

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Carriers Coalition

v.

Verizon Pennsylvania Inc.

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C-20065798

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PREHEARING ORDER #2

A telephonic prehearing conference in this case was held on May 18, 2006. Present through counsel were Pennsylvania Carriers Coalition (complainant or PCC) and Verizon Pennsylvania Inc. (respondent or Verizon).

In accordance with the Prehearing Order dated April 11, 2006, I received Prehearing Memoranda from both parties.

This Order discusses the procedural matters addressed at the prehearing conference.

Both parties agreed that the issues to be addressed are legal in nature, with any necessary facts provided either by Verizon's Answer or through a stipulation entered by both parties. Therefore, the following schedule was established with respect to the filing of briefs addressing complainant's request for summary judgment:

Main Briefs	July 10, 2006
Reply Briefs	July 24, 2006

In accordance with the schedule listed above, briefs must be filed with the Secretary, in accordance with 52 Pa. Code §5.502(a) on the dates listed. Briefs may be served electronically on the dates listed as long as a hard copy is received in-hand by me and all parties

BA

no later than 4:30 p.m. on the next business day. Each party is directed to include a copy of each brief on disk (in Microsoft Word 2002 or a compatible format) with the briefs filed with the Secretary. If you do not e-mail your briefs to me, please include a copy on disk.

All briefs shall comply with the requirements of 52 Pa. Code §§5.501 and 5.502, and in addition to the mandatory contents set forth in 52 Pa. Code §5.501(a), all main briefs, regardless of length, must contain:

- A. A table of contents (also must be included in the reply brief);
- B. A history of the proceeding;
- C. A discussion;
- D. Proposed findings of facts (with record citations to transcript pages or exhibits where supporting evidence appears);
- E. Proposed conclusions of law (with citations to supporting statutes, regulations or relevant case law); and
- F. Proposed ordering paragraphs specifically identifying the relief sought.

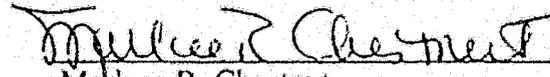
If a reply brief is not filed, it will be assumed that the party does not dispute the assertions, contentions, arguments, etc. made by the other party in its main brief. While it is not necessary in a reply brief to repeat a particular argument or discussion contained in the main brief, the reply brief should note where the responsive argument is located in the main brief and how it responds to the other parties' assertions, contentions, arguments, etc.

Any brief not filed and served on or before the date fixed therefor will not be accepted for filing, except by special permission of the Commission or the presiding Administrative Law Judge pursuant to 52 Pa. Code §5.502(c).

Also as discussed at the prehearing conference, the parties are directed to develop a uniform listing of issues to be used in their briefs.

Finally, the parties are directed to confer among themselves in an attempt to resolve all or some of the issues associated with the Complaint.

Date: May 18, 2006



Marlane R. Chestnut
Administrative Law Judge

OALJ Hearing Report

Please Check Those Blocks Which Apply

Docket No.:	C-20065798		YES	NO
		Prehearing Held:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Case Name:	Pennsylvania Carriers' Coalition v. Verizon	Hearing Held:	<input type="checkbox"/>	<input type="checkbox"/>
	Pennsylvania Inc	Testimony Taken:	<input type="checkbox"/>	<input type="checkbox"/>
		Transcript Due:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
		Hearing Concluded:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Location:	Philadelphia, PA	Further Hearing Needed:	<input type="checkbox"/>	<input checked="" type="checkbox"/>
		Estimated Add'l Days:		
Date:	May 18, 2006			
		RECORD CLOSED:	<input type="checkbox"/>	<input type="checkbox"/>
ALJ:	Marlane R. Chestnut	DATE:		
		Briefs to be Filed:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Reporting Firm:	Sargents Court Reporting	DATE:	7/10/06, 7/24/06	
		Bench Decision	<input type="checkbox"/>	<input type="checkbox"/>
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PLEASE PRINT CLEARLY - Incomplete information may result in delay of processing.

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Check this box if additional parties or attendees appear on back of form

elp.

Amanda Lewis
Reporter's Signature

Note: Completion of this form does not constitute an entry of appearance, see 52 Pa. Code §§1.24 and 1.25.

Cynthia L. Randall
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July 17, 2006

Via UPS Overnight Delivery

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Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
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JUL 17 2006

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: **Pennsylvania Carriers' Coalition
v. Verizon Pennsylvania Inc.
Docket No. C-20065798**

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Dear Secretary McNulty:

Enclosed please find the original and nine copies of the Motion for Summary Judgment, and Memorandum of Law in Support of its Motion for Summary Judgment, with Appendix, being filed by Verizon Pennsylvania Inc. in the above captioned matter. In addition, enclosed please find an electronic copy on diskette of the Motion and of the text of the Memorandum of Law, in Word format, in the same matter.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

Cynthia L. Randall

CLR/slb
Enc.

Via UPS Overnight Delivery
cc: The Honorable Marlane R. Chestnut
Certificate of Service

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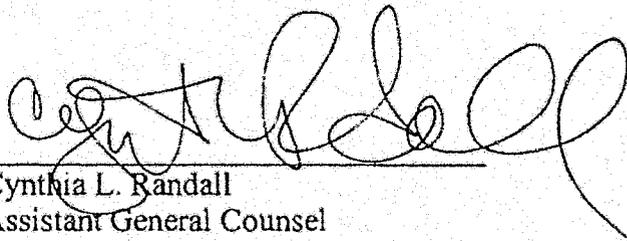
CERTIFICATE OF SERVICE

I, Cynthia L. Randall, hereby certify that I have this day served true copies of Verizon Pennsylvania Inc.'s Motion for Summary Judgment and Memorandum of Law in Support of its Motion for Summary Judgment, upon the party listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 17th day of July, 2006.

VIA E-MAIL AND UPS OVERNIGHT DELIVERY

Mark Stewart, Esquire
Wolf Block Schorr
& Solis-Cohen, LLP
213 Market Street, 9th Floor
Harrisburg, PA 17101



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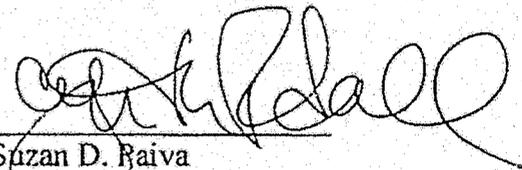
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Carriers' Coalition, :
Complainant, :
 : No. C-20065798
v. :
 :
Verizon Pennsylvania Inc., :
Respondent. :

VERIZON PENNSYLVANIA INC.'S MOTION FOR SUMMARY JUDGMENT

For the reasons set forth in the attached Memorandum of Law, which is incorporated as though fully set forth herein, Verizon Pennsylvania Inc. ("Verizon") respectfully requests pursuant to 52 Pa. Code § 5.102 that Summary Judgment be granted in Verizon's favor and against the Pennsylvania Carriers' Coalition ("PCC"), and that the PCC's Complaint be dismissed with prejudice.

Respectfully submitted,



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Attorneys for Verizon Pennsylvania
Inc.

Date: July 17, 2006

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S OFFICE

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Carriers' Coalition,
Complainant,

v.

Verizon Pennsylvania Inc.,
Respondent.

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No. C-20065798

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VERIZON PENNSYLVANIA INC.'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Date: July 17, 2006

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VERIZON PENNSYLVANIA INC.'S MEMORANDUM OF LAW JUL 17 2006
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

COMMUNICATIONS COMMISSION
CLERK'S BUREAU

INTRODUCTION

Elevating form over substance, the Pennsylvania Carriers' Coalition ("PCC")¹ challenges Verizon's approved and tariffed Access to Operations Support Systems ("Access to OSS") and Daily Usage File ("DUF") rates as applied to resellers, arguing that the rates appear in the "wrong" tariff and that the cost of these services must be recovered instead through the wholesale discount. The PCC resellers cannot deny that federal law and this Commission's own precedent require them to pay Verizon Pennsylvania Inc. ("Verizon") for the cost of these services. Their attempt to evade payment -- and even to seek refunds for past payments -- by quibbling with the Commission-approved method for recovering these costs should be rejected.

The PCC does not dispute that as resellers they actually use these services, or that the charges are cost-based, but argues only that the method chosen by Verizon and the Commission to recover these costs from resellers was technically flawed. In so doing, the PCC attempts to create a "loophole" through which Verizon must provide these services to resellers for free, despite the fact that the Commission clearly held that resellers should pay for these services in a proceeding in which the PCC and its member companies actively participated.

Under the undisputed facts and applicable law, Verizon is entitled to summary judgment. As the Commission has already held, these rates are fair and reasonable cost-

¹ The PCC is not an actual entity, but is a name used for litigation purposes by a group of three companies represented by common counsel: Full Service Computing Corp. t/a Full Service Network ("FSN"), ATX Licensing, Inc. ("ATX") and Line Systems, Inc. ("LSI").

based charges that should be borne by the cost-causers, including resellers. As the presiding officer has noted, the rates were properly tariffed in Tariff 216, which applies to services provided by Verizon to Other Telephone Companies. There is no legal requirement to place charges applicable to resellers exclusively in the Retail tariff, nor is there any legal requirement to account for such costs in the wholesale discount.

The PCC's challenge to these rates is not only legally meritless but precluded by 66 Pa.C.S. section 316 and by the doctrine of *res judicata*, as the PCC and its member companies were parties to the proceeding in which these rates were found to be fair and reasonable as applied to resale lines, and chose not to challenge or appeal the rates despite many opportunities to do so. Summary judgment should therefore be granted in Verizon's favor and against the PCC.

BACKGROUND AND HISTORY OF PROCEEDING

Verizon's current Access to OSS and DUF charges were approved in the Commission's *Generic UNE* case and took effect on October 1, 2004.² Access to OSS was a new monthly recurring rate, approved to compensate Verizon for the past and ongoing costs of making its OSS available to CLECs and resellers.³ DUF rates were set to replace pre-existing rates for a service through which resellers and UNE carriers may choose to purchase the intraLATA local and toll call usage record details of their end users.⁴ DUF is an optional service,⁵ so if the PCC members are being charged for DUF on their resold lines it is because they affirmatively ordered this service for those lines.

² *Generic Investigation Re Verizon Pennsylvania Inc.'s Unbundled Network Element Rates*, Docket No. R-00016683 ("*Generic UNE*").

³ *Generic UNE*, Tentative Order entered Nov. 4, 2002, at 169.

⁴ *Id.* at 172.

Throughout the litigation of the *Generic UNE* case, the Commission was clear that the Access to OSS and DUF rates would apply both to UNE lines and to resold lines. The Commission held that these rates were appropriately formulated by apportioning the relevant costs among the users of these services, including both UNE carriers and resellers.⁶ If the rates instead had been calculated to apply only to UNE lines, the number of lines over which the costs were spread would have been smaller, and the resulting rate would have been higher.⁷

Verizon's testimony in the *Generic UNE* case clearly stated that the proposed Access to OSS charge was "a monthly recurring charge for resellers and UNE purchasers,"⁸ which was intended to recover Verizon's past and ongoing costs to make its OSS available to CLECs and resellers. Verizon's witnesses testified that the "costs presented in this testimony reflect the OSS costs Verizon incurs to provide wholesale

⁵ See, e.g., *Generic UNE*, AT&T/WCom St. 8.0 (Recurring Panel Rebuttal) at 173-74, n.171 (noting that Verizon has assumed for purposes of the study that 75% of resellers will purchase the DUF product); *Generic UNE*, Recommended Decision, May 3, 2002 at 65.

⁶ *Generic UNE*, Recommended Decision, May 3, 2002, at 64-65.

⁷ *Generic UNE*, VZ St. 1.0 filed 12/7/01 at 129 (Verizon "proposes to recover the total costs through monthly recurring charges to CLECs that are based on the number of UNE loops, platform/combinations and *resold lines* that are forecasted to be in service in Pennsylvania in the 10-year forecast period.") (emphasis added); *id.* at 129-30 (CLECs "will only be responsible for their fair share of such costs based on the projected demand of UNE loops, platforms/combinations and *resold lines*.") (emphasis added). See also Verizon PA's Access to OSS cost study, Part F-5, Workpaper 4, Section 1, page 13 (demonstrating that the demand assumption included resale as well as UNE loops and UNE-P). (The cost study is not attached hereto because it is proprietary and subject to a protective order entered in the *Generic UNE* matter. Verizon will produce it if a substantially similar protective order is entered in this matter.)

⁸ *Generic UNE*, VZ St. 1.0 filed 12/7/01 at 135 (emphasis added). See also *id.* at 136 ("Verizon proposes to recover ongoing costs in the same fashion as the development cost, on a monthly per *resold line/UNE loop/UNE platform or combination basis*) (emphasis added); *id.* at 170 ("Verizon PA is proposing a monthly recurring charge of \$0.84 per *resold line/UNE loop/UNE platform/Combination*") (emphasis added).

products to CLECs and resellers.”⁹ The Commission adopted ALJ Schnierle’s Recommended Decision on this issue, which had held that Verizon could impose “a recurring ‘access to OSS’ charge of \$0.83 or \$0.78 per month per line on all UNE loops, UNE platforms and resale loops.”¹⁰ ALJ Schnierle held that Verizon is entitled to recover all of its costs to provide access to OSS, and that such costs were reasonable and sufficiently documented.¹¹ Other parties raised objections to the Access to OSS rate, arguing that Verizon should bear some of the costs, that the costs should be spread across all telecommunications users and that Verizon had not sufficiently documented the costs. These arguments were rejected. No party objected to the application of the rate to resellers. The *Tentative Order’s* holding became the Commission’s final holding on this rate with the December 11, 2003 *Final Order* because no party challenged it.

As with the Access to OSS rate, it was clear from the outset that the DUF rate would apply to those resellers that ordered DUF service.¹² As described in Verizon’s direct testimony in the *Generic UNE* case, DUF “provides resellers and UNE purchasers with the IntraLATA local and toll call usage record details of their end users. DUF consists of the processing and transmission of those call record details.”¹³ In his Recommended Decision, ALJ Schnierle found that the DUF rate spread Verizon’s cost to provide the service across an “assumed demand” that included “resale services,” and

⁹ *Id.* at 129. See also *id.* at 131 (“costs were incurred specifically to satisfy the Telecommunications Act’s requirements and permit CLECs to obtain UNEs *and resale* in an efficient manner.”) (emphasis added)

¹⁰ *Generic UNE*, Recommended Decision, May 3, 2002 at 63 (emphasis added).

¹¹ *Id.* at 64.

¹² Indeed, Verizon had already been applying its previous DUF rates to resellers.

¹³ *Generic UNE*, VZ St. 1.0 filed 12/7/01 at 171 (emphasis added).

approved the proposed rate.¹⁴ Again, although various parties had objected to the rate on other grounds, including that the assumed demand was too low, no party challenged the application of the rate to resellers. The Commission's *Tentative Order* adopted the ALJ's conclusion on the DUF rate, which became the final holding in the December 11, 2003 *Final Order* because no party challenged it.¹⁵

Two of the plaintiffs here, FSN and ATX, were parties to the *Generic UNE* case.¹⁶ FSN filed comments to the *Tentative Order* on December 30, 2002 and additional comments and reply comments in January and February of 2003. FSN and ATX jointly filed comments to the *Tentative Order* in April of 2003. None of these filings challenged the approval of the Access to OSS or DUF rates (either generally or as applied to resellers). In February of 2004, the PCC (including FSN, ATX and LSI) as well as FSN, separately, filed comments to Verizon's compliance filing, which included other challenges to the DUF rate but again did not challenge its application to resellers.¹⁷ These filings did not challenge the Access to OSS rate at all.

In its *Final Compliance Order* entered July 16, 2004 the Commission approved Verizon's rates resulting from the *Generic UNE* proceeding, as well as Verizon's proposed tariff modifications to incorporate the results of the case. The tariff revisions

¹⁴ *Generic UNE*, Recommended Decision, May 3, 2002, at 65 (emphasis added).

¹⁵ *Generic UNE*, *Tentative Order* entered Nov. 4, 2002, at 172.

¹⁶ FSN filed a petition to intervene in the *Generic UNE* case on November 8, 2002. ATX filed a petition to intervene in the *Generic UNE* case on April 9, 2003. FSN and ATX actively filed pleadings in the action. LSI filed a petition to intervene in the *Generic UNE* case on February 25, 2004. The Commission's final Compliance Order entered July 16, 2004 denied LSI's petition to intervene, finding that its interests were adequately represented by other parties and noting that existing party FSN was a signatory to the comments that LSI sought to submit so that its arguments would still be considered. LSI did not attempt to raise any argument about the application of Access to OSS or DUF charges to resellers.

¹⁷ *Generic UNE*, The Pennsylvania Carriers' Coalition's Comments to Verizon's Compliance Filing, filed February 25, 2004, FSN Comments to Verizon's Compliance Filing, filed February 25, 2004.

with modifications directed by the Commission went into effect October 1, 2004, pursuant to the Commission's Order. The new Access to OSS and DUF rates were included in Verizon's tariff Pa. PUC 216. (Tariff 216, Sec. 3C. 12.e., Third Revised Sheet 14).

On January 19, 2006, the PCC filed this Complaint contending that Access to OSS and DUF charges should not be applied to resold lines and are not properly tariffed as applied to resellers. On February 13, 2006, Verizon filed its Answer together with a Motion to Dismiss the Complaint as insufficient on its face and barred by 66 Pa.C.S. section 316 and the doctrines of *res judicata* and collateral estoppel. On April 5, 2006, the presiding officer denied the Motion to Dismiss, holding that it is not clear whether the required identity of parties or issues exists such that *res judicata* or collateral estoppel can be applied. The presiding officer noted, however, that the Access to OSS and DUF charges clearly were calculated and approved on the basis that they would apply to resold lines, that they were duly tariffed, and that their inclusion in Tariff 216 rather than Tariff 1 "is irrelevant."¹⁸ Subsequently the parties conferred and agreed that the matter should be disposed of based on motions for summary judgment.

On June 19, 2006, counsel for the PCC submitted an agreed list of issues to be addressed in the motions, as follows: 1) whether the complaint is barred as a matter of law by the Commission's prior orders in the *Generic UNE* case; 2) whether the Access to OSS and DUF charges are properly tariffed as applied to resellers; 3) whether Verizon misapplied the Access to OSS charge in certain instances by charging the fee on a per line rather than per loop basis; and 4) whether the Telecommunications Act of 1996

¹⁸ Order Denying Motion to Dismiss, April 5, 2006, at 4.

limits Verizon to recovering Access to OSS and DUF costs from resellers only through the wholesale discount.

STANDARD FOR SUMMARY JUDGMENT

A motion for summary judgment in a proceeding before the Commission should be granted if “the pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” 52 Pa. Code section 5.102(b)(c); *South River Power Partners, L.P. v. West Penn Power Company*, Docket No. C-00935287, 1996 Pa PUC Lexis 79 (March 26, 1996). In this case, the facts are not in dispute, and the parties agree that the PCC’s claims may be resolved as a matter of law.

DISCUSSION

1. The Complaint is Barred as a Matter of Law by the Commission’s Decisions in the Generic UNE Matter

In its Motion to Dismiss, Verizon argued that the Complaint was precluded by the doctrines of *res judicata* and collateral estoppel because the PCC and its member companies were parties to the *Generic UNE* proceeding but chose not to challenge these rates during the proceeding nor appeal the Commission’s final order. The presiding officer denied the motion on the ground that the record was not clear as to whether the parties and issues were identical. As discussed in detail below, *res judicata* bars the complaint even though the specific arguments raised in this Complaint were not made in the *Generic UNE* proceeding because the subject matter and ultimate issues are the same in both proceedings and the parties are either identical or in privity with one another. Even if *res judicata* did not preclude the Complaint, however, summary judgment must

be granted because the decisions in the *Generic UNE* matter are Commission precedent and should be followed. The Commission has already resolved all of the legal issues raised by the Complaint by determining that the rates are fair and reasonable as applied to resold lines and approving their placement in Tariff 216.

a. The Complaint is barred by *Res Judicata*

The doctrine of *res judicata* applies to proceedings before the Commission.¹⁹

Once the Commission has entered a final judgment on the merits of a matter, the “parties to that case and their privies are thereafter bound ‘not only as to every matter which was offered and received, but also as to any other admissible matter which might have been offered.’”²⁰ *Res judicata* applies not only to claims actually litigated but also to claims that could have been litigated during the first proceeding if they were part of the same cause of action.²¹ Causes of action may be considered identical when, in both the current and the prior proceedings, the subject matter and the ultimate issues were the same.²²

Not only actual parties but all those in privity with actual parties are bound by the judgment in the first proceeding.²³ Under these standards, it is clear that the PCC and its member companies are bound the Commission’s decisions in the *Generic UNE* matter.

¹⁹ *Philadelphia Electric Co. v. PUC*, 61 Pa. Commw. 325, 334, 433 A.2d 620, 625 (1981). See also *O’Toole v. Bell Telephone Co. of PA, Inc.*, 77 Pa. PUC 98, 104 (1992); *Suprick v. Commonwealth Telephone Co.*, No. C-00903161, 1995 Pa PUC LEXIS 15 (Opinion and Order entered January 25, 2995).

²⁰ *Suprick*, 1995 Pa PUC LEXIS at * 7 (quoting *Commission v. Sunnen*, 333 US 591 (1948)).

²¹ *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Balent v. City of Wilkes-Barre*, 542 PA 555, 564, 669 A.2d 309, 313 (1995).

²² *Philadelphia Fraternal Order of Correctional Officers v. Rendell*, 701 A2d 600, 607 (Pa. Commw. 1997).

²³ *Allen v. McCurry*, 449 U.S. at 90, *Balent v. City of Wilkes-Barre*, 542 PA at 563.

i. The Causes of Action are the Same in Both Proceedings

The subject matter and ultimate issues are the same in both proceedings. As the presiding officer noted in the Order denying Verizon's Motion to Dismiss, the purpose of the *Generic UNE* proceeding was to determine whether the proposed rates, including the rates at issue, were fair and reasonable as formulated.²⁴ The PCC purports to challenge the application of the rates to resellers rather than the rates themselves, but this distinction is illusory. The calculation of the rates and their subsequent approval was dependent on the assumption that the rates would apply to resellers. As the presiding officer stated, "in the *Generic UNE* proceeding, the Access to OSS and DUF charges clearly were calculated on the basis of and intended to be charged to resold lines."²⁵ Because the rates are formulated to recover Verizon's undisputed costs to provide the OSS and DUF services, they would have to be formulated differently if any category of users were eliminated. In approving the rates as formulated, the Commission necessarily held both that it is appropriate to recover these costs from resellers, and that the proposed rates are an acceptable method of recovering them. These holdings dispose of the PCC's claims that resellers should not have to pay these rates or that the costs should have been built into the wholesale discount. The fact that the PCC companies did not raise the specific arguments that they make here is irrelevant because *res judicata* does not require that the issues litigated be identical as long as the issues could have been raised in the first proceeding.

The PCC argues that the Commission's holdings in the *Generic UNE* matter do not address the PCC's claim that the rates were improperly tariffed. That is incorrect, as

²⁴ Order Denying Motion to Dismiss, April 5, 2006, at 5.

²⁵ *Id.* at 4.

Commission's *Final Order* explicitly directed Verizon to file the applicable rates in Tariff 216.²⁶ Verizon made initial and revised compliance filings showing that these rates would appear in Tariff 216. The PCC commented on the initial compliance filing, but did not argue that the Access to OSS and DUF rates should be tariffed elsewhere. The placement of the rates in Tariff 216 was ultimately approved by the Commission in its *Final Compliance Order* entered July 16, 2004. Just before these tariffs became effective, the PCC, *including LSI*, filed a Complaint and Request for Rejection or Suspension of Verizon's Tariff Supplement on September 27, 2004. In that complaint, the PCC demanded that the Commission "require that Verizon's August 2 compliance tariff become effective as planned on October 1, 2004."²⁷ The August 2 compliance tariff, which did become effective as planned on October 1, 2004, included the placement of these rates in Tariff 216. Therefore the Commission's holdings do address and resolve the PCC's claim, and the PCC had every opportunity to raise the issues it raises here in the *Generic UNE* proceeding.

The PCC also has argued that *res judicata* does not bar the entire Complaint because Verizon's application of the Access to OSS rate on a per-line rather than per-loop basis is not addressed by the Commission's holdings in the *Generic UNE matter*. As discussed in detail in Section 2 below, that is incorrect. ALJ Schnierle approved Verizon's proposal to "apply a recurring 'Access to OSS' charge of 0.83 or 0.78 per month *per line* to all UNE loops, UNE platforms and resale loops."²⁸ As the rates were

²⁶ *Generic UNE*, Final Order, ordering para. 4.

²⁷ *PCC v. Verizon Pennsylvania Inc.*, Docket No. R-000016683C0001, PCC's Complaint and Request for Rejection or Suspension of Tariff Supplement, filed September 27, 2004.

²⁸ *Generic UNE*, Recommended Decision, May 3, 2002, at 62.

formulated to spread the costs across resale lines, not loops,²⁹ the Commission's approval of the rates as formulated necessarily precludes the PCC's claim here. In any event, even if *res judicata* did not bar the PCC's minor claim regarding whether Access to OSS should be billed per-line or per-loop on certain lines, it is undeniable that *res judicata* still bars the PCC's larger challenges to the application of the Access to OSS and DUF rates to resellers and the tariffing of those rates.

For all of these reasons, it is clear that the subject matter of both actions is the same for purposes of *res judicata*.

ii. **The Parties are the Same in Both Proceedings**

The required identity of parties is also present here. The PCC is the party of record in this matter. It is undisputed that the PCC, comprised of all three of the plaintiffs here, filed comments to Verizon's compliance filing in the *Generic UNE* proceeding on February 25, 2004, which were considered by the Commission. It is also undisputed that FSN and ATX separately filed pleadings and were parties to the *Generic UNE* proceeding, and that each of them filed multiple sets of comments and reply comments on the proposed rates.

Given the above facts, there can be no question that ATX and FSN are bound by the doctrine of *res judicata*, regardless of whether or not LSI is so bound, and their claims should be dismissed.

The PCC is also incorrect in arguing that LSI cannot be bound by the outcome of the *Generic UNE* proceeding because its motion to intervene was denied by the Commission on July 16, 2004. *Res judicata* applies not only to actual parties but also those in privity with them. Privity for purposes of *res judicata* does not mean contractual

²⁹ *Generic UNE*, VZ St. 1.0 filed 12/7/01 at 129-30.

privity, but rather an identity of legal interests in the outcome of the proceedings: "Privity connotes those so connected in law with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right."³⁰ In denying the motion, the Commission specifically held that "we find that the interests which [LSI] would assert are adequately represented by existing participants."³¹ Existing participants included FSN, ATX and the PCC, which explicitly included all three parties. The Commission's finding that LSI's legal interests were represented by existing participants establishes the required privity for purposes of *res judicata*. The Commission considered and ruled on LSI's arguments, as presented by the other members of the PCC, including a challenge to the DUF rate on different grounds. The Commission clearly intended that its holdings in *Generic UNE* would be binding on LSI notwithstanding its denial of LSI's motion to intervene.

There is no question that the PCC and its member companies had every opportunity to challenge the Access to OSS and DUF rates as they apply to resellers in the *Generic UNE* proceeding. They chose not to, and *res judicata* therefore bars the instant Complaint.

b. Collateral Estoppel Bars Relitigation of the Issues Raised in the Complaint

Because *res judicata* bars the complaint in its entirety, it is unnecessary to apply the doctrine of collateral estoppel. However, Verizon notes that the doctrine of collateral estoppel would also apply to prevent the PCC from relitigating the issues of whether the applicable rates were properly applied to resellers, whether they apply on a per-line basis,

³⁰ *Jordon v. the United Telephone Company of Pennsylvania*, Docket No. C-00946430, 1995 Pa. PUC Lexis 158 (December 22, 1995); See also *Day v. Volkswagenwerk Aktiengesellschaft*, 318 Pa. Super 225, 464 A.2d 1313, 1317-18.

³¹ *Generic UNE*, Final Compliance Order, July 16, 2004 at 7.

and whether it was appropriate to recover Access to OSS and DUF costs through tariffed rates as opposed to an offset to the wholesale discount. For the reasons discussed above, all of those issues were necessarily decided by the Commission when it approved the rates.

Collateral estoppel is “a doctrine which prevents re-litigation of an issue in a later action, despite the fact that it is based on a cause of action different from the one previously litigated. The identical issue must have been necessary to final judgment on the merits, and the party against whom the plea is asserted must have been a party, or in privity with a party, to the prior action and must have had a full and fair opportunity to litigate the issue in question.”³² The PCC argues that the application of these rates to resellers was not essential to the Commission’s decision to approve them, but that is incorrect. The Commission held that Verizon is entitled to recover *all* of its costs for Access to OSS and DUF services.³³ It would be impossible to achieve the stated purpose of cost recovery unless the approved rates are paid by resellers as well as CLECs. For the same reason, the application of these rates on a per line basis also was essential to the Commission’s decision. With respect to the argument that Access to OSS costs should be or were being recovered through the wholesale discount, that precise argument was made by AT&T and Worldcom and was necessarily rejected by the Commission when it approved the rates.³⁴ The fact that a party other than the PCC raised this argument in the *Generic UNE* proceeding is irrelevant, as collateral estoppel only requires that the issue

³² *Balent v. City of Wilkes-Barre*, 542 Pa. 555, 564, 669 A.2d 309, 313, citing *Allen v. McCurry*, 449 U.S. 90, 94-95.

