligation to contribute to funding a PA USF, the Wireless Carriers’ interest in pursuing these issues and developing a record would be largely if not entirely obviated. Motion, fn 2, p.3.

Essentially, this puts the Commission on notice that the wireless carriers will be far less participatory if they know at the outset that the end product won’t cost them anything. Although this was meant to be persuasive in convincing me to respond to this Motion with a definitive answer, the effect is just the opposite.

As discussed in the oral argument, this docket is an investigation. The Commission has charged me with six specific points upon which to develop a full analysis and recommendation. The “investigation will form the basis for any proposed regulatory changes and is an appropriate way to address the intention of our July 2003 Order in light of recent legislative changes.” Order of December 16, 2004.

At oral argument, the CMRS providers expressed a more conciliatory attitude. They have a desire to understand before taking a stand on any other issues whether their interest is pecuniary or merely academic. The Motion indicates a desire to be excused from the

litigation, but at argument, both counsel for the CMRS providers stated that they did not ask for leave to withdraw from the case. However, when asked point-blank whether they would continue to participate or whether they would use a grant of their Motion to evade discovery requests, neither attorney would state with any certainty that their clients would continue to participate and cooperate fully.

Sprint agreed with the substance of the CMRS providers' arguments and also agreed that the initial issue of whether the Commission can exercise jurisdiction and include the wireless carriers in a PA USF is a threshold question which should be determined prior to the litigation of the remainder of the issues.

RTCC argued that the Commission could find jurisdiction if it chooses to exercise it, based on the policy perspective, since the state and federal law support universal service and must, therefore, expect that it will be funded. Sections 501 and 3019 of the Public Utility Code, 66 Pa. C.S. § 501, 3019 establish an adequate basis for authorizing wireless contributions. The federal statute directs that states may authorize contributions by wireless carriers.

OSBA stated that the purpose of the case is to investigate the stated issues, and that there is no hardship for the wireless carriers to remain in the case as full participants. AT&T supported this stand by pointing out that the Motion seems to say that the wireless carriers will stay in the case as long as the Commission says right now, up front, that they'll never include them in any USF fund, and that ties the hands of the Commission and results in an inaccurate record if the Commission does decide to exercise jurisdiction over them. AT&T recommended denying the Motion on those grounds.

From a strict legal standpoint, the reasoning expressed in the Motion is persuasive. PUC powers must be express or by strong and necessary implication. *Fairview Water Co., v. Pa. Publ. Util. Comm'n*, 509 Pa. 384, 502 A.2d 162 (1985). The Commission's authority derives from the express measures stated in the Public Utility Code, which authorizes the Commission to supervise and regulate public utilities doing business within the Commonwealth. 66 Pa. C.S. § 501(b). The definition of "public utility" specifically states that

the term does not include: (iv) Any person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service.” 66 Pa. C.S. § 102.

CMRS providers are not public utilities, and therefore, the Commission’s ability to exercise jurisdiction over them is more limited than it would be if the CMRS providers were given public utility status. The Motion makes a leap in logic when it states that the Commission’s inability to regulate them under present law necessarily means that the Commission’s concerns regarding the inclusion of CMRS providers in the definition of contributors to a PA USF are misplaced. The Motion states:

10. The Wireless Carriers by this motion seek determination only of the issue of the Commission’s jurisdiction under the Public Utility Code to require CMRS Providers to contribute to the funding of a PA USF. Nothing herein shall be construed as a waiver of the Wireless Carriers’ rights to raise and argue any other issue of law, fact or policy relevant to this proceeding, which rights are hereby reserved.

The Motion asks for a

... recommended decision finally determining that the Commission lacks the statutory authority to require that CMRS Providers contribute to the funding of a Pennsylvania Universal Service Fund.

