

CAPTION SHEET

CASE MANAGEMENT SYSTEM

1. REPORT DATE: 00/00/00	:	
2. BUREAU: ALJ	:	
3. SECTION(S):	:	
5. APPROVED BY:	:	4. PUBLIC MEETING DATE:
DIRECTOR:	:	00/00/00
SUPERVISOR:	:	
6. PERSON IN CHARGE:	:	7. DATE FILED: 01/19/06
8. DOCKET NO: C-20065798	:	9. EFFECTIVE DATE: 00/00/00

PARTY/COMPLAINANT: PENNSYLVANIA CARRIERS' COALITION

RESPONDENT/APPLICANT: VERIZON PENNSYLVANIA INC

COMP/APP COUNTY:

UTILITY CODE: 310200

ALLEGATION OR SUBJECT

COMPLAINANT STATES THEY ARE SEEKING RELIEF FROM THE COMMISSION FROM VERIZON'S UNLAWFUL IMPOSITION OF UNTARIFFED CHARGES ON ITS RESALE SERVICES. THE COMPLAINANT REQUEST THAT THE COMMISSION SUSTAIN THIS COMPLAINT AND: (A) DIRECT VERIZON TO CREDIT THE PCC MEMBERS FOR ALL OSS & DUF CHARGES PAID IN RELATION TO THEIR RESALE LINES AND SERVICES; (B) IMPOSE THE MAXIMUM CIVIL PENALTY FOR EACH AND EVERY PCC RESALE LINE ON WHICH VERIZON IMPOSED ITS UNTARIFFED OSS CHARGE & EACH RESALE CALL ON WHICH VERIZON IMPOSED ITS UNTARIFFED DUF CHARGES (C) DECLARE THAT VERIZON IS PRECLUDED FROM FILING A TARIFF SUPPLEMENT DESIGNED TO IMPLEMENT THE OSS & DUF CHARGES IN RELATION TO CLEC RESALE LINES AND SERVICE; AND (D) GRANT SUCH OTHER RELIEF AS THE COMMISSION DEEMS JUST AND REASONABLE.

DOCKETED
 JAN 24 2006

DOCUMENT
 FOLDER

213 Market Street, 9th Floor, P.O. Box 865, Harrisburg, PA 17108-0865
Tel: (717) 237-7160 ■ Fax: (717) 237-7161 ■ www.WolfBlock.com

Mark S Stewart
Direct Dial: (717) 237-7191
Direct Fax: (717) 237-2771
E-mail: mstewart@wolfblock.com

ORIGINAL

RECEIVED
2006 JAN 19 PM 3:54
PENNSYLVANIA
SECRETARY'S BUREAU

January 19, 2006

VIA HAND DELIVERY

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

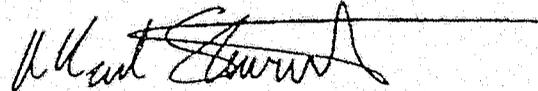
Re: Pennsylvania Carriers' Coalition v. Verizon Pennsylvania, Inc.; Docket No. C-20065798

Dear Secretary McNulty:

Enclosed for filing are the original and three copies of a Complaint, in the above-referenced matter.

If you have any question regarding this filing, please contact me at your convenience.

Very truly yours,



Mark S. Stewart

For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP

MSS/jls
Enclosures

HAR 63397 1/FULL022-2-#730

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ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Carriers' Coalition
Complainant

v.

Verizon Pennsylvania, Inc.
Respondent

Docket No.