³³ *Generic UNE*, Recommended Decision, May 3, 2002 at 62.

³⁴ *Generic UNE*, AT&T/WCom Main Brief at 169-70.

was necessary to the judgment and that the party in question had a full and fair *opportunity* to litigate it. Those requirements are met here, and the PCC therefore is foreclosed from re-litigating these issues.

c. The Holdings in the Generic UNE Matter are Commission Precedent and Resolve the Claims Made Here

Even if the above doctrines did not apply, which they do, the claims made by the PCC must still be dismissed because the Commission's holdings in the Generic UNE matter constitute Commission precedent on the legal issues raised in the Complaint and dictate that summary judgment must be granted. Administrative agencies such as the Commission have the obligation to render consistent opinions and should either follow, distinguish or overrule their own precedents.³⁵ As discussed above, after a four-year proceeding in which multiple parties challenged these rates on a host of grounds, the Commission found that these rates were reasonable and justified as formulated. In particular, the Commission held that Verizon's costs to provide Access to OSS and DUF services should be borne entirely by the cost-causers and not by Verizon or by retail end-users, and that those costs were properly documented and properly recovered through the rates at issue. Other parties to the *Generic UNE* proceeding challenged the Commission's approval of these rates in a case filed the United States District Court for the Eastern District of Pennsylvania, which granted the PUC's motion for summary judgment, upholding the rates as approved. The federal court also held that Verizon

³⁵ *N.L.R.B. v. Rhone-Poulenc, Inc* 789 F.2d 188, 193 (3d Cir. 1986); *Lehigh Valley Farmers v. Block*, 640 F. Supp. 1497, 1517 (E.D. Pa.), aff'd, 829 F.2d 409 (3d Cir. 1986); *Standard Fire Ins. Co. v. Insurance Department*, 148 Pa. Commw. 350, 356, 611 A.2d 356, 359 (1992)

should not have to bear any of the costs to provide Access to OSS and DUF services, and that the costs were reasonable and properly documented.³⁶

The result sought by the PCC is directly contrary to these holdings, and accordingly would violate 66 Pa. C.S. § 316, which provides that:

Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.

“This section of the Public Utility Code precludes a collateral attack upon a Commission order that has not been reversed upon appeal.”³⁷ The instant Complaint is just such a collateral attack and is therefore precluded.

If the presiding officer were to find that resellers are exempt from paying these rates, Verizon would be forced to bear the resellers' share of the costs to provide these services. The Commission and the federal court both have expressly held that such a result is unfair and inappropriate and those precedents are controlling here. Further, the legal issues raised in the Complaint are necessarily resolved by the Commission's holdings -- discussed in more detail below -- that these rates should apply to resellers, that the Access to OSS rate should apply on a per-line basis and that the rates should appear in Tariff 216. As these issues have already been resolved by the Commission, application of precedent dictates that summary judgment be granted.

³⁶ *Verizon Pennsylvania Inc. v. Pennsylvania Public Utility Commission*, 380 F. Supp. 2d 627, 654-58 (E.D. Pa. 2005).

³⁷ *Suprick*, 1995 Pa PUC LEXIS at * 7.

2. The Rates are Properly Tariffed as to Resellers

The PCC's argument that the Access to OSS and DUF charges are not properly tariffed is meritless. The PCC attempts to characterize the tariffs narrowly, asserting that Tariff 216 is the "UNE Tariff" and that rates applicable to resellers must appear in Tariff 1, the "Retail Tariff", but nothing in the language of either tariff supports that interpretation. As the presiding officer concisely stated:

These charges were accepted by the Commission and included in Verizon's tariff. The fact that they are contained in Tariff 216, rather than Tariff 1, is irrelevant, in light of the language contained in Tariff 1, that "[t]o the extent that services are available for resale subject to terms and conditions set out in other provisions of this Tariff or other Telephone Company Tariffs, those terms and conditions remain applicable except to the extent they conflict with the language of this Section." Tariff 1, Section 8.1(A)(1), First Revised Sheet 4A. There is additional language that, "[t]he regulations contained in this Section are intended to supplement the regulations contained in other sections of this or other Telephone Company tariffs to the extent such other regulations do not conflict with the regulations contained herein." Id. at (A)(2). Further, there is no language in tariff 216 stating that it applies only to UNE purchasers, not to resellers. In fact, it states that "[t]his tariff applies to services provided by [Verizon] to Other Telephone Companies that have been authorized by the Pennsylvania Public Utility Commission to provide local exchange service in Pennsylvania," which, as pointed out by Verizon, can include resellers as well as CLECs that lease UNEs. Tariff 216, Sec. 1(A), Third Revised Sheet 1.

Further, the Commission expressly approved the placement of these rates in Tariff 216 with full knowledge that the tariff would apply to resellers as well as CLECs. Tariff 216 is an appropriate place to publish these rates as they represent charges for services that are only available to other telephone companies and are not available to end users on a retail basis.

The PCC suggests that Verizon should have filed the challenged rates in two different tariffs – in Tariff 216 for UNE purchasers and again in Tariff 1 for resellers. Such cross-referencing was neither ordered by the Commission nor required by the tariffs themselves. The PCC's reliance on language in the Commission's *Final Order* stating

that Verizon should implement revisions to Tariff 216 “and any related tariffs or tariff amendments” is misplaced given that the Commission subsequently approved Verizon’s compliance filing showing that these rates would appear *only* in Tariff 216. It is apparent that the Commission found this course of action to comply with its Order.

Finally, the PCC’s suggestion that the placement of these rates in Tariff 216 provided “no clear notice” to the PCC or its member companies that the Access to OSS and DUF charges would apply to resold lines (Complaint ¶ 19) is completely refuted by the public record of the *Generic UNE* matter, in which it was abundantly apparent that these rates would apply to resellers.

Accordingly, summary judgment must be granted on the PCC’s claim that these rates are “untariffed” as applied to resellers.

3. The Access to OSS Rate Applies on a Per-Line, not Per-Loop Basis

The PCC asserts that the Access to OSS rate was approved “to be applied on a per-loop basis” rather than a per-line basis. This contention relates to a minor dispute over whether Verizon is properly applying the Access to OSS charge to certain lines. According to the PCC, even if the Access to OSS rate is properly tariffed and properly applied to resellers, certain types of resold lines should not pay the rate because of the way Verizon is technically provisioning the service on those lines.³⁸ The PCC claims that Verizon has misapplied the tariff by charging for each telephone line when multiple lines are served by the same loop: “the charge has been applied to remote call forward numbers as well as every direct inward dial line on a primary rate interface despite the fact that all the traffic for those lines is carried over the same loop.” (Complaint ¶ 25).

³⁸ This claim has nothing to do with the application of the DUF rate.

The PCC is incorrect that the rate was approved on a per loop basis for resellers. In fact, as discussed above, ALJ Schnierle approved Verizon's proposal to "apply a recurring 'Access to OSS' charge of 0.83 or 0.78 per month *per line* to all UNE loops, UNE platforms and resale loops."³⁹ This is reflected in the Commission's *Final Compliance Order* and in the approved tariff, both of which state that each Access to OSS rate applies "*per line*, per month."⁴⁰ The application of these rates on a per line basis is consistent with the supporting cost studies, which calculated the rates based on the projected number of "resold lines", regardless of how those lines were provisioned. As stated in Verizon's testimony during the *Generic UNE* proceeding: "Verizon proposes to recover these initial development costs over a 10-year period through a monthly recurring charge for resellers and UNE purchasers based on their share of the forecasted number of UNE loops, platform/combinations and **resold lines** in service."⁴¹

The PCC cannot point to any language that states that the rates apply on a "per loop" basis. In support of its position, it cites the *Tentative Order*, which states that "Verizon proposed a recurring Operations Support Systems (OSS) access charge on all UNE loops, UNE-P and resale loops, to recover expenses associate with the initial development necessary to provide access to operation support systems and ongoing maintenance of provisioning OSS."⁴² While this shorthand characterization of Verizon's proposal does not specify that the charges apply on a per line basis, it is clear that the Commission was describing Verizon's proposal, not making any changes to it. In fact,

³⁹ Recommended Decision at 62.

⁴⁰ Final Compliance Order, ordering paragraph 1 and attached schedule of rates; Pa. PUC No. 216, Section 3, 3rd revised sheet 14.

⁴¹ *Generic UNE*, VZ St. 1.0 filed 12/7/01 at 135

⁴² *Generic UNE*, *Tentative Order* at 169.

the *Tentative Order* adopted the ALJ's recommendation unchanged. As the ALJ specified that the charges would apply on a per-line basis as proposed by Verizon, the PCC cannot rely on the language of the *Tentative Order* to reach a different result. Ultimately the Commission approved Verizon's proposed tariff amendments, which specified that the rates applied on a per line, per month basis.

Of course, once the tariff became effective, Verizon was obligated to charge the rates on a per line, per month basis as specified in the tariff. 66 Pa. C.S. section 1303 (adherence to tariffs). Once set, "tariffed rates are binding on both the customer and the utility."⁴³ Therefore, summary judgment should be granted on the PCC's claim that Verizon is improperly charging the OSS rate on a per-line basis.

4. **The Telecommunications Act Does Not Require that all Charges to Resellers Be Reflected in the Wholesale Discount**

The Telecommunications Act of 1996 requires ILECs to "offer for resale at wholesale rates any telecommunications service"⁴⁴ that the [incumbent] carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. section 251(c)(4)(A). The wholesale rates for such services are determined based on retail rates charged to subscribers, excluding "the portion thereof attributable to any marketing, billing, collection and other costs that will be avoided by the local exchange carrier." 47 U.S.C. section 252(d)(3). It is undisputed that Access to OSS and DUF are not being re-sold to end user customers and therefore the associated costs are not included in the retail

⁴³ *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 808 A.2d 1044 (Pa. Commw. 2002).

⁴⁴ "Telecommunications Service" is defined as "offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public regardless of the facilities used. 47 U.S.C. section 153(46). "Telecommunications" is defined as "transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received."

rates.⁴⁵ Neither will these costs be avoided by ILECs in providing service on a wholesale basis. Therefore, these charges fall outside the Act's definition of wholesale rates.

The PCC argues that the Act requires Verizon to recover any additional costs that it may incur as a result of providing service on a wholesale basis through offsets to the avoided costs specified in section 252(d)(3). The Act says no such thing, however. The Act does not contemplate that the wholesale price of re-sold services will be the only cost of doing business for resellers, as the PCC seems to suggest, and the question of how ILECs may recover the costs they incur in providing services directly to wholesale customers is not addressed in this section. Accordingly, it is perfectly consistent with the Act to recover these costs that are not a part of retail rates through tariffed rates applied to resellers as opposed to the offset mechanism suggested by the PCC.⁴⁶ With respect to DUF costs in particular, it would be inappropriate to incorporate Verizon's costs into the wholesale discount because DUF is an optional service that some resellers do not elect to purchase and should not have to pay for.

At least two federal courts have held that it is appropriate for resellers to pay separate charges for OSS services. In *Bell Atlantic Delaware v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000), the United States District Court for the District of Delaware

⁴⁵ See *Generic UNE*, VZ St. 1.0 filed 12/7/01 at 128 (OSS costs to be recovered from CLECs and resellers represent only those costs incurred to develop and modify systems to facilitate access to Verizon's OSS by other carriers).

⁴⁶ Nothing in the Act precludes Verizon from separately charging resellers for services that are not "telecommunications services". For example, in *MCI Telecom Corp v. Bell Atlantic-PA, Inc.*, 271 F.3d 491, 519-20 (3d Cir. 2001), *cert. denied*, 123 S.Ct. 340 (2002), the United States Court of Appeals for the Third Circuit held that directory publishing service is not "telecommunications services" and that therefore resellers would be required to pay retail rates for this service. 271 F.3d at 520. Similarly, the United States District Court for the District of Colorado held that resellers could be charged retail rates for enhanced services such as voicemail and inside wire maintenance. *US West Communications Inc. v. Hix*, 183 F. Supp. 2d 1249, 1254 (2000).

addressed the precise issue raised here, reviewing the Delaware Commission's approval of a separate charge to resellers for access to OSS service. The court held that section 252(d) of the Telecommunications Act does not preclude ILECs from imposing a separate charge on resellers for access to OSS:

Section 252(d)(3)'s language. . . makes clear that the starting point for the wholesale rate calculation is the retail rate for the service in question. The Hearing examiners concluded that the OSS access charge compensates Bell for costs associated with updating its OSS interfaces to permit new entrant access. Assuming the accuracy of this conclusion, these access costs are not included in Bell's retail rate for OSS services because Bell's retail customers do not "access" its OSS. As such, there is no allowance for such costs in Bell's retail rates and, consequently, none also in the discounted wholesale rate. Nothing on the face of the Act prohibits imposing an additional charge to compensate Bell for providing OSS access to its competitors.

Although the court ultimately remanded the case to the Commission to develop factual support for the proposed Access to OSS charges, it clearly held that such charges are appropriate if properly documented and supported, as they are in this case.

In *Southwestern Bell Tel. Co. v. Public Utility Commission of Texas*, 2003 U.S. Dist LEXIS 26410 (July 9, 2003) the United States District Court for the Western District of Texas addressed the issue of whether OSS costs should be treated differently for UNE-based CLECs and resellers. Rejecting the argument that such costs should be recovered from resellers through a wholesale rate as opposed to a UNE rate, the court stated: "paragraph 17 [of the FCC's Local Competition Order] does not suggest that OSSs are classified as *either* UNE's or resale services, depending on the use. Rather, paragraph 17 indicates that a UNE used to provide OSS may be utilized to provide UNE-based or resale service." *Id.* at 23, emphasis in original. The court therefore held that resellers should pay the same rates as UNE-based CLECs for OSS services.

As these holdings demonstrate, assessing a cost-based charge for access to OSS that applies equally to UNE-based CLECs and resellers is consistent with the Telecommunications Act and perfectly appropriate. Thus, there is no basis for the PCC to argue that this Commission was somehow limited by the Telecommunications Act to recover these costs only through the wholesale discount. The Commission's order requiring these costs to be recovered through a separate charge to resellers was a perfectly valid exercise of the Commission's ratemaking discretion under the Telecommunications Act.

There is also no basis for the PCC to argue that "OSS related costs" are somehow already being recovered from resellers through the wholesale discount. Rather, what the PCC really seeks to achieve through this argument is a result that would leave Verizon with no means to recover these costs at all. First, this Commission already considered and rejected the claim that these costs were included in the wholesale discount.⁴⁷ In fact, the wholesale discounts in effect during the time that the record in the *Generic UNE* case was assembled were invalidated by the federal courts on the ground that they did not allow Verizon to recover from resellers the full costs it was entitled to recover.⁴⁸ The current wholesale discounts resulted from a settlement with the PCC itself, agreed to and approved at a time when both the PCC and the Commission had full knowledge that the

⁴⁷ *Generic UNE*, AT&T/WCom Main Brief at 169-70 (AT&T and Worldcom argued that "Verizon's access to OSS cost study" reflects costs that "Verizon has also proposed to recover in . . . its charges to resellers of wholesale services."). "It is well-settled that the Commission is not required to consider expressly or at length each contention or argument raised by the parties," and any argument or issue that is not specifically addressed is deemed to have been duly considered and denied. *PUC v. Superior Water Co.*, R-00994672, 2000 Pa PUC LEXIS 14 (Opinion and Order entered March 3, 2000) (citing *Consolidated Rail Corp. v PUC*, 625 A.2d 741 (Pa. Commw. 1993)).

⁴⁸ *MCI Telecom. Corp. v. Bell Atlantic-PA, Inc.*, 271 F.3d at 519-20.

Commission had already approved the recovery of Access to OSS and DUF costs from resellers through a separate charge.⁴⁹

Accordingly, the PCC's claim that Verizon and the Commission were limited to recovering these costs only through the wholesale discount is baseless and must be rejected.

PROPOSED CONCLUSIONS OF LAW⁵⁰

1. The Complaint is barred as a matter of law by the doctrine of *res judicata* because the claims made in the Complaint were resolved by the Commission's holdings in the *Generic UNE* matter, to which the PCC member companies were parties or privies
2. The doctrine of collateral estoppel precludes the PCC from re-litigating the issues of whether the Access to OSS and DUF rates apply to resellers, whether they apply on a per-line basis, and whether it was appropriate to recover Access to OSS and DUF costs through tariffed rates as opposed to an offset to the wholesale discount. These issues were necessarily resolved by the Commission's holdings in the *Generic UNE* matter, to which the PCC member companies were parties or privies.
3. The Complaint is barred as a matter of law by 66 Pa. C.S. § 316, because the issues raised in the Complaint were resolved by the Commission's holdings in the *Generic UNE* matter, which constitutes Commission precedent on these issues.
4. The Access to OSS and DUF rates were duly and lawfully tariffed in Tariff 216.
5. The Access of OSS rate applies on a per-line basis to each resold line as approved by the Commission and set forth in Tariff 216, and not on a per-loop basis.

⁴⁹ The *Generic UNE* case and the resale case were proceeding simultaneously before this Commission. The Settlement Stipulation in the resale case was dated October 29, 2004. By that time the Commission had issued its *Tentative Order* (November 4, 2002) and its *Final Order* (December 11, 2003) in the *Generic UNE* case, and Verizon's tariffed compliance rates had gone into effect (October 1, 2004). Throughout the *Generic UNE* proceedings it was clear to the Commission and the parties that these rates would apply to resold lines. The PCC and its member companies therefore knew or should have known that these rates would apply to resold lines when they entered into the Settlement Stipulation in the resale case.

⁵⁰ The parties have agreed that there are no disputed issues of material fact; hence no proposed findings of fact are necessary.

6. The Telecommunications Act of 1996 does not require Verizon to account for Access to OSS and DUF costs through the wholesale discount as opposed to a tariffed charge.
7. Summary judgment in favor of Verizon and against the PCC is warranted under 52 Pa. Code section 5.102(b)(c) because there are no disputed issues of material fact and judgment may be granted as a matter of law on all of the claims raised in the Complaint.

PROPOSED ORDERING PARAGRAPH

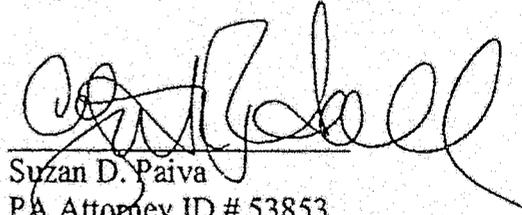
Pursuant to 52 Pa. Code § 5.102 it is hereby ORDERED that Summary Judgment is GRANTED in favor of Verizon Pennsylvania Inc. and against the Pennsylvania Carriers' Coalition. The Complaint is hereby DISMISSED WITH PREJUDICE.

CONCLUSION

For the reasons set forth above, Verizon respectfully requests that its motion for summary judgment be granted and that the PCC's Complaint be dismissed with prejudice.

Date: July 17, 2006

Respectfully submitted,



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APPENDIX: PORTIONS OF FILINGS CITED IN VERIZON PENNSYLVANIA
INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT

Generic Investigation of Verizon Pennsylvania Inc.'s
Unbundled Network Element Rates, Docket No. R-00016683
AT&T/WCOM Statement 8.0 Panel Rebuttal Testimony on Recurring Costs
Filed by AT&T Communications of Pennsylvania, Inc. and MCI WorldCom
Network Services, Inc. January 11, 2002
P. 173-174 with Attachment 36 (*Cited in footnote 5*)

Generic Investigation of Verizon Pennsylvania Inc.'s
Unbundled Network Element Rates, Docket No. R-00016683
Verizon Pennsylvania Inc. Statement No. 1 Direct Panel Testimony on Recurring Costs
Filed by Verizon Pennsylvania Inc. December 7, 2001
Pgs. 128-36; 170-71 (*Cited in footnotes 7, 8, 9, 13, 41 and 45*)

Generic Investigation of Verizon Pennsylvania Inc.'s
Unbundled Network Element Rates, Docket No. R-00016683
The Pennsylvania Carriers' Coalition's Comments to Verizon's Compliance Filing
Filed by the Pennsylvania Carriers' Coalition February 25, 2004 (*Cited in footnote 17*)

Generic Investigation of Verizon Pennsylvania Inc.'s
Unbundled Network Element Rates, Docket No. R-00016683
Full Service Network's Comments to Verizon's Compliance Filing
Filed by Full Service Network February 25, 2004 (*Cited in footnote 17*)

Pennsylvania Carriers' Coalition v. Verizon Pennsylvania Inc.
Docket No. R-00016683 C0001
Pennsylvania Carriers' Coalition Complaint and Request for Rejection
or Suspension of Tariff Supplement
Filed by Pennsylvania Carriers' Coalition September 27, 2004 (*Cited in footnote 27*)

Generic Investigation of Verizon Pennsylvania Inc.'s
Unbundled Network Element Rates, Docket No. R-00016683
Joint Initial Post-Hearing Brief of AT&T Communications of Pennsylvania, Inc.
and MCI WorldCom Network Services, Inc. March 8, 2002
Pages 169-70 (*Cited in footnote 47*)

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S OFFICE

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July 17, 2006

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

VIA FEDERAL EXPRESS

James McNulty, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
2nd Fl., 400 North Street
Harrisburg, PA 17105-3265

Re: Pennsylvania Carriers' Coalition v. Verizon Pennsylvania,
Inc.; Docket No. C-20065798

Dear Secretary McNulty:

Enclosed are the original and 15 copies of the Pennsylvania Carriers' Coalition's Motion for Partial Summary Judgment and Memorandum in Support Thereof in the above-referenced matter. A copy has been served on the parties of record as indicated by the attached Certificate of Service. If you have any questions regarding this filing, please contact me.

DOCUMENT FOLDER

Very truly yours,



Mark S. Stewart

For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP

MSS/jls
Enclosures

cc: Hon. Marlane R. Chestnut, ALJ (w/enc)
Certificate of Service (w/enc)

HAR 67113 1/FUL022-7:8730

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing Motion for Partial Summary Judgment and Memorandum in Support Thereof of the Pennsylvania Carriers' Coalition upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant).

VIA EMAIL AND FIRST CLASS MAIL

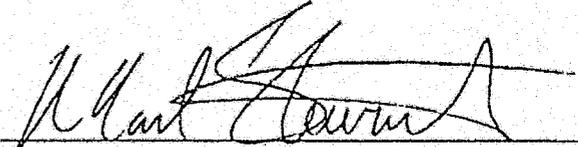
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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU


Mark S. Stewart, Esquire

Date: July 17, 2006

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Carriers' Coalition
Complainant

v.

Verizon Pennsylvania, Inc.
Respondent

Docket No. C-20065798

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JUL 17 2006

**MOTION FOR PARTIAL SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT THEREOF
OF THE PENNSYLVANIA CARRIERS' COALITION**

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

I. INTRODUCTION AND SUMMARY

The Pennsylvania Carriers' Coalition ("PCC"),¹ by and through its counsel, respectfully submits this Motion for Partial Summary Judgment as to liability on the claims set forth in its Complaint: (1) Verizon Pennsylvania Inc. has improperly tariffed – and essentially not tariffed – its charges for access to operation support systems ("OSS") and the Daily Usage File ("DUF") as applied to Resale lines; (2) Verizon has misapplied its OSS charge on high capacity lines and in certain service arrangements; and (3) Verizon should be precluded from tariffing its OSS and DUF charges as applied to Resale because such application would be inconsistent with the manner for setting wholesale rates for the resale of telecommunications service under the Telecommunications Act of 1996 and the Pennsylvania Public Utility Commission's ("PUC" or "Commission") Orders. The parties agree that no genuine issues of material fact exist in regard to these claims, and, for the reasons explained in this Memorandum in Support, the PCC is entitled to judgment as a matter of law.

¹ The PCC is comprised of Full Service Computing Corp. t/a Full Service Network ("FSN"), ATX Licensing, Inc. ("ATX"), and Line Systems, Inc. ("LSI").

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The Public Utility Code sets forth two well-established and straight forward rules regarding the tariffing of a utility's rates: (1) the tariffs must show all rates established and collected by the utility, and (2) a utility may only demand or receive the rates identified in its tariffs specifically for a particular service. 66 Pa. C.S. §§ 1302-1303. In applying these rules, the Commission has enunciated fundamental precepts that give life to the text of the rules. First, a utility has a duty to its customers to provide accurate information regarding its rates and tariffs.² Second, ambiguities in tariffs are to be construed against the utility, as the drafter, and in favor of customers.³ Finally, in order for the notice purposes of Section 1302 of the Code to be given effect, the disclosure of rates in tariffs must be meaningful.⁴

In regard to the application of the OSS and DUF charges to Resale, Verizon has violated all of these rules and precepts. Verizon tariffed these charges in its Tariff 216, which by its terms contains rates applicable to Unbundled Services, or UNEs,⁵ -- and therefore, not Resale service. The Tariff 216 language imposing the charges makes no mention whatsoever of their application to Resale. Further, the tariff including wholesale rates for Resale, Tariff 1, does not identify the OSS and DUF charges as applicable to the service. As such, Verizon has failed to show in its tariffs all of the rates applicable to Resale, it has breached its duty of accuracy to its

² *Gallaher v. PPL Electric Utilities*, Docket No. F-01075037, Initial Decision (Jan. 8, 2003) (citing *AT&T Communications of Pennsylvania, Inc. v. Pa. P.U.C.*, 568 A.2d 1362, 1363-64 (Pa. Cmwlth. 1990); 2003 Pa. PUC LEXIS 9, *16; *Gallaher*, Docket No. F-01075037, Final Order (March 12, 2003) (permitting Initial Decision to become final and sustaining complaint).

³ *The Electric Materials Company v. North East Heat & Light Company*, Docket No. C-00913544, Opinion and Order (June 16, 1994); 1994 Pa. PUC LEXIS 12, **16-17.

⁴ *Fontana v. West Penn Power Company*, Docket No. C-20030721, Opinion and Order (October 28, 2004); 2004 Pa. PUC LEXIS 43, *5.

⁵ Verizon Tariff Pa. P.U.C. No. 216, Section 3, 6th Revised Sheet 1.

Resale customers, and it has charged rates for Resale that its tariffs do not show as applicable thereto.

In its defense, Verizon has pointed to vague and ambiguous language in its retail tariff, Tariff 1, about the potential applicability of rates from other tariffs to its retail services.⁶ However, the Commission has held that such ambiguity must be construed against the utility and in favor of the customer.⁷ Moreover, Verizon's attempted reliance on its vague catch-all provision palpably violates the Commission's dictate that the disclosure of rates applicable to a service must be meaningful.⁸

The parties agree that there are no genuine issues of material fact relevant to this claim. Verizon's tariffs state what they state. Further, the Commission's Orders authorizing the charges, and directing Verizon to implement them in certain tariffs, speak for themselves. Given this absence of a factual dispute, and the fact that Sections 1302 and 1303 of the Code, along with the PUC's interpretations thereof, entitle the PCC to judgment as a matter of law, the Administrative Law Judge ("ALJ") should grant summary judgment as to liability in the PCC's favor for Verizon's failure to properly tariff its OSS and DUF charges as applied to Resale.

The same is true as to the remaining claims in the PCC's Complaint. The parties have stipulated to facts showing that Verizon has applied its OSS charge to each internal extension associated with Direct Inward Dialing services ("DIDs") purchased by LSI and to each of the 23 voice channels supported by Primary Rate Interfaces ("PRI") purchased by LSI. According to Verizon's tariff, the OSS charge is to be applied on a per line basis. As DIDs are a feature, and

⁶ Verizon Tariff Pa. P.U.C. No. 1, 1st Revised Sheet 4A.

⁷ *The Electric Materials Company*, 1994 Pa. PUC LEXIS 12, **16-17.

⁸ *Fontana*, 2004 Pa. PUC LEXIS 43, *5.

not lines, Verizon's imposition of a fee on each internal extension was erroneous. Likewise, with a PRI, the multiple channels are not lines, but rather are supported by a single local loop or line, and as such Verizon's imposition of OSS charges on a per channel basis was violative of its tariff. Thus, as to both instances, the PCC is entitled to partial summary judgment as to liability.

