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CHARLES E. THOMAS
(1913 - 1998)

June 21, 2005

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

DOCUMENT
FOLDER

In re: Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund
Docket No. I-00040105

Dear Secretary McNulty:

Enclosed for filing on behalf of the Rural Telephone Company Coalition, Office of Consumer Advocate and Office of Trial Staff are an original and three copies of a Petition for Interlocutory Review for action by the Commission. Please note that given the subject matter of the Petition and the existing schedule in the instant proceeding we would respectfully request prompt action and a stay of the schedule. The underlying pleading, a Motion to Defer the Investigation was filed May 25, 2005 and referred to the Law Bureau on May 26, 2005. It had been the Movants intent that the Commission itself would rule on that Motion, given that the Administrative Law Judge was not authorized to modify a PUC Order. However, given that the Administrative Law Judge did rule, we are now asking this Commission to promptly grant Interlocutory Review and/or rule on the Motion as originally filed.

A copy of the attached Petition has been served in accordance with the attached Certificate of Service.

DOCKETED
JUN 22 2005

Very truly yours,

THOMAS, THOMAS, ARMSTRONG & NIESEN

By *Patricia Armstrong*
Patricia Armstrong

SECRETARY'S BUREAU

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Enclosure

- cc: Certificate of Service
- Honorable Wendell F. Holland, Chairman (w/encl.)
- Honorable Kim Pizzingrilli, Commissioner (w/encl.)
- Honorable William Shane, Commissioner (w/encl.)
- Honorable Terrance J. Fitzpatrick, Commissioner (w/encl.)
- Honorable James H. Cawley, Commissioner (w/encl.)

DOCUMENT
FOLDER

DOCKETED

JUN 22 2005

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation Regarding Intrastate :
Access Charges and IntraLATA Toll :
Rates of Rural Carriers, and the : Docket No. I-00040105
Pennsylvania Universal Service :
Fund :

PETITION FOR INTERLOCUTORY REVIEW

**THOMAS, THOMAS, ARMSTRONG
& NIESEN**

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Robert V. Eckenrod, Esquire

Dated: June 21, 2005

SECRETARY'S BUREAU

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TO THE HONORABLE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW, comes the Rural Telephone Company Coalition ("RTCC") (see Attachment 1 hereto), the Office of Consumer Advocate and Office of Trial Staff ("Joint Movants"), by their attorneys, pursuant to 52 Pa. Code § 5.302, and petition this Honorable Commission for Interlocutory Review of the Order of Administrative Law Judge Susan D. Colwell dated June 8, 2005. RTCC poses the following material question for this Commission's review:

MATERIAL QUESTION: Did the presiding officer erroneously issue an Order on a Motion filed with the Commission and erroneously conclude not to stay the instant investigation pending action by the Federal Communications Commission on the same matters at issue in this Commission investigation?

(Proposed Answer as to both parts in the affirmative).

1. On December 20, 2004, the Pennsylvania Public Utility Commission ("Commission") instituted the instant investigation.

2. Following the institution of this Investigation at Docket No. I-00040105, the FCC on March 3, 2005, entered its Order instituting an intercarrier compensation proceeding at CC Docket No. 01-92, which has been published in the Federal Register. In this very significant regulatory proceeding the FCC is examining the intercarrier compensation system including interstate and intrastate access, reciprocal compensation and universal service. In the Notice of Proposed Rulemaking, the FCC states that one of the main reasons reform is needed is because the current intercarrier compensation system is based on jurisdictional and regulatory distinctions that are no longer linked to technological or economic differences (Id. at ¶15). The FCC also established several goals for the intercarrier compensation reform process including the preservation of universal service (Id. at ¶32), promotion of economic efficiency (Id. at ¶31) and maintenance of competitive and technology neutrality (Id. at ¶33).¹

3. On May 23, 2005, RTCC, OTS and OCA jointly filed a Motion for the Commission to defer this investigation pending resolution of the FCC intercarrier

¹One factor identified by the FCC reform proceeding is the fact that the industry is no longer served solely by wireline local and long distance carriers but is served by ISP, wireless providers and VoIP providers. These nontraditional providers play a role in the future communications market and must be considered in intercarrier compensation reform.

compensation proceeding at CC Docket No. 01-92. OSBA filed an answer on May 31, 2005, agreeing that the Motion should be granted in its entirety. The Wireless Carriers as a group by letter dated June 2, 2005 concurred that deferral of the investigation would be appropriate for the reasons stated in the Motion. Only Qwest, MCI and AT&T opposed the Motion. The May 23, 2005 Motion is attached hereto as Attachment 2 and the arguments made therein are incorporated by reference. Joint Movants submit that these arguments continue to apply and should be considered by the Commission.

4. By Order dated June 8, 2005 ("ALJ Order"), Administrative Law Judge Susan D. Colwell held, among other things, that:

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. 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.

ALJ Order at 9-10.

5. When the Joint Motion was filed with the Commission on May 23, 2005, the Movants did not expect Judge Colwell to rule on the Motion, Joint Movants recognize that an ALJ is not empowered to stay a Commission directive as stated at the Prehearing. T. 76. The Commission, however, under authority cited by Joint Movants was petitioned in essence to exercise its authority to amend its Order instituting this investigation in recognition of the superceding, intervening events at the federal level, and defer going forward with intrastate access reform and universal service so long as those same issues were being simultaneously addressed by the FCC. It had been the Joint Movants expectation that the Commission would rule on the Motion and in fact on May 26, 2005, the Secretary's office assigned the Motion to the Law Bureau.

6. The Joint Movants now specifically request that the Commission rule on the Joint Motion for all of the reasons set forth therein.

7. Contrary to the conclusions set out in the ALJ Order, there are significant and compelling reasons justifying a delay in the instant proceeding, not the least of which is that this Commission could not have been aware of the FCC's March 3, 2005 Order when it entered its December 20, 2004 Investigation Order.

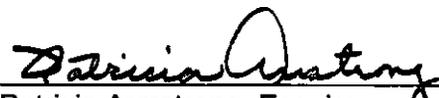
8. There would be clear prejudice to the RTCC members and all other parties to have to expend significant time and resources in an investigation that will undoubtedly be trumped to some extent if not fully by the FCC proceeding. These small companies, which have instituted significant access reform from 2000 through early 2005, and continue to modernize their networks in accordance with their Act 183 commitments would be significantly prejudiced by expending time and resources on a premature investigation. The resolution of the FCC investigation will most definitely impact the resolution of intrastate access reform, reciprocal compensation and universal service and the Commission's investigation of these issues should be stayed pending the resolution thereof.

WHEREFORE, the Rural Telephone Company Coalition for the reasons set forth herein, respectfully requests that this Honorable Commission answer the Material Question in the affirmative, reverse the Interim Order of Administrative Law Judge Susan D. Colwell and grant the Motion of the Rural Telephone Company Coalition, Office of Consumer Advocate and Office of Trial Staff for the Commission to defer this investigation.

Respectfully submitted,

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Rural Telephone Company Coalition

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By 
Robert V. Eckenrod, Esquire

Dated: June 21, 2005

REC-1130

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STOR. W. H. J. J. J. J. J.

ATTACHMENT 1

The RTCC consists of the following rural incumbent local exchange carriers: ALLTEL Pennsylvania, Inc., Armstrong Telephone Company - PA, Armstrong Telephone Company-North, Bentleyville Communications Corporation, d/b/a The Bentleyville Telephone Company, Buffalo Valley Telephone Company, Citizens Telephone Company of Kecksburg, Commonwealth Telephone Company, Conestoga Telephone and Telegraph Company, Denver and Ephrata Telephone and Telegraph Company d/b/a D&E Telephone Company, Deposit Telephone Company, Frontier Communications of Breezewood, Inc., Frontier Communications of Canton, Inc., Frontier Communications of Lakewood, Inc., Frontier Communications of Oswayo River, Inc., Frontier Communications of Pennsylvania, Inc., The Hancock Telephone Company, Hickory Telephone Company, Ironton Telephone Company, Lackawaxen Telecommunications Services, Inc., Laurel Highland Telephone Company, Mahanoy & Mahantango Telephone Co., Marianna & Scenery Hill Telephone Company, The North-Eastern Pennsylvania Telephone Company, North Penn Telephone Company, North Pittsburgh Telephone Company, Palmerton Telephone Company, Pennsylvania Telephone Company, Pymatuning Independent Telephone Company, South Canaan Telephone Company, Sugar Valley Telephone Company, Venus Telephone Corporation, West Side Telephone Company and Yukon-Waltz Telephone Company.

REF ID: A11111

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SECRETARY OF DEFENSE

ATTACHMENT 2

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation Regarding Intrastate :
Access Charges and IntraLATA Toll : Docket No. I-00040105
Rates of Rural Carriers, and the :
Pennsylvania Universal Service Fund :

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**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**

Pursuant to 52 Pa. Code § 5.103 and 66 Pa. C.S. §§ 331, 501 and 703, the Rural Telephone Company Coalition¹ ("RTCC") Office of Consumer Advocate ("OCA") and Office of Trial Staff ("OTS") (collectively "Joint Movants") move to defer the above referenced investigation pending resolution of the Federal Communications

¹The RTCC consists of the following rural incumbent local exchange carriers: ALLTEL Pennsylvania, Inc., Armstrong Telephone Company - PA, Armstrong Telephone Company-North, Bentleyville Communications Corporation, d/b/a The Bentleyville Telephone Company, Buffalo Valley Telephone Company, Citizens Telephone Company of Kecksburg, Commonwealth Telephone Company, Conestoga Telephone and Telegraph Company, Denver and Ephrata Telephone and Telegraph Company d/b/a D&E Telephone Company, Deposit Telephone Company, Frontier Communications of Breezewood, Inc., Frontier Communications of Canton, Inc., Frontier Communications of Lakewood, Inc., Frontier Communications of Oswayo River, Inc., Frontier Communications of Pennsylvania, Inc., The Hancock Telephone Company, Hickory Telephone Company, Ironton Telephone Company, Lackawaxen Telecommunications Services, Inc., Laurel Highland Telephone Company, Mahanoy & Mahantango Telephone Co., Marianna & Scenery Hill Telephone Company, The North-Eastern Pennsylvania Telephone Company, North Penn Telephone Company, North Pittsburgh Telephone Company, Palmerton Telephone Company, Pennsylvania Telephone Company, Pymatuning Independent Telephone Company, South Canaan Telephone Company, Sugar Valley Telephone Company, Venus Telephone Corporation, West Side Telephone Company and Yukon-Waltz Telephone Company.

Commission's ("FCC") intercarrier compensation proceeding at CC Docket No. 01-92.² The Joint Movants herein further respectfully request expedited consideration of this motion in order to avoid all parties expending unnecessary time and expense relating to this investigation. The Joint Movants are also concerned that this Commission should not expend its resources prior to the FCC's resolution of its intercarrier compensation proceeding which will definitely impact the ultimate resolution of this investigation. In support of the motion, the Joint Movants state as follows:

1. This investigation was instituted as a result of the Commission's prior Order entered July 15, 2003, at M-00021596, *In re: Access Charge Investigation per Global Order of September 30, 1999* ("2003 Order"), at 12 in which it discussed implementing access reform in Pennsylvania in an efficient and productive manner. The 2003 Order also provided that a rulemaking proceeding would be initiated no later than December 31, 2004, to address possible modifications to the Pennsylvania Universal Service Fund ("USF" or "Fund") regulations and the simultaneous institution of a proceeding to address all resulting rate issues should disbursements from the Fund be reduced in the future. Accordingly, the Commission by Order entered December 20, 2004³, instituted the instant investigation stating, as follows:

Therefore, an investigation is hereby instituted to consider whether intrastate access charges and intraLATA toll rates should be further reduced in the rural ILECs' territories, and to consider any and all rate issues and rate changes that should or would result in the event that

²See, 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) (the "FNPRM").

³Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund, (Order entered December 20, 2004 at I-00040105).

disbursements from the Fund are reduced or eliminated.³ This 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. The USF rate issues (access charge rates, toll rates, local service rates) should be addressed in a full, formal investigation before any formal changes to the regulations are proposed and moved through the regulatory process. Consequently, the matter will be assigned to the Office of Administrative Law Judge for appropriate proceedings.

³This investigation shall remain separate from the pending proceeding before Administrative Law Judge Fordham at C-20027195 regarding Verizon PA's and Verizon North's access charge reform.

2. In determining any action this Honorable Commission should take in this proceeding, it is important to review its history on access reform beginning with the reductions to access and intralata toll rates undertaken in early 2000 with the entry of the Global Order⁴ continuing through the second stage of access reform pursuant to the 2003 Order and as a result of the Phase II Access Reform proceeding at Docket No. M-00021596⁵ as recently as December 2004, there has been gradual but significant access reform in Pennsylvania to date. In 2003, virtually all of the RTCC members filed tariffs for intrastate traffic sensitive ("TS") rates which mirrored their interstate TS rates.

3. The current investigation was undertaken to comply with the settlement terms filed at Docket No. M-00021596, which in no manner mandated that any further changes to the Pennsylvania USF, intrastate access or residential local charges must

⁴As provided in the initial USF plan adopted by the Commission in the Global Order, if the Fund is eliminated, all rate changes accomplished in that initial round of reform would be undone. The effect of the Global Order was to reduce access rates and also limit the rate charged to residential customers for local service. Access rate reductions and local service rate support through the Pennsylvania USF plan would revert to where they were prior to the changes made in the Global Order, if the Pennsylvania USF were eliminated.