C-20065798

COMPLAINT

I. INTRODUCTION AND SUMMARY

The Pennsylvania Carriers' Coalition ("PCC"),¹ by and through its counsel, respectfully submits this Complaint against Verizon Pennsylvania Inc. ("Verizon"), seeking relief from the Pennsylvania Public Utility Commission ("PUC" or "Commission") from Verizon's unlawful imposition of untariffed charges on its Resale service. Effective April 2005, Verizon has charged competitive local exchange carriers ("CLECs"), including the PCC members, an eighty-two cent per line charge on all Resale lines for access to its operation support systems ("OSS"). From that same time, Verizon has also applied multiple Daily Usage File ("DUF") charges to CLECs' Resale lines on a per call basis. Verizon's OSS and DUF charges were applied to the PCC's Resale lines despite the fact that the charges appear only in Verizon's Tariff 216, which covers rates and service conditions for the provision of unbundled network elements ("UNEs"). Nothing in Verizon's Tariff 216 states that the OSS and DUF charges are applicable to Resale.

Certainly, if allowed to continue this unauthorized and illegal practice of picking-and-choosing items from Tariff 216 to bill its Resale carrier competitors, Verizon will have effectively raised its Resale rates to levels greater than what Verizon charges its own retail end

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

user customers. Indeed, under Verizon's apparent pick-and-choose approach, any charge, even loop and port charges, could be applied to Resale. Further, the Resale provisions of Verizon's retail tariff, Tariff Pa. PUC No. 1, do not impose or contain any reference to the OSS or DUF charges. As such, Verizon's imposition of an untariffed charge violates Sections 1302, 1303 and 1501 of the Public Utility Code.

Moreover, the Commission should declare that Verizon is precluded from applying these charges to its Resale service, as the charges are inconsistent with the requirements of federal law for setting Resale rates on an avoided cost basis.² Under those requirements, Verizon's wholesale rates for Resale service *must be determined* by applying a discount to Verizon's retail rates that is based on the costs Verizon actually avoids when its services are offered at wholesale instead of retail. From the inception of Verizon's Resale rates, the Commission has afforded it an offset to capture recurring and nonrecurring costs associated with its operation support systems.³ Accordingly, Verizon's cost recovery for OSS is already incorporated into its Resale rates via the formulation of the wholesale discount, and any attempt to impose an additional OSS or DUF charge, much less attempting to do so as a result of a proceeding *dedicated to setting UNE rates*, would constitute double recovery.

In specific support of its Complaint, the PCC avers as follows:

² 47 U.S.C. § 252(d)(3); *MCI Telecom. Corp. v. Bell Atlantic-PA, Inc.*, 271 F.3d 491, 519-20 (3d Cir. 2001), *cert. denied*, 123 S.Ct. 340 (2002).

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

II. BACKGROUND

1. ATX is a competitive local exchange carrier serving customers in Verizon's service territory. ATX's principal place of business is 2100 Renaissance Boulevard, King of Prussia, PA 19406.

2. FSN is a competitive local exchange carrier serving customers in Verizon's service territory. FSN's principal place of business is 600 Grant Street, Suite 5780, Pittsburgh, Pa 15219.

3. LSI is a competitive local exchange carrier serving customers in Verizon's service territory. LSI's principal place of business is 17 Campus Blvd., Suite 100, Newtown Square, PA 19073.

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

Alan Kohler, Esquire
Mark Stewart, Esquire
Wolf Block Schorr & Solis-Cohen, LLP
212 Locust St., Suite 300
Harrisburg, PA 17101
717-237-7172
akohler@wolfblock.com
mstewart@wolfblock.com

5. By Orders dated December 19, 1996 and February 6, 1997, the Commission first established Verizon's wholesale rates for the resale of Verizon's telecommunications services.⁴ In those Orders, the Commission adopted the conclusion that Verizon's wholesale rates for Resale "must be determined on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange

⁴ *Pa. PUC v. Bell Atlantic*, Docket No. R-00963578.

carrier.”⁵ Further, the PUC adopted the position, advocated by Verizon, that its OSS-related costs should be treated as offsets to the identified avoided costs, as well as the conclusion that such OSS-related costs were in fact recovered in the just and reasonable wholesale discount rate established for Verizon.⁶