Finally, the issue of whether Verizon should be precluded from properly tariffing its OSS and DUF charges as applied to Resale is also one as to which no genuine need for trial exists. Federal law and the Commission's decisions make clear that the application of the fees to Resale is inconsistent with the requirements for setting Resale rates on an avoided cost basis. Under those requirements, Verizon's wholesale rates for Resale service must be determined by applying a discount to Verizon's retail rates that is based on the costs Verizon actually avoids when its services are offered at wholesale instead of retail.⁹ The current discount, approved by the Commission approximately one month prior to Verizon's imposition of the OSS and DUF charges, establishes the Resale rate. Period. Add-on charges are contrary to the required manner for setting the Resale rate.

Ultimately, if allowed to continue its unauthorized and illegal practice of picking-and-choosing items from Tariff 216 or other tariffs to bill its Resale carrier competitors, Verizon will have effectively raised its Resale rates to levels greater than what Verizon charges its own retail end user customers. Indeed, under Verizon's pick-and-choose approach, any charge – even loop and port charges – could be applied to Resale. Given the substantial decrease in the discount used to establish Resale rates (and subsequent increase in the Resale rate itself), approved by the Commission in March 2005, the specter of *wholesale* Resale rates exceeding Verizon's *retail*

⁹ 47 U.S.C. § 252(d)(3); *Wholesale Rate for Resale of Telecommunications Provided by Verizon Pennsylvania Inc. and Verizon North Inc.*, Docket No. R-00038516, Order (June 16, 2003); *MCI Telecom. Corp. v. Bell Atlantic-PA, Inc.*, 271 F.3d 491, 519-20 (3d Cir. 2001), *cert. denied*, 123 S.Ct. 340 (2002).

rate is very real indeed. The intent behind the Telecommunications Act of 1996 and the PUC's decisions to establish local telephone competition, and the legal rules designed to foster that competition, cannot tolerate Verizon's imposition of add-on charges to the Resale rate.

In specific support of this Motion, the PCC states as follows:

I. Pursuant to the Commission's regulations, at 52 Pa. Code § 5.102(c), summary judgment is proper on a particular outstanding issue when there exists no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.¹⁰ "A fact is material if it might affect the outcome of the case, and an issue is genuine if the evidence is such that a reasonable factfinder could return a verdict in favor of the nonmovant."¹¹ The parties agree (and even if they did not it would be so) that no such genuine issue exists as to any fact material to the PCC's three claims. As explained herein, based on the Public Utility Code, the Commission's decisions, and the Telecommunications Act of 1996, the PCC is entitled to judgment as a matter of law as to liability on its claim that Verizon improperly tariffed its OSS and DUF charges and misapplied its OSS charge,¹² and is entitled to judgment on its request for declaratory relief.¹³

II. STATEMENT OF FACTS

2. By Orders dated December 19, 1996 and February 6, 1997, the Commission first established Verizon's wholesale rates for the resale of its telecommunications services.¹⁴ In those Orders, the Commission adopted the conclusion that Verizon's wholesale rates for Resale

¹⁰ See, *P.J.S. v. Pennsylvania State Ethics Com'n*, 723 A.2d 174, 176 (Pa. 1999).

¹¹ *Leonard v. General Motors Corp.*, 13 F.3d 674, 679 (3d Cir. 1993) (citing *Anderson v. Liberty Lodge, Inc.*, 477 U.S. 242, 248 (1986)).

¹² Complaint at §§ III and IV.

¹³ Complaint at § V.

¹⁴ *Pa. PUC v. Bell Atlantic*, Docket No. R-00963578.

“must be determined on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.”¹⁵ Further, the PUC adopted the position, advocated by Verizon, that its OSS-related costs should be treated as offsets to the identified avoided costs, as well as the conclusion that such OSS-related costs were in fact recovered in the just and reasonable wholesale discount rate established for Verizon.¹⁶

3. On or around August 31, 2001, an investigation into Verizon’s rates for UNEs was initiated by the Commission.¹⁷ The purpose of that proceeding was to determine whether “the existing tariffed rates for [Verizon’s] unbundled network elements” continued to be just and reasonable.¹⁸ As part of that proceeding, Verizon proposed its OSS charge for all UNE loops and UNE-P as a mechanism for recovering expenses associated with the initial development necessary to provide access to operation support systems and ongoing maintenance of provisioning OSS.¹⁹ The proposed OSS charge was also applicable to Resale loops.²⁰

¹⁵ *Id.*, Recommended Decision (November 20, 1996) (1996 Pa. PUC LEXIS 209, **67-68) (citing 47 U.S.C. § 252(d)(3)); *Id.*, Opinion and Order (December 19, 1996) at Ordering ¶ 3 (adopting Recommended Decision). While the meaning of the phrase “will be avoided” was a contested issue in that proceeding, the distinction debated in that proceeding is immaterial to this matter.

¹⁶ *Id.*, Recommended Decision (November 20, 1996) (1996 Pa. PUC LEXIS 209, *66); *Id.*, Opinion and Order (December 19, 1996) at Ordering ¶ 3 (adopting Recommended Decision).

¹⁷ *Generic Investigation Re Verizon Pennsylvania, Inc.’s Unbundled Network Element Rates (“Generic UNE proceeding”)*, Docket No. R-00016683, Order (August 31, 2001).

¹⁸ *Id.* at 1 (emphasis added).

¹⁹ *Id.*, Tentative Order (November 4, 2002) at 169.

²⁰ *Id.*

4. In that proceeding, Verizon also proposed multiple DUF charges.²¹ Through the DUF, CLECs are provided with records of their customers' intraLATA local and toll usage detail for billing purposes. As to each call, Verizon's proposal called for a charge to be applied for recording the message and a separate charge to be applied for transmitting the record to the CLEC.²²

5. In its Final Opinion and Order, the Commission stated that it was, by its Order, "establish[ing] final rates for UNEs" for Verizon.²³ The Commission discussed neither the OSS nor the DUF charges, and instead adopted the findings and conclusions of its Tentative Order,²⁴ which in turn adopted the recommendation of the Administrative Law Judge to approve the OSS and DUF proposals.²⁵

6. On January 26, 2004, Verizon submitted its Compliance Filing, which proposed changes to its Tariff 216, regarding UNEs, and Tariff 218, regarding collocation and interconnection service. Nothing in the Compliance Filing amended the Resale provisions of Verizon's Tariff 1, or otherwise indicated that the proposed OSS and DUF related tariff changes implicated Resale service. The Commission did not accept the filing and issued a Compliance

²¹ *Id.* at 170-71.

²² *Id.*; Recommended Decision at 64-65.

²³ *Id.*, Final Opinion and Order (December 11, 2003) at 14 (emphasis added).

²⁴ *Id.* at 14 and Order ¶ 3.

²⁵ *Id.*, Tentative Order at 170 and Order ¶ 12. Notably, the Recommended Decision did not mention the applicability of the OSS charge to Resale service. *Id.*, Recommended Decision at 63-64.

Order directing Verizon to file a tariff supplement consistent with and implementing the rates approved in the Final Opinion and Order.²⁶

7. On August 2, 2004, Verizon again submitted tariff supplements for Tariffs 216 and 218. No tariff supplement was submitted to adjust the Resale provisions of Tariff 1, including Section 1, 4th Revised Sheet 4C, which discusses the wholesale discount and rates Verizon may charge for Resale service. Nothing about the tariff amendments to Tariffs 216 and 218 included any statement of the OSS and DUF charges' application to Resale service. The tariff supplements were approved by the Commission on September 30, 2004, and were effective October 1, 2004.

8. On June 12, 2003, the Commission initiated a proceeding to recalculate Verizon's wholesale rates for the resale of its telecommunications services.²⁷ This proceeding was necessitated by a change in federal law as to the interpretation of the phrase "will be avoided" in Section 252(d)(3) of the Telecommunications Act of 1996.²⁸ In the Resale rates proceeding, Verizon, through its witnesses and otherwise, acknowledged that the purpose of the proceeding was, in fact, to "establish wholesale rates."²⁹ Accordingly, Verizon proposed wholesale rates for Resale service that were discounted from its retail costs by 13.34%, if CLECs utilized Verizon's

²⁶ *Id.*, Compliance Order (July 16, 2004).

²⁷ *Wholesale Rate for Resale of Telecommunications Provided by Verizon Pennsylvania Inc. and Verizon North Inc.*, Docket No. R-00038516.

²⁸ *Id.*, Recommended Decision (February 4, 2005) at 1-2; *see MCI Telecom. Corp. v. Bell Atlantic-PA, Inc.*, 271 F.3d 491, 519-20 (3d Cir. 2001), *cert. denied*, 123 S.Ct. 340 (2002).

²⁹ *Wholesale Rate for Resale of Telecommunications Provided by Verizon Pennsylvania Inc. and Verizon North Inc.*, Docket No. R-00038516, Verizon Statement No. 1 (Revised Direct Testimony of Bruce F. Meacham) at 3 ("The Commission initiated the instant proceeding . . . in order to establish wholesale rates that comply with current legal requirements").

Operator Services and Directory Assistance, and 15.07%, if CLECs did not use Verizon's Operator Services.³⁰

9. On October 29, 2004, the parties to the Resale rates proceeding, which included FSN, entered into a Settlement Stipulation resolving the proceeding. By its terms, the Settlement proposed "statewide wholesale rates for the resale of [Verizon and Verizon North's] telecommunications services."³¹ Nowhere in the Settlement, and nowhere in Verizon's statement in support presenting it to the Commission, did Verizon disclose that the "statewide wholesale rates for the resale of its telecommunications services" being proposed were further subject to the application of the OSS and DUF charges from the UNE Tariff 216. On March 4, 2005, the PUC adopted a Recommend Decision endorsing the Settlement.³²

10. In or around April 2005, Verizon began applying its OSS charge on a per line basis to all Resale lines of the PCC members. At the same time, Verizon began assessing the DUF message and transmission charges on a per call basis for all Resale activity of the PCC's customers. Verizon retroactively applied both the OSS and DUF charges to October 1, 2004.

11. The parties have stipulated to certain facts related to the claims set forth in Section IV of the PCC's Complaint. Those stipulated facts, which pertain specifically to LSI, are attached hereto as Appendix A.

³⁰ *Id.* at 28.

³¹ *Id.*, Settlement Stipulation at ¶ 10(a). Verizon was the primary drafter of the Settlement Stipulation.

³² *Id.*, Order (March 4, 2005). Verizon's new Resale rates went into effect on December 1, 2005.

III. IS THE COMPLAINT BARRED AS A MATTER OF LAW BY THE COMMISSION'S PRIOR ORDERS IN THE *GENERIC UNE* CASE?

12. Neither the PCC's Complaint nor this Motion for Partial Summary Judgment is barred as a matter of law by the doctrines of *res judicata* or collateral estoppel.³³

13. *Res judicata*, or claim preclusion, prevents a future suit between the same parties on the same cause of action after a final judgment is entered on the merits of the action.³⁴ "Four conditions, or 'identities,' must be established before claim preclusion will bar a cause of action. Those conditions include: '(1) identity of the subject matter; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality or capacity of the parties suing or being sued'"³⁵ Further, claims must have been fully and actually litigated for determined before *res judicata* applies.³⁶

14. Collateral estoppel, or issue preclusion "bars relitigation of an issue of law or fact in a subsequent action when all of the following factors are demonstrated: '(1) the legal or factual issues are identical; (2) they were actually litigated; (3) they were essential to the judgment; (4) and they were material to the adjudication.'"

15. Verizon's claims of *res judicata* and collateral estoppel are misplaced. The doctrines do not and cannot apply to persons who were not parties to the initial proceeding

³³ Based on the ALJ's Order denying Verizon's Motion to Dismiss and the fact that Section IV of the Complaint undeniably sets forth a new claim subsequent to the *Generic UNE* proceeding, the PCC presumes that this argument is not being asserted as to Section IV of the Complaint.

³⁴ *Temple University v. W.C.A.B.*, 753 A.2d 289, 291(Pa. Cmwlth. 2000); *Chada v. Chada*, 756 A.2d 39, 42 (Pa. Super. 2000).

³⁵ *Id.*

³⁶ *LP Water and Sewer Co. v. Pa. P.U.C.*, 722 A.2d 733, 739 (Pa. Cmwlth. 1998).

producing the determination that purports to bar a subsequent claim or relitigation of an issue.³⁷ *Res judicata* is only applicable if the parties to the *Generic UNE* proceeding and this matter are identical.³⁸ The parties are plainly not identical, as LSI was not a party to the *Generic UNE* proceeding. While ATX and FSN participated in the *Generic UNE* proceeding, LSI was denied permission to intervene.³⁹ As such, at a minimum, *res judicata* cannot bar LSI from relief on the claims in the Complaint.

16. Likewise, with collateral estoppel, the party against whom the doctrine is asserted must have been a party to the prior proceeding and had a full and fair opportunity to litigate the issue.⁴⁰ As stated above, LSI was not a party to the *Generic UNE* proceeding. Further, the fact that parties deemed by the PUC to hold similar interests to LSI were participants in the *Generic UNE* proceeding is insufficient to invoke preclusion against LSI. Any claim that LSI should be precluded despite not being a party to the *Generic UNE* proceeding is tantamount to saying that any time a CLEC raises an issue, or is a party to a proceeding where an issue is tangentially raised even if not actually litigated or essential to the outcome, all other CLECs in Pennsylvania are forever barred and precluded from raising that issue in subsequent litigation. Clearly, such an assertion has no support whatsoever in law.

³⁷ See, *Temple University*, 753 A.2d at 291-92 (*res judicata* requires identity of the parties and collateral estoppel can only be applied against person who had full and fair opportunity to litigate in prior action); *Chada*, 756 A.2d at 42-43 (same).

³⁸ *Temple University*, 753 A.2d at 291; *Chada*, 756 A.2d at 42.

³⁹ While FSN and ATX participated in the *Generic UNE* proceeding under the PCC designation, LSI was not a party to that proceeding. The "PCC" is not a legal entity, but rather is merely a name used to describe the informal coalition of CLECs participating in various PUC proceedings.

⁴⁰ *Temple University*, 753 A.2d at 291; *Chada*, 756 A.2d at 42.

17. Moreover, as to PCC's claim set forth in Section III of the Complaint contesting Verizon's unlawful imposition of untariffed charges on Resale service, the doctrines of *res judicata* and collateral estoppel are not applicable because the claims and issues in the two proceedings are not the same.⁴¹ As the Superior Court has explained in regard to *res judicata*: "When the cause of action in the first and second actions *are distinct, or even though related*, are not so closely related that matters essential to recovery in the second action have been determined in the first action, the doctrine of *res judicata* does not apply."⁴² The claim and issue in the *Generic UNE* proceeding involved the justness and reasonableness of Verizon's UNE rates, including the OSS and DUF charges and their application to UNEs and Resale. Here, as to Section III of the Complaint, the claim and issue involves Verizon's charging of untariffed rates and fees as applicable to Resale service. These claims and issues are not identical.⁴³ Whether Verizon's rates are substantively lawful on their face is a different claim/issue than whether Verizon has actually and properly tariffed and implemented those rates as applicable to Resale.

18. Furthermore, at best, the claims and issues are related, but, as the Superior Court explained, being related is not sufficient to trigger *res judicata*.⁴⁴ Nothing essential to the PCC's recovery on its claim for the charging of untariffed rates on Resale was "determined" in the

⁴¹ *Temple University*, 753 A.2d at 291-92 (issue preclusion applies only where issues in two proceedings are "identical," while claim preclusion requires identity of subject matter and causes of action) (emphasis added); *Chada*, 756 A.2d at 42-43.

⁴² *Chada*, 756 A.2d at 44 (emphasis added).

⁴³ *See, e.g., Temple University*, 753 A.2d at 292 (issue of insurer's reimbursement for medical expense compensation not same as reimbursement for wage-loss compensation on same facts); *National Fuel Gas Distribution Corp. v. Pa. P.U.C.*, 677 A.2d 861, 867 n. 4 (Pa. Cmwlth. 1996) (issue of whether utility could recover interest on take or pay payments was not same as issue of whether utility could retain such interest payments).

⁴⁴ *Chada*, 756 A.2d at 44.

Generic UNE proceeding. The plain text of the PUC's Final Opinion and Order and its Compliance Filing Order show that the Commission made no determination that Verizon had tariffed a Resale rate via its Tariff 216 amendments and, in fact, establish just the opposite.⁴⁵ Nor could FSN and ATX, parties to the *Generic UNE* proceeding, have been expected or required to bring to Verizon's attention that it had failed to tariff these charges as applied to Resale in its Compliance Filing. Accordingly, the application of claim and issue preclusion to PCC's cause of action contesting Verizon's unlawful imposition of untariffed charges as applied to Resale cannot bar summary judgment.

19. Finally, as to Section V of the Complaint and the PCC's request for declaratory relief that Verizon is precluded from tariffing its OSS and DUF charges as applied to Resale, in order for issue preclusion to bar relief, the issues in the *Generic UNE* proceeding and this matter must be identical, must have been actually litigated, and must have been essential to the PUC's decision in the *Generic UNE* case.⁴⁶ Of course, as noted above, both claim and issue preclusion cannot be applied against LSI as it was not a party to the *Generic UNE* proceeding and never had any opportunity to litigate this issue.⁴⁷ More generally, though, the PCC's challenge to the *manner* of setting Verizon's wholesale rates for the resale of its telecommunications service was

⁴⁵ *Generic UNE proceeding*, Final Opinion and Order at Ordering ¶ 4 (quoted at *infra* at p. 19); *Id.*, Order (July 14, 2004) at 25 ("We shall approve tariff revisions for Verizon's UNE rates which conform to and are consistent with the attached schedule of rates") (emphasis added).

⁴⁶ *Temple University*, 753 A.2d at 292 ("Issue preclusion bars relitigation of an issue of law or fact in a subsequent action when *all* of the following factors are demonstrated: (1) the . . . issues are identical; (2) they were *actually litigated*; (3) they were *essential to the judgment*, and (4) they were *material to the adjudication*") (emphasis added); *Chada*, 756 A.2d at 43; *Estate of Pew*, 655 A.2d 521, 536-37 (Pa. Super. 1994) (where issue in subsequent proceeding "was not essential to previous decree" preclusion would not apply).

⁴⁷ *Temple University*, 753 A.2d at 291; *Chada*, 756 A.2d at 42.

never addressed, much less litigated, in the *Generic UNE* proceeding.⁴⁸ Additionally, the issues of the application of the OSS and DUF charges to Resale were not actually litigated by the parties to the proceeding.⁴⁹

20. Perhaps most significant is the fact that the application of the OSS and DUF charges to Resale were by no means "essential" to the PUC's decision in the *Generic UNE* proceeding.⁵⁰ The Commission made abundantly clear, both at the onset of the *Generic UNE* proceeding and upon issuance of its Final Opinion and Order, that the proceeding's scope, focus, and intent was to review the just and reasonableness of Verizon's UNE rates. As the Commission declared when initiating the *Generic UNE* proceeding:

This order directs the initiation of a proceeding effective September 17, 2001, to consider whether the existing tariffed rates

⁴⁸ The law calls for the PUC not to apply issue preclusion where the determination relied on as preclusive is inconsistent with another determination of the Commission. See *Restatement of the Law, Second, Judgments*, § 29 (Comment f) (citing *Blumcraft of Pittsburgh v. Kawneer Co.*, 482 F.2d 542 (5th Cir. 1973) and *Funk v. Coates*, 323 F. Supp. 988 (S.D.N.Y. 1971)). This is particularly true here, where the PCC relies on an Order of the Commission that both recognized the required manner for setting Resale rates and expressly found that OSS-related costs were already included in and recovered by the Resale rates established by the PUC (see, *infra*, Section VI), while Verizon relies upon a decision which did not address the double recovery argument and merely invokes the generic "any argument not addressed is deemed denied" language (Verizon's Motion to Dismiss at 12, n. 36).

⁴⁹ In addressing the OSS charge proposal in the *Generic UNE* case, the focus of the Commission was on the status of access to OSS as a UNE. *Generic UNE* proceeding, Tentative Order at 170; Recommended Decision at 63-64. Likewise, in regard to the proposed DUF charge, the Commission's focus was on the provisioning of the DUF as a UNE and whether the charge constituted a double recovery of UNE costs already recovered in Verizon's UNE-related Annual Cost Factors. *Id.*, Tentative Order at 171. The Annual Cost Factor was an element in determining Verizon's forward-looking, TELRIC based rates for its UNEs. See, e.g., *Id.*, Recommended Decision at 28.

⁵⁰ *Temple University*, 753 A.2d at 292; *Chada*, 756 A.2d at 43; *Estate of Pew*, 655 A.2d at 536-37.

for Verizon Pennsylvania, Inc.'s (Verizon's) unbundled network elements (UNEs) continue to be just and reasonable.⁵¹

Likewise, in its Final Opinion and Order, the Commission identified the same purpose for the proceeding,⁵² and declared that, upon consideration of all that had come before in the proceeding: “[W]e shall establish final rates for UNEs in this proceeding consistent with the discussion, below, and subject to the Commission’s review of a compliance tariff filing by Verizon.”⁵³ In its Final Opinion and Order, the Commission discussed neither the OSS nor the DUF charges, and instead adopted the findings of its Tentative Order, which in turn adopted the recommendation of the Administrative Law Judge – which recommendation did not focus on the charges’ applicability to Resale.⁵⁴

21. Beyond its statements as to the scope of the *Generic UNE* proceeding, the Commission’s actual decisions and Orders in that proceeding also demonstrate that the applicability of the OSS and DUF charges to Resale was not essential to its action in the *Generic UNE* proceeding. For instance, in its Final Order, the Commission directed that: “Verizon shall file a tariff or tariff supplement . . . implementing revisions to the UNE rates in its Tariff Pa. P.U.C. No. 216, and any related tariffs or tariff amendments . . .”⁵⁵ The Commission further declared that, upon review of Verizon’s Compliance Filing, “the Commission reserves the right

⁵¹ *Generic UNE proceeding*, Order (August 31, 2001) at 1 (emphasis added).

⁵² *Id.*, Final Opinion and Order at 1 (“This proceeding is the continuing investigation to consider whether the existing tariffed rates for Verizon’s . . . unbundled network elements (UNEs) continue to be just and reasonable”) (emphasis added).

⁵³ *Id.* at 14 (emphasis added).

⁵⁴ Complaint at ¶¶ 8-9.

⁵⁵ *Generic UNE proceeding*, Final Opinion and Order at Ordering ¶ 4 (emphasis added).

to reject any rate that is not properly justified and adjust the *UNE rate* in question.”⁵⁶ Finally, and even more convincing, is the Commission’s description of its action in approving Verizon’s Compliance Filing in the *Generic UNE* proceeding:

Based on the foregoing, we shall approve tariff revisions for Verizon’s UNE rates which conform to, and are consistent with the attached schedule of rates appended to this Order on Compliance as Appendices A and B.⁵⁷

22. Significantly, in all of these statements, the Commission made clear that the scope of its *Generic UNE* proceeding and the decisions and Orders that resulted from that proceeding was focused on Verizon’s UNE rates, and whether or not those UNE rates were just and reasonable. Indeed, the Commission did not even mention Resale rates or the application of the OSS and DUF charges to Resale in the Order initiating the *Generic UNE* proceeding, the Final Opinion and Order, or the final Compliance Order. Verizon’s attempts to expand the scope of the *Generic UNE* proceeding, and introduce new Resale rates as part of that proceeding, cannot and did not alter the Commission’s scope or somehow render those Resale charges “essential” to the PUC’s decisions in the *Generic UNE* proceeding.

23. Further, it is important to note the scope and breadth of the *Generic UNE* proceeding and the Commission’s investigation into whether Verizon’s UNE rates were just and reasonable. Over the course of this three year proceeding, approximately 50 issues were considered by the Commission. Buried in these complex issues, the Commission concluded that access to OSS was a UNE, and as to both it and the DUF the Commission accepted Verizon’s formulations of the charges. At that juncture, and for three reasons, FSN and ATX did not have

⁵⁶ *Id.* at Ordering ¶ 7 (emphasis added).

⁵⁷ *Id.*, Order (July 16, 2004) at 25 (emphasis added).

a sufficient level of incentive to litigate the issue necessary to invoke issue preclusion.⁵⁸ First, at the time the *Generic UNE* proceeding was being litigated, Resale was only a sparsely utilized service arrangement by CLECs in comparison to UNEs and UNE-P. Second, a myriad of issues were present in the case and the PUC's Ordering paragraphs did not authorize the applicability of DUF and OSS on Resale, and therefore further litigation did not appear to be warranted. Finally, Verizon never tariffed the charges for Resale, implementing them only in its UNE tariff with language that made no reference to Resale, and thus no need for an objection to the Compliance Filing ever arose.

24. For all of the foregoing reasons, Verizon's assertions of claim and issue preclusion as to the declaratory relief sought by the PCC are erroneous.

IV. ARE THE ACCESS TO OSS AND DUF CHARGES PROPERLY TARIFFED AS APPLIED TO RESALE?

25. Pursuant to the Public Utility Code, public utilities must state the rates and fees they intend to charge customers in their tariffs. To wit, Section 1302 of the Public Utility Code states:

Under such regulations as the commission may prescribe, every public utility shall file with the commission . . . tariffs showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission.

66 Pa. C.S. § 1302 (emphasis added). Equally clear is the rule that utilities may only charge customers those rates and fees that are stated in their tariffs. Section 1303 of the Code prescribes: "No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person . . . a greater or lesser rate *for any service rendered* . . . than that specified in the tariffs of such public utility *applicable thereto*." 66 Pa. C.S. § 1303

⁵⁸ See *Restatement of the Law, Second, Judgments*, § 29 (Comment g).

(emphasis added).⁵⁹ Clearly, it is not enough that rates or charges appear somewhere in some tariff, but rather they must be specified in a tariff as applicable to a particular service rendered.

26. The two tariffs at issue in this case involve Verizon's Tariff No. 216 and Tariff No. 1. Tariff 216 applies to Unbundled Network Elements. Indeed, the very first sentence of the Tariff 216 section containing the OSS and DUF charges limits the scope of the tariff to unbundled services only: "This section contains a schedule of rates and regulations applicable to the Unbundled Services."⁶⁰ Tariff 1, also known as Verizon's retail tariff, includes the provisions dedicated to the purchase at wholesale of its telecommunications services for the purpose of resale.⁶¹

27. Effective April 2005, retroactive to October 2004, Verizon began charging the PCC for OSS charges on Resale lines and DUF rates on Resale calls pursuant to Tariff 216.⁶² Verizon's decision to initiate these charges occurred shortly after the March 4, 2005 decision of the Commission to adopt a settlement establishing new (and higher) Resale rates. Verizon implemented the changes resulting from this settlement regarding Resale rates by filing a tariff supplement to Tariff 1. Notably, not until after settlement of the issues regarding the resale Tariff, did Verizon decide to apply the OSS and DUF charges to Resale under Tariff 216.

28. As noted above, in order to be lawful under the Public Utility Code, the Resale-based OSS and DUF charges must be shown in Verizon's tariffs as being applicable specifically

⁵⁹ Charging a customer a fee or rate not in the utility's tariff also constitutes unreasonable service in violation of Section 1501 of the Code.

⁶⁰ Tariff 216, Section 3, 6th Revised Sheet 1.

⁶¹ The Resale provisions are contained at Section 1, Paragraph 8, of Tariff 1.

⁶² Verizon Answer at ¶¶ 15-16.

to Resale. 66 Pa. C.S. §§ 1302-1303. Verizon's tariffs fail this test, and accordingly the PCC is entitled to summary judgment.

29. First, Verizon's amendments to its UNE tariff, Tariff 216, did not in any way apply the OSS and DUF charges to Verizon's Resale service. As is plain from the text of the tariff, the provisions addressing Resale service are predominantly in Verizon's retail tariff, Tariff 1. To the contrary, Verizon's Tariff 216 addresses UNE rates. Verizon explicitly states the same in the first sentence of Section 3 of its Tariff 216, which contains the OSS and DUF charges, declaring that the rates identified in the section are "applicable to the Unbundled Services." Resale is not an "Unbundled Service."

30. The limited scope of Tariff 216 was also recognized by the Commission in its Final Order in the *Generic UNE* proceeding, when it ordered:

4. That Verizon Pennsylvania, Inc., shall file a tariff or tariff supplement, and supporting data and documentation, implementing revisions to the UNE rates in its Tariff Pa. P.U.C. No. 216, and any related tariffs or tariff amendments, which conform to and are in compliance with the modifications and directives set forth in this Final Opinion and Order⁶³

Plainly, as the emphasized text reveals, the Commission understood and expected Verizon to implement any revisions to its UNE rates in Tariff 216. Equally clear is the fact that Verizon was ordered to make any revisions to its non-UNE rates in "any related tariffs or tariff amendments." The application of the OSS and DUF charges to Resale as a result of a proceeding dedicated to the setting of *UNE rates*⁶⁴ would, at best, fall within the "related tariff

⁶³ *Generic UNE proceeding*, Final Opinion and Order at Ordering ¶ 4 (emphasis added).