⁵Access Charge Investigation per Global Order of September 30, 1999 et al., (Order entered July 15, 2003 at M-00021596 et al.).

occur by year end 2006 or any other date. There is no sunset provision in either the regulations establishing the Fund or in the State and Federal law authorizing the Fund. In the prior Pennsylvania USF proceeding before this Commission at Docket No. M-00021596, the parties merely agreed not to challenge the Fund until after December 31, 2006. There was no provision that it would expire on any date.

4. The current Pennsylvania USF is premised on both the State and Federal policy of fostering universal service to assure that ubiquitous and affordable local service remains available to all consumers. As provided in Section 254(b) of the Telecommunications Act of 1996 ("TCA-96"), 47 U.S.C. §254(b):

(b) UNIVERSAL SERVICE PRINCIPLES.—The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

1. QUALITY AND RATES.—Quality services should be available at just, reasonable, and affordable rates.

2. ACCESS TO ADVANCED SERVICES.— Access to advanced telecommunications and information services should be provided in all regions of the Nation.

3. ACCESS IN RURAL AND HIGH COST AREAS.— Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

4. EQUITABLE AND NON-DISCRIMINATORY CONTRIBUTIONS. —All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

5. SPECIFIC AND PREDICTABLE SUPPORT MECHANISM.—There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

47 U.S.C. §254(b) (emphasis added).

5. Following the institution of this Investigation at I-00040105, the FCC on March 3, 2005 entered its Order instituting an intercarrier compensation proceeding at CC Docket No. 01-92, which has been published in the Federal Register. This FCC proceeding might well be regarded as the most significant regulatory proceeding since divestiture. The FCC in this proceeding is examining the intercarrier compensation system including interstate and intrastate access, reciprocal compensation and universal service. In the Notice of Proposed Rulemaking, the FCC states that one of the main reasons reform is needed is because the current intercarrier compensation system is based on jurisdictional and regulatory distinctions that are no longer linked to technological or economic differences (Id at ¶15). The FCC also established several goals for the intercarrier compensation reform process including the preservation of universal service (Id at ¶32), promotion of economic efficiency (Id at ¶31) and maintenance of competitive and technology neutrality (Id at ¶33).⁶

⁶One factor identified by the FCC reform proceeding is the fact that the industry is no longer served solely by wireline local and long distance carriers but is served by ISP, wireless providers and VoIP providers. These nontraditional providers play a role in the future communications market and must be considered in intercarrier compensation reform. However, this Commission does not have full jurisdiction over all of these providers and their services.

6. In its Order entered March 3, 2005, the FCC is seeking comments on seven⁷ comprehensive access reform proposals intended to replace the "outmoded system of intercarrier payments in the telecommunications industry with a uniform regime suited for competitive markets and new technologies."⁸ The Order sets forth May 23, 2005, and June 22, 2005, as the dates for the filing of comments and reply comments.⁹ This FCC proceeding has the potential to directly impact if not render moot, the universal service and access charge issues in this proceeding.

7. The proposals are as follows:

Inter-carrier Compensation Forum (ICF). The group represents a group of nine carriers. The plan would reduce most per-minute termination rates from existing levels to zero over a six-year period for larger LECs but maintain a smaller termination rate for rural LECs. Revenue eliminated would be replaced by a combination of end-user charges and universal service support. Both MCI and AT&T are members of this group.

Expanded Portland Group (EPG). The group is comprised of small and mid-sized rural LECs. Its two-phase plan would eventually convert per-minute intercarrier charges to capacity-based charges. A new Access Restructure Charge would be implemented to make up any revenue shortfalls.

⁷There are seven plans which are officially part of the FNPRM. Other groups subsequently have submitted additional statements of position, two of which include NARUC and CTIA.

⁸(FCC 2/10/05 News Release)

⁹ Many of the parties to this proceeding, as well as the Commission itself, are expected to file comments with the FCC. In fact AT&T and MCI are two of the primary supporters of the ICF Proposal discussed infra which proposal includes reform of intrastate access charges by the FCC, the very same reform being addressed by this proceeding. In fact, the ICF lists as one of its critical objectives "[r]eplacing today's myriad of [sic] different intercarrier compensation rates - - - including interstate access, intrastate access." Ex Parte Brief of ICF in Support of the Intercarrier Compensation and Universal Service Reform Plan (filed October 5, 2004) at page 5.

Alliance for Rational Intercarrier Compensation (ARIC). ARIC represents small rural providers serving high-cost areas. Its Fair Affordable Comprehensive Telecom Solution (FACTs) plan unifies per-minute rates at a level based on a carrier's embedded costs and provides for local retail rate rebalancing to benchmark levels.

Cost-Based Intercarrier Compensation Coalition (CBICC). The coalition represents competitive local exchange carriers or CLECs. The plan would create a cost-based termination rate in each geographic area for all types of traffic. The CBICC proposal also covers certain VoIP traffic.

Home Telephone Company and PBT Telecom (Home/PBT). Home and PBT are rural local exchange carriers. The plan would replace the current regimes with connection-based intercarrier charges. Lost revenues would be recovered from an increase to the SLC and a new bulk billed intercarrier cost recovery fund.

Western Wireless. Western Wireless is a wireless carrier that receives universal service support in 14 states. Its plan would reduce intercarrier charges in equal steps over four years to bill-and-keep with a longer transition period for small rural incumbents. All existing USF funds are replaced with a single high cost fund.

NASUCA. NASUCA is the National Association of State Utility Consumer Advocates. NASUCA's plan would reduce certain intercarrier rate levels over a five-year period.

NARUC favors charges that are competitively and technologically neutral.

CTIA is a wireless association which supports bill and keep, recovery of a large portion of costs from end-users and the creation of a single USF support mechanism.

8. Certain aspects of those plans which have the potential to conflict with the instant proceeding are as follows:

ARIC

- Local rates to be set at a nationwide average RBOC Level without state rate proceedings.
- Existing USF mechanisms retained.
- Unify all intercarrier rates - interstate, intrastate - reciprocal compensation.

- Existing USF unchanged.
- New State Equalization Fund.
- Existing State USF merged into SEF.

ICF

- FCC to determine intrastate access rates.
- Covered Rural Telephone Companies continue to have transport revenues.
- Recover lost revenue by end-user charges and new federal USF support.
- USF mechanisms offering financial support for CRTC's and non-CRTC's.
- USF funding based on units and a single contribution methodology for collecting funding for both new and existing USF support.
- Reallocation of cost responsibility - CRTC has no obligation beyond the boundaries of its study area.
- New SLC up to \$10/month.

CBICC

- Intrastate access rates go to baseline in each geographic area
- Transition period for intrastate rates and offset by increase in end-user charge and USF.
- Reallocation of cost responsibility - Rural LEC does not bear transport costs beyond service territory.

HOME/PBT

- New USF for any shortfall.
- Reallocation of cost responsibility – interconnection must be on RLEC network.

EPG

- National Benchmark (including SLC) of \$21.00, all permanent rates set at interstate access and a new access restructure charge (ARC) to make up revenue shortfall billed to carrier. Rates also apply to EAS Traffic.

WESTERN WIRELESS

- All USF replaced.

NASUCA

- Allocate network costs to all that use the network.
- Reduce interconnection rate to \$.0095 per minute for rural carriers, but allow states to request additional USF funding where necessary.

NARUC

- Convert all per minute charges to capacity charges.
- Rural Access Charge Transition Fund - ensure revenue neutrality for 3 years.
- Federal USF absorbs state RLEC access reform.
- National Benchmark local rates.

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.

10. For example, if the FCC adopts EPG's national benchmark of \$21.00, which includes the federal SLC, and all other revenue shortfalls are recovered from an Access Restructure Charge (ARC) assessed on all carriers across the country, and Pennsylvania acts prematurely by raising local rates above \$14.50 (\$21.00 - \$6.50), Pennsylvanians may essentially forego the opportunity to receive their fair share of the ARC. Likewise, if the Commission were to prematurely require the increase of all local service rates to \$18.00, then Pennsylvania consumers might be unfairly burdened by potential further increases to the federal SLC which might go as high as \$10.00 on top of a rate rebalanced \$18.00 charge. If Pennsylvania access reform totaled \$X million and it was implemented ahead of the FCC, Pennsylvania may lose its ability to benefit from \$X million of Federally collected universal service dollars. If intercarrier compensation goes to a capacity charge, any Pennsylvania changes may be nullified. These are only a few of the many examples of why it would be prudent for this Commission to defer action on this matter for twenty-four months or until the FCC acts on its Intercarrier Compensation proceeding, whichever is earlier. It is clear that the FCC's Order will impact the matters raised in this proceeding.

11. One of the most important issues specifically posed by the FCC is the FCC's authority to preempt the state's regulation of intrastate access and local interconnection and the establishment of alternative cost recovery mechanisms within the intrastate jurisdiction. The FCC specifically requested comments concerning the legal basis for it to exercise jurisdiction over intrastate access mechanisms in order to adopt a uniform intercarrier compensation rate structure that will reduce arbitrage,

promote competition, protect universal service, and reduce regulation.¹⁰ While many may oppose FCC preemption concerning the setting of intrastate access charges, the PUC must seriously consider the potential for its authority in this area to be changed by an FCC decision. In addition, it is quite likely that, even if the FCC does not preempt in this area, it may offer guidelines to the states for access reform and encourage reforms through incentive mechanisms. Potential FCC action in this area should caution against the PUC acting on intrastate access charges before the FCC order is issued.

12. Moreover, virtually every proposal contains some means of providing for universal service support or supplemental support for rural areas. As Mark Wigfield of the FCC's Wireline Competition Bureau stated in recognizing the importance of the rural issue:

Rural carriers get 30% of their revenues from access fees and 30% through the universal service fund. . . .

13. Without question, the FCC's resolution of its intercarrier compensation proceeding will impact Pennsylvania ILECs, intrastate universal service funding and intrastate rates that are paid by Pennsylvania consumers. Under these circumstances, the Joint Movants herein believe that the Commission should maintain the status quo until the FCC addresses the comments and releases an Order at CC Docket No. 01-92 which may well take place before the end of this year. If changes are made at this time relating to intrastate rates and universal service funding, the Pennsylvania ILECs, which have already implemented substantial intrastate access reform, and their consumers, who have already encountered substantial local service increases in order to offset prior intrastate access reductions, may get no credit for such rate reform proposals pending

¹⁰ FNPRM, ¶¶ 78-82.

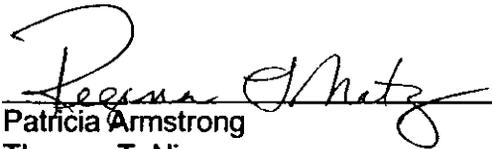
before the FCC and may face additional subscriber line charges or other rate increases independent of whatever action this Honorable Commission has taken. Pennsylvania consumers and carriers could lose the opportunity to benefit fully from increased federal funding simply because they may have moved too quickly in reducing their access rates before new federal mechanisms were put in place. Thus, the Joint Movants herein submit that not only would it be prudent to stay the current proceeding at least for twenty-four months to await the impact and assess the status of the FCC's actions at CC Docket No. 01-92, but in fact to proceed in advance of the FCC would not be sound public policy.

14. Accordingly, the Joint Movants respectfully request that the Commission act expeditiously on this motion and, based on the circumstances existing today, issue an Order deferring this matter pending the outcome of the FCC intercarrier compensation proceeding at Docket No.01-92, but not to exceed a period of twenty-four months or until the FCC acts on its Intercarrier Compensation proceeding, whichever is earlier.

WHEREFORE, for all the foregoing reasons, the Joint Movants respectfully request that:

1. The Commission issued an Order staying the proceeding.
2. Grant such further relief consistent with the foregoing that it deems reasonable and just.

Respectfully submitted,



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DATE: May 23, 2005

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Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation Regarding Intrastate Access : Docket No. I-00040105
Charges and IntraLATA Toll Rates of :
Rural Carriers, and the Pennsylvania :
Universal Service Fund :

SECRETARY'S BUREAU

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CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of June, 2005, served a true and correct copy of the foregoing Petition for Interlocutory Review on behalf of the Rural Telephone Company Coalition, Office of Consumer Advocate and Office of Trial Staff upon the persons and in the manner listed below:

VIA E-MAIL AND HAND DELIVERY

Honorable Susan D. Colwell
Administrative Law Judge
Pennsylvania Public Utility Commission
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P.O. Box 3265
Harrisburg, PA 17105-3265

Robert V. Eckenrod, Esquire
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VIA E-MAIL AND FIRST CLASS MAIL, POSTAGE PREPAID

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Patricia Armstrong

COMMONWEALTH OF PENNSYLVANIA

DATE: June 22, 2005

SUBJECT: I-00040105

TO: Office of Special Assistants

FROM: James J. McNulty, Secretary *KB*

BTL

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

Attached is a copy of a Petition for Interlocutory Review, filed by Rural Telephone Company Coalition, Office of Trial Staff and Office of Consumer Advocate in connection with the above docketed proceeding.

This matter is assigned to your Office for appropriate action.

Attachment

cc: ALJ
LAW

ksb

DOCUMENT
FOLDER

DOCKETED

JUN 22 2005

COMMONWEALTH OF PENNSYLVANIA



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June 28, 2005

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HAND DELIVERED

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

DOCUMENT
FOLDER

**Re: Investigation Regarding Intrastate Access Charges and
IntraLATA Toll Rates of Rural Carriers, and the
Pennsylvania Universal Service Fund
Docket No. I-00040105**

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KJR

Dear Secretary McNulty:

Enclosed for filing are the original and nine (9) copies of the Brief in Support of the Petition for Interlocutory Review on behalf of the Office of Small Business Advocate in the above-docketed proceeding. As evidenced by the enclosed certificate of service, two copies have been served on all active parties in this case.

