

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
November 9, 2006

**SUBJECT:** C-20065798; PA Carriers Coalition v. Verizon PA, Inc.

**TO:** James J. McNulty  
Secretary

**FROM:** Cheryl Walker Davis, Director  
Office of Special Assistants

*CWD*

DOCUMENT  
FOLDER

Pursuant to the requirements of Act 294, (66 Pa. C.S. § 332(h)), Chairman Holland, Vice Chairman Cawley and Commissioner Pizzingrilli have requested full review of the Administrative Law Judge's Initial Decision in the above-captioned proceeding. All the requests for review are dated November 9th.

Please notify the Office of Administrative Law Judge to prepare the case for consideration at a future Public Meeting.

**DOCKETED**  
DEC 08 2006

*Exceptions Filed*

SECRETARY'S BUREAU

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Act 294

Case Identification:

C-20065798; PA Carriers Coalition v. Verizon PA, Inc.

Initial Decision By:

ALJ Marlane R. Chestnut

Deadline for Return to OSA:

November 9, 2006

This decision has not been reviewed by OSA.

\* \* \* \* \*

I want full Commission review of this decision.

*Dorell J. Stinebaugh*

Commissioner

11/9/06

Date

OFFICE OF SPECIAL ASSISTANTS

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Commissioner

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Act 294

Case Identification:

C-20065798; PA Carriers Coalition v.  
Verizon PA, Inc.

Initial Decision By:

ALJ Marlane R. Chestnut

Deadline for Return to OSA:

November 9, 2006

This decision has not been reviewed by OSA.

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I want full Commission review of this decision.

James H. Cawley

November 9, 2006

Commissioner

Date

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Commissioner

Date

Act 294

Case Identification:

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OFFICE OF SPECIAL  
ASSISTANTS

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I want full Commission review of this decision.

Kim Fitzgerald

Commissioner

11-9-06.

Date

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~~11-9-06~~

Commissioner

Date

Act 294

Case Identification:

C-20065798; PA Carriers Coalition v.  
Verizon PA, Inc.

Initial Decision By:

ALJ Marlane R. Chestnut

Deadline for Return to OSA:

November 9, 2006

This decision has not been reviewed by OSA.

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OFFICE OF SPECIAL  
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I want full Commission review of this decision.

\_\_\_\_\_

Commissioner

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Date

I do not want full Commission review of this decision.

Terrance J. Fitzgerald

Commissioner

11/8/06

Date

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# ORIGINAL

November 15, 2006

2006 NOV 15 PM 3:34  
SECRETARY'S BUREAU

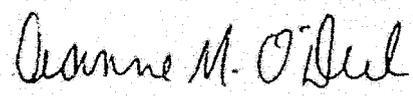
James McNulty  
Secretary  
PA Public Utility Commission  
Commonwealth Keystone Bldg.  
2nd Fl., 400 North Street  
P.O. Box 3265  
Harrisburg, PA 17105-3265

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

Dear Secretary McNulty:

On behalf of the Pennsylvania Carriers' Coalition enclosed for filing please find an original and nine copies of its Exceptions to the Initial Decision with regard to the above-referenced matter. Copies are being served in accordance with the Certificate of Service.

Very truly yours,



Deanne M. O'Dell

For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP

## DOCUMENT FOLDER

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Enclosure

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# BTL

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Carriers' Coalition  
Complainant

v.

Docket No. C-20065798

Verizon Pennsylvania, Inc.  
Respondent

ORIGINAL

2006-10-15 PM 3:34  
SECRETARY'S BUREAU

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EXCEPTIONS OF PENNSYLVANIA CARRIERS' COALITION  
TO INITIAL DECISION

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INTRODUCTION

The Pennsylvania Carriers' Coalition ("PCC"),<sup>1</sup> by and through its counsel, respectfully submits these Exceptions to the Initial Decision ("I.D.") of Administrative Law Judge ("ALJ") Marlane R. Chestnut dated October 11, 2006 and issued on October 26, 2006 regarding the above-captioned case.<sup>2</sup>

The decisions the Commission makes in this case are crucial to telephone competition in Pennsylvania. While many complex legal issues are discussed in these exceptions, the core of this case is whether Verizon will be permitted to use legal gymnastics to price Resale higher than the cost of retail to eventually push competitors out of the market. In this case, Verizon has chosen to apply charges found in its Unbundled Network Element ("UNE") Tariff 216 to resellers. Verizon's UNE tariff does not provide notice that these charges will be applied to

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<sup>1</sup> The PCC is an informal group of Pennsylvania-based competitive local exchange carriers ("CLECs") comprised of Full Service Computing Corp. ("FSN"), ATX Licensing, Inc. ("ATX"), and Line Systems, Inc. ("LSI").

<sup>2</sup> *Pennsylvania Carriers Coalition v. Verizon Pennsylvania, Inc.* ("I.D."), Docket No. C-20065798, Initial Decision, (dated October 11, 2006).

resellers nor did Verizon tariff these charges in its Resale tariff. If the Commission approves of this action, a ticking time bomb of charges will be created in the UNE Tariff 216 that Verizon could decide at will to apply to resellers at anytime in the future without notice or warning. Such actions would have a devastating impact on the ability of competitors to offer viable alternatives to Verizon's telecommunications services. In this case, the Commission can prevent this from occurring by requiring Verizon to comply with the Public Utility Code when tariffing its services and charging the rates in those tariffs to the customers governed by the specific tariff. Verizon has a duty to tariff all its rates and charges, and to do so accurately and in a manner that provides its customers with adequate notice. Verizon plainly violated its duty, here, and the Commission should hold it accountable.

#### **PROCEDURAL BACKGROUND AND SUMMARY OF EXCEPTIONS**

This proceeding was initiated by a complaint the PCC filed on January 19, 2006 against Verizon Pennsylvania, Inc. ("Verizon") containing the following counts: (1) Verizon has improperly tariffed – and essentially not tariffed – its charges for access to operation support systems ("access to OSS") and the Daily Usage File ("DUF") as applied to Resale lines; (2) Verizon has misapplied its access to OSS charge on high capacity lines and in certain service arrangements; and, (3) Verizon should be precluded from tariffing its access to 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 Commission's Orders. For relief, PCC requested that the Commission: (1) direct Verizon to credit the PCC members for all access to OSS and DUF charges paid in relation to their resale lines and service; (2) impose the maximum civil penalty on Verizon pursuant to 66 Pa.C.S. §3301(a) for each PCC resale line on which Verizon imposed

its untariffed OSS charge and each resale call on which Verizon imposed its untariffed DUF charges; and, (3) declare that Verizon is precluded from filing a tariff supplement "designed to implement the access to OSS and DUF charges in relation to CLEC Resale lines and service."

Since the parties agreed that no genuine issues of material fact exist in regard to these claims, each party submitted a Motion for Summary Judgment on July 17, 2006. On July 31, 2006 each party filed its Reply. The ALJ issued her I.D. on October 26, 2006 which granted the Motion of Summary Judgment filed by Verizon, denied the Motion for Partial Summary Judgment filed by PCC, and denied PCC's complaint.<sup>3</sup> PCC excepts to the reasons underlying the ALJ's decision and requests that the Commission reject the I.D. and grant PCC the relief requested in its January 19, 2006 Complaint.

More specifically, PCC excepts to the ALJ's conclusion that Verizon has properly tariffed the access to OSS and DUF charges in its Tariff 216 - the UNE tariff.<sup>4</sup> Verizon is required by law to tariff its charges in a way that is clear and unambiguous.<sup>5</sup> By applying the access to OSS and DUF charges which are located in the UNE tariff to resellers, who primarily rely on Verizon's Tariff 1 for resale services, Verizon has not properly tariffed these charges and PCC is entitled to be refunded all the charges assessed by Verizon since October 1, 2004. Additionally, PCC reasonably believed that Verizon's costs for these services as applied to resellers would be covered through the resale rate based on Verizon's actions to not begin the

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<sup>3</sup> *Pennsylvania Carriers Coalition v. Verizon Pennsylvania, Inc.*, Docket No. C-20065798, Initial Decision ("I.D.") at 22-23 (dated October 11, 2006).

<sup>4</sup> *Id.* at Conclusion of Law No. 12.

<sup>5</sup> 66 Pa.C.S. §§ 1302, 1303.

retroactive charging these services on resellers until after the Commission adopted the parties' settlement in the *Wholesale Rate for Resale*<sup>6</sup> proceeding.

PCC excepts to the ALJ's conclusion that Verizon has properly applied its access to OSS and DUF to resale.<sup>7</sup> Federal law and Commission precedent require that Verizon's rate for resale be calculated using the retail rate as the starting point and that the costs of OSS are factored into the discount applied to that retail rate.<sup>8</sup> If the ALJ's methodology were permitted to be effective, nothing would prevent Verizon from choosing other Tariff 216 UNE rates to apply to resellers even though these costs are already built into the Resale rate. Such unfettered discretion could result in Resale rates above retail rates and push CLECs out of the market.