⁶⁴ *Generic UNE proceeding*, Final Opinion and Order at 1, 14 ("This proceeding is the continuing investigation to consider whether the existing tariffed rates for Verizon's . . . unbundled network elements (UNEs) continue to be just and reasonable"); *Id.*, Order (August 31, 2001) at 1.

amendments” proviso. Verizon never filed such a related tariff amendment – and, therefore the PCC is entitled to summary judgment for Verizon’s violations of Sections 1302 and 1303 of the Code. Verizon’s violations in this regard also constitute unreasonable service under Section 1501 of the Code.

31. Even if Verizon could have implemented its Resale-based OSS and DUF charges via its UNE tariff, the actual text of Verizon’s tariff amendments related to those charges offers no clue whatsoever that the charges are applicable to Resale service.⁶⁵ Nor does anything in Tariff 1, and specifically Section 1, Paragraph 8 addressing rates and provisions applicable to Resale service, state that the OSS and DUF charges apply to Resale.⁶⁶

32. As noted above, the Commission’s decisions have further explained the requirements and obligations imposed upon public utilities by Sections 1302 and 1303 of the Code. Of particular import in this matter is the rule that “a utility owes its customers a duty to provide accurate information, including accurate information regarding its tariffs.” *Gallaher v. PPL Electric Utilities Corp.*, 2003 Pa. PUC LEXIS 9, *16 (citing *AT&T Communications, Inc. v. Pa. P.U.C.*, 568 A.2d 1362 (Pa. Cmwlth. 1990)). Verizon has hardly met its duty of accuracy here. Rather, it claims to have implemented new charges on Resale service, the rates for which are set forth in Tariff 1, by amending its UNE tariff, in a section expressly dedicated to identifying the rates for Unbundled Services, via text that makes no mention at all of the new charges application to Resale!

33. Furthermore, the Commission’s decisions clearly hold that a utility violates Section 1302 when its tariffs fail to show all the rates established by the utility and collected or

⁶⁵ Verizon Tariff Pa. P.U.C. No. 216, Section 3, 3rd Revised Sheet 14

⁶⁶ Verizon Tariff Pa. P.U.C. No. 1, Section 1, First Revised Sheet 4A—Fifth Revised Sheet 4C, are attached hereto as Appendix A.

enforced within the jurisdiction of the Commission. *The Electric Materials Company v. North East Heat & Light Company*, 1994 Pa. PUC LEXIS 12, **3-4. In *Electric Materials*, the Commission concluded that the utility's collection of a rate for interruptible gas transportation service was inappropriate since its tariff only provided for firm transportation service.⁶⁷ Similarly, Verizon's collection of Resale-based OSS and DUF charges is inappropriate because its Tariff 216, where the charges appear, applies to UNEs and the actual text of Verizon's tariff amendments related to the OSS and DUF charges does not indicate that they are applicable to Resale service. Nor does anything in Tariff 1 clearly communicate that the OSS and DUF charges apply to Resale. Finally, these Tariff 216 charges were approved by the Commission in September 2004, yet Verizon waited seven months to retroactively apply the charges.⁶⁸

34. As customers of Verizon, the PCC's members have the right to expect that the charges levied by Verizon will be in accordance with its tariffs as approved by the Commission. Verizon's application of charges in Tariff 216 to Resale service has not occurred in the past, did not occur immediately after Verizon put this tariff supplement into effect, and occurred despite the fact that these charges do not appear in the Resale provisions of Verizon's tariff. Verizon's expectations regarding these charges could not reasonably be discerned by its customers, the PCC, either through the words of the tariff or Verizon's actions in implementing the charges. Under Sections 1302 and 1303 of the Code, ambiguous rate matters are to be resolved in favor of customers. *The Electric Materials Company*, 1994 Pa. PUC LEXIS 12, **16-17.

⁶⁷ *Id.*

⁶⁸ In what could be construed as an extreme show of bad faith, the decision to implement these charges occurred just after a settlement between the parties was approved by the Commission regarding Resale rates.

35. Unable to rely on its Tariff 216 provisions to support its Resale-based OSS and DUF charges, Verizon turns to a vague proviso in Tariff 1 that other, unidentified charges in its 225 pages of tariffs⁶⁹ might apply to Resale service. Such an interpretation of the Public Utility Code would turn Sections 1302 and 1303 on their heads, allowing utilities to hide rates and fees, picking and choosing the rates applicable to any given service from hundreds of tariff pages, and leaving consumers with no way of knowing what the applicable charges are for specific services. Section 1302's requirement to "show all rates" would indeed be rendered meaningless – a result that the Commission has already declared unacceptable. *Fontana v. West Penn Power Company*, 2004 Pa. PUC LEXIS 43, **5, 9.

The language Verizon relies on offers the following.

To the extent that services are available for resale subject to terms and conditions set out in other provisions of this Tariff or other Telephone Company Tariffs, those terms and conditions remain applicable except to the extent they conflict with the language of this Section.⁷⁰

This language is plainly not the model of clarity. The text is comprised of multiple potential scenarios that the consumer has no way of knowing whether they apply or not, including: whether or not the services are available for resale; if they are, whether or not the resale of services are subject to any terms or conditions in other portions of the retail or other Verizon tariffs; which provisions in such tariffs are in fact applicable to the resale of service, and whether those yet unidentified other tariff provisions are in conflict with the language of Section 8 of the

⁶⁹ This count only accounts for Tariffs 216 and 218.

⁷⁰ Tariff 1, Section 1, 1st Revised Sheet 4A, Paragraph 8.1(A)(1).

retail tariff. By law, ambiguous tariff provisions such as this must be construed against Verizon and in favor of the customers, the PCC.⁷¹

36. When a utility's tariff does not include authorization for a charge, the Commission will direct the utility to cease and desist from charging the fee until an appropriate tariff is filed with the Commission. *David B. Lytle v. T.W. Phillips Gas & Oil Co.*, C-20027322 (December 30, 2002). In such cases, a refund of all the fees paid plus interest is appropriate since the customer was forced to pay an illegal, untariffed fee. *Id.* Verizon began charging the PCC members the Resale-based OSS and DUF fees in April 2005, retroactive to October 2004. Since Verizon's Tariff 216 does not apply to Resale, the text of the Tariff 216 amendments do not address the charges' application to Resale, and Verizon's tariff that does apply to Resale does not permit this charge, Verizon's charges have been unlawful, the PCC is entitled to a refund, and summary judgment as to liability should be entered in favor of the PCC.

V. DID VERIZON MISAPPLY THE ACCESS TO OSS CHARGE IN CERTAIN INSTANCES BY CHARGING THE FEE ON A PER LINE RATHER THAN A PER LOOP BASIS?⁷²

37. The PCC is also entitled to summary judgment as to liability on its claim that Verizon has misapplied the OSS charge, in both the UNE and Resale contexts, in relation to specific high capacity services. The parties have stipulated to facts, set forth in Appendix A,

⁷¹ *The Electric Materials Company*, 1994 Pa. PUC LEXIS 12, **16-17.

⁷² While the joint statement of issues presents this question as stated, the issue, as set forth in the Complaint, is whether Verizon misapplied the charge by applying it on a per telephone number as opposed to a per loop basis. See, Complaint at ¶ 24 ("Verizon has misapplied the OSS charge to both UNE and Resale by collecting it on a per telephone number, as opposed to per loop, basis").

concerning these scenarios, which involve Verizon's application of the OSS charge to PRIs and direct inward dial service ("DID") purchased from it by LSI.⁷³

38. As indicated in Appendix A, a PRI supports 24 channels, 23 voice or data and one control channel. PRIs, which are the equivalent of a T-1 circuit, support access to the voice and data channels over a single, integrated local loop.⁷⁴ For each PRI sold to LSI, Verizon applies the OSS 24 times, once each for the loop and 23 channels. DIDs are a service whereby multiple internal extensions can be reached by a telephone caller without having to pass through an operator or attendant.⁷⁵ DIDs are a "feature," whereby the multiple internal extensions or direct inward dial telephone numbers are supported by a single line.⁷⁶ As to certain configurations of DIDs purchased by LSI, Verizon applies the OSS charge to each internal extension or direct inward dial telephone number related to the DID.

39. In both the PRI and DID context, Verizon's application of the OSS charge has been erroneous. As per the Verizon's tariff and the Commission's decisions in the *Generic UNE* proceeding, the OSS charge is to be applied on a per line/per loop basis.⁷⁷ To that end, the

⁷³ The PCC's Complaint also contested Verizon's imposition of the OSS charges in the context of remote call forwarding ("RCF"). Based on the stipulation in Appendix A, the PCC believes that the RCF issue should be resolved and that, if it presents examples to Verizon where it was assessed an OSS charge on both the underlying line and the RCF feature, that the charges will be corrected.

⁷⁴ *Newton's Telecom Dictionary* at 448-49, 658 (20th ed. 2004). If this matter went to trial, Verizon could produce no competent evidence to rebut this fact. *Community Medical Services v. Local 2665*, 437 A.2d 23, 27 (Pa. Super. 1981) ("[t]he movant may discharge his burden of proof by demonstrating that if the case proceeded to trial his opponent could produce no competent evidence to support a contrary position").

⁷⁵ Appendix A at ¶ 4.

⁷⁶ *Newton's Telecom Dictionary* at 255 (20th ed. 2004).

⁷⁷ Tariff 216, Section 3, 3rd Revised Sheet 14; *Generic UNE* proceeding, Tentative Order (November 4, 2002) at 169.

Commission described the charge as: "Verizon proposed a recurring Operations Support Systems (OSS) access charge on all UNE *loops*, UNE-P, and resale *loops*"⁷⁸ Yet, as the facts show, Verizon has not applied the charge on a per line/loop basis in the PRI and DID contexts. PRI service involves only a single line/loop, which supports multiple channels.⁷⁹ Each channel is not a separate line/loop, and consequently Verizon's application of the OSS to PRIs has violated its tariff.

40. Similarly, DIDs are not lines/loops. Rather, DIDs are a feature that can be added to a line. For example, DIDs are a primary feature of a Centrex system.⁸⁰ Under the DID feature, all the internal extensions or direct inward dial numbers receive calls over a single line.⁸¹ As such, under Verizon's tariff, only the line, and not the multiple internal extensions associated with the DID feature, should be subject to the OSS charge.

41. Verizon's misapplication of the OSS charge in the PRI and DID contexts violates Sections 1303 and 1501 of the Code. Accordingly, the PCC is entitled to judgment of liability as a matter of law, and the ALJ should grant this Motion.

⁷⁸ *Generic UNE* proceeding, Tentative Order (November 4, 2002) at 169 (emphasis added). The fact that Verizon's proposal involved a per loop application, and its tariff supplement implementing the charge is phrased in terms of a per line application, indicates that loops and lines are synonymous. *See, Newton's Telecom Dictionary* at 481 (20th ed. 2004) ("In traditional telecom, a line is an electrical path (two wires) between a phone company central office and a subscriber, usually with an individual phone number that can be used for incoming and outgoing calls. A line, in this definition, is the most common type of loop").

⁷⁹ *Newton's Telecom Dictionary* at 448 (20th ed. 2004).

⁸⁰ *Newton's Telecom Dictionary* at 255 (20th ed. 2004).

⁸¹ *Id.*

VI. DOES TELECOMMUNICATIONS ACT OF 1996 LIMIT VERIZON TO RECOVERING ACCESS TO OSS AND DUF COSTS FROM RESELLERS ONLY THROUGH THE RESALE DISCOUNT?

42. Federal law imposes on incumbent local exchange carriers, including Verizon, the duty to offer "resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers...and to not prohibit...[nor] impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications services." 47 U.S.C. §§ 251(b)(1) and (c)(4).

43. In pricing resale services, the Telecommunications Act of 1996 mandates that the wholesale rates "shall" be determined "on the basis of retail rates, charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 47 U.S.C. §252(d)(3). The term "shall" is undeniably mandatory in effect. Significantly, Section 252(d)(3) of the Act does not state that wholesale rates for Resale shall be determined on the basis of the retail rates, with noted exclusions, *and in addition other charges and fees determined and imposed by the State.*

44. State commissions have the responsibility of determining the actual rates. 47 U.S.C § 252(d)(3). The Commission recognized the mandatory nature of the method for setting wholesale rates for Resale when it initially established Verizon's rates and held that those rates "must be determined on the basis of retail rates charged to subscribers for the telecommunications service requested," with adjustments for the appropriate exceptions.⁸²

⁸² *Id.*, Recommended Decision (November 20, 1996) (1996 Pa. PUC LEXIS 209, **67-68) (citing 47 U.S.C. § 252(d)(3)) (emphasis added); *Id.*, Opinion and Order (December 19, 1996) at Ordering ¶ 3 (adopting Recommended Decision). While the meaning of the phrase "will be avoided" was a contested issue in that proceeding and was later reversed, the distinction is immaterial to this matter.

Further, the PUC acknowledged the need for Resale rates to be determined only via the application of the wholesale discount by directing that Verizon's OSS-related costs be recovered as an offset to the identified avoided costs and incorporated into the discount rate established for Verizon.⁸³ While the rates set by this Commission in 1997 were declared unlawful by the United States Court of Appeals for the Third Circuit, the overarching methodology of determining the wholesale rate on the basis of the retail rate, with appropriate exclusions, has remained unchanged.⁸⁴

45. This mandatory method for setting Resale rates was reaffirmed in the recent Commission-initiated proceeding to recalculate Verizon's wholesale rates for Resale.⁸⁵ In that proceeding, the Commission declared:

As discussed above, the law currently requires that the rate(s) "be determined based on retail rates charged to subscribers, excluding "the portion thereof attributable to any marketing, billing, collection, and other costs *that will be avoided* by the local exchange carrier."⁸⁶

Moreover, as noted by ALJ Colwell, in the Recommended Decision adopted by the Commission, "Verizon explains that the resale discount is a creature of federal law and must be calculated as

⁸³ *Id.*, Recommended Decision (November 20, 1996) (1996 Pa. PUC LEXIS 209, *66); *Id.*, Opinion and Order (December 19, 1996) at Ordering ¶ 3 (adopting Recommended Decision).

⁸⁴ *MCI Telecom. Corp. v. Bell Atlantic-PA.*, 271 F.3d 491, 519-520 (3d Cir. 2001), *cert. denied*, 123 S.Ct. 340 (2002)(reversing District Court judgment upholding the rates, *MCI Telecom Corp. v. Bell Atlantic-PA.*, (E.D. Pa.), originally filed at Civil Action No. CV-97-1857 (M.D. of Pa).

⁸⁵ *Wholesale Rate for Resale of Telecommunications Provided by Verizon Pennsylvania Inc. and Verizon North Inc.*, Docket No. R-00038516.

⁸⁶ *Id.*, Order (June 16, 2003) at 4 (underlining added, italics original).

specifically directed in the Telecommunications Act.⁸⁷ Yet, through the OSS and DUF charges, Verizon attempts to impose on Resale service charges wholly at odds with and not at all contemplated by the specific method for calculating Resale rates as directed by the Telecommunications Act.

46. Notably, the entire purpose of the wholesale rates proceeding, as noted by the Commission, was to establish THE rates for resale of Verizon's telecommunications service.⁸⁸ Verizon acknowledged this purpose explicitly.⁸⁹ Indeed, the Settlement of the parties in that case, by its terms, proposed "statewide wholesale rates for the resale of [Verizon and Verizon North's] telecommunications services."⁹⁰ Nowhere in the Settlement, and at no time in its presentment to the Commission, did Verizon disclose that the "statewide wholesale rates for the resale of its telecommunications services" being proposed were illusory and in reality would be significantly higher than those rates set forth in the Settlement due to the application of the OSS and DUF charges from the UNE Tariff 216.

47. Add-on charges, such as the OSS and DUF, that enable Verizon to recover costs purportedly incurred in relation to Resale above and beyond, and separate and apart from the wholesale discount are starkly contrary to the required method for setting the Resale rate that is required under Section 252(d)(3) of the Telecommunications Act and the Commission's

⁸⁷ *Id.*, Recommended Decision (Feb. 4, 2005) at 6 (emphasis added).

⁸⁸ *Id.*, Order (June 16, 2003) at 1.

⁸⁹ *Wholesale Rate for Resale of Telecommunications Provided by Verizon Pennsylvania Inc. and Verizon North Inc.*, Docket No. R-00038516, Verizon Statement No. 1 (Revised Direct Testimony of Bruce F. Meacham) at 3 ("The Commission initiated the instant proceeding . . . in order to establish wholesale rates that comply with current legal requirements").

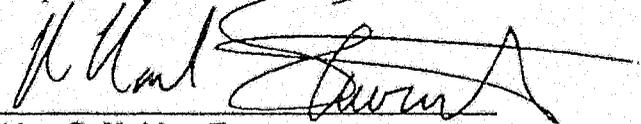
⁹⁰ *Id.*, Settlement Stipulation at ¶ 10(a). Verizon was the primary drafter of the Settlement Stipulation.

decision. As such, the PCC is entitled to summary judgment on its claim for declaratory relief precluding Verizon from attempting to properly tariff the OSS and DUF charges as applied to Resale.

48. Ultimately, Verizon's unauthorized and illegal practice of picking-and-choosing items from Tariff 216 or other tariffs to bill its Resale carrier competitors as add-ons to the Resale rate, Verizon will have effectively raised its Resale rates to levels greater than what Verizon charges its own retail end user customers. Such a scenario would violate Verizon's obligation under the Telecommunications Act that it not "impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications services." 47 U.S.C. §§ 251(b)(1) and (c)(4).

WHEREFORE, for all of the foregoing reasons, the PCC respectfully requests that the ALJ grant its Motion for Partial Summary Judgment as to liability on Section III and IV of the Complaint and grant it the declaratory relief sought in Section V.

Respectfully submitted:



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Date: July 17, 2006

APPENDIX A

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

1. Verizon ISDN Primary Service ("ISDN PRI") is a central office based service arrangement that provides a 1.544-Mbps digital connection between the central office and the customer premises. This connection provides 24 channels, each of which is a full 64,000 bits per second. One of these channels is typically used for out-of-band signaling control. Each of the other 23 channels can be used to carry voice or data transmissions.
2. In the case of a customer that purchases ISDN PRI service from Verizon, Verizon applies the Access to OSS charge to each of the 23 voice/data channels.
3. LSI purchases ISDN PRI service from Verizon.
4. Direct Inward Dial ("DID") is a service that permits incoming exchange calls to be dialed directly by a calling party to a specific extension associated with a PBX or other customer premises equipment without the assistance of an attendant.
5. Verizon and LSI agree that remote call forwarding ("RCFs") is a feature. Verizon does not apply the Access to OSS charge to the RCF feature itself, but applies it to the underlying telephone lines which have the RCFs feature.

CONTAINS PROPRIETARY INFORMATION

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Re: Generic Investigation Re Verizon :
Pennsylvania, Inc.'s Unbundled Network : Docket No. R-00016683
Element Rates :

THE PENNSYLVANIA CARRIERS' COALITION'S
COMMENTS TO VERIZON'S COMPLIANCE FILING

I. INTRODUCTION

The Pennsylvania Carriers' Coalition ("PCC")¹ submits these Comments to Verizon Pennsylvania, Inc.'s ("Verizon") January 26, 2004 filing which purports to comply with the Commission's December 11, 2003 Final Opinion and Order, as captioned above ("*2003 UNE Rate Order*"). These comments address two issues in which Verizon is proposing huge increases to its current Tariff 216 rates: 1) the rates for interoffice facilities or dedicated transport ("IOF"); and 2) the Daily Usage File ("DUF") rates.

Both of these rates fall into the category of rates that vary by 50% or more, up or down, from the current rate, for which the Commission directed that Verizon provide "a specific

¹ The PCC is an informal group of Pennsylvania-based competitive local exchange carriers ("CLECs") comprised of Full Service Computing Corp. t/a Full Service Network ("FSN"), ATX Licensing, Inc. ("ATX"), Remi Retail Communications, L.L.C. ("Remi") and Line Systems, Inc. ("LSI") which have joined together to protect their interests in matters before this Commission. FSN and ATX have already previously intervened in this matter. Concomitant with the submission of these comments, Remi and LSI are submitting a Petition to Intervene. While the intervention petition has merit and should be granted, if the Commission denies the Petition, these Comments should be considered as submitted by FSN and ATX.

concise explanation and verifiable documentation" for the rate change.² In fact, the two rates addressed by these Comments are being proposed to be increased by hundreds of percentage points and, accordingly, the Commission should investigate Verizon's proposed rates thoroughly. Because Verizon did not follow the Commission's instructions for supporting these 50% or more rate changes, and because the PCC does not have the resources to dissect Verizon's cost model run, the Commission should require that the existing IOF and DUF rates remain in effect until a Commission investigation is completed.

In reviewing these rate changes, the Commission must recognize the effect that such dramatic increases have on the PCC members' respective businesses. If Verizon's proposed IOF rates are permitted to become effective, the underlying costs of FSN, ATX and other switch-based CLECs to backhaul traffic to their respective switches will skyrocket, severely restricting the companies' abilities to extend switch coverage outward. Effectively, such increases will preclude any possibility of extending switch coverage outside the two major metropolitan areas.³ As to the DUF rates, these charges must be paid by CLECs to acquire the usage records necessary to issue retail bills to CLEC customers and access bills to other carriers. The magnitude of the proposed DUF increases, if permitted to become effective, will load tens, and in some cases, hundreds of thousands of dollars in increased monthly costs on PCC members and other CLECs significantly affecting their ability to compete with Verizon and offer competitive rates to their customers.

² 2003 UNE Rate Order at 17. As explained below, Verizon has not provided an adequate explanation nor has it provided verifiable documentation for these rate charges.

³ Verizon's attempt to increase IOF rates by such a voluminous magnitude dovetails with its attempt in the *Nine Month TRO Proceeding* to eliminate dedicated transport routes as UNEs as part of its determined effort to put all of its CLEC competition out of business.

In the Commission's 2003 UNE Rate Order, the Commission was wise to question and to continue to investigate rates which varied so dramatically from Verizon's cost model runs in previous UNE rate proceedings. In fact, the Commission's intuition that something may be wrong is right on target. The Commission should require Verizon to produce a comprehensive explanation with verifiable documentation and should not allow these draconian increases to become effective until it is proven that the rate are necessary for Verizon to recover its forward looking costs.

II. COMMENTS

A. IOF Rates

Interoffice facilities or IOF is the UNE which CLECs utilize to transport traffic on a dedicated basis between Verizon's central offices. IOF service is provided and priced by Verizon in both fixed rate components and mileage based components depending on the capacity of the facilities provided. IOF is used by switch-based CLECs to serve customers and is a critical component of the costs that FSN, ATX and other CLECs incur in serving customers from their respective switches.⁴

The two IOF rate components which are critical cost elements for PCC members are the mileage based rates for DS1 and DS3 facilities, both of which appear on Attachment III to the Verizon compliance filing as rates that are being proposed to increase by more than 50%.

Attachment III reflects the following rate comparison for these rate elements.

	<u>Tariff 2.6 Rate</u>	<u>Proposed Verizon Rate</u>	<u>% Increase</u>
DS-1 per mile	\$ 0.60	\$ 3.37	462%
DS-3 per mile	\$16.94	\$51.31	203%

⁴ Remi and LSI do not own or operate their own switches and their interest in these Comments is primarily focused on the DUF rates.

Despite the Commission's instructions on page 17 of its Order that Verizon provide a specific concise explanation and verifiable documentation for each specific UNE rate that increases by more than 50%, the entirety of Verizon's explanation for these voluminous rate increases is as follows.

Increase in the IOF elements due to an increase in the investment for the outside plant accounts as well as an increase in the annual cost factors applied in the outside plant investments.

Furthermore, Verizon has not provided any specific documentation for these rate increases other than the general documentation of the entire cost model runs. Clearly, this does not provide the Commission with what it needs to determine if such dramatic rate increases are truly justified from a forward-looking cost perspective.

The Commission must require adequate information from Verizon and should hold any rate increases in abeyance until a comprehensive evaluation is completed. These rate increases are of no small consequence to PCC members. In fact, ATX has calculated that such a rate increase would increase its IOF mileage costs by more than 273% or, on average, approximately **BEGIN PROPRIETARY** **END PROPRIETARY** per month per customer. For FSN, the costs associated with extending its switch coverage to outlying areas from its switch in downtown Pittsburgh will be increased by over 450% -- an increase that will eliminate any potential to serve more rural customers on a switch-based basis.⁵ These massive increases will unreasonably restrict FSN's and ATX's ability to provide competitive benefits to existing customers and will severely limit future business opportunities.

⁵ Because almost all CLEC switches are in more urban areas, the IOF mileage rate increases would generally have a chilling effect on any CLEC which relies on IOF to serve any significant distances outside of those urban areas.

Imposing these increases on IOF mileage rates is directly at odds with the Commonwealth's objectives to bring meaningful, facilities-based competition to the more rural parts of Pennsylvania. Indeed, such increases serve to promote rather than diminish the digital divide which the General Assembly is so determined to prevent.

Accordingly, the Commission should require full disclosure from Verizon and preclude any increases to IOF rates unless and until such increases are fully justified from a forward looking cost perspective.⁶ Otherwise, Verizon will be overcompensated to the detriment of facilities-based providers and their customers.

B. DUF Rates

Daily usage files are the usage records produced and transmitted by Verizon for each inbound and outbound call placed by or to a CLEC customer utilizing Verizon's local circuit switching. For a UNE-P provider, DUFs are a necessary element of providing retail bills to customers and access bills to other carriers. Accordingly, in addition to switch usage charges, CLECs pay any additional usage based rate for the records associated with the switch usage.

These DUF rates are also subject to a massive rate increase proposed by Verizon.

However, Verizon's compliance filing only tells half the story.

Attachment III to the compliance filing which identifies the 50% or more rate changes, identifies the following DUF rate change:⁷

⁶ The PCC proposes that the Commission identify rates like IOF and DUF which require further investigation and require other final rates which are subject to this proceeding to become effective.

⁷ Attachment III to the compliance filing indicates that the DUF "[i]ncrease due to an increase in the cost of providing the service and a decrease in demand for the service." Again, Verizon provides an inadequate explanation for the magnitude of the rate increase and provides no specific documentation for the rate increase as the Commission required for rates on the 50% or more rate change list.

	<u>Tariff 216 Rate</u>	<u>Proposed Verizon Rate</u>	<u>% Increase</u>
Existing Message Recording per message	\$0.000261	\$0.00149	471%

This charge is for recording the message. While bad enough standing alone, Attachment 1 to the compliance filing reveals that Verizon is proposing an additional charge of \$0.001079 for transmitting the same DUF record. While Attachment 1 (page 10 of 11) indicates that the transmittal charge is a "new rate structure," review of Verizon Tariff No. 216 reveals that it actually is another massive increase as follows.⁸

	<u>Tariff 216 Rate</u>	<u>Proposed Verizon Rate</u>	<u>% Increase</u>
Per Record Transmittal	\$0.000095	\$0.001079	1036%

Taken together, the rate charged to CLECs for recording and transmission of DUF files is as follows:

	<u>Tariff 216 Rate</u>	<u>Proposed Verizon Rate</u>	<u>% Increase</u>
DUF Rates	\$0.000356	\$0.002569	622%

While the PCC acknowledges that in ALJ Schnierle's May 7, 2002 Recommended Decision (pp. 63-64) and in the Commission's October 24, 2004 Tentative Order (p. 172), prior to the time of any PCC member participation in this case, a DUF recording rate increase was adopted, it is clear from the ALJ's and the Commission's decisions that they did not appreciate the magnitude of the rate increase. As demonstrated in the attached Exhibit, the increase in DUF rates can increase a UNE-P carrier's costs by tens or hundreds of thousands of dollars per

⁸ See Tariff No. 216, Section 3, 1st Revised Sheet 14. The transmittal charge is referred to in Tariff No. 216 as the "Network Data Mover, per message."

month.⁹ Furthermore, Verizon's proposed rates are completely out of proportion when one considers, as demonstrated in the attached Exhibit, that depending on the duration of the call, the proposed rates for recording and transmitting usage data associated with Verizon's switching function can exceed or, at a minimum, represent a large proportion of the entire charge for the switch usage function.¹⁰ Finally, Verizon's DUF message recording costs would have to be incurred by Verizon for CALEA compliance even if it did not provide wholesale service to CLECs and accordingly, it is completely inappropriate for CLECs to bear the entire burden of this recordkeeping function.

Although not a final Commission decision, in approving Verizon's proposed DUF rates in its November 4, 2002 Tentative Order, the Commission accepted Verizon's argument that a DUF rate increase was justified due to smaller than anticipated DUF usage.¹¹ However, this decision, rendered about a year and half ago, is now outdated, particularly when one considers that AT&T Communications of Pennsylvania, LLC ("AT&T"), entered the residential market in most of Verizon's service territory for the first time in the fall of this year. Accordingly, at a minimum, the Commission should require Verizon to adjust its DUF rates based on present usage, and, furthermore, should require Verizon to re-tariff the DUF rate periodically (at least once every six months) so that any increases or decreases in DUF usage are reflected in the DUF rate on a timely basis.