If you have any questions, please do not hesitate to contact me.

Sincerely,

William R. Lloyd, Jr.
Small Business Advocate

Enclosures

- cc: Hon. Wendell F. Holland, Chairman
- Hon. James Cawley, Vice Chairman
- Hon. Kim Pizzingrilli, Commissioner
- Hon. Terrence J. Fitzpatrick, Commissioner
- Hon. Bill Shane, Commissioner
- Hon. Susan Colwell, Administrative Law Judge
- Parties of Record

13

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**INVESTIGATION REGARDING INTRASTATE :
ACCESS CHARGES AND INTRALATA TOLL :
RATES OF RURAL CARRIERS, AND THE :
PENNSYLVANIA UNIVERSAL SERVICE FUND :**

DOCKET NO. I-00040105

DOCKETED
JUL 11 2005

**OFFICE OF SMALL BUSINESS ADVOCATE
BRIEF IN SUPPORT OF THE
RURAL TELEPHONE COMPANY COALITION,
OFFICE OF CONSUMER ADVOCATE AND
OFFICE OF TRIAL STAFF
PETITION FOR INTERLOCUTORY REVIEW**

ORIGINAL

**William R. Lloyd, Jr.
Small Business Advocate**

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Dated: June 28, 2005

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I. INTRODUCTION

On December 20, 2004, the Pennsylvania Public Utility Commission (“PUC” or “Commission”) entered an Order instituting an investigation at Docket No. I-00040105 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 (“ILECs”). The investigation was assigned to Administrative Law Judge (“ALJ”) Susan Colwell.

On February 3, 2005, the Office of Small Business Advocate (“OSBA”) filed a Notice of Intervention.

ALJ Colwell presided over in-person prehearing conferences on Wednesday, February 16, 2005, and April 21, 2005. In addition to the OSBA, the following parties entered appearances and were represented by counsel at those conferences: Office of Consumer Advocate (“OCA”); Rural Telephone Company Coalition (“RTCC”); United Telephone Company of Pennsylvania d/b/a/ Sprint (“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”).

Among other things, the second prehearing conference addressed scheduling matters, including whether or not the investigation should be stayed pending the outcome of the Intercarrier Compensation Proceeding before the Federal Communications Commission (“FCC”) at CC Docket No. 01-92.

On May 23, 2005, the RTCC, the OCA, and the OTS jointly filed a Motion seeking a stay of this investigation pending the outcome of the FCC proceeding. The OSBA did not join in the Motion; but the OSBA filed an Answer on May 31, 2005, asking the Commission to grant the Motion in its entirety. Some of the wireless carriers submitted a letter which generally supported the Motion. However, Qwest, AT&T, and MCI opposed the Motion.

By Order of June 8, 2005, ALJ Colwell denied the Motion filed by the RTCC, the OCA, and the OTS. In response to ALJ Colwell's Order, the RTCC, the OCA, and the OTS (collectively, "Joint Petitioners") filed a Petition for Interlocutory Review ("Petition") on June 21, 2005. The Petition presented the following Material Question for Commission review:

MATERIAL QUESTION: Did the presiding officer erroneously issue an Order on a Motion filed with the Commission and erroneously conclude not to stay the instant investigation pending action by the Federal Communications Commission on the same matters at issue in this Commission investigation?

As the Joint Petitioners recognized by their proposed answer, there are actually two parts to the Material Question.

Pursuant to 52 Pa. Code §5.302(b), the OSBA files this Brief in support of that part of the Petition which addresses whether the ALJ erred by refusing to grant the requested stay. In the OSBA's view, this investigation should be stayed pending the outcome of the FCC's Intercarrier Compensation Proceeding.

II. ARGUMENT

A. Should the ALJ have ruled on the Motion?

In Paragraph 5 of the Petition, the Joint Petitioners allege that they had intended that the Commission, rather than ALJ Colwell, rule on their May 23, 2005, Motion seeking a stay of this

proceeding pending the outcome of the FCC's Intercarrier Compensation Proceeding. Consistent with that expectation, the Joint Petitioners have framed the first part of the Material Question to address whether it was erroneous for ALJ Colwell to rule on the Motion.

The OSBA takes no position on the first part of the Material Question. In the OSBA's view, the essential question is whether a stay should be granted—regardless of the procedure by which that issue properly comes before the Commission.

B. Should a Stay be granted?

As the ALJ pointed out in her June 8, 2005, Order, at page 9, the Commission has instituted a Verizon access charge proceeding which generally parallels the Commission's investigation into rural ILEC access charges. See the Verizon access charge proceeding at *AT&T Communications of Pennsylvania, LLC. v. Verizon North Inc. and Verizon Pennsylvania Inc.*, Docket No. C-20027195.

The Commission's Order initiating the investigation of rural ILEC access charges was entered on December 20, 2004. Thereafter, in a January 18, 2005, Opinion and Order in the Verizon proceeding, the Commission acknowledged the potential impact of an access charge proposal before the FCC and directed the ALJ to expand the Verizon proceeding to consider the FCC's deliberations. That access charge proposal is now part of the FCC's Intercarrier Compensation Proceeding. See Order entered January 18, 2005, pages 14-15, at Docket No. C-20027195, wherein the Commission stated as follows:

As noted by the OCA, there have been significant developments in the federal arena that may impact the [Verizon] remand proceeding. We are especially concerned about any impact that the proposed ICF [Intercarrier Compensation Forum] proposal, if it is ultimately approved by the FCC, may have jurisdictionally on access charge regulation in Pennsylvania, our

ability to further reduce or restructure intrastate access charges, and whether any FCC action may lead to a double recovery by the LECs in Pennsylvania in light of the remanded proceeding, and if the FCC permits intrastate access charges to be offset by increases to the federal SLC [Subscriber Line Charge]. Therefore, to the extent that any determination is made by the FCC that ultimately adopts the ICF proposal, or any other FCC action that is concluded prior to this remand proceeding that would assume authority over the intrastate access charges addressed in this proceeding, we shall direct the ALJ to expand the scope of this proceeding for the purpose of addressing the impact the FCC action may have on our jurisdictional responsibilities, as well as its relationship to the final recommended decision on access rates arising from this remand proceeding.

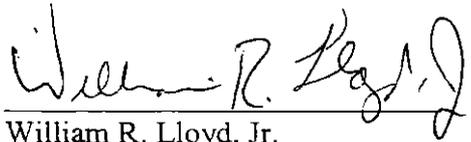
The proposals before the FCC in the Intercarrier Compensation Proceeding include changes in interstate and intrastate access and universal service. Just as the Commission recognized in the Verizon proceeding that the FCC's access charge deliberations could seriously impact if, and how, Verizon's intrastate access charges should be changed, so too could the FCC's deliberations seriously impact if, and how, the rural ILECs' intrastate access charges should be changed.

The Commission expressly directed the ALJ in the Verizon access case to take account of the FCC proceeding. However, because the Commission did not similarly direct the ALJ in this case, the record in this investigation is likely to be deficient and the Commission is likely to need a subsequent proceeding to evaluate the recommendations in this investigation in light of the FCC's deliberations. Therefore, to minimize litigation, the Commission should stay this investigation pending the outcome of the FCC's proceeding.

III. CONCLUSION

For the reasons set forth in this Brief, the OSBA respectfully requests that the Commission grant that portion of the Petition which seeks a Stay of this investigation.

Respectfully submitted,



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Dated: June 28, 2005

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation Regarding Intrastate Access :
Charges and IntraATA Toll Rates of Rural : Docket No. I-00040105
Carriers, and the Pennsylvania Universal :
Service Fund :

CERTIFICATE OF SERVICE

I certify that I am serving two copies of the Brief in Support of the Petition for Interlocutory Review, on behalf of the Office of Small Business Advocate, by e-mail and first class mail upon the persons addressed below:

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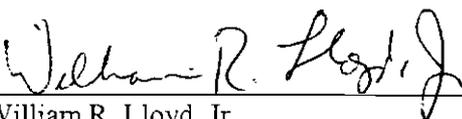
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Small Business Advocate

Date: June 28, 2005

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL
Docket No. J-00040105

Investigation Regarding Intrastate Access
Charges and IntraATA Toll Rates of Rural
Carriers, and the Pennsylvania Universal
Service Fund

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I certify that I am serving two copies of the Brief in Support of the Petition for Interlocutory Review, on behalf of the Office of Small Business Advocate, by e-mail and first class mail upon the persons addressed below:

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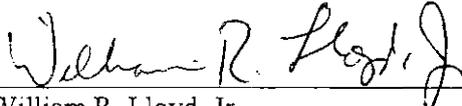
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ORIGINAL

Re: Investigation Regarding Intrastate Access
Charges and IntraLATA Toll Rates of Rural
Carriers, and the Pennsylvania Universal
Service Fund
Docket No. I-00040105

Dear Secretary McNulty:

Enclosed please find for filing an original and nine (9) copies of the Office of
Consumer Advocate's Brief in Support of Petition for Interlocutory Review in the above-captioned
proceeding.

Copies have been served upon all parties of record as shown on the attached
Certificate of Service.

Sincerely,

Joel H. Cheskis
Assistant Consumer Advocate

Enclosures

- cc: All parties of record
- Hon. Susan D. Colwell, ALJ
- Hon. Wendell F. Holland, Chairman
- Hon. James H. Cawley, Vice Chairman
- Hon. Kim Pizzingrilli, Commissioner
- Hon. William Shane, Commissioner
- Hon. Terrance J. Fitzpatrick, Commissioner

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

Investigation Regarding Intrastate :
Access Charges and IntraLATA Toll : Docket No. I-00040105
Rates of Rural Carriers, and the :
Pennsylvania Universal Service Fund :
:

OFFICE OF CONSUMER ADVOCATE'S
BRIEF IN SUPPORT OF PETITION FOR
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Dated: July 1, 2005

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Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund, Docket No. I-00040105, Order (entered Dec. 20, 2005)..... 1

I. INTRODUCTION

This proceeding was instituted by an Order entered on December 20, 2004 by the Pennsylvania Public Utility Commission ("Commission") seeking 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.¹ Access charges are the rates charged by telephone companies to other telephone companies seeking access to the local loop in order to provide services to the end-user. The Commission sought an investigation into access rate issues and rate changes and consider the potential that disbursements from the Pennsylvania Universal Service Fund ("Fund") are reduced. In its Order, the Commission recognized its responsibility for assuring the maintenance of universal service telecommunications services at affordable rates in Pennsylvania as well as the evolving nature of this responsibility. The Commission noted that the Fund helps to maintain the affordability of local service provided by a majority of the telephone companies in the Commonwealth.

In response to the Commission's December 20, 2004 Order, a Prehearing Conference was held before ALJ Colwell on February 16, 2005. At that time, it was determined that the commencement of this proceeding would be delayed to allow for an exchange of data amongst the parties and possible settlement discussions. The commencement of this proceeding was also delayed in light of several ancillary issues, including an impending proceeding regarding intercarrier compensation being conducted by the Federal Communications Commission ("FCC"), at Docket No. 01-92,² and the filing of preliminary pleadings regarding the impact of

¹ Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund, Docket No. I-00040105, Order (entered Dec. 20, 2005) ("Investigation Order").

² In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, FCC 05-33, Further Notice of Proposed Rulemaking (rel. March 3, 2005).

wireless carriers on this proceeding. It was determined that a Further Prehearing Conference would be convened in April 2005 to re-examine when it was appropriate to commence this proceeding.

On March 3, 2005, the FCC issued the Further Notice of Proposed Rulemaking ("ICC FNPRM") at the intercarrier compensation docket. Comments in response to the ICC FNPRM were filed on May 23, 2005. Through the ICC FNPRM, the FCC is examining the intercarrier compensation system including interstate and intrastate access, reciprocal compensation and universal service. In the ICC FNPRM, the FCC stated that one of the main reasons reform is needed is because the current intercarrier compensation system is based on jurisdictional and regulatory distinctions that are no longer linked to technological or economic differences. The FCC also specifically stated that one of the goals for the intercarrier compensation reform process is the preservation of universal service.

On April 21, 2005, a Further Prehearing Conference was convened for additional consideration of a procedural schedule in this matter. At the same time, oral argument was heard from the parties regarding the outstanding Motion filed by the wireless carriers. Additionally, and despite considerable disagreement amongst the parties, a procedural schedule was established which required the filing of direct testimony on August 1, 2005 and evidentiary hearings in October, 2005. At that time, the Rural Telephone Company Coalition ("RTCC") proposed that they may seek to delay this proceeding through the type of interlocutory appeal now before the Commission. ALJ Colwell indicated on the record that she would not allow for any further delay in this proceeding and would also not raise the matter with the Commission in

the form of a Material Question.³ She suggested that any such matter should be filed with the Commission.

On May 23, 2005, the RTCC, the Office of Consumer Advocate (“OCA”) and the Commission’s Office of Trial Staff (“OTS”) filed a joint Motion for the Commission to defer this investigation pending the resolution of the FCC intercarrier compensation proceeding. By Order dated June 8, 2005, ALJ Colwell issued an Order that denied the joint Motion and also granted in part, and denied in part, the wireless carriers’ motion.

On June 21, 2005, the RTCC, the OCA and the OTS petitioned the Commission for Interlocutory Review of ALJ Colwell’s June 8, 2005 Order. In particular, the Joint Movants posed the following Material Question for the Commission’s review:

Did the Presiding officer erroneously issue an Order on a Motion filed with the Commission and erroneously conclude not to stay the instant investigation pending action by the Federal Communications Commission on the same matters at issue in this Commission investigation?