The second remedy paragraph seeks bifurcation of the jurisdiction issue presented by the motion from the remaining issues in order to permit immediate Commission consideration of the recommended decision as a final order, or for certification of the issue to the Commission. Recommended decisions, as opposed to orders or initial decisions, are issued for motions involving a question of jurisdiction, the establishment of a prima facie case or standing. While a typical motion involving jurisdiction will result in a decision that the Commission does or does not have the jurisdiction over key parties or to decide the ultimate issue in a case, a decision on this Motion will not decide any ultimate issue in the case.

The Commission Order initiating this proceeding seeks to compile information which will aid in formulating regulatory revisions or additions under the new legislation. It does not address the status of CMRS providers. The questions addressing wireless companies do not assume that CMRS providers are public utilities. Neither does the Commission Order direct the Office of Administrative Law Judge to determine whether CMRS providers *could* be included in the definition of contributors to the PA USF, only whether they *should* be included. The scope and details necessary to answer the wireless carriers' question in the Order will not change whether or not the Commission declares that it does or does not have jurisdiction to require CMRS participation in the PA USF. Accordingly, it is not conclusive to state whether or not the Commission has the authority to require CMRS providers to contribute to the funding of a PA USF, and the question presented is not the type of issue anticipated by 52 Pa. Code § 5.103(d)(3).

Section 5.103(d)(1) and (2) provide for rulings where an immediate ruling is essential in order to proceed with the hearing, or which if granted would otherwise dispose of parties' rights. 52 Pa. Code § 5.013(d)(1) and (2). Neither of these situations exist here.

Therefore, the motion will be disposed of by order. The wireless parties will be assured that they are not public utilities within the meaning of the Public Utility Code. In addition, after seeing how valuable their clients are to this investigation, they will be named indispensable parties and encouraged to cooperate with the other parties to this case.

Motion of the Rural Telephone Company Coalition, Office of Consumer Advocate and Office of Trial Staff for the Commission to Defer This Investigation Pending Resolution of the FCC Intercarrier Compensation Proceeding at CC Docket No. 01-92

On May 23, 2005, the RTCC filed this Motion jointly with the OTS and OCA, seeking a stay of this case pending the outcome of the FCC case regarding universal service.

Responses were filed by OCA, the Wireless Carriers¹, and jointly by Qwest Communications, AT&T, and MCI.

In support of a stay, the Motion states that the Investigation was instituted to comply with the settlement terms at Docket No. M-00021596. There is no sunset provision for the PA USF, simply an agreement amongst the parties to the above-cited case to not challenge the PA USF until after December 31, 2006.

The current PA USF is premised on state and federal policy of fostering universal service at affordable prices.

On March 5, 2005, two months after institution of this Investigation, the FCC entered its Order instituting an intercarrier compensation proceeding at CC Docket No. 01-92. Included in the docket is interstate and intrastate access, reciprocal compensation and universal service. The moving parties state that the FCC proceeding has the potential to directly impact if not render moot the universal service and access charge issues in this proceeding. The Motion lists the proposals and certain aspects of the proposals which have the potential to conflict with this Investigation. Motion, pages 6-9. It states that:

9. Most of the foregoing proposals could have a significant impact on rural access reform. In many of these proposals, the above reforms cover both interstate and intrastate access and affect both interstate and intrastate USF funds. Most of the proposed plans propose that rural carriers should continue to receive funding of their networks to foster universal service and in many cases create supplemental rural universal service funding or access charge replacement funding to compensate rural carriers for additional required access reform. Accordingly, it would be unreasonable, unproductive and inefficient for this Commission to act in advance of the FCC.

¹ Cellco Partnership c/b/a Verizon Wireless, Nextel Communications Inc., Omnipoint Communications Inc. d/b/a T-Mobile, Omnipoint Communications Enterprises LLC d/b/a T-Mobile, and Voicestream Pittsburgh LP d/b/a T-Mobile.

The Motion contains examples of what might befall Pennsylvania if the Commission acts before the FCC. Based on the potential for conflict and even exemption, the moving parties advocate a stay of this proceeding in favor of maintaining the status quo until the federal proceeding is finished.

OCA agrees with the Motion and requests that the Commission grant the Motion in its entirety.