⁹ For example, a CLEC serving 30,000 UNE-P customers is likely to incur approximately ten million DUF records and will see a rate increase of over \$20,000 per month as a result of Verizon's proposed DUF rates.

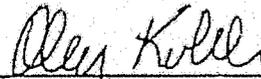
¹⁰ So, for example, for a one minute call the DUF charge (on a per message basis) would be over 187% of the total switch usage charge (on a per minute basis). For a four minute call, the DUF charge would be over 46% of the total switch usage charge.

¹¹ Tentative Order at 122.

III. CONCLUSION

For all the foregoing reasons, Verizon's proposed dramatic increases in IOF and DUF rates should not be permitted to become effective, at least until such time as the Commission conducts a comprehensive review to determine whether the proposed rates are justified by Verizon's forward-looking costs. Accordingly, after adjudicating the Exceptions to Verizon's compliance filing, the Commission should direct all of Verizon's UNE rates to become effective, except for those on the 50% or more rate change list which require further review

Respectfully submitted,



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Dated: February 25, 2003

Verizon DUF Rates

Rate Element	Tariff No. 216	Verizon's Proposal	% Change
Pre Record Recorded	\$ 0.000261	\$ 0.001490	471%
Per Record Transmitted	\$ 0.000095	\$ 0.001079	1036%
Totals	\$ 0.000356	\$ 0.002569	622%

Actual effect on UNE-P carrier costs

# of DUF Records (Per Month)	Tariff No. 216	Verizon's Proposal	Monthly Financial Impact
1,000,000	\$ 356.00	\$ 2,569.00	\$ (2,213.00)
2,000,000	\$ 712.00	\$ 5,138.00	\$ (4,426.00)
5,000,000	\$ 1,780.00	\$ 12,845.00	\$ (11,065.00)
10,000,000	\$ 3,560.00	\$ 25,690.00	\$ (22,130.00)
50,000,000	\$ 17,800.00	\$ 128,450.00	\$ (110,650.00)
100,000,000	\$ 35,600.00	\$ 256,900.00	\$ (221,300.00)

DUF Rates as a component of ULS Costs

ULS Rate	Tariff No. 216	Verizon's Proposal
	\$ 0.001802	\$ 0.001373
Call Duration in Minutes	DUF as a % of Tariff No. 216	DUF as a % of Verizon's Proposal
1	19.76%	187.11%
2	9.88%	93.55%
3	6.59%	62.37%
4	4.94%	46.78%
5	3.95%	37.42%
6	3.29%	31.18%
7	2.82%	26.73%
8	2.47%	23.39%
9	2.20%	20.79%
10	1.98%	18.71%

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Re: Generic Investigation Re Verizon :
Pennsylvania, Inc.'s Unbundled Network : Docket No. R-00016683
Element Rates :

**FULL SERVICE NETWORK'S COMMENTS TO
VERIZON'S COMPLIANCE FILING**

Full Service Computing Corp. t/a Full Service Network ("FSN") submits these Comments to Verizon Pennsylvania Inc.'s ("Verizon") January 26, 2004 compliance filing which purports to implement the Commission's December 11, 2003 Final Opinion and Order in the Commission's most recent review of Verizon's Unbundled Network Element ("UNE") rates, as captioned above ("*2003 UNE Rate Order*"). These comments address one issue which is near and dear to FSN – that being Verizon's proposed enormous increase in its Density Cell 4 loop rate from \$16.75 per month to a whopping \$23.62 per month.¹

As reflected in the underlying record of this proceeding, FSN is a relatively small CLEC which operates entirely in Pennsylvania and focuses its business activities in the Pittsburgh area.² While FSN was a participant in the remand portion of this proceeding, it does not have the resources to evaluate Verizon's calculation of the \$23.62 DC4 loop rate which Verizon is now proposing as the result of the Commission's *2003 UNE Rate Order*. However, FSN can

¹ FSN is also submitting Joint Comments in this proceeding along with the other members of the Pennsylvania Carriers' Coalition ("PCC"), ATX Licensing, Inc. ("ATX"), Line Systems, Inc. ("LSI") and Remi Retail Communications, L.L.C. ("Remi") addressing two other enormous wholesale rate increases being proposed by Verizon – that being its proposed interoffice facility and daily usage file rates.

² FSN Comments to Commission Tentative Order at 1-2.

comment first-hand on the impact of Verizon's proposed DC4 loop rate increase if it is permitted by this Commission to become effective.

To the best of its knowledge, FSN is one of the few competitive local exchange carriers ("CLECs") which actively provides service to residential customers in DC4.³ Based on the current DC4 loop rates and what appeared to be the prospects for further reduction in this docket (given this Commission's public commitment to bringing meaningful competition to the rural areas of the Commonwealth through its widespread Customer Education Program), FSN had conditional, but concrete, plans to expand its business in DC4. However, as FSN warned the Commission, substantial increases in DC4 rates would not only cause cancellation of the DC 4 expansion plans, but would cause FSN to "withdraw into downtown Philadelphia and Pittsburgh."⁴

This unfortunate scenario now appears to be moving closer to becoming a reality. Despite the Commissions' efforts to make appropriate adjustments to Verizon's cost study, and despite the fact that these adjustments have had a meaningful and very pro-competitive effect on many UNE's including the loop rates in DC's 1, 2 and 3, the DC4 loop rate which Verizon claims results from the Commission's Order would shut down the little competition that has developed in rural parts of the Commonwealth overnight.

As to FSN, it has terminated all marketing activities in DC4.⁵ Furthermore, if Verizon's proposed DC4 loop rates are adopted, FSN will be required to dramatically increase its rates to its existing DC4 customers making it highly likely that they will not remain FSN customers.⁶

³ FSN Comments at 3-5.

⁴ FSN Comments at 5-6.

⁵ In fact, as the record reflects, FSN terminated its marketing activities in DC4 around the time of issuance of the Commission's Tentative Order in this case. As it stated in its

Freezing out the approximate one million residential customers in DC4 from the benefits of local competition is in no one's best interest – with the possible exception of Verizon. In fact, in the recent Chapter 30 legislative debates, avoiding a digital divide between the urban and rural parts of the Commonwealth was of the highest legislative priority.⁷ Nevertheless, Verizon's proposed rates would promote the exact digital divide the General Assembly wants to prevent by freezing out DC4 customers from the competitive landscape – essentially for all time.

Such an outcome not only thwarts a significant part of FSN's business plan, but it is antithetical to the public interest the Commission is directed to protect. While the Commission's Order is generally good for competition in DCs 1, 2, and 3,⁸ it outright destroys competition in DC4. The Commission can simply not allow this scenario to occur and the agency has several options which are addressed in the Comments below.

December 30, 2002 Comments, “. . . upon receiving word of the Commission's Tentative Order, FSN immediately called a halt to its expansion plans and has suspended all marketing activities in Density Cell 4.” Comments at 4.

⁶ Most existing FSN DC4 customers subscribe to a plan under which they receive local service and certain features for \$24.95 per month. If Verizon's proposed DC4 loop rates are adopted, FSN will be forced to eliminate that DC4 service offering and will restrict DC4 service to an all in one plan which will be priced at \$54.95 per month.

⁷ In fact, three of the four bills introduced in the General Assembly last year, SB 900, HB 1669, and HB 1010 contained numerous provisions to promote rural competition, including a provision that required Verizon's wholesale rates to be less than its retail rates and a provision that provided universal service support to both ILEC and CLECs which served rural areas and Density Cell 4 in particular.

⁸ The only other critical exceptions are Verizon's proposed dedicated transport and daily usage file rates which are addressed in the Joint Comments of the PCC at this docket.

I. COMMENTS

A. The Commission Should Hold Verizon to its Voluntary Commitment in the Structural Separation Case.

The current \$16.75 DC4 loop rate offered by Verizon through Tariff 216 is not a result of a Verizon cost study or a Commission ratemaking order, but instead was a result of a voluntary commitment by Verizon to the Commission to avoid structural separation. As the Commission knows well, in its historical *Global Order*,⁹ upon a finding that Verizon was engaging in anti-competitive behavior, the Commission ordered that Verizon structurally separate its wholesale operations from its retail operations and initiated a proceeding specifically designed to implement that objective.¹⁰ After conducting a year-long proceeding, on April 11, 2001, the Commission issued an Order which rescinded the structural separation requirement conditional on Verizon's voluntarily agreeing to a number of conditions. In establishing the conditions, the Commission could not have been clearer about the repercussions if Verizon chose not to enter into a voluntary commitment to these conditions, which the Commission referred to jointly as the "functional/structural separation terms and conditions." Simply put, if Verizon refused to make a voluntary commitment to all of the terms and conditions, the Commission would proceed with the implementation of the structural separation of the Company.

One of the "functional/structural separation terms and conditions" is critically relevant to this proceeding. As the Commission explained the condition,

In the rural areas of Pennsylvania, competition is severely lacking. A prospective decrease in UNE rates in Density Cell 4, which encompasses the most rural areas, will provide competitors with the opportunity to deploy services otherwise not affordable in these

⁹ *Joint Petition of NEXTLINK Pennsylvania, Inc. et al.*, P-00991648, P-00991649 (September 30, 1999)

¹⁰ *Global Order* at 215-236.

areas. We are, therefore, ordering a \$0.75 reduction in 2-wire loop rates, in Density Cell 4. The new 2-wire loop rate in Density Cell 4 shall be revised accordingly.

Structural Separation Order at 40.¹¹

The Commission went on to direct that a UNE rate proceeding be convened to determine whether any further adjustment to Verizon's UNE rates was necessary.¹² However, nothing in the Order indicated or could be interpreted to relieve Verizon of its structural separation avoidance condition.

By letter dated April 20, 2001, Verizon accepted all of the conditions in the Commission's April 11, 2001 Order.¹³ Subsequently, Verizon reduced its DC4 loop rates by \$.75 to \$16.75 per month which remains the DC4 loop rate to this day.

Regardless of the outcome of the Commission adjustments to Verizon's cost study, Verizon should not be let off the hook for its voluntary commitment pertaining to its DC4 loop rates. No time limitation was placed on the commitment and the commitment among the other conditions relieved Verizon of the Commission's structural separation requirement which by its own calculations saved the Company approximately one billion dollars.

Furthermore, Verizon's commitment is just as important to rural competition as it was in 2001. Make no mistake about it, attempting to offer local service in DC4 at a \$16.75 loop rate is marginal at best and, from FSN's perspective, those rates should be reduced significantly. However, at least the \$16.75 loop rate provides FSN and other CLECs with a fighting chance. In

¹¹ Because Verizon's DC4 loop rate at the time was \$17.50, the term required Verizon to voluntarily reduce its DC4 rate to \$16.75 to avoid structural separation.

¹² *Structural Separation Order* at 47, Ordering Para. 19.

¹³ Although the letter stated some qualifications about the nature of the functional separation conditions, it made no qualification about the DC4 loop rate commitment.

contrast, if the Commission allows Verizon's proposed DC4 loop rates to become effective, the chances for meaningful rural competition will be buried – probably forever.

B. The Commission Should Make Further Adjustment to Verizon's Cost Inputs and Should Complete the FLC/CC/BC Adjustment.

If the Commission is unwilling to hold Verizon to its structural separation avoidance commitment for DC4 loop rates, it should act to further adjust Verizon's cost inputs to reduce the resulting DC4 loop rate to a reasonable level. While FSN does not have the resources to engage experts to tear apart Verizon's cost model, it can identify some simple measures which will significantly contribute to a more reasonable DC4 result.

First, the Commission should adopt the Exceptions of AT&T and MCI (which companies do have the resources to identify where Verizon has not fully complied with the Commission's Order) which have apparently discovered some significant discrepancies in the manner in which Verizon ran its cost model which, once corrected, will reduce Verizon's proposed loop rates, including those in DC4. These reductions, while meaningful, will likely not reduce the DC4 loop rate nearly enough to even remotely approach the existing \$16.75 monthly rate.

Second, the Commission should complete its Forward Looking Conversion ("FLC")/Current Cost/Book Cost ("CC/BC") ratio adjustment in compliance with the FCC's *Virginia Arbitration Order*.¹⁴ In the *Virginia Arbitration Order*, the FCC conducted a UNE rate proceeding for Verizon Virginia, Inc., because the Virginia Commission had decided not to conduct its own proceeding. The FCC made many determinations in the *Virginia Arbitration Order*, but its two most noteworthy determinations were that Verizon's forward looking cost of

¹⁴ *In the Matter of ... Petition of WorldCom, Inc. for Preemption... of the Virginia State Corporation Commission*, CC Docket No. 00-218 (August 29, 2003)

capital should be set higher to reflect a competitive environment¹⁵ and that in calculating Verizon's Annual Cost Factors, Verizon's proposed FLC factor should be rejected and replaced with AT&T/MCI's proposed CC/BC ratio.¹⁶

In its *2003 UNE Rate Order*, the Commission found the Virginia Arbitration Order to be "instructive" and followed the FCC's two primary determinations with one exception. For example, on the basis of the *Virginia Arbitration Order*, the Commission increased Verizon's cost of capital by about 2 ½ points from that adopted in its Tentative Order from 9.83% to 12.37% -- an increase which has a significant upward impact on Verizon's UNE rates. However, as to the FLC/CC/BC adjustment, the Commission only adopted half of the FCC's adjustment and while it rejected the FLC, it did not finish the job and replace it with the CC/BC ratio. While this half-adjustment does have a significant downward impact on Verizon's loop rates, including the DC4 rates, its impact is generally cut in half because the Commission did not adopt the FCC's full adjustment.¹⁷

The Commission's half-way approach has a particularly problematic effect on DC4 rates. This is because, as recognized by Judge Schnierle, the FLC/CC/BC adjustment (when applied in full) has a disproportionate impact in DC4 as compared to the other Density Cells.¹⁸

¹⁵ *Virginia Arbitration Order* at ¶ 104.

¹⁶ *Virginia Arbitration Order* at ¶ 140.

¹⁷ The Commission apparently plans to revisit the rest of the adjustment, insertion of the CC/BC ratio, through a future proceeding -- for unknown and unexplained reasons. See *2003 UNE Rate Order* at 16.

¹⁸ See March 17, 2003 Supplemental Recommended Decision on Remand at 40 recognizing that the FLC/CC/BC adjustment would apparently reduce the DC4 rates more so than in other density cells.

While there is no assurance that finishing the job now (rather than in some future proceeding) will result in rates that will enable meaningful DC4 competition, it certainly would represent a step in the right direction. Accordingly, the Commission should act to complete its work and finish the adjustment, as the FCC did in the *Virginia Arbitration Order*, in this proceeding.

C. The Commission Should Establish A Universal Service Funding Mechanism

If the Commission is unwilling to resolve the DC4 problem through the means advocated above and, in fact, even if it does, the Commission should establish a universal service funding mechanism to remove implicit subsidies (and support) in Verizon's rates and to provide corresponding high cost support to both ILECs and CLECs serving DC4's high cost areas. The concept of a universal service fund is not new to the Commission and does not require an in-depth explanation here. While this Commission has dabbled in implementation of a USF through its small company fund, that fund does not address Verizon's service territory, where a funding mechanism is most needed, and only supports reductions in access charge and toll rates -- because support from the fund is not portable, it does not advance competition in high cost areas.¹⁹

To address the Density Cell 4 problem, the Commission must establish a universal service finding mechanism for Verizon's service territory which removes all implicit subsidy (and support) from Verizon's access charges and directs the corresponding support, in a portable manner, to all ILECs and CLECs serving residential customers in DC4. It is noteworthy in this regard that three of the four bills introduced in the General Assembly in the legislative debate

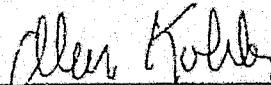
¹⁹ Of course, this makes some sense for the independent companies where generally local competition is still prohibited.

last year, SB900, HB1669 and HB1010 required establishment of just such a universal service finding mechanism.²⁰ Of course, one of the keys to a successful universal service funding mechanism is a large contribution base. While the Commission could effectively implement a USF in Verizon's service territory without cellular companies as part of the contribution base, such an expansion of the contribution base, if necessary through legislative action, would be helpful to the Commission's efforts to promote rural competition.

II. CONCLUSION

If the Commission's allows Verizon's proposed DC4 loop rates to become effective, the competitive scenario in DC4 will be intolerable with literally no light at the end of the tunnel. The Commission should effectively address this situation now through the alternatives addressed in these Comments.

Respectfully submitted,



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Dated: February 25, 2003

²⁰ It is also noteworthy that two of these three pieces of legislation required that cellular companies be included in the contribution base.

COPY

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Carriers' Coalition :
Complainant, :
v. :
Verizon Pennsylvania, Inc. :
Respondent. :

Docket No. R-00016683C000

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**PENNSYLVANIA CARRIERS' COALITION'S
COMPLAINT AND REQUEST FOR REJECTION
OR SUSPENSION OF TARIFF SUPPLEMENT**

I. INTRODUCTION AND SUMMARY

The Pennsylvania Carriers' Coalition ("PCC")¹ submits this Complaint and Request for Rejection or Suspension against a tariff supplement filed by Verizon Pennsylvania, Inc ("Verizon") on September 14, 2004. Although Verizon's filing is confusing and misleading, it is apparently attempting to unilaterally amend its August 2, 2004 compliance tariff in the above-captioned matter, which is currently scheduled to become effective as filed on October 1, 2004. The nature of Verizon's proposed amendments is to eliminate certain rate decreases, which it erroneously believes is required by the Federal Communications Commission's ("FCC") *Interim Order*,² while leaving other rate element increases undisturbed

¹ The PCC is comprised of Full Service Computing Corp. /a ("FSN"), Remi Retail Communications, L.L.C. ("Remi"), ATX Licensing, Inc. ("ATX") and Line Systems, Inc. ("LSI") and is an informal group of competitive local exchange carriers ("CLECs") which conduct all of their business or their primary business in Pennsylvania.

² *In the Matter of Unbundled Access to Network Elements*, WC Docket 04-313 (August 20, 2004) ("*Interim Order*").

Verizon's requested relief is as anti-competitive as anything Verizon has ever brought before this Commission. Verizon's tariff supplement, in conjunction with its related stay petition of other portions of its compliance tariff, attempts to split the Commission's three and a half year old wholesale rate proceeding in two and, in doing so, turn it on its head. Of course, this inappropriate request is nothing more than a continuing and determined attempt to destroy its competitors, including the PCC members, to the disadvantage of this Commission's pro-competitive agenda and the interests of Pennsylvania's consumers and businesses.

The Commission should simply reject (or at a minimum suspend) Verizon's tariff supplement. Indeed, nothing in the FCC's *Interim Order* (or any other regulatory or judicial decision) compels or permits the result that Verizon demands.

Through its tariff supplement, Verizon is attempting to evade the outcome of a Commission proceeding which was actually initiated over three years ago in August of 2001³ and finally decided by Order entered December 11, 2003⁴ -- eight months prior to the FCC's release of the *Interim Rules*. Accordingly, Verizon's request does nothing more than attempt to take advantage of the fact that it has taken approximately nine months to implement this Commission's order -- otherwise the rates ordered by the Commission would have been in effect months ago.

This Commission has repeatedly determined that Verizon must continue to unbundle all of its network elements needed to provide the Unbundled Network Element Platform ("UNE-P") under state law at prices compliant with the Commission's rate orders, at least until such time as

³ *Generic Investigation Re: Verizon Pennsylvania Inc.'s Unbundled Network Elements, Order Instituting Generic Investigation of Verizon's UNE Rates*, R-00016683, (August 30, 2001).

⁴ *Generic Investigation Re: Verizon Pennsylvania Inc.'s Unbundled Network Elements Final Opinion and Order*, R-00016683 (December 11, 2003).

Verizon meets the *Global Order*⁵ standards for relief⁶ Nothing in the *Interim Order* preempts a state commission's exercise of state law authority. Nor is there any suggestion in the *Interim Order* that a state commission's exercise of state authority is in any way impacted. Accordingly, Verizon's compliance tariff rates, unaffected by its September 14, 2004 tariff supplement, have been properly established by the Commission under state and federal law, are not directly affected by the *Interim Order* and should become effective as planned.

Furthermore, even under the *Interim Order*, the FCC did not intend to affect state commission rate orders, even if unlike here the rate orders were issued entirely under federal law, that were adopted long before the issuance of the *Interim Rules* or the *USTA II* mandate -- as is the case with this Commission's December 11, 2003 Final Ratemaking Order at issue here. The fact that the implementation of the rates has taken place over an extended period does not change the fact that the state commission rate determination was reached long before the June 15, 2004 benchmark date contained in the *Interim Rules*. Accordingly, even if the *Interim Rules* had a direct impact on this Commission's unbundling and pricing decisions under state law -- which they do not -- the *Interim Order* cannot be reasonably interpreted to affect a ratemaking order issued over six months prior to the *USTA II* mandate.

⁵ *Joint Petition of Nextlink Pennsylvania, inc. et al.* P-00991648, P-00991649 (September 30, 1999).

⁶ *Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Markets*, 1 00030100, Final Order (December 18, 2003) Reconsideration Order (May 27, 2004) (jointly "Enterprise Switching Orders"); *Pennsylvania Public Utility Commission v. Verizon Pennsylvania, Inc. Tariff No. 216 Revisions Regarding Four Line Carve Out*, R-00049524 (August 5, 2004); *Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc. Tariff No. 216 Revisions regarding Switching, Transport and Platform for High Capacity Loops*, R-00049525 (August 5, 2004) All of these Commission Orders are subject to a pending federal court challenge by Verizon -- a challenge which this Commission has requested the federal court to dismiss. *Verizon Pennsylvania, Inc. v. Terence J. Fitzpatrick et al.*, Civil Action No. 04-2709 (E.D. Pa.).

In addition, under no circumstances does the *Interim Order* support Verizon's notion that a state rate order which preceded the *Interim Order* and the *USTA II* mandate should be split in two to reject rate decreases and leave rate increases undisturbed. And, in fact, such a view is complete nonsense. As the Commission is well aware, the rates which resulted from the Commission's December 11, 2003 Final Ratemaking Order -- the product of a series of Commission determinations regarding interrelated rate inputs, including inputs like cost of capital and depreciation, with different effects on different rate elements -- are each related to each other and the resulting output of Verizon's cost study. To split the ratemaking decision in two, as Verizon proposes, would turn the entire rate order and the Commission's underlying input determination on their head resulting in a completely irrational and unsupported decision and a decision which would be completely inconsistent with this Commission's underlying evidentiary record -- an unsupported result under state and federal law.

Finally, if the Commission were to grant the relief Verizon requests, it would violate the terms of Verizon's Bell Atlantic/GTE merger commitments under which Verizon agreed to and has a continuing obligation to provide the network elements at issue at cost-based rates. Since only the rates ordered by the Commission in its December 11, 2003 Final Ratemaking Order comply with the cost-based rate standard, the rates contained in Verizon's August 2, 2004 compliance tariff, in their entirety, must become effective on October 1, 2004.

It is noteworthy that Verizon has now shed the veil that it advocated to this Commission since the 1996 Telecommunications Act that it supports local exchange competition. Verizon's current attempt is one of many initiatives to outright destroy local competition at its very roots. Such an outcome is not only inconsistent with the Telecommunications Act, but Pennsylvania public policy and the interests of Pennsylvania's consumers and businesses.

The PCC respectfully requests that the Commission continue to reject Verizon's destructive attempts and reject the September 14, 2004 tariff supplement currently before the agency. In specific support of its request, the PCC states as follows:

II. THE PCC

1. The PCC is an informal group of Pennsylvania CLECs comprised of FSN, Remi, ATX and LSI. All PCC members compete with Verizon in Verizon's service territory and rely on unbundled network elements purchased from Verizon and Verizon's wholesale tariff, known as Tariff 216.

2. The PCC is represented by the following attorneys in this proceeding:

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3. Each PCC member leases network elements from Verizon which are affected by the rates proposed in Verizon's September 14, 2004 tariff supplement.

4. The PCC and its member companies have standing to participate in these proceedings.

III. BACKGROUND

5. On April 11, 2001 the Commission issued an Order which relieved Verizon of the *Global Order's* structural separation requirement.⁷ As a condition of the relief, the Commission ordered commencement of a new proceeding to determine whether any further adjustments of

⁷ *Re: Structural Separation of Bell Atlantic Pennsylvania, Inc. Retail and Wholesale Operations*, M-00001353 (April 11, 2001).

Verizon's UNE rates was necessary and committed to reaching a Commission decision on additional UNE rate adjustments by no later than December 31, 2001.

6. On August 31, 2001, the Commission issued an *Order Instituting Generic Investigation of Verizon's UNE Rates* and opened the above-captioned docket.

7. To say the least, the Commission's wholesale rate proceeding took longer than anticipated and the Commission did not reach a Final Rate-making Order until December 11, 2003.

8. The Commission then initiated the compliance stage of the proceeding to implement its December 11, 2003 Final Rate-making Order.

9. On July 17, 2004, the Commission entered a Compliance Order which required Verizon to file its compliance tariff within 15 days to become effective on October 1, 2004. On August 2, 2004, Verizon submitted its compliance tariff with an effective date of October 1, 2004.

10. On August 20, 2004, the FCC released its *Interim Order*. As relevant here, the primary purpose of the *Interim Order* and associated *Interim Rules* was to maintain the status quo for federal unbundling requirements for a six month period following publication pending establishment of permanent rules. As to the pricing of those network elements, the FCC established a benchmark date of June 15, 2004, a day after the *USTA II* mandate was entered, to maintain the status quo from that date until its permanent rules were issued. While the FCC commented on the status of state commission rate decisions issued after June 15, 2004, it was not clear nor conclusive and clarification of the issue remains pending before the FCC.⁸

⁸ Verizon's claim that only state commission increases are permitted under the *Interim Rules* has not been decided and remains pending before the FCC. See Petition for

11. In the meantime, starting in December of 2003, this Commission moved forward with its own unbundling regime under state law, which initiative relied on and was grounded in the unbundling standards established in the *Global Order*. Though the *Enterprise Switching Orders*, issued in December of 2003 and May of 2004 respectively, the Commission required that enterprise switching continue to be unbundled even though enterprise switching elements are no longer required to be unbundled under 47 U.S.C. § 251 federal unbundling rules.⁹ The Commission is also in the midst of reviewing Verizon's state law unbundling obligations under the *Global Order's* unbundling standards.

12. The Commission's December 11, 2003 Final Ratemaking Order is intended to establish cost-based rates for Verizon network elements which must continue to be unbundled under state (and in some cases also under federal) law. The Commission's Ratemaking order is issued under both state and federal law which share the "just, reasonable and non-discriminatory" ratemaking standard. The Commission's regulatory activity in this area under state law is not directly affected by the federal standards embodied in the *Interim Order*.

IV. DISCUSSION

13. Verizon's attempt to reject all rate decreases and adopt all rate increases pertaining to mass market switching, enterprise loops and dedicated transport in its pending compliance tariff is flawed and must be rejected for a variety of reasons.

14. First, nothing in the *Interim Order* preempts or suggests any effect of the *Interim Order* on state commission unbundling decisions under authority of state law and associated

Emergency Clarification or Errata of the Association for Local Telecommunications Services (ALTS") filed August 27, 2004 at CC Docket No. 04-313.

⁹ Verizon has a pending challenge to the *Enterprise Switching Orders* before the District Court for the Eastern District of Pennsylvania.

network element pricing decisions. Accordingly, the Commission's state unbundling plan, which is fully consistent with the Telecommunications Act, remains in full force and effect and the associated pricing embodied in Verizon's compliance tariff should be required to become effective, as planned and without modification, on October 1, 2004.

15. Second, nothing in the *Interim Order* was intended to disturb a state commission ratemaking order which was issued over six months prior to the June 15, 2004 benchmark date in the *Interim Order*. Accordingly, even if applicable, the *Interim Order's* focus on maintaining the status quo is properly interpreted to be inclusive of the Commission's December 11, 2003 Final Ratemaking Order which established cost-based and "just, reasonable and non-discriminatory" rates for Verizon based on a huge evidentiary record at the time of issuance.

16. Third, while in the *Interim Order*, the FCC comments on post June 15, 2004, state commission ratemaking decisions, nothing in the *Interim Order* is reasonably interpreted to require or permit splitting a state commission ratemaking decision in two in a manner that rejects the rate decreases and adopts the rate increases. Any impact of the *Interim Rules* on a state commission ratemaking decision must effect the decision in its entirety, one way or another.