As discussed further below, the OCA respectfully requests that this Honorable Commission answer the Material Question IN THE AFFIRMATIVE.

II. ARGUMENT

- A. This Commission should postpone the instant investigation pending action by the Federal Communications Commission on the same matters at issue in this investigation.

As indicated above, the FCC released its ICC FNPRM on March 3, 2005 in which it solicited comments on a variety of issues. Through the ICC FNPRM, the FCC desires to alter the intercarrier compensation regime because it believes that a regime different than what

³ Tr. 76.

currently exists would work better with the diverse services that use the same networks.⁴ The FCC asserts that the current regime creates opportunities for regulatory arbitrage because charges for similar interconnection services differ depending on the connecting carrier type (wireless or wireline), the type of call (local or toll) or the jurisdiction (intrastate or interstate).⁵ At the same time, existing telecommunications retail service offerings blur these distinctions by becoming mixed bundles of state and interstate local and long distance service. As such, carriers can engage in regulatory arbitrage to gain a competitive advantage by paying lower intercarrier compensation rates based on regulatory rate structure instead of by providing a superior service. The FCC is attempting to establish a unified intercarrier compensation regime in an effort to reduce the impact of the regulatory rate structure on the competitive outcome.

The FCC requested comments on a number of plans that were filed by major advocacy groups with the FCC after the first notice in this proceeding in an attempt to answer the outstanding issues facing the FCC. The instant Petition for Interlocutory Review provides a brief discussion of nine plans that are discussed in the ICC FNPRM.⁶ Some of these plans were submitted by groups which include several parties to this proceeding. For example, AT&T and MCI are members of the Intercarrier Compensation Forum (“ICF”) that submitted a plan and the OCA is a member of the National Association of State Utility Consumer Advocates (“NASUCA”) which also submitted a plan.

Significantly, most of the proposals submitted to the FCC will likely have a substantial impact on rural intrastate access reform, the very issue that is at the heart of the instant proceeding. In many of the proposals, both interstate and intrastate access charges will be

⁴ ICC FNPRM at ¶¶ 15-17.

⁵ Id. at ¶ 3.

⁶ See, Petition at Attachment 2, ¶ 8.

affected as well as both interstate and intrastate universal service funds. Whether the FCC preempts the PUC from further action in this area or offers incentives to reach targeted intrastate access rates, or simply encourages states to comply with new FCC guidelines, the FCC's action in this area will prove critical in establishing a national mechanism for achieving intercarrier compensation parity. Most importantly, many of the 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 reductions in access rates. These funds offset access reductions taking place after the FCC Order and are designed as a substitute for rural local rate increases, thereby maintaining universal service in rural communities.

One of the most important issues specifically posed by the FCC in the ICC FNPRM is the FCC's authority to preempt a state's regulation of intrastate access and local interconnection rates and the establishment of alternative cost recovery mechanisms within the intrastate jurisdiction. The FCC requested comments concerning the legal basis for it to exercise jurisdiction over intrastate access mechanisms in order to adopt a uniform intercarrier compensation rate structure that will reduce arbitrage, protect universal service and reduce regulation.⁷ As such, the FCC's legal authority to order a decrease in state access rates is being debated. AT&T, MCI and Qwest each advocate before the FCC that the FCC should reduce intrastate access rates but now argue before the Pennsylvania Commission that it should reduce intrastate access rates also.

⁷ ICC FNPRM at ¶¶ 78-82.

In response to the ICC FNPRM, AT&T and MCI, through their participation in the ICF advocated a plan that “crucially, tackles both interstate and intrastate compensation rules”⁸ and argued that the intrastate rates have the greatest disparity in the current system.⁹ The ICF Comments state “[A] uniform regime must apply the same rate consistently across all carriers, technologies, and services [and] unify interstate and *intrastate* compensation systems.”¹⁰ The ICF then argues that “section 251(b)(5) clearly provides the [FCC] with authority to preempt intrastate access regimes *in toto* in order to replace them with a uniform intercarrier compensation system...”¹¹

Likewise, Qwest has also advocated in Comments in the FCC’s ICC FNPRM proceeding that “the FCC has the authority to adopt a bill and keep plan for *all* intercarrier traffic,” including intrastate traffic, and “in fact, without such an opportunity, the entire plan would be unlawful.”¹² Qwest further argued to the FCC that “in order for the Qwest plan, or any other plan that relies on a bill and keep, to be workable, it must apply to intrastate traffic as well as interstate traffic” and that “state rules must conform to the bill and keep scheme in the same time frame as traffic in the interstate jurisdiction.”¹³ Similar to AT&T and MCI in the ICF Comments, Qwest also notes that “if necessary, the FCC has the authority to preempt state access charges in order to implement a rational intercarrier compensation regime” but that “exercise of federal preemptive

⁸ In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Comments of the Intercarrier Compensation Forum (May 23, 2005) at 6.

⁹ Id. at 8.

¹⁰ Id. at 12 (emphasis added).

¹¹ Id. at 76.

¹² In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Comments of Qwest Communications International Inc. on Further Notice of Proposed Rulemaking (May 23, 2005) at 16 (emphasis added).

¹³ Id. at 15.

jurisdiction is not necessary because Section 251(b)(5) of the Act is a direct jurisdictional grant that does not need further analysis or preemptive action.”¹⁴

NASUCA, however, has argued that the FCC has no such preemptive authority. NASUCA argues that the FCC should encourage, but cannot compel, states to order access charges consistent with an FCC determined rate.

These issues, and others, form the basis of the Pennsylvania proceeding. For example, the PUC articulated six specific questions to be addressed through this investigation. Those questions pertained to, *inter alia*, whether intrastate access charges should be reduced, what rates are influenced by contributions to the Pennsylvania USF and what should the Commission do after the USF expires on or about December 31, 2006.¹⁵ As such, there is significant overlap between the issues to be addressed in this investigation and the issues to be addressed in the ICC FNPRM. Most significantly, this Commission must be aware that the FCC may preempt its actions in this area.

Likewise, it is difficult for the parties to the instant proceeding to present to this Commission options consistent with a potential order from the ICC FNPRM with specificity given the range of potential outcomes that may develop from the FCC proceeding. It will also be difficult for the Commission to conduct its proceeding simultaneously on the same issues. The Commission should delay the commencement of this proceeding to allow the parties to better present their positions and to allow the PUC to resolve those remaining issues that the FCC has not addressed. It may be that, once the FCC acts, the PUC will decide that no further action is required. It is impossible constructively to resolve this issue until we learn of the national plan that the FCC will develop.

¹⁴ Id. at 5-6.

¹⁵ Investigation Order, at 5.

It is highly likely that the ICC FNPRM will impact the issues that are to be addressed in the instant proceeding. For the reasons discussed more specifically below, it would not be sound public policy for this Commission to proceed with the instant investigation while the ICC FNPRM is still proceeding. As such, the Commission should grant the Petition for Interlocutory Review and postpone the instant investigation pending action by the FCC on the same matters at issue in this investigation.

- B. It would not be sound public policy and would prejudice consumers to continue this proceeding in advance of the Federal Communications Commission proceeding because doing so could lead to higher rates for Pennsylvania consumers purchasing protected noncompetitive local services than if the PUC waited for the FCC to act.

The instant Petition for Interlocutory Review should be granted and this proceeding should be postponed pending the resolution of the ICC FNPRM because recovery of the state access reduction through a revenue neutral increase of Pennsylvania rates through the instant proceeding will likely lead to higher rates for customers purchasing noncompetitive local services than if this proceeding were postponed until after the FCC has issued an order in the ICC FNPRM. Acting in this manner will prejudice consumers. The same state access rate reductions at issue in this proceeding may be recovered through an increase in the federal Subscriber Line Charge ("SLC") or the federal USF that would be applied under proposals now pending in the ICC FNPRM. The OCA submits that the FCC is aware of the large impact that reducing rural intrastate access charges will have nationwide. Accordingly, many parties appearing before the FCC have proposed various mechanisms by which federal funds will be developed in order to fund such required intrastate access reductions.

Timing of intrastate Pennsylvania access reform will become important under a federal mechanism. These expanded federal funds will generally fund intrastate access reductions that

result from an ICC FNPRM order and will not apply to intrastate access reductions that were ordered *prior* to such an Order. The Commission should delay the current proceeding to avoid double recovery and an unnecessary overcharging of customers.

For example, the ICF plan, the plan currently supported by most industry participants, including AT&T and MCI, allows carriers to recover access reductions generally through revenue neutral mechanisms.¹⁶ The plan allows carriers to increase the SLC in order at least to recover the difference between the base year access revenues and the projected revenues determined by the FCC through the adoption of the access rate reduction. If this Commission were also to order an additional access charge reduction in this proceeding, any such reduction may result in revenue neutral rate rebalancing applied to local rates. Thus, both the FCC and this Commission could allow the carrier to recover the same access reduction through an increase in the SLC or the local rate. In both cases, the result is an increase in the monthly bill for consumers that will prejudice such consumers.

More specifically, assuming, for example, that the difference between interstate and intrastate access revenue for the rural companies in Pennsylvania is currently \$80 million and the rural Companies have 1.2 million access lines. If access rates are reduced such that intrastate and interstate rates were brought into parity, the FCC could raise the SLC by \$5.56 (equal to \$80 million divided by 1.2 million lines divided by 12 months) in the ICC FNPRM and this Commission may determine to require an increase in the local exchange rate also by \$5.56 in this proceeding.¹⁷ If the FCC and this Commission calculated the reduction in intrastate access rates based upon the same or similar base year access revenues, they would then each raise the SLC

¹⁶ The Intercarrier Compensation Forum Plan, CC Docket No. 01-92, Ex Parte (Oct. 5, 2004).

¹⁷ According to the ICF plan, the maximum rural carrier SLC increase would be \$3.50 from the current cap of \$6.50 to \$10.00. Any additional revenue required to offset the access reductions would be recovered through enhanced universal service funding.

and local rate in order to reduce the same dollars of intrastate access revenue. The two different regulatory bodies would not be coordinating their simultaneous implementation of intrastate access reductions and Pennsylvania consumers would be required to bear the burden twice for the same reduction.

Regrettably, the same recovery would occur if the FCC were to adopt many of the plans currently before it in the ICC FNPRM that reduces intrastate access rates. Unless the Commission waits until the FCC has acted, a double recovery could not be prevented. If the Commission follows the FCC, then it could tailor its intrastate access charge revisions based on the reductions and recovery mechanisms ordered by the FCC. The Commission would then know to what extent the FCC has required or encouraged intrastate access rates to be reduced and how much of the reduction in intrastate access rates will be assumed by the federal mechanism. The OCA emphasizes that the FCC may entirely preempt this Commission's authority over Pennsylvania access charges thus rendering this proceeding moot. If the FCC does not preempt this Commission and this Commission agrees with the FCC rate proposal and the FCC federal mechanism recovers the entire revenue difference, then there is no reason for this Commission to act at all. If the federal mechanism recovers only part of the difference, then the Commission will be in a better position to determine what, if any, further action it need take. At the very least, however, the Commission could ensure that Pennsylvania consumers will not be double-charged for the same access rate reductions. The uncertainty contained in the FCC proceeding requires that this Commission not act now but wait until it is more clear how much intrastate access charge reform may still be needed after the ICC FNPRM.

As such, it would not be sound public policy and would prejudice consumers to continue this proceeding in advance of the FCC's ICC FNPRM because doing so could lead to higher

rates for Pennsylvania consumers purchasing protected noncompetitive local services. The Commission should grant the Petition for Interlocutory Review and stay the instant investigation pending action by the FCC on the same matters at issue in this investigation.

- C. It would not be sound public policy to continue this proceeding in advance of the Federal Communications Commission proceeding because doing so will likely foreclose an opportunity to receive federal universal service funds.

The instant Petition for Interlocutory Review should be granted and this proceeding stayed because Pennsylvania may not be able to receive federal universal service funds if this Commission acts prior to the FCC issuing an Order on the ICC FNPRM. If this Commission acts prior to the FCC's determination, it may foreclose an opportunity to receive federal universal service funds.

Some plans currently pending before the FCC, such as the ICF, allow carriers to recover the total allowed revenue per-line by either increasing their SLC or from a new universal service plan, as discussed above. Under these proposals, *the carriers must first increase their SLCs to the allowed amounts prior to obtaining supplemental funding from the federal USF*. As a result, the total allowed revenue that can be obtained from the federal USF depends on the level of state access rates in existence prior to the start of the plan. If this Commission reduces state access rates in this proceeding for a year that turns out to be the base year for the FCC proceeding, then the total allowed revenue that can be drawn from the federal USF decreases. With a lower total allowed revenue, it is more likely that the SLC increase would recover the entire total allowed revenue and Pennsylvania carriers would not be able to access the federal USF funds.

If this Commission initiates access reductions before the FCC concludes the ICC FNPRM, it is quite possible that local rates and the SLC will both increase and Pennsylvania carriers will not receive any funding from the federal USF. However, if the FCC proceeding is

finalized prior to this Commission implementing further access reductions, and, as discussed above, possibly automatically increasing local rates as a result, which the OCA opposes at the FCC, then it is likely that the SLC will increase and carriers will receive universal service funding and local rates will not increase. As a result, Pennsylvania consumers would be better off if this Commission delays its actions and allows the FCC to take the first step in rebalancing rates because the double recovery of any access revenue reduction will be avoided and there is the possibility that Pennsylvania will receive universal service support to offset the access revenue reduction.