PCC excepts to the ALJ's decision that its complaint is barred by *res judicata* and collateral estoppel.<sup>9</sup> The basis for this decision was the ALJ's erroneous conclusions (1) that the PCC, more specifically PCC member LSI, were parties of record in the *Generic UNE* proceeding<sup>10</sup> and (2) that the issues of the *Generic UNE* proceeding are the same as the issues in this complaint.<sup>11</sup> Regarding the parties in both proceedings, neither PCC nor LSI were parties of record in the *Generic UNE* proceeding. Further, if permitted to stand, the ALJ's decision would

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<sup>6</sup> *Wholesale Rate for Resale of Telecommunications Provided by Verizon Pennsylvania Inc. and Verizon North Inc.*, Docket No. R-00038516, Final Order (March 4, 2005)

<sup>7</sup> I.D. Conclusion of Law No. 12.

<sup>8</sup> 47 U.S.C. §§ 251(b)(1) and (c)(4); 252(d)(3). See also *Pennsylvania Public Utility Commission v. Bell Atlantic*, Docket No. R-00963578, Recommended Decision (November 20, 1996)(1996 Pa. PUC LEXIS 209, \*\*67-68)(citing 47 U.S.C. § 252(D)(3).

<sup>9</sup> *Id.*, Conclusion of Law 7-10.

<sup>10</sup> *Generic Investigation Re Verizon Pennsylvania, Inc.'s Unbundled Network Element Rates* ("Generic UNE proceeding"), Docket No. R-00016683, Order (August 31, 2001).

<sup>11</sup> I.D. at 11-14.

mean that anytime any CLEC participates in any proceeding no other CLECs can ever bring future complaints to the Commission contesting how the Commission's decision was implemented. Regarding the issues in both proceedings, they are not the same. The *Generic UNE* proceeding involved setting the just and reasonableness of Verizon's UNE rates. The current complaint proceeding involves Verizon's applicability of those rates to resellers. Further, the ALJ's determination that PCC cannot bring this complaint because it was required to raise the issue in the *Generic UNE* proceeding inappropriately shifts Verizon's burden to comply with Commission orders to PCC and will send the message that public utilities can invent creative ways of applying their tariffs after they are approved because none of their customers can ever object once the case is closed.

Finally, PCC excepts to the ALJ's conclusion that Verizon is properly applying its access to OSS and DUF charges in the context of Integrated Services Digital Network ("ISDN") using Primary Rate Interface ("PRI") configuration.<sup>12</sup> The ALJ erroneously adopts Verizon's definition of "line" to conclude that the access to OSS and DUF charges should be applied on each of the 23 channels that are supplied with the ISDN PRI service.<sup>13</sup> As the definition of "line" is confusing and Verizon fails to define it in its tariffs, doubt regarding this tariff ambiguity must be resolved against Verizon as the drafter of the tariff in favor of PCC, Verizon's customer.

Based on all of these exceptions, PCC is entitled to judgment as a matter of law regarding its January 19, 2006 complaint. PCC respectfully asks the Commission to grant its exceptions, reject the ALJ's I.D. and direct the relief requested in PCC's complaint.

<sup>12</sup> I.D. Conclusion of Law No. 13.

<sup>13</sup> I.D. at 15-18.

PCC's exceptions to the ALJ's specific legal conclusions are as follows:

### EXCEPTIONS

- I. **The ALJ erred in concluding that Verizon has properly tariffed the access to OSS and DUF charges in its Tariff 216 (I.D. at 14-15; Conclusions of Law No. 12).**

Even though the ALJ erroneously determined that PCC's complaint was barred by *res judicata* and collateral estoppel, she did address the merits of PCC's complaint that Verizon had improperly tariffed the access to OSS and DUF charges in its Tariff 216.<sup>14</sup> PCC excepts to the ALJ's conclusion that Verizon properly tariffed and implemented these rates as applied to resellers for several reasons. First, Verizon's actions violate the Public Utility Code provisions regarding tariffing. Second, Verizon's actions in a related proceeding, the *Wholesale Rate for Resale* case,<sup>15</sup> reasonably lead PCC to believe that all resale rates would be charged pursuant to the settlement reached in that case.

The two tariffs at issue in this case involve Verizon's Tariff No. 216 and Tariff No. 1. Tariff 216 applies to UNEs. 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."<sup>16</sup> 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.<sup>17</sup>

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<sup>14</sup> I.D. at 14-15.

<sup>15</sup> *Wholesale Rate for Resale*, Docket No. R-00038516, Final Order (March 4, 2005)

<sup>16</sup> Tariff 216, Section 3, 6<sup>th</sup> Revised Sheet 1 (emphasis added).

<sup>17</sup> The Resale provisions are contained at Section 1, Paragraph 8, of Tariff 1.

Despite the ALJ's determination that where the charges are located is "irrelevant,"<sup>18</sup> the Public Utility Code requires public utilities to state the rates and fees they intend to charge customers in their tariffs.<sup>19</sup> In fact, "a utility owes its customers a duty to provide accurate information, including accurate information regarding its tariffs"<sup>20</sup> and violates Section 1302 when its tariffs fail to show all the rates established by the utility and collected or enforced within the jurisdiction of the Commission.<sup>21</sup> In short, 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.

Verizon has 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. 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

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<sup>18</sup> I.D. at 15.

<sup>19</sup> "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). "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 (emphasis added)

<sup>20</sup> *Gallaher v. PPI 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))

<sup>21</sup> *The Electric Materials Company v. North East Heat & Light Company*, 1994 Pa. PUC LEXIS 12, \*\*3-4

“applicable to the Unbundled Services.” Resale is not an “Unbundled Service.” Further, 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.<sup>22</sup> 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.<sup>23</sup>

In its defense, Verizon offers the following language from Tariff 1:

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.<sup>24</sup>

This language is plainly not the model of clarity. The text is comprised of multiple potential scenarios that the customer 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 retail tariff. Despite the ALJ’s conclusion to the contrary, Verizon’s placement of resale rates in the wrong tariff (which is just one of Verizon’s 20 total tariffs) violates the Public Utility Code and creates an ambiguity that must be construed against Verizon as drafter of the tariff. Therefore,

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<sup>22</sup> Verizon Tariff Pa. P.U.C. No. 216, Section 3, 3rd Revised Sheet 14.

<sup>23</sup> Verizon Tariff Pa. P.U.C. No. 1, Section 1, First Revised Sheet 4A - Fifth Revised Sheet 4C, are attached hereto as Appendix A.

<sup>24</sup> Tariff 1, Section 1, 1st Revised Sheet 4A, Paragraph 8.1(A)(1).

PCC's exception on this issue must be granted and the Commission should grant the relief requested in PCC's complaint.

Beyond violating the law with its ambiguous tariffing, the *Wholesale Rate for Resale* proceeding was simultaneously occurring with the *Generic UNE* proceeding and created the reasonable belief that the rates approved there would be the complete rate Verizon would charge resellers. The ALJ's decision inappropriately focuses on the effective date of the UNE rates (October 1, 2004) and the Settlement Stipulation in the *Wholesale Rate for Resale* proceeding (October 29, 2004).<sup>25</sup> Using these dates, the ALJ concludes that PCC knew prior to settling the *Wholesale Rate for Resale* proceeding that Verizon planned to charge resellers the Tariff 216 UNE rates for access to OSS and DUF. What this conclusion fails to consider, however, is that neither the Commission's orders in the *Generic UNE* proceeding nor Verizon's Compliance Filings gave notice that Verizon planned to apply its Tariff 216 UNE tariff to resellers while, at the same time, the parties were dealing specifically with the Resale rate in the *Wholesale Rate for Resale* proceeding. Therefore, PCC reasonably believed that the Resale rate would be that negotiated in the *Wholesale Rate for Resale* proceeding.

Verizon did not begin charging the rates for UNEs set forth in the *Generic UNE* proceeding until April 2005 and these rates were made retroactive to October 2004. 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.<sup>26</sup> Throughout the course of that case, which spanned

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<sup>25</sup> I.D. at 20.

<sup>26</sup> *Wholesale Rate for Resale*, Docket No. R-00038516, Order (March 4, 2005).

two years and overlapped the *Generic UNE* proceeding,<sup>27</sup> 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.<sup>28</sup> 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."<sup>29</sup> The ALJ's reliance on the effective date of both sets of rates to support her decision that Verizon properly tariffed its resale rate for OSS and DUF in its UNE Tariff because PCC knew of Verizon's intentions to do this is erroneous. In fact, PCC had every reason to believe the opposite - that the resale rates were being set in the *Wholesale Rate for Resale* proceeding, not the *Generic UNE* proceeding. Therefore, PCC's exception to the ALJ's determination that Verizon has properly tariffed its access to OSS and DUF charges in its Tariff 216 should be granted and the Commission should grant PCC the relief requested in its complaint.