6 On or around September 17, 2001, an investigation into Verizon’s rates for UNEs was initiated by the Commission.⁷ The purpose of that proceeding was to determine whether “the existing tariffed rates for [Verizon’s] unbundled network elements” continued to be just and reasonable.⁸ As part of that proceeding, Verizon proposed its OSS charge for all UNE loops and UNE-P as a mechanism for recovering expenses associated with the initial development necessary to provide access to operation support systems and ongoing maintenance of provisioning OSS.⁹ The proposed OSS charge was also applicable to Resale loops.¹⁰

7. In that proceeding, Verizon also proposed multiple DUF charges.¹¹ Through the DUF, CLECs are provided with records of their customers’ intraLATA local and toll usage detail

⁵ *Id.*, Recommended Decision (November 20, 1996) (1996 Pa. PUC LEXIS 209, **67-68) (citing 47 U.S.C. § 252(d)(3)); *Id.*, Opinion and Order (December 19, 1996) at Ordering ¶ 3 (adopting Recommended Decision). While the meaning of the phrase “will be avoided” was a contested issue in that proceeding, the distinction debated in that proceeding is immaterial to this matter.

⁶ *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).

⁷ *Generic Investigation Re Verizon Pennsylvania, Inc.’s Unbundled Network Element Rates*, Docket No. R-00016683, Order (August 31, 2001).

⁸ *Id.* at 1 (emphasis added).

⁹ *Id.*, Tentative Order (November 4, 2002) at 169.

¹⁰ *Id.*

¹¹ *Id.* at 170-71.

for billing purposes. As to each call, Verizon's proposal called for a charge to be applied for recording the message and a separate charge to be applied for transmitting the record to the CLEC.¹²

8. In addressing the OSS charge proposal, the focus of the Commission was on the status of access to OSS as a UNE.¹³ 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.¹⁴

9. In its Final Opinion and Order, the Commission stated that it was, by its Order, "establish[ing] final rates *for UNEs*" for Verizon.¹⁵ The Commission discussed neither the OSS nor the DUF charges, and instead adopted the findings and conclusions of its Tentative Order,¹⁶ which in turn adopted the recommendation of the Administrative Law Judge to approve the OSS and DUF proposals.¹⁷

10. On January 26, 2004, Verizon submitted its Compliance Filing, which proposed changes to its Tariff 216, regarding UNEs, and Tariff 218, regarding collocation and interconnection service. Nothing in the Compliance Filing amended the Resale provisions of

¹² *Id.*; Recommended Decision at 64-65.

¹³ *Id.*, Tentative Order at 170; Recommended Decision at 63-64.

¹⁴ *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.

¹⁵ *Id.*, Final Opinion and Order (December 11, 2003) at 14 (emphasis added).

¹⁶ *Id.* at 14 and Order ¶ 3.

¹⁷ *Id.*, Tentative Order at 170 and Order ¶ 12. Notably, the Recommended Decision did not mention the applicability of the OSS charge to Resale service. *Id.*, Recommended Decision at 63-64.

Verizon's Tariff 1, or otherwise indicated that the proposed OSS and DUF related tariff changes implicated Resale service. The Commission did not accept the filing and issued a Compliance Order directing Verizon to file a tariff supplement consistent with and implementing the rates approved in the Final Opinion and Order.¹⁸

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

12. On June 12, 2003, the Commission initiated a proceeding to recalculate Verizon's wholesale rates for the resale of its telecommunications services.¹⁹ This proceeding was necessitated by a change in federal law as to the interpretation of the phrase "will be avoided" in Section 252(d)(3) of the Telecommunications Act of 1996.²⁰ Nothing in either federal law or the PUC's orders related to the June 2003 proceeding altered the Commission's previous findings that the lawful recovery method for Verizon's OSS-related costs was as an offset of its avoided costs in the formulation of the wholesale discount rate or that such costs were in fact already being recovered in Verizon's Resale rates.²¹

¹⁸ *Id.*, Compliance Order (July 16, 2004).

¹⁹ *Wholesale Rate for Resale of Telecommunications Provided by Verizon Pennsylvania Inc. and Verizon North Inc.*, Docket No. R-00038516.