Clearly, Pennsylvania consumers would be prejudiced if they were precluded from receiving the full benefit of the federal universal service funding to which they contribute simply because this Commission's actions preceded the determination of the ICC FNPRM and precluded taking full advantage of available funding. As such, it would not be sound public policy to continue this proceeding in advance of the FCC's ICC FNPRM because doing so will likely foreclose an opportunity for this Commission to receive federal universal service funds. The Commission should grant the Petition for Interlocutory Review and stay the instant investigation pending action by the FCC on the same matters at issue in this investigation.

D. Conclusion.

The Commission should grant the Petition for Interlocutory Review and stay the instant investigation pending action by the FCC on the same matters at issue in this investigation. Moving forward with this investigation is not sound public policy because doing so may result in a double-recovery of charges on Pennsylvania consumers to reduce the same intrastate access charge rate. Furthermore, if this Commission does not delay any action in this proceeding, it may foreclose the possibility of recovering significant federal universal service funds. Finally,

the instant Petition for Interlocutory Review should be granted because it would otherwise make it more difficult for the PUC to consider the outcomes of this proceeding by requiring the Commission to speculate as to how the FCC proceeding may impact this investigation. Similarly, granting the instant Petition for Interlocutory Review would avoid a waste of administrative resources by deciding issues that the Commission may not have to, or be able to, decide.

III. CONCLUSION

The Office of Consumer Advocate respectfully requests that this Honorable Commission answer the Material Question pending before it in the above-captioned proceeding IN THE AFFIRMATIVE.

Respectfully submitted,



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Dated: July 1, 2005
84771

CERTIFICATE OF SERVICE

Re: Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund
Docket No. I-00040105

I hereby certify that I have this day served a true copy of the foregoing document, Office of Consumer Advocate's Brief in Support of Petition for Interlocutory Review, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 1st day of July, 2005.

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ORIGINAL

July 1, 2005

VIA HAND DELIVERY

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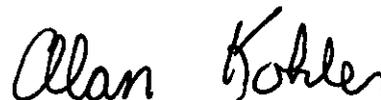
Re: Investigation Regarding Intrastate Access Charges and
IntraLATA Toll Rates of Rural Carriers, and the
Pennsylvania Universal Service Fund
Docket No. I-00040105

KJR

Dear Secretary McNulty:

Enclosed for filing please find an original and nine copies of the Brief of AT&T Communications of Pennsylvania, LLC, Qwest Communications Corporation and MCI metro Access Transmission Services, LLC in Opposition to Petition for Interlocutory Review with regard to the above referenced matter. All Parties have been served in accordance with the attached Certificate of Service.

Respectfully submitted,



Alan Kohler

For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP

ACK/cll
Enclosure

cc: Susan D. Colwell, Administrative Law Judge (w/enc)
Parties on the attached Certificate of Service (w/enc.)

HAR:59888.1/ATT004-225580

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

Docket No. I-00040105

ORIGINAL

BRIEF OF AT&T COMMUNICATIONS OF PENNSYLVANIA, LLC, QWEST
COMMUNICATIONS CORPORATION AND MCIMETRO ACCESS TRANSMISSION
SERVICES, LLC IN OPPOSITION TO PETITION FOR INTERLOCUTORY REVIEW

DOCKETED
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July 1, 2005

I. STATEMENT OF THE CASE

One only need to review this Statement of the Case to understand that certain parties to this proceeding are engaged in an aggressive strategy of delay -- apparently determined to avoid litigation of this investigation and a decision by the Commission at all costs. Such tactics impede the proper conduct of the administrative process and should not be tolerated.

This docket is one of two the Commission has opened to reform Pennsylvania's outdated and market-distorting access charge structure in which the IXC Intervenors are actively participating.¹ In a docket closely related to this matter,² where the Commission is completing the two-step elimination of subsidies from Verizon's access rates, the Commission has already rejected the central argument that the Petitioners³ make here -- namely, that Pennsylvania access reform should be delayed until the FCC completes its Intercarrier Compensation docket, a matter than has been open since 2001 with no end in sight.⁴

In the Verizon docket, the OCA had argued in an Answer filed in December of 2004 that the Commission should consider the pendency of the Intercarrier Compensation Forum ("ICF Plan"), a comprehensive intercarrier compensation plan which had been submitted to the FCC by AT&T, MCI and others in October of 2004, and access reform initiatives before the FCC in its conduct of the Verizon Remand proceedings. In making its claim, OCA placed particular

1 The IXC Intervenors are AT&T Communications of Pennsylvania, LLC ("AT&T"), MCI WorldCom Communications, Inc. ("MCI") and Qwest Communications Corporation ("Qwest").

2 AT&T Communications of Pennsylvania, LLC v. Verizon North Inc. and Verizon Pennsylvania, Inc., C-20027195.

3 The Petitioners are the Rural Telephone Company Coalition ("RTCC"), the Office of Consumer Advocate ("OCA") and the Office of Trial Staff ("OTS").

4 In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92. The FCC docket was opened through issuance of a Notice of Proposed Rulemaking ("NPRM") in April of 2001.

emphasis on the need to coordinate state and federal access reform initiatives in order to avoid inequities like double recovery of access costs.

On January 18, 2005 the Commission entered an Order which clarified the conduct of the Verizon Remand proceeding. The Commission concluded that the remand proceedings should go forward, the matter should be expedited subject to any constraints on the Administrative Law Judge ("ALJ") and that the scope of the investigation should be expanded to address the ICF Plan as well as any FCC action on intercarrier compensation reform "to the extent that the FCC issues a decision prior to issuance of the Recommended Decision on Remand in this proceeding."⁵

Suffice it to say, the Commission's efforts to advance Pennsylvania access reform have not been confined to Verizon. On December 20, 2004, while it was considering how the Verizon Remand proceedings should be conducted, the Commission entered an Order at the above-captioned docket instituting an investigation to determine whether there should be further intrastate access charge reductions and interLATA toll rate reductions in the service territories of rural incumbent local exchange carriers ("rural ILECs") and to examine all rate issues and rate changes that should or would occur in the event that disbursements from the Pennsylvania Universal Service Fund ("PUSF") are reduced. The investigation was assigned to ALJ Susan D. Colwell to preside over the proceedings. The IXC Intervenors, the three public advocates and the Rural Telephone Company Coalition ("RTCC") intervened in the investigation

The Verizon remand proceedings are currently pending before ALJ Fordham. Two rounds of testimony have been submitted, hearings are scheduled for mid July and the matter is expected to be decided early next year. As directed by the Commission, to the extent that the FCC acts prior to an ALJ or Commission determination, that action will be considered in the

5 January 18, 2005 Order, C-20027195 at 15-16.

outcome of the remand proceedings, but will not delay the outcome of the Pennsylvania proceeding.

On March 3, 2005, the FCC issued a Further Notice of Proposed Rulemaking ("FNPRM") to address intercarrier compensation issues.⁶ The FNPRM commenced the lengthy process of developing an extensive public record, developing and promulgating a set of regulations, and defending those regulations on appeal. By any reasonable assessment and based on the FCC's prior record, such a process resulting in final, legally effective rules could take years to complete.

On April 21, 2005, a Second Prehearing Conference was held before ALJ Colwell. As described in ALJ Colwell's April 22, 2005 Scheduling Order, the RTCC argued at the Second Prehearing Conference that establishment of a litigation schedule should be deferred pending the final outcome of the FCC's FNPRM. Also, as described by the ALJ, the RTCC made virtually identical arguments pertaining to the need for consideration and the avoidance of double recovery as OCA made to the Commission in the Verizon Remand proceedings. After hearing the various arguments, the ALJ rejected the requests for delay and established a litigation schedule calling for testimony in August and September, hearings in October and briefs in November.

Apparently dissatisfied with this result, on May 23, 2005, the RTCC, the OCA and the Office of Trial Staff ("OTS") filed a Motion again requesting that the investigation be deferred pending resolution of the FCC's FNPRM. The motion essentially (with some added detail) repeated the arguments made at the April 21, 2005 Prehearing Conference. Although not pled in

⁶ In the Matter of Developing a Unified Intercarrier Compensation Regime, cc Docket No. 01-92 (March 3, 2005). The FNPRM is actually a renewal of the NPRM initiated by the FCC in April of 2001 at the same docket -- a NPRM which never materialized into any FCC action pertaining to intercarrier compensation reform.

this form, the motion requested that the ALJ's April 22, 2005 Scheduling Order be reconsidered and reversed.⁷ The IXC Intervenors opposed the motion.

On June 8, 2005, ALJ Colwell issued an Order Disposing of Motions in which she denied the RTCC/OCA/OTS motion and maintained the April 22, 2005 Scheduling Order. On June 21, 2005, the RTCC, OCA and OTS submitted a Petition for Interlocutory Review with the Commission. While the petition is pled so as to challenge the ALJ's June 8, 2005 Order Disposing of Motions, in reality, it seeks interlocutory review of the ALJ's April 22, 2005 Scheduling Order. It is noteworthy that the petition is being submitted a full six months after the Commission's initiation of this investigation, three and one half months after release of the FCC's FNPRM and two months after the ALJ's Scheduling Order.

II. SUMMARY OF ARGUMENT

The pending Petition for Interlocutory Review essentially seeks Commission review of the ALJ's April 22, 2005 Scheduling Order. The petition, filed two months after the Scheduling Order, is not timely filed and should be denied on this ground alone.

Commission regulations provide for interlocutory review of "material" questions that have arisen or are likely to arise. 52 Pa. Code § 5.302. The petition does not raise a material issue and is untimely. Even if the Commission applies the standard provided for in 52 Pa. Code § 5.304 applicable to review of discovery rulings, it would be required to reject the petition on the basis that an exceptional situation is not present.

Even if the Commission addresses the merits of the petition, the request for relief should be rejected. The petition seeking to delay this case is directly contrary to this Commission's

⁷ Although the parties to the motion were apparently attempting to seek relief directly from the Commission, any such attempt was procedurally deficient (See 52 Pa. Code §§ 5.103(d)(1) and 5.301(a)) and the motion was properly decided by ALJ Colwell.

intent. The implication that this Commission was somehow unaware of the federal proceedings when it *sua sponte* initiated this case is not supportable. Further, the implication that the FCC only initiated its proceeding with the release of its FNPRM is misleading and inaccurate. As indicated previously, the FCC's proceeding on intercarrier compensation began *over four years ago* through issuance of its intercarrier compensation NPRM in April of 2001.

The Commission has already rejected the notion that Pennsylvania access reform should wait until the FCC completes its intercarrier compensation reform proceedings by determining that the Verizon Remand Access Reform proceedings should continue on as expedited a basis as possible. There is no distinction present for this investigation, which essentially addresses the same issues for other ILECs in the Commonwealth, which could justify a different result and the ALJ's Scheduling Order, which follows a similar course as the litigation schedule in the Verizon Remand Proceedings, should be affirmed.

As the parties to this proceedings are well aware, FCC rulemaking dockets of this magnitude often takes years to complete, if they are completed at all. It is noteworthy that the FCC actually started the pertinent rulemaking in 2001. It is not at all certain when the FCC will reach a conclusion.

In the meantime, as recognized by the Commission in the Order instituting this investigation, ILEC access charges remain well above cost in order to generate revenues to subsidize local rates -- a policy which was endorsed in the days of telephone monopolies -- but which cannot continue. High access charges are making it impossible for IXC's to compete against wireless carriers, VoIP providers and e-mail. To the extent high access charges are used to keep basic local exchange prices below market levels, they also retard the expansion of competitive local exchange services and the deployment of new technology. Access charges,

therefore, must be reduced to enable competition in local markets and associated benefits. As the Commission concluded, "[i]t is now the Commission's policy to promote competitive local markets by bringing the ILEC's access charges closer to costs."⁸ Application of this policy has been delayed for far too long and further delay cannot be justified. Otherwise, any semblance of fair and meaningful competition cannot be achieved.

The Commission should move forward expeditiously to apply its policy and in doing so to retain control over how access reform (and any associated rate rebalancing) is accomplished. As in the Verizon Remand proceedings, if, and only if, the FCC acts during the pendency of this proceeding, should that action be considered and accommodated within this proceeding. Otherwise, the Commission should proceed under state law and if relatively minor adjustments to coordinate with federal activity at a later date become necessary, those adjustments can be addressed at that time.

III. MATERIAL QUESTION

The Petitioners have proposed the following material question in their Petition:

Did the presiding officer erroneously issue an Order on a Motion filed with the Commission and erroneously conclude not to stay the instant investigation pending action by the Federal Communications Commission on the same matter at issue in the Commission investigation?

The IXC Intervenors cannot accept this proposed question because it contains two erroneous premises: 1) the question assumes that the Petitioners' own procedural shortcomings and failure to abide by Commission procedural regulations are somehow the fault of the ALJ; and 2) the question presumes the conclusion that the FCC will decide intrastate access issues --a conclusion which is far from clear and, in fact, is strongly opposed by the Petitioners themselves.

⁸ Order at 3.

Instead, while the IXC Intervenors request the Commission to deny interlocutory review, any material question answered by the Commission should read as follows:

Material Question: Should the Commission delay an investigation the Commission itself initiated with the intent to implement its stated policy in favor of access reform, and address universal service fund issues, based on the possibility that at some unknown point well into the future the FCC may issue legally effective rules which establishes intrastate access standards and may require some adjustment by the Commission?

Suggested Answer: No.