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<sup>27</sup> The *Wholesale Rate for Resale* case was initiated by Commission Order entered June 16, 2003 and was closed by Commission Order entered March 4, 2005. The *Generic UNE* proceeding was initiated by Commission Order entered August 31, 2001 and was closed by Commission Order entered July 16, 2004.

<sup>28</sup> Verizon began charging UNE rates in accordance with the *Generic UNE* proceeding in April 2005 retroactive to October 1, 2004.

<sup>29</sup> See *Wholesale Rate for Resale*, Docket No. R-00038516, Settlement Stipulation at ¶ 10(a). Verizon was the primary drafter of the Settlement Stipulation.

II. **The ALJ erred in concluding that Verizon has properly applied its access to OSS and DUF to resale (Finding of Fact No. 17; I.D. at 18-20; Conclusion of Law No. 12)**

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."<sup>30</sup> The ALJ erroneously concluded that because access to OSS and DUF are not sold to retail customers, they are not to be included in the base rate that is used to establish the wholesale rate.<sup>31</sup> PCC excepts to this conclusion for two reasons. First, this Commission has already concluded that Verizon's OSS-related costs are recoverable as an offset and incorporated into the discount rate applied to resale. Second, if the ALJ's methodology were permitted to be effective, nothing would prevent Verizon from choosing other Tariff 216 UNE rates to apply to resellers even though these costs are already built into the Resale rate. Such unfettered discretion could result in Resale rates above retail rates and push CLECs out of the market. For these reasons, PCC's exception must be granted.

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."<sup>32</sup> 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

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<sup>30</sup> 47 U.S.C. §§ 251(b)(1) and (c)(4).

<sup>31</sup> I.D. at 19, Finding of Fact 17.

<sup>32</sup> 47 U.S.C. §252(d)(3).

retail rates, with noted exclusions, *and in addition other charges and fees determined and imposed by the State or the incumbent carrier.*

State commissions have the responsibility of determining the actual rates.<sup>33</sup> 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.<sup>34</sup> Further, the Commission 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.<sup>35</sup> 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.<sup>36</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *Pennsylvania Public Utility Commission v. Bell Atlantic*, Docket No. R-00963578, Recommended Decision (November 20, 1996)(1996 Pa. PUC LEXIS 209, \*\*67-68)(citing 47 U.S.C. § 252(D)(3). 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.

<sup>35</sup> *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).

<sup>36</sup> *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, *MCITelecom Corp. v. Bell Atlantic-PA.*, (E.D. Pa.), originally filed at Civil Action No. CV-97-1857 (M.D. of Pa). the Commission declared: *Wholesale Rate for Resale*, Docket No. R-00038516. ("the law currently requires that the rate(s) 'be determined based on retail rates charged to subscribers, excluding "the portion thereof attributable to any

Verizon's applicability of access to OSS and DUF charges to resellers imposes charges wholly at odds with, and not at all contemplated by, the specific method for calculating Resale rates as directed by the Telecommunications Act. 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.<sup>37</sup> Verizon acknowledged this purpose explicitly.<sup>38</sup> 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."<sup>39</sup> 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. 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 decision. Thus, PCC's exceptions on this issue must be granted. The Commission should determine that Verizon's

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marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." Order (June 16, 2003) at 4 (underlining added, italics original).

<sup>37</sup> *Id.*, Order (June 16, 2003) at 1.

<sup>38</sup> *Wholesale Rate for Resale*, 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").

<sup>39</sup> *Id.*, Settlement Stipulation at ¶ 10(a). Verizon was the primary drafter of the Settlement Stipulation.

applicability of Tariff 216 UNE charges to reseller violates federal law and Commission precedent and grant PCC the relief requested in its complaint.

Beyond circumventing the proper methodology to determine resale rates, the ALJ's conclusion that access to OSS and DUF are not sold to retail customers does not mean that Verizon is entitled to recover these costs through add-on charges to the Resale rate. An example of why this logic is flawed is the fact that loop and port charges are factored into the retail rate and are listed separately in Verizon's Tariff 216 as UNEs because they can be purchased separately by CLECs. Neither loop nor port would be sold directly to retail customers. Further, these items should not be charged to resellers since the starting point of the Resale rate is the retail rate which includes the loop and port costs. Just like loop and port costs are built into the retail rate underlying the Resale rate, OSS has been factored into the Resale rate through the discounts to the retail rate. If the Commission allows Verizon to charge resellers for a charge that is already factored into the Resale rate (and is not properly tariffed to apply to resellers), there would be nothing to prevent Verizon from beginning to charge resellers other Tariff 216 UNE charges under the same theory. Such a decision would allow Verizon to pick-and-choose items from Tariff 216 or other tariffs to bill its Resale carriers as add-ons to the Resale rate. Inevitably the result will be to raise the Resale rates to levels greater than what Verizon charges its own retail end user customers. The effect of this could be devastating for providing competitive landline telecommunications alternatives for Pennsylvania consumers. Thus, PCC's exception on this issue must be granted, the Commission should prohibit Verizon from adding additional charges to the resale rate under the guise of Tariff 216, and grant PCC the relief outlined in its complaint.

### III. PCC's Complaint is not barred by either Res Judicata or Collateral Estoppel

The ALJ erroneously applies the doctrines of *res judicata*<sup>40</sup> and collateral estoppel<sup>41</sup> to find that PCC's complaint is not properly before the Commission. The ALJ bases her conclusion on her finding that there is an identity of parties and an identity of issues between PCC's complaint and the *Generic UNE* proceeding.<sup>42</sup> As detailed further below, neither identity of parties nor issues is present between the two cases and PCC's exception on this issue must be granted.

- A. The ALJ erred in concluding that there was an identity of parties in the *Generic UNE* proceeding to preclude the complaint in this proceeding according to principles of *res judicata* and collateral estoppel (Finding of Fact No. 7, I.D. at 11-12; Conclusion of Law Nos. 9-10).

PCC excepts to the ALJ's conclusion that PCC's complaint should be barred by the doctrines of *res judicata* and collateral estoppel because "PCC itself (and including the same membership) was a party of record" or "in privity" with parties of record in the *Generic UNE* proceeding.<sup>43</sup> This conclusion is incorrect. While *res judicata* requires identity of the parties

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<sup>40</sup> *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.<sup>40</sup> "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.'" *Temple University v. W.C.A.B.*, 753 A.2d 289, 291 (Pa. Cmwlth. 2000); *Chuda v. Chuda*, 756 A.2d 39, 42 (Pa. Super. 2000).

<sup>41</sup> 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. *Temple University*, 753 A.2d at 292.

<sup>42</sup> I.D. at 12-14.

<sup>43</sup> I.D. at 12, Finding of Fact No. 7, Conclusion of Law No. 9-10.

and collateral estoppel can only be applied against a person who had full and fair opportunity to litigate in the prior action,<sup>44</sup> the parties in this case are neither the same nor in privity with those of the *Generic UNE* proceeding.

The ALJ erroneously concluded that PCC, and by extension PCC member LSI, was an active party in the *Generic UNE* proceeding.<sup>45</sup> Significantly, as a matter of law and fact, the PCC is not a legal entity. Rather, it is an informal coalition of CLECs. The "PCC" has no collective existence, is only reflective of the actions of its individual parties, and could not have been a party to any proceeding.

Setting this aside, however, is the fact that the PCC was never recognized as a party in the *Generic UNE* proceeding. The *Generic UNE* proceeding was initiated by Commission Order entered August 31, 2001.<sup>46</sup> Two of the four members of PCC, i.e. ATX and FSN, were active parties in the *Generic UNE* proceeding.<sup>47</sup> Where ATX and FSN's interests were similar, they filed joint comments.<sup>48</sup> By the time of the Compliance phase in 2004, two other relatively small carriers, Remi and LSI, believed that the Commission would benefit from knowing that their

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<sup>44</sup> See *Temple University*, 753 A.2d at 291-92; *Chada*, 756 A.2d at 42-43.

<sup>45</sup> I.D. at 11-12, Finding of Fact No. 7, Conclusion of Law 9, 10

<sup>46</sup> *Generic UNE proceeding*, Docket No. R-00016683, Order (August 31, 2001).

<sup>47</sup> *Id.* FSN intervened in the *Generic UNE* proceeding on November 8, 2002 after the Commission issued its November 4, 2002 Tentative Order which returned the case to the ALJ to determine the validity of the rates using the assumptions in the Tentative Order. FSN remained an active party on an individual basis throughout the close of the *Generic UNE* proceeding. ATX filed a Petition to Intervene in the *Generic UNE* proceeding on April 9, 2003 after the ALJ issued a Supplemental R.D. in response to the Commission's Tentative Order.