17. Furthermore, to grant Verizon the relief it requests would violate Verizon's obligations and commitments resulting from its merger with GTE Corp. To address the adverse public interest associated with its merger with GTE, former Bell Atlantic voluntarily agreed to a package of merger conditions, including a voluntary commitment to facilitate and preserve UNE-based competition, including unbundled local switching in combination with other network elements. The centerpiece of the voluntarily-proposed and subsequently approved merger conditions provided that the combined company – now Verizon – would continue to provide all UNEs and UNE combinations at cost-based rates without interruption until legal challenges to

the FCC's unbundling rules were ultimately resolved. Verizon expressly committed to "continue to make available to telecommunications carriers each UNE required under" the FCC's *UNE Remand Order*, among others, from the effective date of the merger "until the date on which the [FCC]'s orders in those proceedings, and any subsequent proceedings, become final and non-appealable" (emphasis added). Moreover, Bell Atlantic expressly committed to honor its voluntarily-offered condition until "the date of a final, non-appealable judicial decision providing that [the then existing] UNEs or combination of UNEs are not required to be provided by GTE/Bell Atlantic in the relevant geographic area." Furthermore, as part of the condition, Verizon agreed to and was required to continue to offer these elements at cost-based rates "until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide such UNEs at cost-based rates." *Memorandum Opinion and Order, Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control*, 15 FCC Rcd 14032 at ¶ 316 (2000). See also *id.*, App. D, 39.

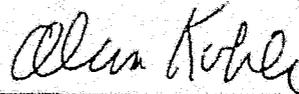
18. Certainly, the FCC's *Interim Order*, even shed its most favorable light to Verizon, is not a final, non-appealable judicial decision which terminates the cost-based rate merger commitment. Accordingly, Verizon's merger commitment which includes a requirement that Verizon continue to provide the network elements at issue to CLECs at cost-based rates remains in effect and can not be disregarded.¹⁰ Because the rates in Verizon's August 2, 2004 compliance

¹⁰ Verizon will undoubtedly claim that it was relieved from this condition 36 months from closing of the merger. However, as the FCC stated in adopting the 36 month deadline, "The conditions we adopt today will remain effective and enforceable for 36 months, unless otherwise specified in the relevant condition." *Bell Atlantic/GTE Merger Order* at ¶ 255. Of course, as described above, that is exactly what the FCC did in specifically establishing the UNE unbundling and cost-based rate conditions by superceding the 36 month deadline with its final, non-appealable order requirement.

tariff are the rates that this Commission has determined are cost-based, those rates must become effective as planned to comply with the merger conditions.

19. Based on the foregoing, Verizon's September 14, 2004 tariff supplement should be rejected or, at a minimum, suspended and the Commission should require that Verizon's August 2 compliance tariff become effective as planned on October 1, 2004.

WHEREFORE, for all of the foregoing reasons, the PCC requests that the Commission reject or suspend Verizon's September 14, 2004 tariff supplement

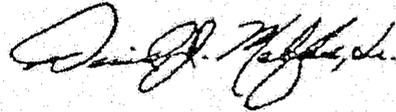


Daniel Clearfield
Alan Kohler
Wolf, Block, Schorr and Solis-Cohen LLP
212 Locust Street, Suite 300
Harrisburg, PA 17101
(717) 237-7172

Dated: September 27, 2004

VERIFICATION

I, David J. Malfara, Sr., President and Chief Executive Officer of Remi Retail Communications, LLC hereby state that the facts set forth in the attached Complaint and Request for Suspension of Tariff Supplements are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

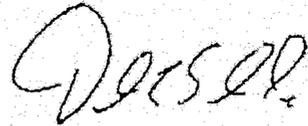


David J. Malfara, President and Chief
Executive Officer
Remi Retail Communications, LLC

Date: September 27, 2004

VERIFICATION

I, David E. Schwencke, President of Full Service Computing Corporation t/a Full Service Network, hereby state that the facts set forth in the attached Complaint and Request for Suspension of Tariff Supplements are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

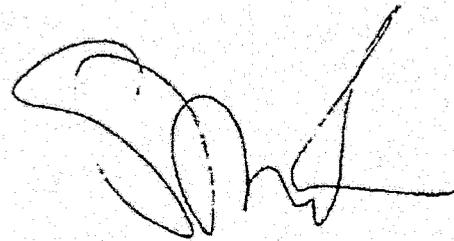


David E. Schwencke, President
Full Service Computing Corp.
t/a Full Service Network

Date: September 27, 2004

VERIFICATION

I, Scott Dulin, Senior-Vice President of ATX Licensing, Inc. hereby state that the facts set forth in the attached Complaint and Request for Suspension of Tariff Supplements are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

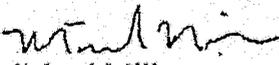


Scott Dulin, Senior Vice-President
ATX Licensing, Inc.

Date: September 27, 2004

VERIFICATION

I, Michael Miller, Vice President of Line Systems, Inc. hereby state that the facts set forth in the attached Complaint and Request for Suspension of Tariff Supplements are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).


Michael Miller,
Line Systems, Inc.

Date: September 27, 2004

PUBLIC REDACTED VERSION

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Generic Investigation of Verizon
Pennsylvania, Inc.'s Unbundled
Network Element Rates

)
)
)

Docket No. R-00016683

JOINT INITIAL POST-HEARING BRIEF OF
AT&T COMMUNICATIONS OF PENNSYLVANIA, INC.
AND MCI WORLDCOM NETWORK SERVICES, INC.

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March 8, 2002

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looking" assumptions to the number of nodes per ring and the average distance between the nodes based on work by its interoffice traffic experts. But Verizon's model does not attempt to identify the actual network configuration or seek to develop the SONET rings that would support the demand on the network. Clearly, the Synthesis Model goes farther than Verizon's interoffice cost study and develops the facilities to serve the projected demand.

Verizon's various criticisms of the Synthesis Model are largely without merit. A principal complaint by Verizon about the Synthesis Model is that it does not take into account the point-to-point traffic in developing facilities. Verizon Stmt. 9.0 (Gansert Reb.) at 22-23. But this criticism applies equally to Verizon's cost model, which does not attempt to model a forward-looking network. AT&T/WCOM Ex. 10 (Va. Tr. 5547-51). Verizon also criticizes the Synthesis Model for underestimating the facilities, but this criticism ignores the fact that the Synthesis Model common transport costs are higher than those of Verizon.

The interoffice module of the Synthesis Model is by no means perfect, but it provides an appropriate, if conservative, estimate of common transport costs. If, however, the Commission decides to use Verizon's common transport costs, those costs were developed using the same underlying cost elements set forth in Verizon's dedicated transport cost study, and accordingly the same adjustments proposed by AT&T and WorldCom should be made to the common transport costs.

J. OSS/Access To OSS

Verizon proposes to apply a recurring "Access to OSS" charge of \$0.83 or \$0.78 per month per line to all UNE loops, UNE platforms and resale loops. Verizon asserts that this charge is designed to recover: "(1) initial development costs to make ... access to operations support systems possible; and (2) the associated recurring capital costs and ongoing maintenance expenses associated with provisioning OSS Access on an ongoing basis." Verizon Stmt. 1.0

(Recurring Cost Panel Dir.) at 126-27. Verizon has failed to justify recovery of either set of OSS access charges.

I. Recovery Of Competition-Onset Costs

The one-time development costs in Verizon's "access to OSS" study are caused by the transition to a competitive environment, not by new entrants' orders for UNEs. Therefore, it is inappropriate to recover these costs solely from new entrants. Because new entrants incur costs for their own portion of the electronic gateway between their operation and Verizon's OSS, the simplest competitively neutral mechanism for cost recovery is to require each company to bear its own costs for access to OSS. AT&T/WCOM Stmt. 8.0 (AT&T/WCOM Recurring Cost Panel Reb.) 140-47. This procedure is also the only way to give Verizon an incentive to select the most efficient means of complying with its competition-onset obligations. If Verizon is allowed to pass on to CLECs the costs of developing the necessary new gateways and functions, Verizon's incentive will be to do so in as costly and inefficient manner as possible. *Id.*

If the Commission authorizes any explicit charge for access to OSS charge, however, the charge should take the form of a competitively neutral surcharge on all Pennsylvania telecommunications users.¹³¹ Verizon's surrebuttal testimony asserts that an end-user surcharge of this kind would be unlawful and the source of an improper subsidy for CLECs.¹³² Verizon itself proposed recovering OSS costs through an end-user surcharge in Hawaii, however, and has consented to a similar arrangement in New York.¹³³

¹³¹ AT&T/WCOM Stmt. 8.0 (AT&T/WCOM Recurring Cost Panel Reb.) at 148-52 (citing state and FCC precedent); Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Services, Rulemaking 95-04-043 (Cal. PUC 9/8/00), at 13.

¹³² Verizon Stmt. 1.1 (Recurring Cost Panel Sur.) at 216-26; Verizon Stmt. 3.2 (Shelanski-Tardiff Sur.) at 39.

¹³³ Tr. 355-56; AT&T Exh. 29 (Verizon opening brief to the Hawaii PUC filed Jan. 10, 2001) at 12-13; AT&T/WCOM Ex. 4 (Va. Tr. 3940-43 (Minion)).

Based on Verizon's reported access to OSS costs, an eight-cent per month per line surcharge would be ample to recover all of the alleged costs over a ten-year period. Even the eight-cent per month surcharge figure is likely too high, because Verizon's access to OSS cost study almost certainly reflects costs that are embedded or short-run, rather than forward-looking and long run;¹³⁴ costs of systems that are redundant or obsolete;¹³⁵ costs incurred to satisfy FCC conditions to the approval of the mergers that created Verizon;¹³⁶ and costs that Verizon has also proposed to recover in its recurring charges for individual UNEs or its charges to resellers of wholesale service.¹³⁷ AT&T/WCOM Stmt. 8.0 (AT&T/WCOM Recurring Cost Panel Reb.) at 153-59. The FCC has no way to verify that these improper costs were excluded: Verizon's cost study documentation is too cursory and incomplete. AT&T/WCOM Stmt. 8.0 (AT&T/WCOM Recurring Cost Panel Reb.) at 153-59; AT&T/WCOM Exh. 5 (Va. Tr. 3975-76 (Murray)).

2. Recovery Of Ongoing OSS Expenses

Approximately 56 percent of Verizon's proposed Access to OSS charge is purportedly designed to recover the ongoing costs of maintaining and improving OSS. Verizon has not estimated these ongoing costs directly, and has simply *assumed* that annual software maintenance costs will equal 15 percent of initial development costs. Verizon provides virtually no

¹³⁴ AT&T/WCOM Stmt. 8.0 (AT&T/WCOM Recurring Cost Panel Reb.) at 153-54.

¹³⁵ *Id.* at 157. Verizon purported to design its OSS access charge to recover the OSS development costs the company incurred during 1996-99. The OSS systems developed during 1996-99 that are now partially or wholly obsolete include certain billing systems that have been superseded by Express Track; the Verizon South preorder graphical user interface ("GUI") known as ECG; and the basic ordering interfaces that preceded Local Service Ordering Guide ("LSOG") 4 and 5. AT&T/WCOM Ex. 4 (Va. Tr. 3914-24 (Minion)).

¹³⁶ AT&T/WCOM Stmt. 8.0 (AT&T/WCOM Recurring Cost Panel Reb.) at 157, AT&T/WCOM Ex. 4 (Va. Tr. 3930-3932 (Minion)).

¹³⁷ AT&T/WCOM Stmt. 8.0 (AT&T/WCOM Recurring Cost Panel Reb.) at 157-58; Va. Tr. 3957-59 (Murray) (explaining nature of potential double-recovery); *Id.* at 3962-64 (colloquy between Mr. Minion and FCC Staff).

support for this ratio, makes no attempt to account for reductions in OSS computer costs over time, and, in any event, cannot reasonably apply this ratio to OSS development costs that are themselves inflated. For these and other reasons, Verizon should be required to recover its ongoing OSS costs in the same way it captures all normal forward-looking recurring OSS expenses, through its normal cost factors. AT&T/WCOM Stmt. 8.0 (AT&T/WCOM Recurring Cost Panel Reb.) at 151-65.

K. Daily Usage File ("DUF")

Verizon has proposed several Daily Usage File ("DUF") charges for recording and transmitting the DUF messages competitors with records of their customers' intraLATA local and toll usage detail for billing purposes. The most significant of these charges is a per-message "Message Recording" charge of \$0.00153 per message. AT&T/WCOM Stmt. 8.0 (AT&T/WCOM Recurring Cost Panel Reb.) at 165-66.

This proposed charge is approximately *six times* the current price in Pennsylvania of \$.000261 per message (which is itself inflated), and also well out of proportion with the prices adopted in other states. For a subscriber that generates 200 messages per line per month, this charge would add \$0.30 per line per month to the CLEC's costs of serving that customer. *Id.*

These costs are inflated in several respects. First, the types of costs Verizon has included here are the same types of costs it claims to be recovering through its proposed annual cost factors; hence, including these supposed labor costs in the per-message DUF charge would likely double-recover Verizon's costs. *Id.* at 166-70.

Second, Verizon has spread the DUF costs over an implausibly low number of messages, and has compounded the error by assuming an implausibly low rate of growth in demand. Specifically, Verizon has assumed that the total demand for DUF messages in the region will be under [BEGIN VERIZON PROPRIETARY] [END VERIZON

PROPRIETARY] million per year in 2000, and will increase by only slightly more than [BEGIN VERIZON PROPRIETARY] [END VERIZON PROPRIETARY] percent per year after that. AT&T/WCOM Exh. 4 (Va. Tr. 3989) (Minion). Verizon Cost Study Va. Exh. F-3. This is much lower than the rate of growth that Verizon predicts for overall demand for resale and UNE-P in the same region during the same period:

[BEGIN VERIZON PROPRIETARY]

[END VERIZON PROPRIETARY]

Assume that the average line will generate 200 messages per month, the disparity between the two sets of growth rates implies that only [BEGIN VERIZON PROPRIETARY] [END VERIZON PROPRIETARY] percent of resale and UNE-P lines will have customers subscribing to DUF in the years 2002, 2003 and 2004, respectively. These percentages are much lower than the take rates assumed by Verizon in *sizing* its DUF service center, however. For that purpose, Verizon assumed that a *majority* of resale and UNE-P customers would subscribe to DUF. See AT&T/WCOM Exh. 4 (VA Tr. 3992) (Minion).

There is no indication that Verizon has ever made any "adjustment on a forward-looking basis to match the size of the CBO [customer billing organization] to the size of the demand" AT&T/WCOM Ex.4 (Va. Tr. 3999) (Murray). Because the predominantly labor-related costs of the CBO should be closely scaleable with demand, Verizon's failure to reduce

¹³⁸ Figure for 2000 comes from Verizon response to MCI WorldCom/AT&T Request IV-7.

Cynthia L. Randall
Assistant General Counsel



ORIGINAL

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July 31, 2006

Via UPS Overnight Delivery

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Pennsylvania Public Utility Commission
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Harrisburg, PA 17120

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JUL 31 2006

PENNSYLVANIA PUBLIC UTILITY COMMISSION
SECRETARY'S OFFICE

Re: **Pennsylvania Carriers' Coalition
v. Verizon Pennsylvania Inc.
Docket No. C-20065798**

Dear Secretary McNulty:

Enclosed please find the original and nine copies of Verizon Pennsylvania Inc.'s Memorandum of Law in Opposition to the PCC's Motion for Summary Judgment, being filed in the above captioned matter. In addition, enclosed please find an electronic copy on diskette of the Memorandum of Law, in Word format, in the same matter.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

Cynthia L. Randall

CLR/slb
Enc.

cc: **Via UPS Overnight Delivery**
The Honorable Marlane R. Chestnut
Certificate of Service

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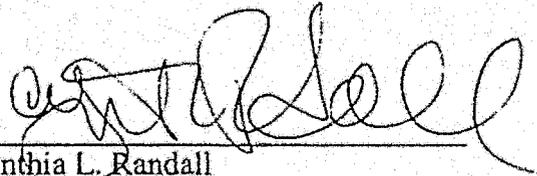
CERTIFICATE OF SERVICE

I, Cynthia L. Randall, hereby certify that I have this day served true copies of Verizon Pennsylvania Inc.'s Memorandum of Law in Opposition to the PCC's Motion for Summary Judgment, upon the party listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 31st day of July, 2006.

VIA E-MAIL AND UPS OVERNIGHT DELIVERY

Mark Stewart, Esquire
Wolf Block Schorr
& Solis-Cohen, LLP
213 Market Street, 9th Floor
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JUL 31 2006

PENNSYLVANIA PUBLIC UTILITY COMMISSION
REGISTRAR'S BUREAU

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Carriers' Coalition,
Complainant,

v.

Verizon Pennsylvania Inc.,
Respondent.

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No. C-20065798

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JUL 31 2006

PA PUBLIC UTILITY COMMISSION
PHILADELPHIA'S BUREAU

VERIZON PENNSYLVANIA INC.'S MEMORANDUM OF LAW
IN OPPOSITION TO THE PCC'S MOTION FOR SUMMARY JUDGMENT

DOCUMENT
FOLDER

DOCKETED
AUG 7 2006

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ORIGINAL

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**VERIZON PENNSYLVANIA INC.'S MEMORANDUM OF LAW
IN OPPOSITION TO THE PCC'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Lacking in any factual or legal support for its claims, the PCC's Motion for Partial Summary Judgment and Memorandum in Support Thereof ("PCC Brief") mischaracterizes the governing tariffs, statutes, caselaw and even the limited "stipulation" of agreed facts attached to its brief. The PCC never denies that OSS and DUF costs are caused by resellers and that resellers are legally required to pay them. Instead, the PCC relies on baseless technical arguments in an attempt to create a loophole and foist the costs its member companies should rightfully pay onto Verizon or other carriers.

First, the PCC unconvincingly attempts to avoid the preclusive effect of the Commission's *Generic UNE* orders approving these charges to resellers and their placement in Verizon's Tariff 216. Arguing that it did not have a "sufficient level of incentive to litigate" the issues in the *Generic UNE* case (PCC Brief at 17), the PCC seeks to be excused from well-established legal doctrines that preclude it from challenging these rates now when it should have raised any such claims in the *Generic UNE* case. But the law does not allow this Commission to grant the PCC the "second bite at the apple" that it seeks, and its complaint should be dismissed.

Second, the PCC argues that the challenged rates are "untariffed," even though they plainly appear in Tariff 216, which by its terms is applicable to services provided to all local exchange companies. The PCC tries to justify this claim by making a false distinction between the rates paid by resellers and the rates paid by other CLECs for the same service, but there is no support for this distinction in the tariffs, in the *Generic UNE* orders, or anywhere else.

Third, the PCC attempts to evade its fair share of the Access to OSS costs by arguing that resold telephone lines associated with a high-capacity service platform should not pay the Access to OSS charge, even though both the *Generic UNE Recommended Decision* adopted by the Commission and the tariff clearly state that the charge applies on a "per line" basis. The PCC attempts to confuse the issue by asserting, without any support, that "line" actually means "loop" and creating the new phrase "line/loop." Through this wordplay, the PCC would have a CLEC serving a large business with 23 resold lines provided on a high capacity platform (the so-called "line/loop") pay the same Access to OSS charge as a CLEC providing one residential POTS line, thus shifting a disproportionate share of cost recovery to CLECs that serve mass market customers, contrary to the terms of Verizon's Commission-approved tariff.

Fourth, the PCC argues in a conclusory fashion that the Telecommunications Act requires that costs for Access to OSS and DUF services be reflected in the wholesale discount for the resale of retail telecommunications service, not in a separate charge. But the language it quotes says *nothing whatsoever* about whether the wholesale discount for resold retail telecommunications services should also incorporate the cost of services provided directly to resale carriers. In fact, a fair reading of the Act would *not* include those costs as part of the wholesale discount, which only takes into account costs to provide retail service that are "avoided" as a result of providing service at wholesale, not *additional* costs that are incurred as a result of providing wholesale service. Thus, the Commission was well within its authority to order that Verizon collect these costs – which are not part of Verizon's costs to provide retail service, but are incurred solely to

provide services to other carriers – through a separate per-line charge on resellers rather than artificially building them into the resale discount.

The PCC's arguments amount to little more than wordplay and are completely devoid of the factual and legal support that would be required to find in favor of the PCC on its claim that resellers have been improperly charged for "untariffed" services since October of 2004. Because the PCC has not met its burden of demonstrating that it is entitled to judgment in its favor under the undisputed facts and governing law, its motion must be denied. Further, because all of its claims are precluded by the holdings in the *Generic UNE* proceeding, the complaint must be dismissed with prejudice.

DISCUSSION

1. The Complaint is Barred as a Matter of Law by the Commission's Decisions in the *Generic UNE* Matter

As discussed in detail in Verizon's Memorandum in Support of its Motion for Summary Judgment ("Verizon Main Brief"), the Commission approved the rates at issue in the *Generic UNE* proceeding after considering numerous challenges by CLECs and other parties. The Commission explicitly found that the rates would apply to resellers because they were specifically calculated to spread the relevant costs across both UNE and resold lines.¹ FSN and ATX were parties to that proceeding. LSI also participated in that proceeding through the PCC. Although its late-filed motion to intervene was denied, for purposes of the doctrine of *res judicata* LSI remained in privity with the other PCC member companies – indeed, the Commission held that its legal interests were represented by those parties.² Although it was fairly disclosed in the record and

¹ Verizon Main Brief at 2-6.

² Verizon Main Brief at 11-12.

acknowledged by the ALJ and the Commission throughout the proceeding that the Access to OSS and DUF rates would apply to resellers, neither the PCC nor its member companies ever challenged the application of the rates to resellers. Nor did they challenge Verizon's compliance filing showing that those rates would appear in Tariff 216.³ For these reasons, the PCC is precluded by *res judicata* from challenging these rates in the instant proceeding.⁴

The PCC argues that the claims made in the instant matter, while related to those litigated in the *Generic UNE* matter, are not precisely the same. Even if that were true, it would not defeat the application of *res judicata*: "Importantly, *res judicata* will not be defeated by minor differences of form, parties or allegations where the controlling issues have been resolved in a prior proceeding in which the present parties had an opportunity to appear and assert their rights."⁵ The PCC claims that the controlling issues were not decided in *Generic UNE* because "the plain text of the PUC's Final Opinion and Order and its Compliance Filing Order show that the Commission made no determination that Verizon had tariffed a Resale rate via its Tariff 216 amendments."⁶ The controlling issue, however, is not whether the Commission approved, or Verizon tariffed, a "resale rate" (whatever that means) – it is whether the Commission approved, and Verizon tariffed, rates for Access to OSS and DUF service that apply to both CLECs and resellers. The Commission expressly did so.

³ Verizon Main Brief at 5, 12.

⁴ See Verizon Main Brief at 8-12.

⁵ *Jett v. Beech Interplex, Inc. et al*, 2004 U.S. Dist. LEXIS 13352 (E.D. Pa. 2004), quoting *Helmig v. Rockwell Mfg. Co.*, 389 Pa. 21, 131 A.2d 622, 627 (Pa. 1957). See also, Verizon Main Brief at 8-11.

⁶ PCC Brief at 13.

As discussed in detail in Verizon's Main Brief, the application of these rates to resellers was essential to the Commission's approval because the rates were specifically calculated to recover Verizon's costs to provide these services by spreading them across all cost-causers, including resellers. Thus, the rates that were approved for placement in Tariff 216 – a tariff that by its own terms applies broadly to “services provided by [Verizon PA] to Other Telephone Companies that have been authorized by the [PUC] to provide local exchange service in Pennsylvania”⁷ – necessarily apply to resellers and not just UNE-based CLECs. If the PCC were now permitted to collaterally attack the Commissions' holding and block the application of the rates to resellers, the entire rate structure would be invalidated. Verizon would no longer be able to recover all the costs to which it is entitled, and thus the rates would have to be reformulated, re-litigated, and re-approved,⁸ and the resale discount recalculated to include the costs to provide Access to OSS and DUF, which it currently does not. *Res judicata* bars this type of challenge to settled rates.

With respect to collateral estoppel,⁹ the PCC argues that the doctrine does not apply because the issues raised here were not litigated in *Generic UNE* because “the PCC's challenge to the manner of setting Verizon's wholesale rates for the resale of its telecommunications service was never addressed, much less litigated, in the *Generic*

⁷ Tariff 216, Sec. 1(A), Third Revised Sheet 1

⁸ Verizon Main Brief at 9-10.

⁹ As stated in Verizon's Main Brief, it is not necessary to invoke the doctrine of collateral estoppel because *res judicata* bars the entire complaint. However, Verizon maintains that the doctrine would apply to preclude the PCC from re-litigating the issues of whether the applicable rates were properly applied to resellers, whether they apply on a per-line basis, and whether it was appropriate to recover Access to OSS and DUF costs through tariffed rates rather than an offset to the wholesale discount.

UNE proceeding.”¹⁰ This argument is irrelevant, however, because the instant Complaint does not challenge the manner of setting Verizon’s wholesale rates for the resale of its telecommunications service. Access to OSS and DUF service are provided only to other telephone companies and are not retail telecommunications services that may be resold to end users (end users have no reason to purchase OSS or DUF). The rates for these services are the only ones challenged in the Complaint. While the PCC does argue that the costs associated with Access to OSS and DUF should be recovered from resellers via offsets to the wholesale discounts instead of being separately assessed through the challenged rates, that issue actually *was* raised and litigated in *Generic UNE*, and necessarily rejected when the rates were approved.¹¹

Finally, the PCC argues that the approval of Access to OSS and DUF charges as applied to resellers was not “essential” to the judgment in *Generic UNE* as required by the doctrine of collateral estoppel because the “scope, focus and intent” of the *Generic UNE* proceeding was “to review the just and reasonableness of Verizon’s *UNE* rates.” PCC Brief at 14, par. 20. This argument is meritless because the “scope, focus and intent” of a proceeding are simply not relevant to the question of whether a particular issue was essential to the *judgment*. In this case, the judgment approved a number of rates including the challenged rates. For the reasons discussed above and set forth in

¹⁰ PCC Brief at 13.

¹¹ Verizon Main Brief at 13-14. The PCC claims that the Commission’s decision in *Generic UNE* cannot be preclusive on this issue because it is inconsistent with the Commission’s order approving the now-invalid wholesale discounts that PCC contends did contain an offset for OSS related costs. This argument is meritless for two reasons. First, as discussed in more detail in section 4 below, the OSS related costs factored into the old wholesale discount are different from the Access to OSS costs recovered through the rates at issue. More importantly, however, the Commission’s approval of those discounts was invalidated by the federal courts. Obviously there is no support for the proposition that a judgment cannot be preclusive because it is inconsistent with another judgment that was subsequently reversed.

Verizon's Main Brief at 13, the application of these rates to resellers is essential to the judgment approving the rates because the rates were formulated to recover specified costs by spreading them across two categories of users – UNE purchasers and resellers. The rates would fail of their essential purpose if one category of users were excused from paying them.

In any event, as discussed in Verizon's Main brief at 14-15, even if common law doctrines of *res judicata* and/or collateral estoppel did not preclude the PCC from making the claims in the Complaint, which they do, the PCC's collateral attack of the holdings in *Generic UNE* is barred by statute. The Commission already resolved all of the legal issues raised by the PCC when it approved the rates at issue and approved their placement in Tariff 216. 66 Pa.C.S. § 316 dictates that Commission orders "shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review." The application of precedent therefore dictates that the PCC's motion for summary judgment be denied and that Verizon's be granted.

2. The Rates are Properly Tariffed as to Resellers

The PCC contends that the Access to OSS and DUF rates tariffed in Tariff 216 are somehow different from the same rates "as applied to Resale service." As the PCC argues, "Verizon's amendments to its UNE tariff, Tariff 216, did not in any way apply the OSS and DUF charges to Verizon's Resale service."¹² As discussed above, PCC's characterization of Tariff 216 as a "UNE" tariff is a limitation of the PCC's own fabrication because the tariff by its own terms applies more broadly to services provided to "other telephone companies that have been authorized by the [PUC] to provide local

¹² PCC Brief at 19, par. 29.

exchange service in Pennsylvania” – a category that includes resellers. Similarly, the PCC’s invention of the term “Resale Service”¹³ to which the charges at issue are supposedly applied is meritless. “Resale service” does not exist under the tariffs or the applicable law. Rather, under the Telecommunications Act, carriers may *resell* Verizon’s *retail* telecommunications services at a discount. Tariff 1 sets forth certain of Verizon’s noncompetitive retail services, and also contains some provisions relating to resale including the discounts applicable to retail rates. It is undisputed that neither Access to OSS nor DUF is a retail telecommunications service that may be resold. Rather, they are services provided *only* to other telephone companies. Further, the rates for Access to OSS and DUF service are the same for all telephone companies that use these services. Therefore the PCC’s argument that the “resale based OSS and DUF charges” are somehow different from the charges set forth in Tariff 216 (and therefore “untariffed”) is factually and legally incorrect.