IV. ARGUMENT

A. **INTERLOCUTORY REVIEW SHOULD BE DENIED BECAUSE THE PETITION IS UNTIMELY.**

The instant petition was submitted three and one half months after release of the FCC's FNPRM (the basis for the relief requested), and two months after the April 22, 2005 Scheduling Order, which is the Order the pleading effectively challenges.

Section 5.302(a) of the Commission's regulations mandates that "a participant may file a timely petition to the Commission..." seeking interlocutory review. While the term "timely" is not defined, certainly a challenge to an ALJ's ruling two months after the fact cannot be considered timely.

Petitioners apparently believe that their May 23, 2005 Motion was, in essence, a request for interlocutory review of the Scheduling Order and that they intended that it would be decided by the Commission. However, this argument fails under the Commission's rules. Commission regulations at 52 Pa. Code § 5.103(d) make it abundantly clear that the presiding officer is authorized to rule and will rule on all motions. Furthermore, as Petitioners should be well aware, since the arguments in their motion had been previously made and rejected by ruling of the ALJ, that ruling could only be challenged through the interlocutory review process. Not only do

Petitioners fail to recognize the requirements of the Commission's procedural rules, but they appear to blame ALJ Colwell for their own procedural shortcomings.

The fact of the matter is the ALJ ruled on the argument now made to the Commission in her April 22, 2005 Scheduling Order and interlocutory review now is untimely. As stated at the outset, the procedures employed by Petitioners demonstrate nothing more than a determined and improper strategy of repeated requests for delay which should be brought to a halt by the Commission.

B. THE REQUEST FOR INTERLOCUTORY REVIEW SHOULD BE DENIED AS PROCEDURALLY DEFICIENT.

As indicated previously, the instant petition, in reality seeks interlocutory review of the ALJ's April 22, 2005 Scheduling Order. At best, it seeks interlocutory review of the ALJ's June 10, 2005 ruling not to delay the proceedings and to maintain the existing schedule. Either way, the petition is at sharp odds with Commission rules.

Section 5.302 provides for interlocutory review where a "material" question has been raised in a timely fashion. However, the petition raises no material question and in fact simply asks the Commission to bring their rural access investigation to a halt. Nowhere in the Code or Subchapter C of Chapter 5 of Title 52 is there explicit confirmation that a ruling denying a request to delay the schedule is properly subject to interlocutory review.

While the regulations do not suggest that interlocutory review of a request to delay the schedule is appropriate, the regulations do address interlocutory review of discovery matters. Under 52 Pa. Code 5.304(a), "[u]nless otherwise ordered by the Commission in exceptional situations, rulings of presiding officers on discovery are not subject to interlocutory review absent certification by the presiding officer..." Accordingly, if the Commission is to even consider reviewing a scheduling issue, it should do so under the discovery standard. Here, there

is no certification by the presiding officer and no exceptional situation. The Commission instituted this investigation well after the FCC initiated the intercarrier compensation proceeding in 2001 and even well after ICF Plan was filed with the FCC. The Commission has already ruled in the Verizon access case that it does not intend to delay access reform as a result of the federal proceeding. In fact, the Commission specifically recognized the existence of the federal intercarrier compensation proceeding when it ordered the Verizon access case to continue on as expedited a basis as possible. There is nothing exceptional here, other than the determined strategy of delay the Petitioners have employed. Interlocutory review should be denied.

C. IF THE COMMISSION REACHES THE MERITS, THE COMMISSION SHOULD REJECT THE STRATEGY OF DELAY AND MAINTAIN THE EXISTING SCHEDULE.

The RTCC/OCA/OTS petition strikes at the core of the Commission's intent in this proceeding. The motion seeks to reverse the Commission's clear directive that "it is now an appropriate time to consider further access charge reform" and state universal service fund ("USF") issues:

As stated in our prior Order of July 15, 2003, at M-00021596, In re: Access Charge Investigation per Global Order of September 30, 1999, at 12, at that time we did not declare the access rates established by that Order as the final word on access reform. Rather, we characterized the Order as the next step in implementing continued access reform in Pennsylvania in an efficient and productive manner.

* * *

In the Commission's judgment it is now an appropriate time to consider further access charge reform.⁹

This is not the first time the RTCC has proposed delaying this case pending the completion of the FCC's proceeding. On April 21, 2005, Administrative Law Judge Susan D.

9 Order at 4.

Colwell, the presiding officer in this case, heard argument from the RTCC and other parties on the issue of whether the ALJ should stay the proceeding based on the existence of the FCC's FNPRM. The ALJ's Scheduling Order dated April 22, 2005 evidences the fact that the RTCC request to delay the proceeding due to the pending ICC rulemaking proceeding was fully considered and rejected by ALJ Colwell:

RTCC recommends maintaining the status quo in Pennsylvania until the FCC finishes its own Intercarrier Compensation proceeding at CC Docket No. 01-92, which has been published and has a schedule in place. RTCC points out that the FCC proceeding has the potential to preempt whatever occurs as a result of the Commission proceeding. In addition, RTCC expresses its concern that if changes are made before the FCC order is entered, Pennsylvania consumers would get no credit for the substantial intrastate access reform which has already occurred and may face additional subscriber line charges or other rate increases independent of whatever action Pennsylvania has taken. RTCC warns that Pennsylvania consumers would be at risk and may be unable to draw their share from any new federal fund. It recommends staying the proceeding until later in the year in order to better assess the status and potential impact of the federal proceeding. It recommends a schedule based on the issuance of a final PUC order on the Motion of the Wireless Carriers.¹⁰

After consideration of all parties' positions, the ALJ denied the RTCC request for a stay of the proceedings and set a procedural schedule that calls for initial testimony filed by August 1, 2005 with briefing completed by November 22, 2005, thus permitting completion of a Recommended Decision by ALJ Colwell by the end of 2005. As recited in the Statement of the Case, the Petitioners subsequently filed a motion to reverse the Scheduling Order and stay the case which was properly denied by the ALJ.

This is also not the first time the rural ILECs have attempted to delay intercarrier compensation reform pending the FCC's proceeding. In the case dealing with a possible modification of CLEC local calling areas, the Pennsylvania Telephone Association ("PTA") urged the Commission not to act until the FCC completed its proceeding on intercarrier

¹⁰ April 22, 2005 Scheduling Order at 2.

compensation.¹¹ As far back as April 2004, the ILECs argued that FCC action was imminent,¹² which of course has not been the case. Although the ILECs opposed intercarrier compensation reform through a modification of CLEC local calling areas, the ILECs claimed that they were in favor of further access reform. Specifically, in its Main Brief, the PTA stated that "the Commission should continue its reform of access charges, while monitoring the pending *FCC Compensation NPRM*. The PTA, further, continues to support responsible access reform."¹³ The rural ILECs in this case, which are all virtually the same as the PTA companies in the CLEC Local Calling Areas Case, appear now to have reversed course and advocate that the Commission delay any further access reform for what will likely be another several years.

The RTCC/OCA/OTS brief in this case will undoubtedly review the multiple proposals noticed by the FCC for comment and extract elements of the proposals that purportedly could have a significant impact on rural access reform. Rather than make a case for delay of this proceeding, this review of the FNPRM plans, and permutations of those plans that are possible outcomes of the FCC notice of rulemaking proceeding, demonstrates that this FCC docket could take a variety of directions, will take a very long time to complete and will no doubt be punctuated by appeals that could delay finalization of the issues for years. In fact, the FCC recently extended the reply comment period in this matter by thirty days, demonstrating that it intends to proceed with its docket in an unhurried fashion.

11 Generic Investigation in re: 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, Docket No. I-00030096 (hereinafter "Local Calling Areas Case").

12 Direct Testimony of Gary Zingaretti, PTA Statement 1.0 filed April 14, 2004; See also PTA Main Brief filed August 30, 2004.

13 PTA Main Brief at p. 3.

In their petition, the Petitioners claim that the FCC will decide the same issues pending before the Commission in this investigation. However, this position is not only highly speculative, but defies the position taken by at least some of the RTCC members in the FNPRM docket. On May 23, 2005, The Rural Alliance, an organization comprised of over 200 rural ILECs around the nation and including quite a few of the RTCC member companies, filed extensive comments with the FCC, arguing, among other things, that the FCC can not legally impose intrastate access standards or requirements on state commissions. The Rural Alliance recommends that, instead, intercarrier compensation reform (including intrastate access reform) be addressed through a giant collaborative involving the FCC and the 50 state commissions. Accordingly, it is the Alliance's position that the FNPRM can not legally dictate this investigation unless, through collaboration, this Commission and other state commission agree with the outcome.¹⁴ One can only imagine how long such a collaborative would take -- which, of course, is exactly the delay the Alliance and the RTCC desire.

V. CONCLUSION

The RTCC/OCA/OTS petition invites the Commission to reverse direction and adopt a wait-and-see position at precisely the time Pennsylvania should have its own house in order on issues of access charges and the state USF. The Commission has already rejected that position, and should do so again. Rather than lock-in current access rates and maintain the status quo on the state USF for the extended period requested by RTCC/OCA/OTS, the Commission should move ahead with Pennsylvania access charge and USF reform. Pennsylvania consumers deserve no less.

¹⁴ A copy of the relevant portions of The Rural Alliance's comments are attached to this brief.

In the parallel Verizon access charge proceeding, the Commission noted the existence of the ICF Plan pending before the FCC, but it nevertheless prudently directed the ALJ to issue a Recommended Decision as expeditiously as possible.¹⁵ The Commission did not ignore the FCC proceedings in its order at the Verizon Remand docket, but directed the ALJ and parties to address the impact that any FCC determination may have on state issues if such a determination occurs prior to the conclusion of the proceeding.¹⁶ Rather than place the Verizon proceeding on hold, the Commission directed the ALJ to proceed with a Recommended Decision.

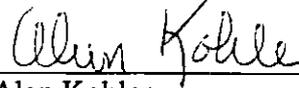
The Commission knew about the existence of the FCC's NPRM when it opened this proceeding and appropriately initiated a review into further access reform and the future of universal service funding. ALJ Colwell has considered the arguments by RTCC for delay of this case and found them unpersuasive. The RTCC/OCA/OTS certainly would not dispute that the FCC's ICC proceeding is complex and will take considerable time to resolve. It is also highly speculative to assume at this time what position the FCC will take and whether or how it will affect any state intercarrier compensation issues. However, the proposal of some of the RTCC members in the FNPRM makes it clear that they strongly oppose any effort by the FCC to unilaterally reform intrastate access and propose a collaborative process which would unavoidably takes years to consummate. Taken together, the Commission should recognize this petition for what it is -- another in a series of steps intended to do nothing more than delay this proceeding indefinitely and affirm the ALJ's April 22, 2005 Scheduling Order.

15 The review of the ICF Plan has evolved into the FCC FNPRM.

16 January 18, 2005 Order, C-20027195 at 14-15.

For the foregoing reasons the IXC Intervenors respectfully request that that Petition for Interlocutory Review be denied.

Respectfully submitted,



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Date: July 1, 2005

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Developing a Unified Intercarrier) CC Docket No. 01-92
Compensation Regime)
)

FURTHER NOTICE OF PROPOSED RULEMAKING

**Comments
of
THE RURAL ALLIANCE**

May 23, 2005

V. ANY INTERCARRIER COMPENSATION REFORM MUST INVOLVE BOTH STATE AND FEDERAL REGULATORS TO BE LEGAL.

Of central importance to *any* decisions that come forth on intercarrier compensation reform are the jurisdictional issues between the Commission and the States, including whether and how issues are to be referred to Federal-State Joint Boards. The Commission addresses these unavoidable jurisdictional issues²⁸³ and seeks comment on the State preemption legal theory posited by ICF,²⁸⁴ as well as joint board referral recommendations made by the Alliance for Rational Intercarrier Compensation (“ARIC”) and the CBICC.²⁸⁵ The Commission wisely recognizes the significance of thoughtful handling of jurisdictional issues, as these are potentially among the most contentious. The Rural Alliance believes that the most practical, and legally sustainable, approach is to avoid pre-empting States’ statutory rights.

The Rural Alliance addresses the Commission’s questions about its authority to assert jurisdiction over intrastate access charges, which the Commission admits “have been an area within the exclusive jurisdiction of State commissions. . . .”²⁸⁶ That passage speaks for itself, and the Rural Alliance believes the Commission should not preempt the States on intrastate access charges or, for that matter, on the review and approval of

²⁸³ See *FNPRM* at ¶¶ 78-82.

²⁸⁴ *Id.* at ¶ 82.

²⁸⁵ *Id.* at ¶ 81.

²⁸⁶ *Id.* at ¶ 78.

reciprocal compensation rates in interconnection agreements.²⁸⁷ Fortunately, the opportunity exists for the Commission and States to engage lawfully, thoroughly and expeditiously in processes to reform intercarrier compensation and establish cost-recovery alternatives necessary to preserve universal service. NARUC shares the viewpoint that Federal and State collaboration is necessary to reform the system, yet recognize State commissions' responsibilities to consumers in their States.²⁸⁸

A. Rate Unification Should Result from a State and Federal Collaborative Process.

The Commission recognizes correctly in the *FNPRM* the limitations it faces in any attempt to assert section 251(b)(5) jurisdiction over access traffic,²⁸⁹ and specifically over intrastate access, which the Commission found in its *Local Competition Order* is also "carved out" under section 251(g).²⁹⁰ The existence of this access "carve out" – coupled with State commissions' specific responsibilities for reciprocal compensation rates under section 251(b) and (d) – leaves much of the responsibility for setting

²⁸⁷ 47 U.S.C. §§ 252(a)-(c), establishing the state approval and arbitration process, and 47 U.S.C. § 252(d)(2)(A), establishing terms for a state's review of transport and termination costs.