<sup>48</sup> See Joint Comments of Full Service Network and ATX Licensing to the Commission's Tentative Order and Joint Exceptions to the Supplemental Recommended Decision, dated April 9, 2003.

businesses would be impacted by the Commission's actions in this very important proceeding. Thus, Remi and LSI chose to join the two active parties, i.e. FSN and ATX, under the informal name of PCC as a way of sharing the funding obligations of their participation.<sup>49</sup> In recognition of the fact that neither Remi nor LSI had been active parties in the *Generic UNE* proceeding before PCC's Comments, Remi and LSI filed a separate Petition to Intervene<sup>50</sup> PCC also noted in its comments that if the Commission denied Remi and LSI's Petition to Intervene then the PCC Comments should be considered as submitted by FSN and ATX.<sup>51</sup> The Petition to Intervene of LSI and Remi was subsequently denied by the Commission.<sup>52</sup> Thus, PCC's Comments became the joint comments of ATX and FSN and neither PCC nor LSI was a party of record in the *Generic UNE* proceeding. The ALJ's conclusion that "PCC itself. . . was a party of record in both proceedings" and that "LSI participated in that proceeding through PCC"<sup>53</sup> is factually incorrect, and PCC's exception on this point must be granted.

Furthermore, the ALJ's conclusion that PCC's current complaint should be barred by the doctrines of *res judicata* and collateral estoppel because LSI was "in privity" with the CLEC participants of the *Generic UNE Proceeding* must be rejected.<sup>54</sup> The ALJ's reasoning starts from the fact that the Commission refused to allow LSI to intervene in the *Generic UNE* proceeding

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<sup>49</sup> See Petition to Intervene of Remi Retail Communications, L.L.C. and Line Systems, Inc. dated February 25, 2004 at 2, ¶ 5.

<sup>50</sup> *Id.*

<sup>51</sup> See 'The Pennsylvania Carriers' Coalition's Comments to Verizon's Compliance Filing, dated February 25, 2003 at n. 1.

<sup>52</sup> *Generic UNE proceeding*, Docket No. R-00016683, Compliance Order, at 5 (July 16, 2004)

<sup>53</sup> I.D. at 12.

<sup>54</sup> *Id.*, Conclusion of Law No. 10.

because the Commission determined that the interests they would have asserted were adequately represented by existing participants.<sup>55</sup> In a footnote, the Commission references the argument that Verizon had made against allowing intervention because LSI and Remi sought to sign on to the PCC comments.<sup>56</sup>

While this was the extent of the Commission's disposition of LSI's Petition to Intervene, the ALJ's applicability of this disposition to PCC's complaint in this case is incredibly far-reaching and cannot be allowed to stand. From the Commission's one sentence disposition and cite to Verizon's opposition, the ALJ decides that the Commission really meant that all the issues important to LSI were litigated throughout the course of the three year *Generic UNE* proceeding and that any issues LSI or any other CLEC might have in the future related in anyway to the application of UNE rates are forever barred because CLECs participated in the *Generic UNE* proceeding. Essentially, the ALJ is declaring that any time any one CLEC is a party to a proceeding, all other CLECs in Pennsylvania are forever barred and precluded from subsequent litigation. This determination could have devastating effects to the Commission's ability to receive input from all stakeholders in telecommunications matters. The reality is that the ALJ's decision on this point could push CLECs further out of the regulatory process, which is already cost-prohibitive for many of them. Without the input of all stakeholders, including competitive telecommunications carriers, the Commission's ability to make good decisions regarding telecommunications matters that benefit the public interest is diminished.

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<sup>55</sup> *Generic UNE proceeding*, Docket No. R-00016683, Compliance Order, at 5 (July 16, 2004).

<sup>56</sup> *Id.* at n. 5.

Moreover, as a matter of law, the concept of privity requires a far higher threshold than the mere similarity of interests evaluated in an intervention context.<sup>57</sup> There is no evidence that such a threshold has been crossed here among LSI, FSN, and ATX. Thus, PCC's exception on this point must be granted and the Commission should conclude that LSI was not in privity with the CLEC participants of the *Generic UNE* proceeding.

**B. The ALJ erred in concluding that there was an identity of issues in the Generic UNE Proceeding and this case to preclude the complaint in this proceeding according to the principles of res judicata and collateral estoppel (Finding of Fact No. 8, I.D. at 8-10; Conclusions of Law Nos. 7-8).**

PCC excepts to the ALJ's conclusion that its complaint is barred by the doctrines of *res judicata* and collateral estoppel because the Commission approved Verizon's Tariff 216 at the end of the *Generic UNE* proceeding.<sup>58</sup> According to the ALJ, implicit in the approval of Tariff 216, was the knowledge that the rates for access to OSS and DUF would be applied to resellers.<sup>59</sup> Yet the *Generic UNE* decision said the exact opposite: that the Commission was approving the UNE rates in 216 and Verizon should amend other tariffs as necessary to implement the decisions of the Commission.<sup>60</sup> Verizon never amended those other tariffs, but did apply the

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<sup>57</sup> "Generally, there is no prevailing definition of 'privity' which can be applied automatically to all cases. Privity for purposes of *res judicata* is not established by the mere fact that persons may be interested in the same question or in proving the same facts." *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313, 1317, (Pa. Super. 1983).

<sup>58</sup> I.D., Conclusion of Law No. 7-8.

<sup>59</sup> *Id.* at 12-14, Finding of Fact No. 8.

<sup>60</sup> *Generic UNE proceeding*, Docket No. R-00016683, Final Opinion and Order at Ordering ¶ 4.

charges to non-UNE, i.e. Resale, arrangements. PCC's complaint against this application was not and could not have been an issue in the *Generic UNE* proceeding and, thus, the ALJ's reasoning is plainly erroneous.

The ALJ believes that since the Commission approved the application of Tariff 216 rates for access to OSS and DUF to resellers, the PCC missed its opportunity in the *Generic UNE* proceeding to object to that decision. Therefore, the ALJ incorrectly finds that PCC's complaint here should be barred. The problem with this logic is twofold. First, the *Generic UNE* proceeding and this complaint do not have the required identity of issues. Second, the ALJ's determination that PCC cannot bring this complaint because it was required to raise the issue in the *Generic UNE* proceeding inappropriately shifts Verizon's burden to comply with Commission orders to PCC and will send the message that public utilities can invent creative ways of applying their tariffs after they are approved because none of their customers can ever object once the case is closed. Since there is no identity of issues between the *Generic UNE* proceeding and this case, PCC's exception must be granted and the Commission should consider the issues set forth in PCC's complaint.

First, 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."<sup>61</sup> Similarly, 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 Commission's decision in the *Generic*

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<sup>61</sup> *Chada*, 756 A.2d at 44 (emphasis added).

UNE case.<sup>62</sup> The issues of whether Verizon properly tariffed the Resale OSS and DUF via Tariff 216 and whether those charges apply to Resale at all are clearly distinct and not identical.

Likewise, 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 UNE*

proceeding.<sup>63</sup> Additionally, the issues of the application of the OSS and DUF charges to Resale were not actually litigated by the parties to the *Generic UNE* proceeding<sup>64</sup> as they were by no means "essential" to the Commission's decision in the *Generic UNE* proceeding.<sup>65</sup>

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,

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<sup>62</sup> *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).

<sup>63</sup> The law calls for the Commission 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 *Fink v. Coates*, 323 F. Supp. 988 (S.D.N.Y. 1971)). This is particularly true here, where the PCC relies on an Orders 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 Commission.

<sup>64</sup> *Temple University*, 753 A.2d at 292; *Chada*, 756 A.2d at 43; *Estate of Pew*, 655 A.2d at 536-37.

<sup>65</sup> 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.

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 for Verizon Pennsylvania, Inc.'s (Verizon's) unbundled network elements (UNEs) continue to be just and reasonable.<sup>66</sup>

Likewise, in its Final Opinion and Order, the Commission identified the same purpose for the proceeding,<sup>67</sup> 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.<sup>68</sup>

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.

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

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<sup>66</sup> *Generic UNE proceeding*, Docket No. R-00016683, Order at 1 (August 31, 2001)(emphasis added).

<sup>67</sup> *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).

<sup>68</sup> *Id.* at 14 (emphasis added).

any related tariffs or tariff amendments . . . .<sup>69</sup> The Commission further declared that, upon review of Verizon's Compliance Filing, "the Commission reserves the right to reject any rate that is not properly justified and adjust the *UNE* rate in question."<sup>70</sup> 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.<sup>71</sup>

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. The Commission did not order that, "Based on the foregoing, we shall approve tariff revisions for Verizon's UNE and Resale rates..."