For example, the PCC cites 66 Pa. C.S. section 1303, which provides that a public utility may not charge “a greater or lesser rate *for any service rendered. . .* than that specified in the tariffs of such public utility *applicable thereto.*” PCC brief at 17 (emphasis in original). According to the PCC, this language means that the “OSS and DUF charges must be shown in Verizon’s tariffs as being applicable specifically to Resale.” The statute says no such thing, however. The statute requires that Verizon charge the tariffed rate for each service. In this case, resellers were charged the tariffed rates for Access to OSS and DUF services (not the nonexistent “resale service”). There is

¹³ See e.g., PCC Brief at 19, par. 29 (“the provisions addressing Resale service are predominantly in Verizon’s retail tariff”); Id. at 20, par. 31 (“the actual text of Verizon’s tariff amendments related to those charges offers no clue whatsoever that the charges are applicable to Resale service.”); Id. at 20, par. 32 (“[Verizon] claims to have implemented new charges on Resale service. . .”).

no dispute that resellers access Verizon's OSS and that they use DUF service, to the extent that they affirmatively order it. Tariff 216 clearly states that the rates at issue apply to Access to OSS and DUF service and therefore complies with section 1303.

The PCC cites *The Electric Materials Company v. North East Heat & Light Company*, 1994 Pa. PUC LEXIS 12, **3-4 for the proposition that "resale based OSS and DUF charges" cannot be imposed using the "UNE" rates set forth in Tariff 216. That case likewise does not support the PCC's argument. In *Electric Materials*, the Commission held that the gas company was not providing the firm transportation service for which it was charging the customer but instead was providing an inferior and unauthorized interruptible service, for which no rate was tariffed. In this case, resellers are getting the benefit of the tariffed services, at the rates for those services that were approved by the Commission to be paid by both CLECs and resellers. *Electric Materials* therefore is inapposite.

The PCC's exaggerated argument that Verizon is "picking and choosing" rates from Tariff 216 to charge to resellers is baseless. The record indisputably demonstrates that both of these rates were specifically calculated and knowingly approved by the Commission for application to resellers, and in this respect are quite distinct from the UNE "loop and port charges" that the PCC refers to in its brief. Accordingly, Verizon's application of the Access to OSS and DUF rates to resellers is in no way arbitrary, should come as no surprise to the PCC, and does not start the Commission down a "slippery slope" whereby any UNE rate may be charged to resellers, as the PCC suggests.

Although the PCC vainly attempts to distinguish the "resale-based" OSS and DUF charges from the charges set forth in Tariff 216, the distinction is illusory and the

rates are one and the same. Further, because the rates are for services provided to other telephone companies, and not for retail telecommunications services, they are properly tariffed in Tariff 216 rather than Tariff 1. The PCC's motion for summary judgment should therefore be denied.

3. The Access to OSS Rate Applies on a Per-Line, not Per-Loop Basis

Apparently unable to support its contention that the access to OSS rate applies on a "per loop" basis, the PCC has abandoned that position and now argues that the charges apply on a "per line" basis, but that "loop" and "line" mean the same thing. In the Joint Issues list filed by PCC's counsel with the presiding officer, the parties agreed that the issue to be resolved is "Did Verizon misapply the access to OSS charge in certain instances by charging the fee on a per line rather than a per loop basis?"¹⁴ The PCC now invalidates that agreed-upon question by collapsing the two terms and referring in its brief to "line/loops."¹⁵ This semantic sleight of hand should be recognized for what it is: a concession that the charges are properly applied on a "per line" basis, as the tariff clearly states and as specifically ordered by the ALJ in his Recommended Decision. *See* Verizon Main Brief at 17-19. The only issue to be resolved is whether Verizon is applying the charge on a per-line basis with respect to the high capacity services purchased by LSI for resale.

LSI purchases ISDN PRI service from Verizon for resale.¹⁶ ISDN PRI is a central office based service arrangement that provides a 1.544 Mbps digital connection between

¹⁴ *See* Joint Issues List filed by counsel for the PCC on June 19, 2006

¹⁵ *See* PCC Brief at 24-25.

¹⁶ *See* Appendix to PCC's Brief at paragraph 3.

the central office and the customer premises.¹⁷ This service is explained in Verizon's tariff Pa. PUC No. 500, section 22 ("PRI tariff"). In simple terms, it is a high capacity network interface supporting 23 voice/data lines that can be configured in different ways. Each ISDN PRI connection provides 24 "channels", one of which is a "D" channel used for signaling and control functions and 23 of which are voice capable "B" channels which "provide the customer with the capabilities of simultaneous access, transmission and switching of voice, data and imaging services via channelized transport." *Id.* In other words, each of the B channels functions as a telephone line, giving the customer the capability to have 23 separate telephone calls proceeding simultaneously.

As the tariff explains: "software defined lines are lines which are provisioned on the Primary Rate Access facility by establishing their identity in central office translations. These lines physically ride on the 4-wire ISDN Primary Rate Access Facility." *Id.* Therefore, the ISDN PRI digital connection supports 23 software defined lines, each of which may be used simultaneously to carry a circuit-switched telephone call or data transmission. These lines can be provisioned in different ways, to provide direct inward dial service, direct outward dial service, two-way service, WATS service, 800 number service or call-by-call service selection. Each PRI can support up to four different configurations on the 23 different lines.

It is undisputed that Verizon bills the tariffed OSS charge on each of the 23 voice-capable lines ("B" channels) associated with each PRI. It does not, as the PCC suggests in its brief, assess an additional charge on the "loop." *See* Appendix to the PCC's brief ("in the case of a customer that purchases ISDN PRI service from Verizon, Verizon applies the Access to OSS charge to each of the 23 voice/data channels.") Each of these

¹⁷ *Id.* at 1.

23 channels is a telephone line from a provisioning and usage standpoint. The PCC argues that the entire ISDN PRI interface arrangement constitutes only one "line" that should be charged the 82¢ Access to OSS rate only once because it has only one billing telephone number, but that unsupported self-serving assertion is not consistent with the tariff or the facts. The PCC's contention is akin to arguing that if there were a tax that applied per-apple, a 25 pound bag of apples should be taxed once because it is sold in one bag. The PCC's interpretation would result in the counter-intuitive situation that a carrier reselling 23 separate telephone lines to a larger business customer, which happen to be provisioned over an ISDN PRI, would pay the identical amount for Access to OSS as a carrier reselling one ordinary POTS line to a residential or small business customer. This would allow carriers like the PCC members, which resell expensive high-capacity business services, to pay a disproportionately low percentage of Access to OSS costs, while those reselling services to residential and small business customers with one or two lines would pay a disproportionately high percentage. The Commission-approved method of spreading OSS costs across the cost-causers is the most fair and simple method – the charge is assessed once on each resold line as set forth in Verizon's tariff. Verizon is complying with the tariff with respect to ISDN PRI arrangements, and the PCC's motion for summary judgment should be denied.

The PCC's claims with respect to Direct Inward Dialing ("DID") are similarly meritless. DID is a service that permits incoming exchange calls to be dialed directly by a calling party to a specific extension associated with a PBX or other customer premises equipment without the assistance of an attendant.¹⁸ The PRI channels discussed above can be configured for direct inward dialing, as Verizon believes is the case for some of

¹⁸ See Appendix to PCC's Brief at 4.

the channels in the ISDN PRI service purchased by LSI, although LSI has not specifically so alleged. Ordinary POTS telephone lines can also be configured for DID. See Verizon tariff Pa. PUC No. 500, section 27.

The PCC states "as to certain configurations of DIDs purchased by LSI, Verizon applies the OSS charge to each internal extension or direct inward dial telephone number related to the DID." While the PCC refers to the Appendix to its Brief to support this statement, the Appendix contains no such statement. To the extent that LSI is referring to ISDN PRI "B" channels that are configured for DID service, the OSS charge is assessed on the underlying line (B channel) but not on the DID service itself. Similarly, where DID is added as a feature to an ordinary telephone line, then the Access to OSS charge is appropriately applied to each underlying telephone line. Verizon is not aware of, nor has LSI called to its attention, any other arrangement for DID service purchased by LSI. For the reasons discussed above, it is appropriate to assess the OSS charge on each B channel and on each telephone line, regardless of whether DID service is applied as a feature on that line or not.

With respect to the remote call forwarding feature, the parties agree that the OSS charge is assessed on the underlying line, not the feature. The PCC concedes that this "resolves the issue" with respect to remote call forwarding. See PCC Brief at 24, n. 73.

Because the PCC has conceded that the OSS charge properly applies on a per line basis and Verizon is properly charging it on a per line basis, the PCC's motion for summary judgment must be denied, and Verizon's motion for summary judgment should be granted.

4. The Telecommunications Act Does Not Require that all Charges to Resellers Be Reflected in the Wholesale Discount

The PCC argues that the cost of Access to OSS and DUF service must be built into the wholesale discount if such costs are to be imposed on resellers. In so arguing, the PCC relies on language from section 251 and 252 of the Telecommunications Act. Section 251 imposes a duty to “offer for resale at wholesale rates any telecommunications service that the carrier provides at retail,” while Section 252 states that “a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.” 47 U.S.C. §§ 251(c)(4) and 252(d)(3). As discussed in Verizon’s Main Brief at 19-22, neither Access to OSS nor DUF service is a “telecommunications service” offered at retail as defined in the Act. Nor are the costs associated with these services “marketing, billing, collection, [or] other” costs that “will be avoided” when providing retail services for resale under the Act because they are not incurred in the process of providing retail service to end users. These are costs incurred by Verizon to provide services that Verizon has been required to provide directly to other telephone companies, including resellers, and are costs that it incurs over and above the costs of providing service to retail customers. Therefore they fall outside the wholesale discount setting process, and the language from the Act cited by the PCC is irrelevant. Significantly, despite the plethora of federal cases discussing the wholesale discount-setting process, the PCC cannot cite a single case supporting its argument that the cost of services provided directly to resellers, and which are not provided to retail customers,

must be reflected in the wholesale discount for retail services and cannot be assessed by separate rates.

The PCC next argues that these costs were once recovered as an *offset* to avoidable costs in the Commission's 1997 decision in the resale case – which decision was subsequently overturned by the United States Court of Appeals for the Third Circuit as being contrary to federal law. According to the PCC, this precedent binds the Commission to require that ILECs always recover such costs through an offset in the resale discount. The PCC's argument is meritless, however, because these particular costs were not included in the offset to the first resale discount and because, even if they were, the Commission is not required to continue to use an offset methodology to recover such costs.

First, to the extent that the PCC assumes that the costs included in the Access to OSS rate that became effective in October of 2004 were the same costs included in calculations used to set the 1997 resale discount, the PCC has not proven that fact. The costs recovered by the 2004 Access to OSS rate were for initial development to modify Verizon's preexisting systems and develop new systems and interfaces necessary to make access to Verizon's OSS possible and for ongoing annual capital and operating costs associated with computer hardware and for software maintenance.¹⁹ The PCC cites ALJ Weismandel's 1996 recommended decision in the first resale discount proceeding adopting *OCA's* cost study offsetting certain one-time costs for servicing and interfacing with co-carriers (but no ongoing costs).²⁰ But Verizon's unrefuted testimony submitted

¹⁹ *Generic UNE*, VZ St. 1.0 filed 12/7/01 at 216.

²⁰ *See Pennsylvania Public Utility Commission v. Bell Atlantic Pennsylvania Inc. et al.* Docket No. R-00963578C0001 Recommended Decision (November 20, 1996)

in 2002 in the *Generic UNE* case (when the 1997 resale discount was still in effect) established that “expenses that were recovered in the wholesale discount were identified and subtracted” from the costs used to calculate the Access to OSS charge.²¹ This record evidence supported the Commission’s rejection of AT&T/MCI’s argument in the *Generic UNE* case that “Verizon’s access to OSS cost study” reflects costs that “Verizon has also proposed to recover in . . . its charges to resellers of wholesale services.”²² Accordingly, while the Commission did use an offset methodology, the PCC has not established that the offset covered the same costs that are being recovered here. In any event, since the Third Circuit held that the Commission’s 1997 methodology grossly overestimated Verizon’s avoided costs and provided too much of a discount from retail rates, the PCC cannot argue that any of Verizon’s OSS-related costs were actually recovered from resellers under these unlawfully low rates.

Second, even if the Commission once approved the use of an offset methodology (subtracting the OSS-related costs from avoided costs to artificially reduce the amount of costs avoided) to compensate Verizon for OSS-related costs, this does not mean that the Telecommunications Act requires such a methodology or that this Commission is thereafter forever bound to use that same method to recover these costs from resellers. There is no support for that proposition whatsoever. Since the Telecommunications Act does not dictate the method by which these costs may be recovered, the PUC was free to select any appropriate method for recovering them. *See, e.g. Bell Atlantic Delaware v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000) (“Nothing on the face of the Act prohibits

1996 Pa PUC LEXIS 207 * 59.

²¹ *Generic UNE*, VZ St. 1.0 filed 12/7/01 at 217.

²² *Generic UNE*, AT&T/WCom Main Brief at 169-70.

imposing an additional charge to compensate Bell for providing OSS access to its competitors.”). After the wholesale discounts that used an offset methodology were invalidated, the PUC chose to approve a different method of recovering OSS-related costs, i.e. the Access to OSS rate at issue. (The cost of DUF service was not part of the offset discussed in connection with the old, now-invalid wholesale discounts).

Further, while the PCC suggests (incorrectly, as discussed above) that the old resale discount already included the same OSS-related costs, the PCC does not and cannot argue that the *current* wholesale discount includes an offset for these costs, although that suggestion appears in the Complaint. In fact, the cost study that Verizon submitted for the record in that case, upon which the settlement establishing the discounts are based, contains no such offset.²³ If such an offset had been included, the wholesale price of resold services would be higher because the offset would have reduced avoided costs and resulted in a smaller discount. Indeed, in agreeing to the settlement with the PCC on October 29, 2004 that resulted in the currently effective resale discounts, Verizon was well-aware that the Commission had already approved the recovery of OSS costs from resellers through a separate per-line charge, and accordingly did not include such an offset in its cost study or insist on a smaller discount to reflect OSS costs that it was already recovering through a separate Commission-approved charge. It would be a denial of Verizon’s due process rights to now eliminate the per-line charge to resellers and hold that Verizon should have recovered these costs as an offset to the resale discount, as the PCC wrongly argues. The Commission has already ruled that these are costs Verizon is legally entitled to recover from resellers. Therefore, if it accepted the

²³ See Wholesale Rate for Resale Services Provided by Verizon Pennsylvania Inc., Docket No. R-00038516, Verizon Statement No. 1.0 Revised (August 23, 2004) and attached Exhibit (cost study).

PCC's meritless legal argument that the only way to recover these costs is through an offset to the resale discount, then at a minimum it would have to decrease the resale discount simultaneously with eliminating the Access to OSS charge to resellers in order to make Verizon whole and allow it to recover these costs.

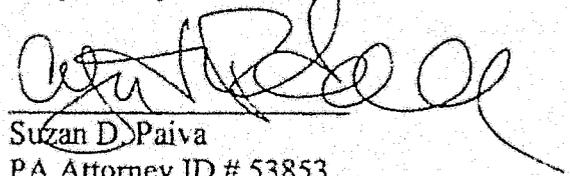
In short, the PCC companies are required to pay these costs through a per-line Access to OSS charge in accordance with the Commission's orders in the *Generic UNE* case, and the Commission was well within its authority to choose to recover these costs through a separate per-line charge rather than as an offset to avoided costs. The PCC's motion for summary judgment should therefore be denied.

CONCLUSION

For the reasons set forth above and in its Main Brief, Verizon respectfully requests that the PCC's Motion for Summary Judgment be denied, and that Verizon's Motion for Summary Judgment be granted.

Date: July 31, 2006

Respectfully submitted,



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GENERIC INVESTIGATION RE:
VERIZON PENNSYLVANIA INC.'S
UNBUNDLED NETWORK ELEMENT RATES

DOCKET NO. R-00016683

VERIZON PENNSYLVANIA INC.
STATEMENT NO. 1.0
(DIRECT TESTIMONY)

PANEL TESTIMONY ON RECURRING COSTS

Witnesses:

Ann A. Dean
Joseph Gansert
Thomas Mazziotti
Louis D. Minion
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DATED: DECEMBER 7, 2001

PUBLIC VERSION

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1 A. No. Unlike the case with unbundled loops, Verizon PA ordinarily would be
2 responsible for trouble testing on unbundled IOF facilities. Accordingly, the
3 costs associated with trouble testing on IOF facilities were already included
4 in the Network ACF for those facilities and thus did not require application
5 of an additional cost factor in connection with the EEL element.

6

7 VII. OSS

8 A. INTRODUCTION TO STUDY AND SUMMARY OF COSTS

9 Q. What does this section of testimony address?

10 A. This section of testimony describes the methodology that Verizon PA has
11 used to identify the costs Verizon PA has incurred and will continue to incur
12 in making its Operations Support Systems ("OSS") available to CLECs and
13 resellers. The Access to OSS UNE is defined by the FCC as consisting of
14 access to five OSS functions: (1) pre-ordering, (2) ordering, (3)
15 provisioning, (4) maintenance and repair, and (5) billing.

16

17 Q. Please provide a brief overview of the types of OSS costs that are related
18 to the Access to OSS UNE?

19 A. There are two primary categories of OSS costs that Verizon PA has incurred
20 or will continue to incur in making Verizon PA's OSS available to CLECs:

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1 (1) initial development costs to modify Verizon PA's pre-existing systems
2 and develop new systems and interfaces necessary to make such access to
3 Verizon PA's OSS possible; and (2) the associated recurring capital costs and
4 ongoing maintenance expenses associated with provisioning Access to OSS
5 on an ongoing basis. This testimony presents both of these costs and
6 proposes a methodology for recovering these costs.
7

8 **Q. Does Verizon have other OSS costs that are not included in the Access to**
9 **OSS charges?**

10 **A.** Yes. Verizon also incurred and will continue to incur costs in connection
11 with the development and ongoing provision of OSS. Some of these costs
12 are associated with provisioning certain specific UNEs or services required
13 by the FCC under the Telecommunications Act. For example, Verizon was
14 required to develop special software to provision line sharing and dark fiber.

15 When the development and maintenance cost associated with OSS is
16 specific to a particular UNE or related service or product, the cost is included
17 in the total UNE cost for that element. The Access to OSS UNE rate
18 recovers only the costs Verizon incurs for the specific OSS functionalities
19 and interfaces that permit CLECs general access to Verizon's systems.
20

21 **Q. Do any of the costs presented in this testimony include the costs of OSS**
22 **that are used for providing Verizon retail services?**

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1 A. No. All of the costs presented in this testimony reflect the OSS costs Verizon
2 incurs to provide wholesale products to CLECs and resellers.

3
4 Q. **Are any of the costs identified in this testimony associated with**
5 **improving Verizon's systems for its own use?**

6 A. No. The costs identified here relate only to developing or modifying systems
7 to facilitate access to Verizon's OSS by other carriers. None of the costs
8 identified here were for improving the basic functioning of the OSS for
9 Verizon PA's use.

10

11 Q. **Please describe how the Access to OSS cost study is organized.**

12 A. The study consists of two sections and is located in VZ-PA CS, Part F-5.
13 Part F-5, Workpaper 4, Page 1-12 presents the development and ongoing
14 costs of OSS access. Part F-5, Workpaper 4, Page 13 provides the demand
15 forecasts that form the basis of Verizon PA's cost recovery proposal.

16

17 Q. **Please summarize the costs Verizon PA has incurred and continues to**
18 **incur to provide the CLECs access to its OSS.**

19 A. As noted, there are initial development costs and recurring maintenance and
20 capital costs. Verizon PA has identified \$227 million for the entire Verizon
21 East footprint in initial development costs that are applicable to Verizon

1 East – South. Verizon PA has also identified approximately \$50 million in
2 ongoing recurring costs.

3
4 **Q. How did Verizon PA determine how to allocate these costs across the
5 footprint?**

6 **A.** Although Verizon PA's share of the initial development costs and ongoing
7 recurring costs based on existing access lines is approximately \$43.0 million
8 and \$9.1 million, respectively, Verizon PA instead proposes to recover the
9 total costs through monthly recurring charges to CLECs that are based on the
10 number of UNE loops, platform/combinations and resold lines that are
11 forecasted to be in service in Pennsylvania in the 10-year forecast period
12 described below. Verizon PA's proposed rate structure is presented in the
13 workpapers in Part F-5 of the cost studies. See VZ-PA CS, Part F-5.

14
15 **Q. How was Pennsylvania's share of the costs of providing access to OSS
16 determined?**

17 **A.** The total relevant regional costs associated with providing access to OSS
18 were attributed to Pennsylvania by dividing access lines in service as of
19 December 31, 2000 for Pennsylvania versus Verizon East – South and
20 Verizon East as appropriate. However, as will be explained later in this
21 testimony, under Verizon's proposed rate structure, Pennsylvania CLECs
22 will only be responsible for their fair share of such costs based on the

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1 projected demand of UNE loops, platforms/combinations and resold lines.
2 This projected demand came from a forecast of demand for resold lines and
3 UNE loops and platform combinations for Pennsylvania, Verizon East –
4 South, and all of Verizon East, provided by Verizon's wholesale marketing
5 organization.

6
7 **Q. Why did Verizon PA include regional OSS costs in its cost studies**
8 **presented here?**

9 **A.** In general, OSS costs were not and will not be incurred on a state-specific
10 basis. Many of the costs for OSS access were incurred as part of region-wide
11 (either throughout Verizon East or throughout Verizon – East South)
12 development of interfaces and modification of OSS. This development was
13 necessary for CLECs in Pennsylvania to obtain OSS access, and Verizon PA
14 accordingly is attributing a fair share of these regional costs to Pennsylvania.
15 Likewise, because OSS typically will be maintained on a regional basis as
16 well, those costs must be allocated to the states that benefit.

17
18 **Q. How did Verizon PA calculate OSS development costs?**

19 **A.** The development costs are based on actual costs that Verizon has already
20 incurred, and were then projected forward using productivity and inflation
21 adjustments. Verizon PA's cost study presents actual expenses through the
22 period ending December 31, 1999. Ongoing costs are developed using

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1 factors applied to capital investment and development costs. Verizon PA
2 addresses these cost identification methods later in this testimony.

3
4 **Q. Are the development costs of Access to OSS forward-looking?**

5 A. Yes, they are. Although the development activity has already taken place,
6 the costs were forward-looking at the time they were incurred and represent
7 costs incurred to undertake the new, incremental operation of providing
8 resellers and UNE purchasers state-of-the art access to Verizon's OSS. The
9 mere fact that dollars already were expended does not change the fact that the
10 costs at issue were incurred after, and as a direct result of, the
11 Telecommunications Act's decree that Verizon develop and install forward-
12 looking advanced OSS capabilities for use by other telecommunications
13 carriers. Unlike historical costs for "embedded" technology and equipment,
14 the OSS development costs were incurred specifically to satisfy the
15 Telecommunication Act's requirements and permit CLECs to obtain UNES
16 and resale in an efficient manner. The costs have no relation to any of
17 Verizon's historic business activities. The mere fact that Verizon initiated
18 the work before obtaining the approval of the specific rates proposed to
19 recover the costs means only that real, rather than estimated, costs can be
20 used in assessing the costs to be recovered.

21 The same is true with respect to the ongoing enhancements Verizon
22 makes to its systems. The requirements for interfaces and gateway systems

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1 have changed as a direct result of the national standards bodies' commitment
2 to semiannual "releases" of new standards, and Verizon has continually
3 upgraded its systems capability to satisfy these standards

4 Finally, Verizon PA's Access to OSS proposed costs are conservative
5 because Verizon PA looked at 1999 costs and projected those concrete costs
6 into the future, thereby providing competitors with the benefit of any
7 productivity gains that outpaced inflation. This adjustment is discussed
8 further below.

9
10 **Q. Are the costs reflected in your study incremental?**

11 **A.** Yes, they are. As mentioned above, the costs reflected in the study represent
12 the costs for an entirely new type of operation: providing OSS Access. The
13 costs identified in the Access to OSS study are incremental because they are
14 incurred solely to provide the functionalities and interfaces necessary for
15 reseller and UNE purchasers access to Verizon PA's OSS.

16
17 **Q. Is Verizon PA's cost study based on the use of the most efficient
18 technology available?**

19 **A.** Yes. Access to Verizon PA's OSS has been made available through new
20 processes and/or changes to existing systems, using the most efficient
21 technology currently available that can support the operations of a local
22 exchange carrier of Verizon's size and scope. For example, for provisioning

1 and trouble administration, the Verizon OSS are primarily products
2 developed by Telcordia (formerly Bellcore) and Lucent Technologies.
3 Verizon also developed several OSS interfaces and gateways primarily "in
4 house," utilizing state-of-the-art programming techniques.
5

6 **Q. Why do you say that the systems Verizon PA developed still represent**
7 **the state-of-the-art in terms of computer systems network architecture?**

8 **A.** The system architecture Verizon actually used reflects the expert judgment of
9 Verizon personnel and contracted vendors experienced in current
10 programming methods and software. Indeed, both WorldCom and AT&T
11 have utilized the system architecture reflected in Verizon PA's study as part
12 of the non-recurring cost model that they have introduced in regulatory
13 proceedings in several states. Both WorldCom and AT&T have represented
14 their model as representing efficient, forward-looking costs, so they should
15 have no reasonable basis for asserting otherwise in this proceeding.
16

17 **B. ACCESS TO OSS COST RECOVERY AND RATE STRUCTURE**

18 1. Overview

19 **Q. How does Verizon PA propose to allocate the costs of providing access to**
20 **its OSS across the region?**

1 A. Verizon PA proposes that the core OSS development costs incurred in 1996
2 and 1997 in either region (Verizon East – North or Verizon East – South) be
3 assigned to that region. Verizon PA proposes that all OSS development work
4 beginning in January 1998 for interfaces and core systems be shared among
5 all the Verizon East jurisdictions. Finally, the Access to OSS Cost Study
6 includes the region-wide interface and gateway system costs for the 1996-
7 1999 study period, as well as the ongoing maintenance costs, and these
8 should also be shared among the Verizon East jurisdictions.

9
10 **Q. Please explain the difference between core OSS development costs, and**
11 **development costs related to interface and gateway systems.**

12 A. “Core systems” refer to those systems that perform the actual pre-ordering,
13 ordering, provisioning, billing, and maintenance/repair functions. Core OSS
14 development costs refer to the costs incurred by Verizon to modify the core
15 systems to enable CLECs to obtain access to use those systems. The
16 interface and gateway systems, on the other hand, act as “middleware”
17 between the CLEC and Verizon PA’s core OSS. The interface and gateway
18 systems allow CLECs to access Verizon’s underlying core OSS.

19

20 2. Rate Structure

1 Q. What rate structure does Verizon propose for the recovery of the initial
2 developmental costs associated with access to Verizon PA's OSS and
3 why is Verizon PA's proposed rate structure appropriate?

4 A. Verizon PA proposes to recover these initial development costs over a 10-
5 year period through a monthly recurring charge for resellers and UNE
6 purchasers based on their share of the forecasted number of UNE loops,
7 platform/combinations and resold lines in service. Verizon PA has attempted
8 to spread the costs of accessing its OSS reasonably, using a straightforward
9 approach based on the forecasted number of lines to be serviced by the
10 resellers and UNE purchasers. Basing the rate calculation on the total
11 number of UNE loops, platform/combinations and resold lines that are
12 forecasted to be in service permits Verizon PA to recover costs based on each
13 reseller's and UNE purchaser's use of Verizon East's OSS.

14 Verizon PA chose a 10-year recovery period because in other
15 jurisdictions, some concern was expressed that a shorter recovery period
16 would disadvantage early entrants. Although Verizon PA does not
17 necessarily agree with that position, it has nonetheless proposed a 10-year
18 recovery period beginning in 2001, in order to mitigate the impact on
19 competing carriers and spread the costs among a relatively large number of
20 CLECs.

21

1 Q. Is the recovery of the initial development costs from the CLECs and
2 resellers over time consistent with general ratemaking principles?

3 A. Yes. It is a widespread practice to take initial product development,
4 introduction and implementation costs for any new product or service and
5 recover those costs from the forecasted demand for that new product or
6 service over a specified period of time.

7
8 Q. How does Verizon PA propose to recover the ongoing costs?

9 A. Verizon PA proposes to recover ongoing costs in the same fashion as the
10 development cost, on a monthly per resold line/UNE loop/UNE platform or
11 combination basis.

12
13 3. Forecasts

14 Q. What role do forecasts play in determining the appropriate rates?

15 A. In order to determine the appropriate rates, Verizon PA must forecast the
16 number of UNE loops, platform/combinations and resold lines that will be in
17 service between now and 2010. The OSS development costs described above
18 are then divided by the levelized demand forecast to develop the appropriate
19 per-unit rates.

20

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1 the cost of development is a more meaningful estimator of software
 2 maintenance costs than a factor applied to general-purpose computer
 3 hardware investments. These analyses, and the supporting data from the
 4 OMG literature, demonstrate that the 15% factor is a reasonable and
 5 conservative estimate of the forward-looking software maintenance costs.

6

7 **Q. Did Verizon calculate any other ongoing costs?**

8 **A.** Yes. The Common Overhead and Gross Revenue Loading ACFs, as
 9 described elsewhere in this testimony, were applied to both the annual costs
 10 associated with the general purpose computer investments and the estimated
 11 annual software maintenance costs.