The Wireless Carriers concur with the Motion because the outcome of the FCC proceeding “will almost certainly dictate some of the rights and responsibilities of carriers and state commissions with respect to most of the issues that are the subject of this investigation. A deferral as sought in the *Deferral Motion* will ensure that the information gathered in this proceeding takes into account such changes in the universal service landscape.” Letter of Wireless Carriers in support of granting Motion.

The Wireless Carriers were careful to point out that they still want their own Motion to be decided regardless of the outcome of the Motion to stay.

Qwest, AT&T and MCI strongly oppose delay. Their opposition points out that delay would reverse the Commission’s own statement in its Order initiating this proceeding that now is the time to address the issues presented. *See* Order of December 20, 2004. In addition, the possibility of delay was, in fact, discussed by the parties during the prehearing conference of April 21, 2005, and it was rejected orally and as indicated by the scheduling order of April 22, 2005.

Qwest, AT&T and MCI (“Companies”) warn that this is not the first time that the rural carriers have tried to delay intercarrier compensation reform pending the FCC proceeding and cites to testimony, as well as the position taken, in another case in April 2004.² The

² Direct testimony of Gary Zingaretti, PTA Statement 1.0 filed April 14, 2004; *Generic Investigation in ref: Impact on Local Carrier Compensation if a Competitive Local Exchange Carrier Defines Local Calling Areas Differently than the Incumbent Local Exchange Carrier’s Local Calling Areas but Consistent with Established Commission Precedent*, PUC Docket No. I-00030096.

companies point out that the FCC proceeding could take a variety of directions, will probably take a very long time to complete, and will most likely be followed by appeals that will delay the final rulemaking for years. Already, the reply comment period had been extended, an act which the Companies characterize as indicative of the FCC's intent to proceed with its docket in an unhurried fashion.

The Companies advocate that Pennsylvania get "its own house in order on issues of access charges and the state USF." Answer, p. 4. The Companies warn that delay increases the potential for customer rate shock when reform actually comes.

As further support, the Companies point out that the Commission noted the FCC proceeding in an order entered January 18, 2005 in the parallel Verizon access charge proceeding, and the Commission directed the ALJ to issue a recommended decision as expeditiously as possible.³

At the second prehearing conference, the possibility of staying the proceeding was discussed during the scheduling phase.

Sprint recognized the federal proceeding and the potential effect, and recommended proceeding with caution.

The wireless carriers supported asking the Commission whether they want the proceeding to continue or to be stayed in light of the federal docket.

MCI pointed out that the Commission was well aware of the impending federal proceeding and instituted this one anyway, so there is no point in delay.

I can see no point in delaying this proceeding at this level. The Commission was aware of the pending federal proceeding when the underlying order in this matter was issued.

³ *ATT&T Communication of Pennsylvania, LLC v. Verizon North Inc. and Verizon Pennsylvania Inc.*, PUC Docket No. C-20027195.

The directive to me was clear: to conduct appropriate proceedings, including but not limited to, a fully developed analysis and recommendation on the questions presented. My contribution will be a recommended decision, which will not become final by operation of law and can be delayed at the Commission level indefinitely should the Commission choose to wait until the federal proceeding is completed before delivering a final decision in this matter. There is no prejudice to any party nor to the consumers of Pennsylvania by proceeding at this time, and the ultimate decision on what to decide and when to decide it will still belong to the Commission.

THEREFORE,

IT IS ORDERED:

1. That the Motion of Wireless Carriers for Determination that the Commission Lacks Jurisdiction to Require CMRS Providers to Contribute to the Funding of a Pennsylvania Universal Service Fund is granted insofar as it depends on the determination that the wireless carriers are not public utilities within the meaning of the Public Utility Code.

2. That the Motion of the Rural Telephone Company Coalition, Office of Consumer Advocate and Office of Trial Staff for the Commission to Defer This Investigation Pending Resolution of the FCC Intercarrier Compensation Proceeding at CC Docket No. 01-92 is denied.

Dated: June 8, 2005


Susan D. Colwell
Administrative Law Judge