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. Therefore, the identity of issues required by *res judicata* and collateral estoppel does not exist here. PCC's exception must be granted and the Commission should determine that

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<sup>69</sup> *Id.* at Ordering ¶ 4 (emphasis added).

<sup>70</sup> *Id.* at Ordering ¶ 7 (emphasis added).

<sup>71</sup> *Id.*, Compliance Order (July 16, 2004) at 25 (emphasis added).

no sufficient identity of issues between the *Generic UNE* proceeding and this case exists to bar PCC's complaint from moving forward.

The second basis the ALJ uses to support her erroneous conclusion that PCC's complaint is barred by *res judicata* and collateral estoppel is her determination that PCC "only has itself to blame" for not contesting Verizon's unilateral decision to charge access to OSS and DUF to resellers via its Tariff 216 in the context of the *Generic UNE* proceeding. This reasoning is flawed. First, there was absolutely nothing in Verizon's two *Generic UNE* compliance filings<sup>72</sup> to even put PCC on notice that sneaking Resale rates in the Tariff 216 UNE tariff was what Verizon had done. Verizon never proposed to tariff the charges for Resale, implementing them only in its UNE tariff with language that made no reference to Resale. Thus, FSN and ATX reasonably concluded that further litigation on this issue did not appear warranted since they reasonably concluded that Verizon did not intend to apply these charges to Resale.

Second, the reality of the *Generic UNE* proceeding is that it lasted over three years and addressed approximately 50 issues. 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. The Commission's Ordering paragraphs did not authorize the applicability of DUF and OSS on Resale but did direct Verizon to file all tariffs as necessary to implement the directives of the *Generic UNE* proceeding. Thus, Verizon had the obligation to submit all appropriate tariffs. The fact that Verizon failed to properly tariff access to OSS and DUF as to resale did not shift the burden to FSN and ATX to expend the time and resources necessary to notify Verizon of its error nor did it somehow bar FSN and ATX from raising the

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<sup>72</sup> The Compliance Phase of the proceeding began with Verizon's Initial Compliance Filing on January 26, 2004. This initial filing was substantively revised by Verizon's filing on March 8, 2004.

issue at a later date once Verizon's intentions to apply the Tariff 216 charges to resellers became clear.<sup>73</sup>

If the ALJ's decision were permitted to stand, the implication is that customers will need to try to anticipate every eventuality with respect to how a public utility might possibly apply a Commission directive and then share all those myriad theories with the Commission through voluminous, and costly, filings or else be forever barred from raising them again. Verizon had the burden of providing the appropriate, legally sufficient tariffs necessary to implement the directives of the Commission. Shifting the burden to PCC to comment on this and then barring PCC from forever raising the issue again once Verizon's intentions became clear encourages Verizon to find creative ways to implement its tariffs once the record closes because there will never be any accountability. Since such a decision would threaten to undermine the very fabric of laws intended to regulate public utilities to safeguard the public interest, PCC's exception must be granted and the Commission should conclude that PCC's complaint is not barred by either *res judicata* or collateral estoppel.

**IV. The ALJ erred in concluding that Verizon has properly applied its Access to OSS rates on a per-line, per month, basis (Finding of Fact No. 14; I.D. at 15-18; Conclusion of Law No. 13)**

The ALJ incorrectly concluded that Verizon has properly applied the access to OSS rate. Factually, all parties agree that Verizon's Tariff 216 states that the access to OSS charge is a recurring charge that shall be applied on the basis of "per line, per month."<sup>74</sup> The question the ALJ needed to determine was what does "line" mean in the context of ISDN PRI. Because the

<sup>73</sup> See *Restatement of the Law, Second, Judgments*, § 29 (Comment g).

<sup>74</sup> Tariff 216, Section 3, revised sheet 14.

AIJ erroneously concluded that "line" means Verizon's interpretation of the software defined channels associated with ISDN PRI, PCC's exception on this issue must be granted.

LSI purchases ISDN PRI service from Verizon. ISDN PRI allows LSI to purchase, for resale, a single digital connection that runs between Verizon's central office and the premises of LSI's customer. As explained by Verizon's tariff, this single digital connection is "a metallic four-wire telephone loop interface between a switch equipped with ISDN and the network termination. . . [i.e. customer premises equipment.]"<sup>75</sup> Thus, LSI purchases a single point of entry (the four-wire telephone loop interface) into LSI's customer's business. Through technology, the ISDN PRI allows this single point of entry to create 23 channels that can be configured in many different ways to accommodate customer's needs. These 23 channels may be configured to provide voice, data, direct inward dial service (DID), direct outward dial service, two-way service, Wide Area Telecommunications Service, and Toll Free Service.<sup>76</sup> Instead of billing LSI for the access to OSS charge once for the ISDN PRI connection between the central office and the customer's premises, Verizon bills the access to OSS charge on each of the 23 channels irrespective of how the channels are utilized. Since Verizon's tariff states that access to OSS will be charged "per line," this issue here is whether the signal point of entry into the business is the line or whether the channels that are created once inside the customer's premises are the "lines."

As bluntly stated in Newton's Dictionary, "the word line is confusing" because some refer to it as the line coming in from the central office to the customer's premises and some refer to it as the extension from the point of entry into the customer's premises to the phone/equipment on a

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<sup>75</sup> VZ Tariff 500, Section 22B(1), 3rd Revised Sheet 2.

<sup>76</sup> *Id.*

user's desk.<sup>77</sup> Since Verizon concludes that "each of [the] 23 channels is a telephone line from a provisioning and usage standpoint," Verizon extends that reasoning for purposes of billing.<sup>78</sup> In this way, Verizon can collect \$18.86 on a recurring basis (.82 x 23 lines) instead of \$.82 on a recurring basis from LSI. What Verizon's unilateral decision regarding tariff interpretation fails to acknowledge, however, is that Verizon's tariff does not define "line," a word that is generally accepted to be confusing. While Tariff No 500, which discusses the ISDN PRI service, does have a definition for "software defined line,"<sup>79</sup> Verizon's Tariff 216, the UNE Tariff where the Access to OSS charge appears, does not define line in terms of what exactly line means for purposes of applying the charges. Moreover, as discussed above, Verizon's access to OSS UNE charge appears in its Tariff 216, the UNE tariff, and provides no notice to Verizon's resale customers that the UNE rates would be applied to them, let alone how an admittedly confusing word such as "line" would translate into the billing CLECs would receive from Verizon.

The bottom line is that Verizon is required to have tariffs free of ambiguity.<sup>80</sup> When a term, such as line, is used and it is commonly accepted in the industry that the term is confusing, Verizon has an obligation to be clear. The first notice LSI had that Verizon would define line as software defined channels was the receipt of Verizon's bill. Because the ALJ's decision on this issue essentially rewards Verizon for being cleverly vague about how its tariffs are going to be applied, PCC's exception must be granted and the Commission should award the relief requested in its complaint.

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<sup>77</sup> *Newton's Telecom Dictionary*, 481 (20th ed. 2004).

<sup>78</sup> Verizon Pennsylvania Inc.'s Memorandum of Law in Opposition to the PCC's Motion for Summary Judgment, dated July 31, 2006 at 11-12.

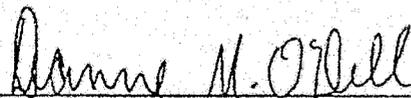
<sup>79</sup> Verizon Tariff 500, Section 22B(1), 3rd Revised Sheet 2.

<sup>80</sup> 66 Pa C.S. §§ 1302, 1303.

CONCLUSION

WHEREFORE, for the reasons set forth above, PCC respectfully requests that the Commission reject the Initial Decision issued October 26, 2006, grant PCC's July 19, 2006 Motion for Partial Summary Judgment, and grant PCC the following relief: (1) direct Verizon to credit the PCC members for all access to OSS and DUF charges paid in relation to their resale lines and service; (2) impose the maximum civil penalty on Verizon pursuant to 66 Pa.C.S.A. §3301(a) for each PCC resale line on which Verizon imposed its untariffed OSS charge and each resale call on which Verizon imposed its untariffed DUF charges; and (3) declare that Verizon is precluded from filing a tariff supplement "designed to implement the access to OSS and DUF charges in relation to CLEC Resale lines and service."

Respectfully submitted,



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Attorneys for Pennsylvania Carriers'  
Coalition

Dated: November 15, 2006

CERTIFICATE OF SERVICE

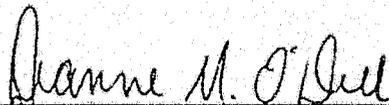
I hereby certify that I have this day served a true copy of the foregoing Exceptions upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant).