12

13 **G. SUMMARY OF COST STUDY RESULTS**

14 **Q. Please summarize the results of the OSS cost study.**

15 **A.** The following chart summarizes several of the key items:

Item	Amount
L1. One-Time Development Costs for which Recovery is being sought	\$226,940 K
L2. Amortized and Adjusted Development Costs (L1) per Year	\$38,068 K
L3. Annual Recurring Costs associated with UNE	\$49,776 K
L4. Annual Costs (L2 + L3)	\$87,844 K

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Item	Amount
L5. Pennsylvania's Share of Annual Costs on Basis of Access Lines	\$16,557 K
L6. Monthly Per Resold Line/Unbundled Loop/ UNE-P/Combination During 10-year recovery period	\$0.84
L7. Monthly Per Resold Line/Unbundled Loop/ UNE-P/Combination After 10-Year recovery period	\$0.46

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Q. Please summarize Verizon PA recommendation for cost recovery for the one-time development costs and the annual recurring costs associated with the Access to OSS UNE.

A. Verizon PA is proposing a monthly recurring charge of \$0.84 per resold line/UNE loop/UNE platform/Combination for 10 years, decreasing to \$0.46 after the 10 year period, to recover Verizon PA share of the \$227 million one time development costs and the \$50 million annual recurring costs associated with the Access to OSS UNE.

VIII. MISCELLANEOUS SERVICES

A. DAILY USAGE FILE

Q. Please explain the daily usage file (DUF) service.

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1 A. This service provides resellers and UNE purchasers with the IntraLATA
2 local and toll call usage record details of their end users. DUF consists of the
3 processing and transmission of those call record details.

4
5 Q. How were the processing and transmission costs for DUF developed?

6 A. Costs were developed for Record Processing, Data Transmission, and Tape
7 or Cartridge. The costs include the computer processing usage time,
8 computer termination maintenance, salary and wages of personnel handling
9 the data transmission functions, software maintenance and disk maintenance.
10 These rate calculations can be found in VZ-PA CS, Part F-3, Section 4.

11

12 B. CUSTOMIZED ROUTING

13 Q. Please describe Customized Routing of OS/DA.

14 A. Customized Routing, as the term is used in this testimony, provides a CLEC
15 or reseller with the ability to route local OS/DA calls to an Alternative
16 Operator Service Provider (AOSP), *i.e.*, to an operator service provider other
17 than Verizon PA.^{39/}

^{39/} The FCC determined in its *UNE Remand Order* that incumbent LECs are not required to offer unbundled access to Operator Services/Directory Assistance (OS/DA), as long as they offer customized routing, as Verizon PA does. See Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3893-94 ¶ 446 (1999) ("*UNE Remand Order*"). Due to the Commission's Order in its prior UNE Pricing case requiring Verizon PA to offer

1

2 Q. How will this service be provided in the future?

3 A. The long-term view for this service is to make use of Advanced Intelligent
4 Network technology. Using an AIN switch "trigger," the Verizon switch
5 providing the CLEC's end user dial-tone will launch a query to an SCP,
6 which will provide instructions on how to route the call, which trunk group to
7 select specific to the originating line, traffic type of the specific call and the
8 destination of the call.

9

10 Q. What assumptions were made with respect to other elements or services
11 that the reseller must provide?

12 A. Customized Routing of OS/DA requires the CLEC or reseller to purchase
13 direct trunks in order for the routed calls to be directed to the designated
14 trunk group, and transported to the AOSP that will handle the OS/DA calls.
15 These trunk facilities must either be purchased from Verizon PA, or
16 otherwise provided for by CLEC or the reseller.

17

this UNE notwithstanding the FCC rule, Verizon PA will continue to offer OS/DA as a UNE in Pennsylvania under the currently approved rate until Verizon PA is able to satisfy the concerns raised in the Commission's Order. *Further Pricing of Verizon Pennsylvania Inc.'s Unbundled Network Elements*, No. R-00005261 (Opinion and Order entered June 8, 2001) at 83. Consequently, no new OS/DA rate is proposed here.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Generic Investigation of)	
Verizon Pennsylvania, Inc.'s)	Docket No. R-00016683
Unbundled Network Element Rates)	
)	

PANEL REBUTTAL TESTIMONY ON RECURRING COSTS

ON BEHALF OF
AT&T COMMUNICATIONS OF PENNSYLVANIA, INC
AND
MCI WORLDCOM NETWORK SERVICES, INC.

AT&T/WCOM Stmt. 8.0

January 11, 2002

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1 spread the support costs, if indeed they were appropriate at all, over the entire
 2 universe of messages, including those that did not require manual intervention.
 3 However, Verizon also contends that “[t]he CBO Message Demand represents the
 4 annual number of DUF messages.”¹⁶⁷ Verizon has provided not basis for its
 5 projection of CBO demand. Even if Verizon intends the CBO demand to
 6 represent the total annual number of DUF messages, it is clear that the projection
 7 is vastly understated, resulting in extremely inflated costs per message.

8 Verizon assumed a CBO annual message demand of [BEGIN VERIZON
 9 PROPRIETARY] ¹⁶⁸ [END VERIZON PROPRIETARY]

10 However, Verizon records many times that number of messages in a year. For
 11 comparison, Verizon assumed that [BEGIN VERIZON PROPRIETARY]

12 ¹⁶⁹ [END VERIZON PROPRIETARY] messages will be transmitted
 13 using the Network Data Mover per year. This is over twenty times the number of
 14 “CBO messages.” Using Verizon’s own projected resale and UNE
 15 platform/combination demand¹⁷⁰ and assuming that 75% of those loops use the

Arbitration, CC Docket Nos. 00-218, 00-249 and 00-251, attached hereto as Attachment 34.

167 Verizon’s Response to MWCOM/AT&T IV-14, attached hereto as Attachment 35.

168 Verizon FA Exhibit Part F-3, Tab 3.1 – Inputs.

169 *Id*

170 Verizon PA Exhibit Part F-5, Workpaper Section I.

1 DUF product¹⁷¹ and that each resale loop and UNE platform has approximately
2 200 messages per line per month, the levelized total annual number of messages
3 recorded would be approximately [BEGIN VERIZON PROPRIETARY]

4 ¹⁷² [END VERIZON PROPRIETARY] If Verizon applied its proposed
5 Message Recording to each, it would recover almost twenty-two times its
6 estimated support costs, turning this function into a profit center and creating
7 hurdles for its competitors at the same time.

8 Correcting Verizon's proposed Message Recording charge for this error,
9 along with corrections to Verizon's factors discussed elsewhere in this testimony,
10 results in a per-message charge of \$0.00007.¹⁷³

11 Q. SHOULD THE COMMISSION ALLOW RECOVERY OF EVEN A
12 PROPERLY ADJUSTED LEVEL OF VERIZON'S CLAIMED DUF COST
13 PER MESSAGE?

14 A. No. Even adjusted so that it would properly reflect Verizon's proposed per
15 message application, any level of DUF per message charge will probably result in
16 discriminatory, above-cost prices for all UNE and resale usage. As we noted

171 Verizon has apparently assumed that 75% of resellers will purchase the DUF product. See Verizon Virginia's Response to AT&T/WCOM 11-31, Docket Nos. 00-218, attached hereto as Attachment 36.

172 This number reflects the Verizon East (both North and South) region. We have assumed that the DUF costs Verizon has presented here are for the entire region, as are most of its cost studies. If the costs are only for the Verizon East - South region, calculating the demand the same way would return a total number of messages of [BEGIN VERIZON PROPRIETARY] [END VERIZON PROPRIETARY]

173 This estimate incorporates corrections to Verizon's factors discussed elsewhere in this testimony. Spreading the costs across only for the Verizon East - South regional
(footnote continued)

1 above, there is no reason to believe that employee expenses for routine business
2 operations such as usage data processing are not already included in the expense
3 loading factors that Verizon applied to the switching UNE and other elements.

4 Unless Verizon *demonstrates* otherwise, the Commission should therefore assume
5 that this cost is already recovered in the switching UNE calculation. Moreover,
6 the Commission should not allow Verizon to impose any extra cost on
7 competitors simply to hand over usage data unless Verizon can show that the
8 process it is using is as efficient as the process that it uses and considered in
9 developing its retail service.

10

11 Q. DOES THAT CONCLUDE YOUR TESTIMONY AT THIS TIME?

12 A. Yes.

demand (as discussed in the previous footnote) results in a per-message charge of
\$0.00019.

ATTACHMENT 36

PANEL REBUTTAL TESTIMONY ON RECURRING COSTS
AT&T/WCOM Stmt. 8.0

Verizon Virginia Inc.

State of Virginia

CC Docket Nos. 00-218, 00-249 and 00-251

REQUEST: AT&T Communications of Virginia, Inc., and WorldCom, Inc.,
Set #: 1

DATED: September 26, 2001

ITEM: AT&T/WCOM 11-31 If, as the Verizon RC panel claims at 213, "[t]he CBO message
demand is the total DUF demand not just the error messages,"
please explain in detail why "only nominal growth [is] forecasted
over the next several years." (VZ RC Panel Surrebuttal Testimony
at 211.)

REPLY: As stated in response to AT&T Communications of Virginia, Inc.,
and WorldCom, Inc., Set #11 Question #27, not all Resellers or
CLECs will request DUF. As stated in footnote 162 of the
Verizon VA Recurring Panel Surrebuttal Testimony, in the
original 1996 DUF study, it was assumed that 75% of the resellers
would request DUF. As result, there are more variables that were
necessarily considered by the Product Manager in determining the
CBO message demand or the total DUF demand than just the
forecasted increase in resold lines/UNE platforms. Consequently,
the Product Manager's assessment was that only nominal growth
in DUF demand would be experienced.

VZ VA #1044

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ORIGINAL

July 31, 2006

VIA FEDERAL EXPRESS

James McNulty, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
2nd Fl., 400 North Street
Harrisburg, PA 17105-3265

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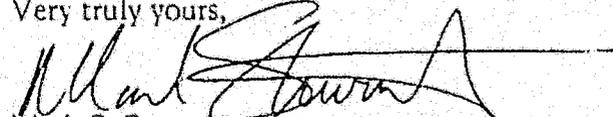
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PA PUC
SECRETARY'S BUREAU

Re: Pennsylvania Carriers' Coalition v. Verizon Pennsylvania, Inc.; Docket No. C-20065798

Dear Secretary McNulty:

Enclosed are the original and 15 copies of the Pennsylvania Carriers' Coalition's Reply Brief in the above-referenced matter. A copy has been served on the parties of record as indicated by the attached Certificate of Service. If you have any questions regarding this filing, please contact me.

Very truly yours,



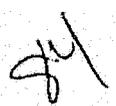
Mark S. Stewart

For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP

MSS/lww
Enclosure

cc: Hon. Marlane R. Chesnut, ALJ (w/enc)
Certificate of Service (w/enc)

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CERTIFICATE OF SERVICE

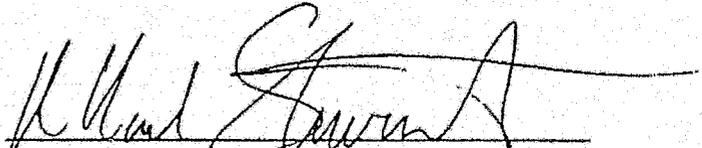
I hereby certify that I have this day served a true copy of the foregoing Reply Brief upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant).

VIA EMAIL AND FIRST CLASS MAIL

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SECRETARY'S BUREAU



Mark S. Stewart, Esquire

Date: July 31, 2006

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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SECRETARY'S BUREAU
PA PUC

Pennsylvania Carriers' Coalition
Complainant

v

Verizon Pennsylvania, Inc.
Respondent

Docket No. C-20065798

DOCUMENT
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ORIGINAL

REPLY BRIEF
OF THE PENNSYLVANIA CARRIERS' COALITION

I. INTRODUCTION

The Pennsylvania Carriers' Coalition ("PCC"),¹ by and through its counsel, respectfully submits this Reply Brief in response to the arguments set forth by Verizon Pennsylvania, Inc. ("Verizon") in its July 17, 2006 Memorandum of Law in Support of its Motion for Summary Judgment ("Verizon Memorandum"). PCC anticipated a majority of Verizon's arguments and refuted these arguments in its July 17, 2006 Motion for Partial Summary Judgment and Memorandum in Support Thereof. Those arguments will not be repeated here.

However, Verizon's Memorandum does highlight three very important facts that support PCC's Motion for Summary Judgment. First, Verizon is unable to point to any specific language throughout the Commission proceedings in either the *Generic UNE* proceeding² or the *Wholesale Rate for Resale* proceeding³ to provide legal support for its decision to implement the charges for

¹ The PCC is comprised of Full Service Computing Corp. t/a Full Service Network ("FSN"), ATX Licensing, Inc. ("ATX"), and Line Systems, Inc. ("LSI").

² *Generic Investigation Re Verizon Pennsylvania, Inc.'s Unbundled Network Element Rates*, Docket No. R-00016683

³ *Wholesale Rate for Resale of Telecommunications Provided by Verizon Pennsylvania Inc. and Verizon North Inc.*, Docket No. R-00038516.

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access to operation support systems ("OSS") and the Daily Usage File ("DUF") as applied to Resale lines via Verizon's Tariff Pa. P.U.C. No. 216 ("Tariff 216"). Second, Verizon did not take action to recover these charges until after all cases at the Commission level were closed which supported PCC's understanding that the Tariff 216 charges would be applied to Unbundled Network Elements ("UNEs") and the settlement in the *Wholesale Rate for Resale* proceeding was the total of the rates to be applied to Resale. Third, Verizon cannot dispute the fact that this Commission has given Verizon an offset to capture recurring and nonrecurring costs associated with its OSS via the formulation of the wholesale discount. For these reasons in addition to the reasons set forth in PCC's Motion for Summary Judgment, the ALJ should grant PCC's Motion as to liability on Section III and IV of the Complaint as well as the declaratory relief sought in Section V.

A. PCC is Entitled to Judgment as a Matter of Law Because Verizon's Reliance on its Own Witnesses and Assumptions Do Not Provide the Legal Support Necessary to Justify its Actions

Since Verizon is required by law to provide accurate information regarding its rates and tariffs⁴ and Tariff 216 is not clear regarding its applicability to Resale service,⁵ Verizon has no choice but to try to provide support for its actions through the Commission's Orders. However, there is no specific language from the Commission's Orders in the *Generic UNE* proceeding that approves the use of Verizon's Tariff 216 to charge access to OSS and DUF as applied to Resale lines. Without this Commission language, Verizon has to rely on its own witness' testimony and

⁴ *Gallaher v. PPL Electric Utilities*, Docket No. F-01075037, Initial Decision (Jan. 8, 2003) (citing *AT&T Communications of Pennsylvania, Inc. v. Pa. P.U.C.*, 568 A.2d 1362, 1363-64 (Pa. Cmwlth. 1990); 2003 Pa. PUC LEXIS 9, *16; *Gallaher*, Docket No. F-01075037, Final Order (March 12, 2003) (permitting Initial Decision to become final and sustaining complaint).

⁵ See PCC's Motion for Summary Judgment, p. 2.

its own assumptions. This reliance is not sufficient for Verizon to meet its statutory obligations of (1) ensuring that its tariffs show all rates established and collected; and (2) demanding only the rates identified in the tariffs specifically for a particular service.⁶ Therefore, PCC is entitled to judgment as a matter of law.

In its initial arguments, Verizon relies on page 135 of the statement of one of its witnesses filed on December 7, 2001 as proof that the Commission accepted Verizon's decision to apply its access to OSS and DUF charges from Tariff 216 to resellers.⁷ According to Verizon, this statement in the "public record" of the proceeding provided clear notice to the parties and the Commission of Verizon's intentions.⁸ What Verizon fails to mention, however, is that the "public record" of the *Generic UNE* proceeding spanned three years, involved approximately 50 issues, dozens of parties, and thousands of pages of testimony, pleadings and orders. In addressing the access to OSS issue, the Commission focused on whether or not it was a UNE.⁹ Regarding the DUF, the Commission focused on the rate to be applied.¹⁰ Moreover, at best, this testimony provided some minimal notice of Verizon's intent to apply the OSS and DUF charges to Resale generally. This testimony did *nothing* to advise the Commission or the parties that Verizon planned to impose the charges via its UNE Tariff. Nor can this testimony obscure or

⁶ 66 Pa. C.S. §§ 1302-1303.

⁷ Verizon Memorandum at 3, n. 8.

⁸ Verizon Memorandum at 17.

⁹ *Generic Investigation Re Verizon Pennsylvania, Inc.'s Unbundled Network Element Rates*, Docket No. R-00016683, Recommended Decision (May 3, 2002) at 63-64; *Id.*, Tentative Order (November 4, 2002) at 169.

¹⁰ *Id.* at 64-65; *Id.*, Tentative Order (November 4, 2002) at 170-172.

change the fact that the Commission instructed Verizon to amend its other, non-Tariff 216 tariffs to implement changes to its non-UNE rates.¹¹

At no point in this proceeding – from the ALJ’s Recommended Decision to the Tentative or Final Orders and the Compliance Order – did the Commission specifically approve Verizon’s chosen course of action. Because of this, Verizon has no choice but to use terms like “assumption” and “intent” as the only legal authority it can find to justify its actions. The reality here is that the only party who knew that Verizon planned to charge access to OSS and DUF to Resale lines pursuant to Tariff 216 - its UNE tariff - was Verizon. Neither the Commission nor Verizon’s customers, like PCC, who were directly and substantially affected by Verizon’s decision could have been expected to presume that Verizon would implement Resale-based charges in a tariff that, by its own terms, is expressly dedicated to stating the rates applicable to “unbundled services.”¹² Since ambiguities in tariffs are to be construed against the utility, as drafter, and in favor of customers,¹³ PCC is entitled to judgment as a matter of law and its Motion for Summary Judgment should be granted.

Perhaps even more incredulous than Verizon’s reliance on the voluminous “public record” of the *Generic UNE* proceeding, is Verizon’s “assumption” theory. Verizon states that it knew when it calculated the rates to be charged under Tariff 216 for access to OSS and DUF that

¹¹ In its Final Order, the Commission directed that: “Verizon shall file a tariff or tariff supplement . . . implementing revisions to the UNE rates in its Tariff Pa. P.U.C. No. 216, and any related tariffs or tariff amendments” *Generic UNE proceeding*, Final Opinion and Order at Ordering ¶ 4.

¹² Verizon Tariff Pa. P.U.C. No. 216, Section 3, 6th Revised Sheet 1.

¹³ *Gallaher v. PPL Electric Utilities*, Docket No. F-01075037, Initial Decision (Jan. 8, 2003) (citing *AT&T Communications of Pennsylvania, Inc. v. Pa. P.U.C.*, 568 A.2d 1362, 1363-64 (Pa. Cmwlth. 1990); 2003 Pa. PUC LEXIS 9, *16; *Gallaher*, Docket No. F-01075037, Final Order (March 12, 2003) (permitting Initial Decision to become final and sustaining complaint).

it would apply these charges to resellers.¹⁴ Since, according to Verizon, the Commission accepted Verizon's final rate for these charges, the Commission "necessarily held" that Verizon's plan to apply these Tariff 216 charges to resellers was approved.¹⁵ Once again, Verizon cannot point to any specific Commission language definitively approving Verizon's intent to apply its access to UNE and DUF charges from Tariff 216 to resellers at all - much less approving their application to Resale via the UNE tariff. In fact, the Commission's Final Order in the *Generic UNE* proceeding, stated just the opposite: "We shall approve tariff revisions for Verizon's UNE rates which conform to and are consistent with the attached schedule of rates."¹⁶ Moreover, neither the 26-page Compliance Order nor the 8-page order closing the *Generic UNE* proceeding detailed any findings regarding access to OSS or DUF.¹⁷ Verizon's claim that it would have calculated the rates differently if it did not intend all along to apply them to resellers may support their application to Resale generally, but does nothing to support Verizon's confusing decision to impose Resale charges in its UNE tariff. This confusion again violates the laws governing tariffs which requires the disclosure of rates in tariffs to be meaningful.¹⁸ Thus, PCC's Motion for Summary Judgment must be granted.

¹⁴ Verizon Memorandum at 9.

¹⁵ *Id.*

¹⁶ *Generic UNE proceeding*, Final Opinion and Order (July 14, 2004) at 25 (emphasis added).

¹⁷ *Generic Investigation Re Verizon Pennsylvania, Inc.'s Unbundled Network Element Rates*, Docket No. R-00016683, Compliance Order (July 16, 2004).

¹⁸ *Fontana v. West Penn Power Company*, Docket No. C-20030721, Opinion and Order (October 28, 2004); 2004 Pa. PUC LEXIS 43, *5.

B. PCC is Entitled to Judgment as a Matter of Law Because Verizon Did Not Apply the Tariff 216 OSS and DUF Charges to Resellers Until After the Close of the Commission Proceeding Addressing All the Resale Charges

Verizon minimizes the timing of its actions to begin collecting the access to OSS and DUF to resellers so as to create the misimpression that PCC knew as early as October 2004 how Verizon intended to apply this charge.¹⁹ Verizon needs this to be believed so Verizon can argue that PCC knew the charges were going to be applied under Tariff 216 while PCC and Verizon were negotiating a settlement of the wholesale resale rate. However, Verizon waited until April 2005 to start applying these charges and made them retroactive to October 2004.²⁰ April 2005 was just one month after the Commission's March 4, 2005 Order adopting the settlement between the parties establishing the wholesale rates for resale of telecommunications services provided by Verizon to retail subscribers.²¹ Throughout the course of that case, which spanned two years and overlapped the *Generic UNE* proceeding, no discussion regarding the applicability of the UNE tariff to resale was negotiated nor discussed. The fact is Verizon waited until after the *Wholesale Rate for Resale* proceeding was closed before applying the access to OSS and DUF charges to resellers under Tariff 216. Consequently, PCC reasonably relied on the settlement in the resale case as the complete package of wholesale resale rates that would be applied. Indeed, the Settlement of the parties in that case, by its terms, proposed "statewide wholesale rates for the resale of [Verizon and Verizon North's] telecommunications services."²²

¹⁹ *Id.* at 23, n. 49.

²⁰ Verizon Pennsylvania Inc.'s Answer to the Complaint of the Pennsylvania Carriers' Coalition at 8, ¶¶ 15-16.

²¹ *Wholesale Rate for Resale of Telecommunications Provided by Verizon Pennsylvania Inc. and Verizon North Inc.*, Docket No. R-00038516, Order (March 4, 2005).

²² *Id.*, Settlement Stipulation at ¶ 10(a). Verizon was the primary drafter of the Settlement Stipulation.

Verizon has an obligation under the law to provide accurate information regarding its rates and tariffs.²³ Verizon neglected this duty, therefore, PCC is entitled to judgment as a matter of law.

C. PCC is Entitled to Judgment as a Matter of Law Because the Commission has Already Determined that Verizon's Cost Recovery for OSS Should be Incorporated into its Resale Rate via the Wholesale Discount

In its Memorandum, Verizon argues that the Commission has rejected the claim that the access to OSS and DUF charges are to be included in the wholesale discount.²⁴ Again, Verizon cannot specify any language in the Commission's Orders in either the *Generic UNE* proceeding or the *Wholesale Rate for Resale* proceeding that definitively support this claim. Instead, Verizon references Commission boilerplate language.²⁵ Two serious flaws underlie Verizon's argument. First, Verizon depends on language in the Commission's *Generic UNE* proceeding to address how wholesale rates are to be calculated. Determination of the wholesale rate, however, was never a part of the Commission's *Generic UNE* proceeding which focused on whether "the existing tariffed rates for [Verizon's] unbundled network elements" continued to be just and reasonable.²⁶ Second, Verizon ignores the fact that from the inception of Verizon's Resale rates, in proceedings devoted to setting the Resale rate, this Commission has given Verizon an offset to

²³ *Gallaher v. PPL Electric Utilities*, Docket No. F-01075037, Initial Decision (Jan. 8, 2003) (citing *AT&T Communications of Pennsylvania, Inc. v. Pa. P.U.C.*, 568 A.2d 1362, 1363-64 (Pa. Cmwlth. 1990); 2003 Pa. PUC LEXIS 9, *16; *Gallaher*, Docket No. F-01075037, Final Order (March 12, 2003) (permitting Initial Decision to become final and sustaining complaint).

²⁴ Verizon Memorandum at 21-22.

²⁵ *Id.* at n. 47.

²⁶ *Id.* at 1 (emphasis added).

capture recurring and nonrecurring costs associated with its OSS via the formulation of the wholesale discount.²⁷

Since the clear Commission precedent does not help Verizon, Verizon offers two federal district court cases in its defense of its ability to undermine the Resale rate and Section 252©(3) of the Telecommunications Act of 1996 requirements by imposing add-on charges.²⁸ Both of these cases are distinguishable from the case under consideration. In *Southwestern Bell Tel. Co.*, the Court determined that electronic processing was not an integral part of the retail service being resold and, therefore, was properly classified as a UNE for pricing purposes.²⁹ Here, however, a UNE-based OSS and DUF already exist and the issue is whether Verizon can use its UNE Tariff 216 for the purposes of creating "add-on" charges to the wholesale Resale rate. Since that issue was not addressed by the Texas District Court, Verizon's reliance on it in this case is misplaced.

In *Bell Atlantic Delaware*, the Court determined that Bell's wholesale rate did not have an allowance for the costs of access to OSS.³⁰ That finding, however, was based on Delaware's proceedings which do not parallel Pennsylvania's proceedings. On the contrary, in

²⁷ *Pa. PUC v. Bell Atlantic*, Docket No. R-00963578, Opinion and Order (December 19, 1996) at Ordering ¶ 3 (adopting Recommended Decision); *Id.*, Recommended Decision (November 20, 1996) (1996 Pa. PUC LEXIS 209, **60 and 66). Based on the fact that Verizon's Customer Billing Center provides the DUFs to CLECs, the PUC, and apparently Verizon, considered the DUF costs to be related to Verizon's OSS. *Generic Investigation Re Verizon Pennsylvania, Inc.'s Unbundled Network Element Rates*, Docket No. R-00016683, Recommended Decision (May 3, 2002) at 65.

²⁸ Verizon Memorandum at 20-22.

²⁹ *Southwestern Bell Tel. Co. v. Public Utility Commission of Texas*, 2003 U.S. Dist. LEXIS 26410 at 23 (July 9, 2003).

³⁰ *Bell Atlantic Delaware v. McMahon*, 80 F. Supp. 2d 218, 248 (D. Del. 2000).

Pennsylvania, the Commission has given Verizon an offset to capture recurring and nonrecurring costs associated with its OSS via the formulation of the wholesale discount³¹

As these points make clear, Verizon inaccurately asserts that "the Commission's order requiring these costs to be recovered through a separate charge to resellers was a perfectly valid exercise off the Commission's ratemaking discretion under the Telecommunications Act,"³² and the Commission did not specifically "require" Verizon to recover these costs in this manner. The PCC is entitled to judgment as a matter of law and the ALJ should grant PCC's Motion as to liability on Section III and IV of the Complaint, as well as the declaratory relief sought in Section V.

II. CONCLUSION

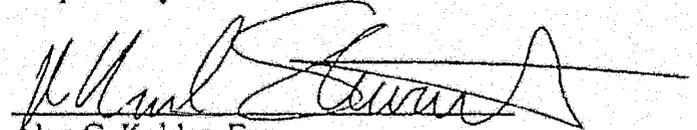
A motion for summary judgment should be granted when no genuine issue as to a material fact exists and the moving party is entitled to judgment as a matter of law. 52 Pa. Code § 5.102(d)(2). In this case, the parties have agreed that there are no genuine issues of material fact. PCC is entitled to judgment as a matter of law for all the reasons set forth PCC's Motion for Summary Judgment and Memorandum in Support Thereof. Additionally, there are no Commission Orders that specifically state that Verizon is permitted to charge access to OSS and DUF to resale lines pursuant to Tariff 216. Verizon did not begin to collect these charges until April 2005, retroactive to October 2004. Because of this delay, PCC reasonably believed that the settlement in the *Wholesale Rate for Resale* proceeding represented the entirety of rates to be

³¹ *Pa. PUC v. Bell Atlantic*, Docket No. R-00963578, Opinion and Order (December 19, 1996) at Ordering ¶ 3 (adopting Recommended Decision); *Id.*, Recommended Decision (November 20, 1996) (1996 Pa. PUC LEXIS 209, **60 and 66).

³² Verizon Memorandum at 22.

charged resellers. Finally, this Commission has given Verizon an offset to capture recurring and nonrecurring costs associated with its OSS via the formulation of the wholesale discount. For these reasons as well as for those outlined in PCC's Motion for Summary Judgment and Memorandum in Support Thereof, the ALJ should grant PCC's Motion as to liability on Section III and IV of the Complaint as well as the declaratory relief sought in Section V.

Respectfully submitted:



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