²⁸⁸ See *NARUC Principles*:

- VI.A. The reciprocal compensation system should ensure that revenues, cost assignment, and the risk of confiscation are jurisdictionally consistent for all classes of traffic.
- VI.B. State commissions should continue to have a significant role in establishing rates and protecting and communicating with consumers.
- VI.D. State commissions should retain a role in this process reflecting their unique insights, as well as substantial discretion in developing retail rates for services provided by providers of last resort, whether a dual or unified compensation solution is adopted.
- VI.E. A proposal preserving a significant State role that fits within the confines of existing law is preferable.
- IX.E. Even when a referral to a Joint Board is not mandated by law, in order to ensure State input the FCC should make a referral, and the Joint Board should act on that referral, in an expedited manner. Similarly, referrals to Joint Conferences should be handled on an expedited basis.

²⁸⁹ 47 U.S.C. § 251(g).

²⁹⁰ See *Local Competition Order* at ¶ 732.

intercarrier compensation rates squarely in the States' hands. The plain language of the law leaves no doubt that intrastate access and reciprocal compensation prices are State commission matters. The task of unifying intercarrier compensation rates thus must be collaborative and meaningfully compliant with the spirit, intent and reality of the Act. For the Commission to pursue any other path in reforming intercarrier compensation would be counter-productive, induce numerous legal challenges and not be helpful for an industry already under duress. The Rural Alliance supports the objective of establishing a unified intercarrier compensation plan using a collaborative approach, within the framework of the Commission's existing statutory authority.

The record in this proceeding includes various proposals recommending that each company unify all intercarrier compensation rates — interstate access, intrastate access and reciprocal compensation — using a collaborative approach between State and Federal regulators. Plans recommending unification of intercarrier compensation rates through a collaborative approach include those filed by EPG, ARIC, CBICC, NARUC and NASUCA. None of these plans recommend bill and keep, except in instances when carriers voluntarily agree to such an arrangement and locally exchanged traffic is in balance, as called for under the Act.²⁹¹ The sponsors of these plans — representing a cross-section of entities with varying interests including State regulators, consumer advocacy agencies, CETCs, and mid-size and small LECs — agree that intercarrier compensation rates should be maintained as a vital cost recovery element. There is also

²⁹¹ Section 252(d)(2)(B) states that "This paragraph shall not be construed – i) to preclude arrangements that afford the *mutual recovery* of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recover (such as bill-and-keep arrangements.)" 47 U.S.C. §§ 252(d)(2)(B) and 252(d)(2)(B)(i).

agreement that each company's rates should be unified to address the arbitrage problems plaguing the industry.

B. The Industry Will Not Benefit by Preempting Intrastate Rates.

Any attempt to impose blanket preemption of State authority, in the absence of clear statutory authority, will produce huge uncertainty in an industry sorely in need of stability. Until the courts fully addressed the legal challenges that would inevitably arise, the industry would be left floundering. Those proposals set forth in this proceeding that promote Commission preemption of State authority over intrastate access raise serious questions of policy and law, as reflected by the *FNPRM*.²⁹² As a matter of policy and law, the role of the State regulator should not be overlooked or ignored. Accordingly, the Rural Alliance believes that neither the industry nor customers would benefit by a Commission attempt to pre-empt the States' statutory rights and duties over intrastate access rates and reciprocal compensation. A more prudent approach would be to involve both Federal and State regulators. Relevant statutory provisions and associated legislative history bear this out.

1. *Historically the Commission Has Lost Cases in which It Attempted to Exercise Preemption.*

Section 2 of the Act specifically states that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier engaged . . ." ²⁹³ While

²⁹² See, e.g., *FNPRM* at ¶¶ 63-86.

²⁹³ 47 U.S.C. § 2.

there are exceptions to this requirement, the exceptions are specific.²⁹⁴ Congress has demonstrated time and again that it knows how to amend section 152 of the Act to broaden the Commission's jurisdiction *when it elects to do so*.

Any Commission attempt to set intrastate rates would be tantamount to asserting jurisdiction over intrastate access or reciprocal compensation. As the Fifth Circuit Court of Appeals found, the Commission is prohibited from taking any action to assert jurisdiction over intrastate matters without a finding that section 254 of the Act applies.²⁹⁵ No such finding exists. Indeed, the opposite is true as evidenced by the Commission losing *TOPUC I*. Commission attempts to set intrastate rates would encourage litigation and create more instability.

Another example of the Commission failing in its attempt preempt the States was in Louisiana Public Service Commission et al. v. Federal Communications Commission, (the "*Louisiana Decision*"). The Court considered and rejected the Commission's attempt to preempt the States on the establishment of State depreciation rates of common carriers. The Court determined that preemption is not lawful where it is not based on statutory authority. The Court considered and fully rejected the argument that the Commission should be able to preempt State authority in order to foster Federal policy:

While it is certainly true, and a basic underpinning of our Federal system, that State regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hines*, 312 U.S., at 67, 61 S.Ct., at 404, it is also true that *a Federal agency may pre-empt State law only when and if it is acting within the scope of its congressionally delegated authority*. This is true for at least two reasons. First, an agency literally has no power to act,

²⁹⁴ 47 U.S.C. §§ 223 – 227.

²⁹⁵ See Texas Office of the Public Utilities Counsel v. FCC, 183 F.3d 393, ("*TOPUC I*") (5th Cir. 1999).

let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace State law is to examine the nature and scope of the authority granted by Congress to the agency. Section 152(b) constitutes, as we have explained above, a congressional *denial* of power to the FCC to require State commissions to follow FCC depreciation practices for intrastate ratemaking purposes. *Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a Federal policy.* An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.²⁹⁶

Even though the Act does not specifically confer power on the Commission to preempt States from establishing intrastate access charges, the *FNPRM* seeks comment on whether the Commission can assert preemptive rights based on several specific statutory provisions or the alternative “mixed use doctrine.”²⁹⁷ None of these considerations, however, can lend unambiguous support to a claim of preemptive authority over the States for the establishment of intrastate access charges.

2. Section 251(b)(5) Is Not Applicable to All Telecommunications Traffic.

In the *FNPRM*, the Commission states that “on its face” section 251(b)(5) applies to all telecommunications.²⁹⁸ This presumption is incorrect. The error is borne out both by the legislative history of the Act and by subsequent Court decisions.

Section 251(b) was established to set forth specific interconnection requirements applicable to LECs in the context of the development of competitive local markets.

²⁹⁶ See *Louisiana Decision* at pp. 374-375, emphasis added.

²⁹⁷ *FNPRM* at ¶ 80.

²⁹⁸ *Id.* at ¶ 90.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true copy of the foregoing document

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July 1, 2005

James J. McNulty, Secretary
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DOCUMENT
FOLDER

In re: Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund
Docket No. I-00040105

Dear Secretary McNulty:

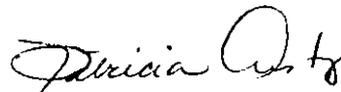
Enclosed for filing on behalf of the Rural Telephone Company Coalition are an original and nine (9) copies of their Brief in Support of the Rural Telephone Company Coalition, Office of Consumer Advocate and Office of Trial Staff Petition for Interlocutory Review in the above referenced proceeding.

A copy of the attached Brief has been served in accordance with the attached Certificate of Service.

Very truly yours,

THOMAS, THOMAS, ARMSTRONG & NIESEN

By



Patricia Armstrong

Enclosure

cc: Certificate of Service
Honorable Wendell F. Holland, Chairman (w/encl.)
Honorable James H. Cawley, Vice Chairman (w/encl.)
Honorable Kim Pizzigrilli, Commissioner (w/encl.)
Honorable William Shane, Commissioner (w/encl.)
Honorable Terrance J. Fitzpatrick, Commissioner (w/encl.)

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Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation Regarding Intrastate Access :
Charges and IntraLATA Toll Rates of : Docket No. I-00040105
Rural Carriers, and the Pennsylvania :
Universal Service Fund :

DOCKETED

JUL 1 2 2005

RURAL TELEPHONE COMPANY COALITION
BRIEF IN SUPPORT OF
THE RURAL TELEPHONE COMPANY COALITION,
OFFICE OF CONSUMER ADVOCATE AND OFFICE OF TRIAL STAFF
PETITION FOR INTERLOCUTORY REVIEW

DOCUMENT
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Date: June 28, 2005

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PENNSYLVANIA PUBLIC UTILITY COMMISSION

I. INTRODUCTION

This Brief is filed by the Rural Telephone Company Coalition ("RTCC") in support of the Joint Petition filed by the RTCC, Office of Consumer Advocate ("OCA") and Office of Trial Staff ("OTS") (collectively "Joint Movants") on June 21, 2005, seeking review of the following material question and requesting that both parts of the question be answered in the affirmative:

MATERIAL QUESTION: Did the presiding officer erroneously issue an Order on a Motion filed with the Commission and erroneously conclude not to stay the instant investigation pending action by the Federal Communications Commission on the same matters at issue in this Commission investigation?

II. BACKGROUND

This investigation was instituted as a result of the Commission's prior Order entered July 15, 2003, at M-00021596, *In re: Access Charge Investigation per Global Order of September 30, 1999 ("Phase II 2003 Access Reform Order")*, in which it discussed implementing access reform in Pennsylvania in an efficient and productive manner. The Phase II 2003 Access Reform Order also implemented a settlement term among the parties to the 2003 investigation by providing that a rulemaking proceeding would be initiated no later than December 31, 2004, to address possible modifications to the Pennsylvania Universal Service Fund ("USF" or "Fund") regulations and the simultaneous institution of a proceeding to address all resulting rate issues should disbursements from the Fund be reduced in the future. Accordingly, the Commission by Order entered December 20, 2004,¹ instituted the instant investigation stating, as follows:

Therefore, an investigation is hereby instituted to consider whether intrastate access charges and intraLATA toll rates should be further reduced in the rural ILECs' territories, and to consider any and all rate issues and rate changes that should or would result in the event that disbursements from the Fund are reduced or eliminated.³ This 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. The

¹Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund, (Order entered December 20, 2004, at Docket No. I-00040105).

USF rate issues (access charge rates, toll rates, local service rates) should be addressed in a full, formal investigation before any formal changes to the regulations are proposed and moved through the regulatory process. Consequently, the matter will be assigned to the Office of Administrative Law Judge for appropriate proceedings.

³This investigation shall remain separate from the pending proceeding before Administrative Law Judge Fordham at C-20027195 regarding Verizon PA's and Verizon North's access charge reform.

Thus, the current investigation was undertaken to comply with the settlement terms filed at Docket No. M-00021596, which in no manner mandated that any further changes to the Pennsylvania USF, intrastate access or residential local charges must occur by year end 2006 or any other date in order for the Fund to continue. There is no sunset provision in either the regulations establishing the Fund or in the State and Federal law authorizing the Fund. In the prior Pennsylvania USF proceeding before this Commission at Docket No. M-00021596, the parties merely agreed not to challenge the Fund until after December 31, 2006. There was no provision that it would expire on any date.

Following the institution of this Investigation at I-00040105, the Federal Communications Commission ("FCC") on March 3, 2005, entered its Order instituting an intercarrier compensation proceeding at CC Docket No. 01-92, which has been published in the Federal Register. This FCC proceeding might well be regarded as the most significant regulatory proceeding, particularly from the perspective of the RTCC companies, since divestiture. The FCC in its proceeding is examining the intercarrier compensation system including interstate and intrastate access, reciprocal compensation and universal service. In the Notice of Proposed Rulemaking, the FCC states that one of the main reasons reform is needed is because the current intercarrier compensation system is based on jurisdictional and regulatory distinctions that are no longer linked to technological or economic differences (Id. at ¶15). The FCC also established several goals for the intercarrier compensation reform process including the preservation of universal service (Id.

at ¶32), promotion of economic efficiency (Id. at ¶31) and maintenance of competitive and technology neutrality (Id. at ¶33).²

In its Order entered March 3, 2005, the FCC is seeking comments on seven³ comprehensive access reform proposals intended to replace the "outmoded system of intercarrier payments in the telecommunications industry with a uniform regime suited for competitive markets and new technologies."⁴ The Order sets forth May 23, 2005, and July 20, 2005, as the dates for the filing of comments and reply comments.⁵ This FCC proceeding has the potential to directly impact, if not render moot, the universal service and access charge issues in this proceeding.

At the April 21, 2005 prehearing, numerous parties, including the RTCC, addressed scheduling concerns and recommended that the status quo be maintained pending FCC action at CC Docket No. 01-92. See Scheduling Order of ALJ Colwell dated April 22, 2005. In fact, at the April 21, 2005 Prehearing the RTCC noted that it might ask this Commission to defer its proceeding (recognizing that the ALJ could not defer a PUC investigation.) The Transcript at page 76 reads as follows:

²One factor identified by the FCC reform proceeding is the fact that the industry is no longer served solely by wireline local and long distance carriers but is served by ISP, wireless providers and VoIP providers. These nontraditional providers play a role in the future communications market and must be considered in intercarrier compensation reform. However, this Commission does not have full jurisdiction over all of these providers and their services.

³There are seven plans which are officially part of the FNPRM. Other groups subsequently have submitted additional statements of position.

⁴(FCC 2/10/05 News Release)

⁵ Many of the parties to this proceeding, as well as the Commission itself, have filed comments with the FCC or are expected to file reply comments. In fact AT&T and MCI are two of the primary supporters of the ICF Proposal which proposal includes reform of intrastate access charges by the FCC, the very same reform being addressed by this proceeding. In fact, the ICF lists as one of its critical objectives "[r]eplacing today's myriad of [sic] different intercarrier compensation rates - - - including interstate access, intrastate access." Ex Parte Brief of ICF in Support of the Intercarrier Compensation and Universal Service Reform Plan (filed October 5, 2004) at page 5.