VIA EMAIL AND FIRST CLASS MAIL

Hon. Marlane Chestnut  
Administrative Law Judge  
1302 Philadelphia State Office Bldg.  
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SECRETARY'S BUREAU

  
\_\_\_\_\_  
Deanne M. O'Dell, Esquire

Date: November 15, 2006

Cynthia L. Randall  
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November 27, 2006

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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Via UPS Overnight Delivery  
James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, PA 17120

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 Reply to Exceptions of the Pennsylvania Carriers' Coalition, being filed in the above captioned matter.

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

Very truly yours,

Cynthia L. Randall

DOCUMENT  
FOLDER

CLR/slb  
Enc.

Via E-Mail and 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 Reply to Exceptions of the Pennsylvania Carriers' Coalition, 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 27<sup>th</sup> day of November, 2006.

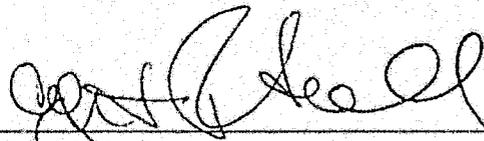
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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU



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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

NOV 27 2006

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Pennsylvania Carriers' Coalition,  
Complainant,

No. C-20065798

v.

Verizon Pennsylvania Inc.,  
Respondent

VERIZON PENNSYLVANIA INC.'S REPLY  
TO EXCEPTIONS OF THE PENNSYLVANIA CARRIERS' COALITION

INTRODUCTION

In a thorough and reasoned initial decision, Administrative Law Judge Marlane R. Chestnut granted summary judgment in Verizon's favor on PCC's<sup>1</sup> complaint, which challenged the application of Verizon's tariffed Access to Operations Support Systems ("Access to OSS") and Daily Usage File ("DUF") rates to resellers. Judge Chestnut held that summary judgment is warranted for two separate and independent reasons: first, because the complaint is meritless under the undisputed facts and law, and second, because the PCC companies are legally precluded from litigating these claims under the doctrines of *res judicata* and collateral estoppel.

Judge Chestnut held that the complaint is precluded by *res judicata* and collateral estoppel because the PCC companies actively participated in the *Generic UNE*<sup>2</sup> proceeding in which the rates were approved, but did not challenge the application of these rates to resellers, nor did they challenge the placement of these rates in Tariff 216. On the merits, Judge Chestnut found that these cost-based rates for services to CLECs

<sup>1</sup> The Pennsylvania Carriers' Coalition ("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").

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

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were expressly approved for application to resellers as well as UNE purchasers, properly applied on a per-line basis, and properly tariffed in Tariff 216, which applies to services provided to other telephone companies. As Access to OSS and DUF services are provided directly to other telephone companies and are not involved in the provision of retail service to end users, Judge Chestnut held that Verizon was not required to tariff these rates in the Retail tariff or to account for them in the wholesale discount. As discussed in detail below, these holdings are legally correct and consistent with Commission precedent, Pennsylvania and federal law and the undisputed facts. Judge Chestnut's Initial Decision therefore should be adopted.

PCC excepts to the Initial Decision on four separate grounds. First, 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. 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. As Judge Chestnut found, "[t]he Commission approved the tariff, the tariff clearly spells out the charges for Access to OSS and DUF and that certainly satisfies any duty Verizon may have had concerning meaningful disclosure of its rates and ensures that Verizon was not charging the PCC companies untariffed rates." Initial Decision at 15.

Second, PCC argues 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. As Judge Chestnut found, however, 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. As Judge Chestnut explained, “[a]ccess to OSS and DUF are not sold to end users, and therefore are not included in the retail rate . . . [therefore] nothing in the TCA or any Commission order applying the TCA prohibits the charging of these tariffed rates to resellers.” Opinion at p. 20.

Third, PCC attempts to evade its fair share of the Access to OSS costs by arguing that resold telephone lines associated with the high-capacity PRI 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. PCC would have a CLEC serving a large business with 23 resold lines provided on a high capacity platform 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. Judge Chestnut rightly concluded that “there can be no question that the Access to OSS charge has been properly applied to PRI arrangements.” Initial Decision at 17.

Finally, PCC argues that its complaint – which amounts to a collateral attack on the Commission’s orders in the *Generic UNE* matter – is not precluded by the doctrines of *res judicata* and collateral estoppel because the required identity of parties and issues is not present. As Judge Chestnut properly found, however, the *Generic UNE* proceeding

directly addressed the precise issues raised here, *i.e.*, the application of these charges to resellers on a per line basis and their placement in Tariff 216. PCC and its member companies were actively involved in that proceeding, two of its three members were parties of record, and the third was in privity with them, and of none them ever raised the arguments made here. As the Judge held, "it is reasonable to expect that the parties to the *Generic UNE* proceeding would take advantage of the opportunity to review and comment on any aspect of Verizon's compliance filing that may affect them. If they do not, they have only themselves to blame." Initial Decision at 13.

For all of these reasons, PCC's exceptions should be rejected. Judge Chestnut's Initial Decision should be adopted and the Complaint should be dismissed.

#### **BACKGROUND AND HISTORY OF PROCEEDING**

Verizon's current Access to OSS and DUF charges were established in the Commission's *Generic UNE* proceeding, and took effect on October 1, 2004.<sup>3</sup> 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.<sup>4</sup> DUF rates were set to replace pre-existing rates for an optional service through which resellers and UNE carriers may choose to purchase the intraLATA local and toll call usage record details of their end users.<sup>5</sup> Because DUF is an optional service,<sup>6</sup> any PCC member companies that are being charged for DUF on their resold lines must have affirmatively ordered DUF service for those lines.

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<sup>3</sup> Finding of Fact No. 5

<sup>4</sup> Finding of Fact No. 6; *Generic UNE*, Tentative Order entered Nov. 4, 2002, at 169

<sup>5</sup> *Id.* at 172, Finding of Fact No. 4.

<sup>6</sup> 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.

It was clear throughout the litigation of the *Generic UNE* case that the Access to OSS and DUF rates were calculated on the basis of, and intended to be charged to, both UNE lines and resold lines.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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,"<sup>10</sup> 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 products to CLECs and resellers."<sup>11</sup> 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,

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<sup>7</sup> Finding of Fact No. 8.

<sup>8</sup> *Generic UNE*, Recommended Decision, May 3, 2002, at 64-65.

<sup>9</sup> *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, platform/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).

<sup>10</sup> *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).

<sup>11</sup> *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.").

UNE platforms and resale loops.”<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.”<sup>15</sup> 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 approved the proposed rate.<sup>16</sup> 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

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<sup>12</sup> *Generic UNE*, Recommended Decision, May 3, 2002 at 63 (emphasis added).

<sup>13</sup> *Id.* at 64

<sup>14</sup> Indeed, Verizon had already been applying its previous DUF rates to resellers.

<sup>15</sup> *Generic UNE*, VZ St. 10 filed 12/7/01 at 171 (emphasis added).

<sup>16</sup> *Generic UNE*, Recommended Decision, May 3, 2002, at 65 (emphasis added); Finding of Fact No. 8.

conclusion on the DUF rate, which became the final holding in the December 11, 2003 *Final Order* because no party challenged it.<sup>17</sup>

Two of the three PCC member companies, FSN and ATX, were parties to the *Generic UNE* case.<sup>18</sup> 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, 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.<sup>19</sup> These filings did not challenge the Access to OSS rate at all. Although LSI's individual motion to intervene was denied on the ground that its interests were adequately represented by other parties, the precise comments it sought to file were filed by the other PCC companies and duly considered by the Commission.<sup>20</sup>

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 with modifications directed by the Commission went into effect on October 1, 2004. The

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<sup>17</sup> *Generic UNE*, Tentative Order entered Nov. 4, 2002, at 172.

<sup>18</sup> 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 FSN was a signatory to the comments that LSI sought to submit so that its arguments would still be considered. LSI did not raise any argument about the application of Access to OSS or DUF charges to resellers.

<sup>19</sup> *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.

<sup>20</sup> Finding of Fact No. 7.

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, PCC filed the instant Complaint. On February 13, 2006, Verizon filed its Answer together with a Motion to Dismiss the Complaint as insufficient on its face and barred by the doctrines of *res judicata* and collateral estoppel. On April 5, 2006, Judge Chestnut denied the Motion to Dismiss, holding that dismissal at that stage was neither clearly warranted nor free from doubt. Subsequently the parties conferred and agreed that the matter should be decided on motions for summary judgment. A briefing schedule was issued on May 18, 2006, and the parties were directed to develop a uniform list of issues to be addressed in the briefs. Consistent with the schedule and agreed issues, on July 17, 2006 Verizon filed a Motion for Summary Judgment, and PCC simultaneously filed a Motion for Partial Summary Judgment. Each party opposed the other's motion. On October 11, 2006, Judge Chestnut entered her Initial Decision granting Verizon's motion, denying PCC's motion, and dismissing the case.