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

²¹ Based on the fact that Verizon's Customer Billing Center provides the DUFs to CLECs, the PUC, and apparently Verizon, considered the DUF costs to be related to Verizon's OSS. *Generic Investigation Re Verizon Pennsylvania, Inc.'s Unbundled Network Element Rates*, Docket No. R-00016683, Recommended Decision (May 3, 2002) at 65.

13. In the Resale rates proceeding, Verizon, through its witnesses and otherwise, acknowledged that the purpose of the proceeding was, in fact, to "establish wholesale rates."²² Accordingly, Verizon proposed wholesale rates for Resale service that were discounted from its retail costs by 13.34%, if CLECs utilized Verizon's Operator Services and Directory Assistance, and 15.07%, if CLECs did not use Verizon's Operator Services.²³ Upon information and belief, the PCC avers that at no point, in either its testimony or its cost study exhibits, did Verizon indicate that its Resale rates would actually be even higher (or the discounts essentially lower) than those figures due to the additional OSS and DUF charges.

14. On October 29, 2004, the parties to the Resale rates proceeding, which included FSN, entered into a Settlement Stipulation resolving the proceeding. By its terms, the Settlement proposed "statewide wholesale rates for the resale of [Verizon and Verizon North's] telecommunications services."²⁴ Nowhere in the Settlement, and at no time in its formulation among the parties or 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. On March 4, 2005, the PUC adopted a Recommend Decision endorsing the Settlement. Verizon's new Resale rates went into effect on December 1, 2005.

²² *Wholesale Rate for Resale of Telecommunications Provided by Verizon Pennsylvania Inc. and Verizon North Inc.*, Docket No. R-00038516, Verizon Statement No. 1 (Revised Direct Testimony of Bruce F. Meacham) at 3 ("The Commission initiated the instant proceeding . . . in order to establish wholesale rates that comply with current legal requirements").

²³ *Id.* at 28.

²⁴ *Id.*, Settlement Stipulation at ¶ 10(a). Verizon was the primary drafter of the Settlement Stipulation.

III. VERIZON'S OSS AND DUF CHARGES, AS APPLIED TO RESALE SERVICE, ARE UNTARIFFED AND UNLAWFUL CHARGES.

15. In or around April 2005, Verizon began applying its OSS charge on a per line basis to all Resale lines of the PCC members.

16. At the same time, Verizon began assessing the DUF message and transmission charges on a per call basis for all Resale activity of the PCC's customers. Upon information and belief, Verizon has retroactively applied both the OSS and DUF charges to October 1, 2004.

17. As of the date of this Complaint, Verizon has not tariffed its OSS or DUF charges as applied to Resale service.

18. Section 1302 of the Public Utility Code states, in pertinent part, as follows:

Under such regulations as the commission may prescribe, every public utility shall file with the commission, within such time and in such form as the commission may designate, tariffs showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission.²⁵

19. Verizon's Tariff 216 does not indicate that the OSS and DUF charges apply to Resale service. Further, Verizon's tariffs generally offer no clear notice that the OSS and DUF charges are applicable to a CLEC's Resale lines.

20. Nonetheless, Verizon has collected its OSS charge on a per line basis for each Resale line served by the PCC members. Likewise, Verizon has collected its DUF charges for each message recorded and record transmitted on a per call basis for each call made by the PCC's Resale customers. As of the date of this Complaint, the PCC members have paid in excess of \$67,000.00 in untariffed OSS and DUF charges.

21. Verizon's imposition and collection of Resale-based OSS and DUF charges that are not shown in its tariffs violates Section 1302 of the Public Utility Code. The purpose of

²⁵ 66 Pa. C.S. § 1302 (emphasis added).

Section 1302 is to ensure that a utility provides clear notice of its rates, and carriers are not permitted thereunder to force customers, either retail or wholesale, to perform major investigations and analyses just to uncover and determine the rates applicable to the services they purchase.