[RTCC Counsel:] Would your Honor have any objection if we brought that [the conflict with the FCC proceeding] to the attention of the Commission? Would that be appropriate?

[ALJ Colwell:] What I can tell you is that I have no intention of asking them myself. I have not certified the question up. I cannot control what you do.

On May 23, 2005, pursuant to 52 Pa. Code §5.103 and 66 Pa.C.S. §§331, 501 and 703, Joint Movants filed with the Commission a Motion to defer the above referenced investigation pending resolution of the Federal Communications Commission's intercarrier compensation proceeding at CC Docket No. 01-92 ("Motion").⁶ The OSBA concurred that the Motion should be granted in its entirety and the wireless providers supported the Motion. The sole objectors were the three IXC's - AT&T, MCI and Qwest. On May 26, 2005, the Secretary of the Commission referred the Motion to the Law Bureau. It was the Joint Movants' intent and expectation that the Commission would rule on the Motion.

However, by Order dated June 8, 2005 ("ALJ Order"), Administrative Law Judge Susan D. Colwell ruled on the Motion and held, among other things, that:

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. 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.

ALJ Order at 9-10.

On June 21, 2005, the Joint Movants filed a Petition for Interlocutory Review which is the subject of this Brief.

⁶See, 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) (the "FNPRM").

III. ARGUMENT

In determining whether a deferral at this time is in the public interest, it is very important to remain mindful that this Commission has not taken the issue of access reform lightly in Pennsylvania. This Commission has actively and persistently addressed access reform beginning with an investigation in 1998 and its consolidation with the Global Litigation, which culminated in reductions to access and intralata toll rates undertaken in early 2000 with the entry of the Global Order.⁷ Access reform continued through further reform in 2003, which was implemented in two stages, a first reduction in December 2003 followed by a second step implementation in December 2004, pursuant to the Phase II 2003 Access Reform Order. As a result of the Phase II access reform proceeding, as recently as only 6 months ago Pennsylvania continued to implement gradual and consistent but significant access reform.⁸ By year end 2003, virtually all RTCC members had filed tariffs for intrastate traffic sensitive ("TS") rates which mirrored their interstate TS rates. Numerous RTCC members also have filed rate rebalancing filings under their respective Chapter 30 Plans resulting in further significant reductions to their access charges.

Numerous aspects of the various plans pending before the FCC (see Motion for discussion of plans) have the potential not only to conflict with the instant proceeding, but also to penalize the Pennsylvania rural ILECs and their ratepayers should advance access and universal service reform be taken in this proceeding. A brief summary of the positions currently being taken before the FCC includes the following:

⁷As provided in the USF plan adopted by the Commission in the Global Order, if the Fund is eliminated, all rate changes accomplished in that initial round of reform would be undone. The effect of the Global Order was to reduce access rates and also limit the rate charged to residential customers for local service. Access rate reductions and local service rate support through the Pennsylvania USF plan would revert to where they were prior to the changes made in the Global Order, if the Pennsylvania USF were eliminated.

⁸The Phase II access reform proceeding provided for in excess of \$27 million in access charge reductions.

ARIC

- Set local rates at a nationwide average RBOC level without state rate proceedings.
- Retain existing USF mechanisms.
- Unify all intercarrier rates - interstate, intrastate - reciprocal compensation.
- Make no changes to existing USF.
- Establish new State Equalization Fund.
- Merge existing State USF into SEF.

ICF

- FCC to determine intrastate access rates.
- Covered Rural Telephone Companies continue to have transport revenues.
- Recover lost revenue by end-user charges and new federal USF support.
- USF mechanisms offering financial support for CTRCs and non-CTRCs.
- USF funding based on units and a single contribution methodology for collecting funding for both new and existing USF support.
- Reallocation of cost responsibility - CRTC has no obligation beyond the boundaries of its study area.
- New SLC up to \$10/month.

CBICC

- Intrastate access rates go to baseline in each geographic area.
- Transition period for intrastate rates and offset by increase in end-user charge and USF.
- Reallocation of cost responsibility - Rural LEC does not bear transport costs beyond service territory.

HOME/PBT

- New USF for any shortfall.
- Reallocation of cost responsibility – interconnection must be on RLEC network.

EPG

- National Benchmark (including SLC) of \$21.00; all permanent rates set at interstate access and a new access restructure charge (ARC) to make up revenue shortfall billed to carrier. Rates also apply to EAS traffic.

WESTERN WIRELESS

- All USF replaced.

NASUCA

- Allocate network costs to all that use the network.
- Reduce interconnection rate to \$.0095 per minute for rural carriers, but allow states to request additional USF funding where necessary.

NARUC

- Convert all per minute charges to capacity charges.
- Rural Access Charge Transition Fund - ensure revenue neutrality for 3 years.
- Federal USF absorbs state RLEC access reform.
- National Benchmark local rates.

Most of the plans currently pending before the FCC, and specifically many aspects of those plans set forth above, have tremendous potential to significantly impact rural access reform. And in many of these proposals, reforms address 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, given the magnitude of the reform efforts pending at the FCC level in conjunction with the levels of access reform already achieved in Pennsylvania, it is not unreasonable for this Commission to defer this self-imposed investigation. In fact, it would be unreasonable, unproductive and inefficient for this

Commission to act on further intrastate access reform until there is something more definitive in the pending proceeding at the FCC.

It requires little Pennsylvania action in advance of the FCC ruling on any of these proposals for Pennsylvania consumers to be hurt. For example, if the FCC adopts EPG's national benchmark of \$21.00, which includes the \$6.50 federal SLC, and all other revenue shortfalls are recovered from an Access Restructure Charge (ARC) assessed on all carriers across the country, but Pennsylvania had already acted to raise local rates above \$14.50 (to any level above the difference between the \$21.00 national benchmark and the \$6.50 SLC), Pennsylvanians may essentially forego the opportunity to receive their fair share of the ARC. Likewise, if the Commission were to prematurely require the increase of all local service rates to \$18.00, then Pennsylvania consumers might be unfairly burdened by potential further increases to the federal SLC which might go as high as \$10.00 on top of a rate rebalanced \$18.00 charge. If Pennsylvania access reform totaled \$X million and it was implemented ahead of the FCC, Pennsylvania may lose its ability to benefit from \$X million of Federally collected universal service dollars. If intercarrier compensation goes to a capacity charge, any Pennsylvania changes may be nullified. These are but a few of the many potential outcomes demonstrating the prudence of this Commission deferring action on this matter for twenty-four months or until the FCC acts on its Intercarrier Compensation proceeding, whichever is earlier. It is clear that the FCC's Order will impact the matters raised in this proceeding and would result in the Commission having to undertake a further proceeding to change the results of this proceeding.

One of the issues specifically posed by the FCC is the FCC's authority to preempt the state's regulation of intrastate access and local interconnection and the establishment of alternative cost recovery mechanisms within the intrastate jurisdiction. The FCC specifically requested comments concerning the legal basis for it to exercise jurisdiction

over intrastate access mechanisms in order to adopt a uniform intercarrier compensation rate structure that will reduce arbitrage, promote competition, protect universal service, and reduce regulation.⁹ While many may oppose FCC preemption concerning the setting of intrastate access charges, this Commission must seriously consider the potential for its authority in this area to be changed by an FCC decision. In fact, the very same IXCs in the instant case have urged the FCC to preempt intrastate access which would void any action taken by this Commission.¹⁰ In addition, it is quite likely that, even if the FCC does not preempt the states in this area, it may offer guidelines to the states for access reform and encourage reforms through incentive mechanisms. These various potential FCC actions in this area is ample justification for this Commission to stay action on intrastate access charges until the FCC order is issued.

Moreover, virtually every proposal contains some means of providing for universal service support or supplemental support for rural areas. As Mark Wigfield of the FCC's Wireline Competition Bureau stated in recognizing the importance of the rural issue, "Rural carriers get 30% of their revenues from access fees and 30% through the universal service fund[.]"

⁹ FNPRM, ¶¶ 78-82.

¹⁰AT&T and MCI are members of the Intercarrier Compensation Forum ("ICF"). They argue that the FCC should "preempt intrastate access regimes *in toto*," and that "every intrastate intercarrier compensation mechanism across the country must be made identical, not just to each other, but to the federal system as well." (ICF Comments at 76). Similarly Qwest argues that "[t]he FCC has plenary jurisdiction over" state access charges and, if necessary, the FCC also "has the authority to preempt state access charges." (Qwest Comments at 5). Qwest argues that all access payments should "be subject to federal jurisdiction," which "includes replacement of intrastate access tariffs. . .with the charging structure described herein." (*Id.*). In fact, AT&T and MCI have submitted a plan before the FCC which would result in a bill and keep mechanism as of July 1, 2011, whereas the Qwest transition period is one of three years. The IXCs have in fact urged the FCC to take rapid and decisive action on the matter.

The FCC's resolution of its intercarrier compensation proceeding will impact Pennsylvania rural ILECs, intrastate universal service funding and intrastate rates that are paid by Pennsylvania consumers. Under these circumstances, the RTCC believes that the Commission should maintain the status quo until the FCC addresses the comments and releases an Order at CC Docket No. 01-92, which may well take place before the end of this year. If changes are made at this time relating to intrastate rates and universal service funding, the Pennsylvania rural ILECs, which have already implemented substantial intrastate access reform, and their consumers, who have already encountered substantial local service increases in order to offset prior intrastate access reductions, may get no credit for such rate reform proposals pending before the FCC and may face additional subscriber line charges or other rate increases independent of whatever action this Honorable Commission has taken. Pennsylvania consumers and carriers could lose the opportunity to benefit fully from increased federal funding simply because they may have moved too quickly in reducing their access rates before new federal mechanisms were put into place. Thus, the RTCC submits that not only would it be prudent to stay the current proceeding at least for twenty-four months to await the impact and assess the status of the FCC's actions at CC Docket No. 01-92, but also in fact to proceed in advance of the FCC would not be sound public policy.

With the exception of the IXCs alone, the parties to this proceeding generally supported a limited deferral of 24 months. The IXCs' sole motive is to increase their bottom line. They have not reduced rates as a result of prior access reform. In fact MCI through its bankruptcy avoided paying millions of dollars of access charges and AT&T was found by the FCC to have unlawfully avoided paying access charges as well.

In their Answer to the Joint Motion, the IXCs argue the following three areas, which the RTCC responds to as follows:

1. The PUC has noted that its Global Order was not the final word on access reform.

This is not disputed. In fact the RTCC in its settlement approved in the Phase II 2003 Access Reform Order agreed to further access reform in 2003 and 2004 totaling approximately \$27 million, and some RTCC companies also undertook rate rebalancings that resulted in further access reductions, supra. Clearly the RTCC in the past two years has voluntarily continued to reform access charges. The RTCC also recognizes that further access reform will result from the FCC Order. However, the RTCC strongly urges this Commission in this investigation not to get ahead of the FCC in view of the enormous potential detriment to the rural ILECs, their customers and the Commonwealth by doing so.

2. The Commission was aware of the FCC proceeding and went ahead with the Verizon access reform proceeding.

While the PUC admittedly referred to the FCC proceeding in its Order involving Verizon, it is not known whether the PUC was aware of the broad scope or potential ramifications of the FCC proceeding on access reform. Moreover, the Verizon proceeding is not a new proceeding involving a potentially whole new level of access reform. Rather, the pending Verizon access reform proceeding is a remand of issues from a prior proceeding. Finally, as rural carriers that both qualify to receive universal service support and continue to depend heavily on access revenues to support ubiquitous local service in their rural service areas, the impact of premature USF and access reform on the RTCC companies will have far more deleterious effects on the RTCC companies than it would have on Verizon.

3. The FCC investigation will proceed in an unhurried fashion taking considerable time to resolve.

FCC Commissioner Coop has specifically stated that intercarrier compensation is a must-do item for the FCC this year and should be the FCC's number one

telecommunications priority. It thus appears that the FCC intends to proceed with due haste. In fact, the very IXCs opposing this Commission's taking note of the FCC's actions are urging the FCC to act promptly. Finally, contrary to the IXCs' inference in their opposition, the relief requested in the Motion is not open ended, but rather has an outside limit of a two-year deferral.

Accordingly, the RTCC respectfully requests that the Commission act expeditiously on this motion and, based on the circumstances existing today, issue an Order deferring further action in this matter pending the outcome of the FCC intercarrier compensation proceeding at Docket No.01-92 or for a period of twenty-four months, whichever is earlier.

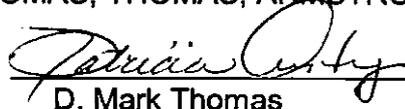
IV. CONCLUSION

Based upon the reasons set forth herein, the Rural Telephone Company Coalition respectfully submits that its Petition for Interlocutory Review should be granted and both parts of the material question set forth therein answered in the affirmative by this Honorable Commission and the proceeding deferred.

Respectfully submitted,

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ORIGINAL

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation Regarding Intrastate Access : Docket No. I-00040105
Charges and IntraLATA Toll Rates of :
Rural Carriers, and the Pennsylvania :
Universal Service Fund :

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CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of July, 2005, served a true and correct copy of the foregoing Brief in Support of the Rural Telephone Company Coalition, Office of Consumer Advocate and Office of Trial Staff Petition for Interlocutory Review upon the persons and in the manner listed below:

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