## **DISCUSSION**

### **Reply to PCC Exception No. 1:**

#### **The Access to OSS and DUF Rates are Properly Tariffed as to Resellers**

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 PCC argues, "Verizon has implemented new charges on *resale service*, the rates for which are set forth in Tariff 1, by amending its UNE tariff. . . via a text that makes no mention at all of the new charges' application to *resale*." PCC Exceptions at 7. For this reason, PCC contends that the rates are somehow "untariffed" as applied to resellers. As Judge Chestnut rightly concluded, however, "[t]he fact that the charges at issue are contained in Tariff 216, rather than Tariff 1, is irrelevant. . ." Initial Decision at 15. Tariff 1 does not

purport to contain every rate a reseller might pay. It expressly states 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. Further, PCC’s characterization of Tariff 216 as a “UNE” tariff is a limitation of 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 exchange service in Pennsylvania” – a category that “can include rates applicable to resellers as well as CLECs that lease UNEs.” Initial Decision at 15. PCC claims that the language in both tariffs is “ambiguous” and should be “construed against Verizon,”<sup>21</sup> but fails to suggest an interpretation of either tariff’s language that would require Verizon to place every rate that a reseller could pay into Tariff 1. As Judge Chestnut noted, “[w]hile this language may be general, it is not ‘vague and ambiguous’ as alleged by PCC, and therefore there is no ambiguity to be construed against the utility and in favor of the customer.” Initial Decision at 15.

Similarly, PCC’s invention of the term “Resale Service”<sup>22</sup> 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

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<sup>21</sup> PCC Brief at 8.

<sup>22</sup> See PCC Brief at 7 (“Verizon has implemented new charges on Resale service. . . .”), id at 8 (“Nor does anything in Tariff 1, and specifically Section 1, Paragraph 8 addressing rates and provision applicable to Resale service, state that OSS and DUF charges apply to Resale.”).

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 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, and was properly rejected in the Initial Decision. There is 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 66 Pa.C.S.A. § 1303. As Judge Chestnut explained:

Although the PCC claims that its members are being charged untariffed rates in violation of the Public Utility Code, 66 Pa.C.S.A. sec. 1302 and 1303, that is not the case. They are being charged the rates actually contained in Verizon's Tariff; there is no allegation that the rates being charged differ from those contained in the tariff. Similarly, there are no ambiguities with respect to the tariff. While Tariff 216 does not specifically say that rates for certain services will be charged to resellers as well as UNE purchasers, it is clear what rates will be charged for whatever entities utilize Access to OSS and DUF service.

Initial Decision at 14.

Although PCC does not deny that resellers use these services and therefore cause the costs that the rates are intended to recover, it argues that it reasonably believed that the cost of these services was incorporated into the wholesale rate for the resale of retail service. This argument is meritless for two reasons. First, because they were involved in the *Generic UNE* proceeding, the PCC companies knew or should have known about the OSS and DUF rates before the *Wholesale Rate for Retail* proceeding closed. See Initial Decision at 20. Second, as discussed in more detail below, the wholesale rate is supported by a detailed cost study specifying all of the cost elements that are factored

into the rate. If access to OSS and DUF costs were incorporated into the wholesale rate, they would have appeared in the cost study as an offset to avoided costs, but they do not.<sup>23</sup> PCC therefore had no reasonable basis for believing that these costs were factored into the wholesale rate. PCC's argument boils down to this: it was not paying attention during the *Generic UNE* proceeding when rates were set to recover these costs, nor during the *Wholesale Rate for Retail* proceeding when these costs were excluded from the cost study; therefore it retained an unsubstantiated belief that these costs were somehow accounted for in the wholesale rate, and this belief justifies its refusal to pay the tariffed rates. Judge Chestnut correctly rejected this specious reasoning.

Thus, although 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 Commission therefore should adopt Judge Chestnut's holding that the rates are properly tariffed.

**Reply to PCC Exception No. 2: The Telecommunications Act Does Not Require that all Charges to Resellers Be Reflected in the Wholesale Discount**

PCC next argues that the challenged rates are invalid because 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, 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

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<sup>23</sup> See Wholesale Rate for Resale Services Provided by Verizon Pennsylvania Inc., Docket No. R-00038516, Verizon Statement No. 1.0 Revised (August 24, 2004) and attached Exhibit (cost study).

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 Judge Chestnut correctly held, however, 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.<sup>24</sup>

PCC compares Access to OSS and DUF charges to loop and port charges, which are separately imposed on UNE purchasers but included in the wholesale rate. This comparison is invalid because loops and ports are required in order to provide service to end users, and therefore are included in the underlying retail rate. The costs at issue here are 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 PCC is irrelevant. As Judge Chestnut explained, “the question of recovery of costs that are not part of the retail rates is not addressed by the TCA, or precluded by the terms of section 252(d)(3).” Initial Decision at 19.

This holding is consistent with federal law interpreting the TCA. In *Bell Atlantic Delaware v. McMahon*, 80 F. Supp. 2d. 218, 248 (D. Del. 2000), the United States

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<sup>24</sup> With respect to DUF costs in particular, it would be wholly 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.

District Court upheld the Delaware Commission's approval of a separate charge to 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 Delaware Public Service 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.

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 PCC, this precedent binds the Commission to require that ILEC's always recover such costs through an offset in the resale discount. 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 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, PCC did not prove 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.<sup>25</sup> 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).<sup>26</sup> But Verizon's unrefuted testimony submitted 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.<sup>27</sup> 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."<sup>28</sup> Accordingly, while the Commission did use an offset methodology in 1997, by accepting Verizon's Access to OSS rate in 2002 the Commission rejected the same argument that PCC makes here, and held that the 1997 offset did not cover the same costs that are being recovered through the current rates. 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, PCC cannot argue that any of

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<sup>25</sup> *Generic UNE*, VZ St. 1.0 filed 12/7/01 at 216.

<sup>26</sup> *See Pennsylvania Public Utility Commission v Bell Atlantic Pennsylvania Inc. et al.* Docket No. R-00963578C0001 Recommended Decision (November 20, 1996) 1996 Pa.PUC LEXIS 207 \* 59.

<sup>27</sup> *Generic UNE*, VZ St. 1.0 filed 12/7/01 at 217.

<sup>28</sup> *Generic UNE*, AT&T/WCom Main Brief at 169-70.

Verizon's OSS-related costs were actually recovered from resellers under these unlawfully low rates.<sup>29</sup>

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 Commission was free to select any appropriate method for recovering them. *See, Bell Atlantic Delaware*, 80 F. Supp. at 248 ("Nothing on the face of the Act prohibits 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 Commission 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 PCC suggests (incorrectly, as discussed above) that the old resale discount already included the same OSS-related costs, PCC does not and cannot argue that the *current* wholesale discount includes an offset for these costs. In fact, the cost study that Verizon submitted for the record in that case, upon which the settlement establishing the discounts is based, contains no such offset.<sup>30</sup> If such an offset had been included, the wholesale price of resold services would be higher because the offset would

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<sup>29</sup> *MCI Telecom. Corp. v. Bell Atlantic-PA*, 271 F.3d 491 (3d Cir. 2001), *cert. denied* 123 S.Ct. 340 (2002).

<sup>30</sup> *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).

have reduced avoided costs and resulted in a smaller discount. Indeed, in agreeing to the settlement with 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 PCC wrongly argues. The Commission has already ruled that these are costs Verizon is legally entitled to recover from resellers. Therefore, if it accepted 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 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 Initial Decision therefore should be adopted.<sup>31</sup>

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<sup>31</sup> PCC's hyperbolic argument that Judge Chestnut's decision gives Verizon the freedom to impose any UNE rates on resellers is absurd. As explained above, the rates at issue in this proceeding were expressly formulated on the basis of, and intended to be applied to, resellers and were approved by the Commission on that basis. The imposition of other UNE rates on resellers has not been approved by the Commission, and thus the drastic scenario envisioned by the PCC is illusory.

**Reply to PCC Exception No. 3: The Complaint is Barred as a Matter of Law by the Commission's Decisions in the Generic UNE Matter**

The Commission approved the rates at issue in the *Generic UNE* proceeding after considering numerous challenges by CLECs and other parties. As discussed above, 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.<sup>32</sup> FSN and ATX were parties to that proceeding. LSI also participated in that proceeding through 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.<sup>33</sup>

Although it was fairly disclosed in the record and acknowledged by the ALJ and the Commission throughout the proceeding that the Access to OSS and DUF rates would apply to resellers, neither 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. For these reasons, Judge Chestnut correctly concluded that PCC is precluded by the doctrines of *res judicata* and collateral estoppel from challenging these rates in the instant proceeding.

**The Complaint is Barred by Res Judicata**

The doctrine of *res judicata* applies to proceedings before the Commission.<sup>34</sup> 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

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<sup>32</sup> See *infra*, p. 6.

<sup>33</sup> See *Generic UNE*, Commission's final Compliance Order entered July 16, 2004.

<sup>34</sup> *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).

offered and received, but also as to any other admissible matter which might have been offered."<sup>35</sup> *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.<sup>36</sup> 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.<sup>37</sup> Not only actual parties but all those in privity with actual parties are bound by the judgment in the first proceeding.<sup>38</sup> Judge Chestnut correctly held that these requirements were met in the instant matter. Initial Decision at 12.

PCC argues that neither the claims nor the parties were identical for purposes of *res judicata*. First, it argues that the parties are not identical because, while two of the three PCC members (ATX and FSN) were parties of record and participated actively in the *Generic UNE* proceeding, the third member LSI, was not permitted to intervene and formally join in comments filed by PCC on behalf of all three member companies. LSI is still bound by *res judicata*, however, because it was clearly in privity with its fellow PCC members. Privity for purposes of *res judicata* does not mean contractual 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."<sup>39</sup> In denying LSI's motion to intervene in the *Generic UNE* case, the Commission specifically

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<sup>35</sup> *Suprick*, 1995 Pa PUC LEXIS at \* 7 (quoting *Commission v. Sunnen*, 333 US 591 (1948)).

<sup>36</sup> *Allen v. McCurry*, 449 U.S. 90, 94 (1980), *Balant v. City of Wilkes-Barre*, 542 PA 555, 564, 669 A.2d 309, 313 (1995).

<sup>37</sup> *Philadelphia Fraternal Order of Correctional Officers v. Rendell*, 701 A.2d 600, 607 (Pa. Commw. 1997).

<sup>38</sup> *Allen v. McCurry*, 449 U.S. at 90, *Balant v. City of Wilkes-Barre*, 542 PA at 563.

<sup>39</sup> *Jordan 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.

held that “we find that the interests which [LSI] would assert are adequately represented by existing participants.”<sup>40</sup> Further, the Commission did consider and rule on LSI’s arguments, as presented by the other members of PCC, including a challenge to the DUF rate on different grounds. The Commission’s finding that LSI’s legal interests were represented by existing participants establishes the required privity for purposes of *res judicata*, as Judge Chestnut properly found:

[I]n this analysis, privity does not mean contractual privity, but rather an identity of legal interests in the outcome of the proceeding. This, in fact, was the basis of the Commission’s finding that the interest of LSI was adequately represented by “existing participants.” Obviously, the Commission considered the arguments that LSI sought to present, and intended that its holding in the *Generic UNE* proceeding would be binding on it.

Initial Decision at 12. This holding does not imply, as PCC suggests, that all other CLECs are precluded by *res judicata* from challenging the rates at issue. Rather, Judge Chestnut’s holding is based on her conclusion that LSI’s particular interests in the *Generic UNE* matter were considered and addressed to the same extent that they would have been had LSI’s motion been granted. In such circumstances, LSI is properly considered a party for purposes of *res judicata*.

PCC next 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.”<sup>41</sup> PCC claims that the controlling issues were not

<sup>40</sup> *Generic UNE*, Final Compliance Order, July 16, 2004 at 7.

<sup>41</sup> *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).

decided in *Generic UNE* because “the Commission did not even mention Resale rates or the application of the OSS and DUF charges to Resale” in its orders.<sup>42</sup> 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.

As discussed above, 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”<sup>43</sup> – necessarily apply to resellers and not just UNE-based CLECs. If 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, 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.

#### **Collateral Estoppel Bars Relitigation of the Issues Raised in the Complaint**

As Judge Chestnut correctly held, even if the doctrine of *res judicata* did not apply, the doctrine of collateral estoppel would preclude PCC from relitigating the issues

<sup>42</sup> PCC Exceptions at 23.

<sup>43</sup> Tariff 216, Sec. 1(A), Third Revised Sheet 1

of whether the applicable rates were properly applied to resellers 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, 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."<sup>44</sup>

PCC argues that the doctrine does not apply because the issues of whether the rates apply to resellers and are properly tariffed were not litigated in the *Generic UNE* matter. Judge Chestnut rightly found to the contrary:

[T]he Access to OSS and DUF rates established in the prior proceeding were calculated on the basis of the costs incurred by, and the anticipated use of the services by, resellers as well as CLECs providing service through the purchase of UNEs, and the placement of those charges in Tariff 216 was approved by the Commission after several opportunities for parties to comment on Verizon's compliance filing.

Initial Decision at 12. PCC also contends that "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 UNE* proceeding."<sup>45</sup> This argument is irrelevant because the instant Complaint does not challenge the manner of setting Verizon's wholesale rates for the resale of its telecommunications service. While PCC

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<sup>44</sup> *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.

<sup>45</sup> PCC Exceptions at 21.

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.<sup>46</sup>

Finally, 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."<sup>47</sup> 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, 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. For all of these reasons, collateral estoppel bars PCC from re-litigating these issues and the Initial Decision granting summary judgment to Verizon should be adopted.

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<sup>46</sup> *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) (*quoting Consolidated Rail Corp. v. PUC*, 625 A.2d 741 (Pa. Commw. 1993)).

<sup>47</sup> PCC Exceptions at 22.

**Commission Precedent Bars this Collateral Attack on its Approved Rates**

In any event, even if the common law doctrines of *res judicata* and/or collateral estoppel did not preclude PCC from making the claims in the Complaint, which they do, 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." This section of the Public Utility Code "precludes a collateral attack upon a Commission order that has not been reversed upon appeal."<sup>48</sup> The application of precedent therefore dictates that PCC's complaint must be dismissed.

**Reply to PCC Exception No. 4:**

**The Access to OSS Rate is Correctly Applied to ISDN Service**

As alleged by PCC, its member company LSI purchases ISDN PRI service from Verizon for resale.<sup>49</sup> ISDN PRI 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 that "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.

<sup>48</sup> *Suprick*, 1995 Pa PUC LEXIS at \* 7.

<sup>49</sup> *See* PCC Exceptions at 26.

As the PRI 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.

Verizon bills the tariffed OSS charge on each of the 23 voice-capable lines ("B" channels) associated with each PRI. Judge Chestnut correctly held that this is the appropriate application of the rate to the ISDN arrangement, because each of the 23 B channels functions as a "line," is defined in the tariff as a line, and therefore is properly treated as a line for billing purposes. Initial Decision at 17. PCC argues that the entire ISDN PRI interface arrangement should be charged the 82¢ Access to OSS rate only once, because the term "line" is confusing and should be construed against Verizon.<sup>50</sup> However, the PRI tariff explains that the 23 "B" channels are "software-defined lines", thereby clarifying the meaning of the term "line" in this context. *See* Tariff Pa. PUC No. 500, section 22, subsection B(1). Since each "B" channel is a line, the Access to OSS rate is properly applied.

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

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<sup>50</sup> The PCC cite Newton's Telecom Dictionary for the proposition that the term "line" is generally confusing and requires clarification, without reference to the clear context in which the term is used in the language of the tariff.

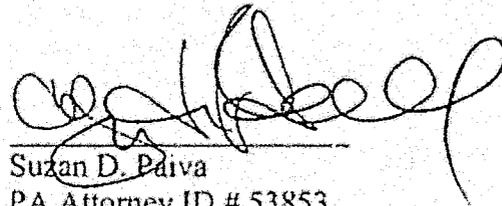
carrier reselling one ordinary POTS line to a residential or small business customer. This would allow carriers like the PCC members, which resell expensive high-capacity business services, to pay a disproportionately low percentage of Access to OSS costs, while those reselling services to residential 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 Judge Chestnut’s holding on this issue should be adopted.

**CONCLUSION**

For the reasons set forth above and in the Initial Decision, Verizon respectfully requests that the Initial Decision be adopted, that summary judgment be entered in favor of Verizon and against PCC, and that PCC’s complaint be dismissed with prejudice.

Dated: November 27, 2006

Respectfully submitted,



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Attorneys for Verizon Pennsylvania  
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DATE: December 5, 2006

SUBJECT: C-20065798

TO: Cheryl W. Davis, Director  
Office of Special Assistants

FROM: James J. McNulty  
Secretary  
nvj

PENNSYLVANIA CARRIERS COALITION  
V.  
VERIZON PENNSYLVANIA, INC.

DOCUMENT  
FOLDER

Copies of the Initial Decision have been served upon all parties of interest.

Exceptions have been filed by:

PENNSYLVANIA CARRIERS COALITION

Reply Exceptions have been received from:

VERIZON PENNSYLVANIA INC

**DOCKETED**  
DEC 08 2006

cc: Susan Hoffner

BTL