22. Section 1303 of the Code also prohibits Verizon from directly or indirectly demanding or receiving a greater rate for service than that specified in its tariffs. As Verizon's Resale-based OSS and DUF charges are not included in its tariffs, Verizon's billing of the PCC for the charges in the Resale context also violates Section 1303.

23. Verizon's imposition of untariffed charges on the PCC constitutes unreasonable wholesale service in violation of Section 1501 of the Code.

IV. VERIZON HAS MISAPPLIED ITS OSS CHARGE.

24. Even apart from the fact that the Resale-based OSS charge is untariffed, and therefore unlawful, Verizon has misapplied the OSS charge to both UNE and Resale by collecting it on a per telephone number, as opposed to a per loop, basis.

25. As to at least LSI, Verizon has applied its OSS charge on a per telephone number basis, even where all of the telephone numbers are over a single loop. For instance, the charge has been applied to remote call forward numbers as well as every direct inward dial line on a primary rate interface despite the fact that all the traffic for those lines is carried over the same loop.

26. To the extent that Verizon's OSS Charge was approved by the Commission for the UNE Tariff 216, it was approved so as to be applied on a per loop basis.²⁶

²⁶ *Generic Investigation Re Verizon Pennsylvania, Inc.'s Unbundled Network Element Rates*, Docket No. R-00016683, Tentative Order (November 4, 2002) at 169.

27. Verizon's Tariff 216 improperly assess the charge on a per telephone number basis.

V. THE PUC SHOULD DECLARE THAT VERIZON IS PRECLUDED FROM TARIFFING ITS OSS AND DUF CHARGES AS APPLIED TO RESALE.

28. Pursuant to Section 331(f) of the Public Utility Code and Section 5.42 of the Commission's regulations, the PUC has the authority to issue declaratory orders to terminate controversies and remove uncertainty regarding matters under its purview.

29. Pursuant to Section 252(d)(3) of the Telecommunications Act of 1996 and the PUC's Orders, Verizon's wholesale rates for the resale of its telecommunications service "must be determined on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."²⁷ Verizon's approach to setting Resale rates – whereby the rate is initially determined by applying the wholesale discount to its retail rates and then increased by various charges that Verizon selectively picks and chooses from its UNE Tariff 216 – is starkly inconsistent with the manner by which Resale rates "must be determined" under the Telecommunications Act.

30. Moreover, pursuant to the Commission's Orders, the lawful manner for Verizon to recover any OSS-related costs is as an offset to its avoided costs. Furthermore, the Commission's Orders have, in fact, already allowed for the recovery of such costs in Verizon's Resale rates.²⁸

²⁷ *Pa. PUC 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)) (emphasis added); *Id.*, Opinion and Order (December 19, 1996) at Ordering ¶ 3 (adopting Recommended Decision).

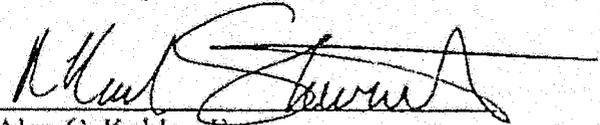
²⁸ *Id.*, Recommended Decision (November 20, 1996), 1996 Pa. PUC LEXIS 209, *66; *Id.*, Opinion and Order (December 19, 1996) at Ordering ¶ 3 (adopting Recommended Decision). Nothing in the Commission's March 4, 2005 Order, setting new wholesale

31. Any attempt by Verizon to tariff its OSS and DUF charges as applied to Resale lines and service would be inconsistent with federal and state law for setting Resale rates, would permit Verizon a double recovery of its OSS-related costs, and would be unlawful.

32. As such, the Commission should declare that Verizon is precluded from filing a tariff supplement to impose its OSS and DUF charges on CLECs in the Resale context.

WHEREFORE, the Pennsylvania Carriers' Coalition respectfully requests that the Commission sustain this Complaint and: (a) direct Verizon to credit the PCC members for all OSS and DUF charges paid in relation to their Resale lines and service; (b) impose the maximum civil penalty pursuant to 66 Pa. C.S. § 3301(a) for each and every PCC Resale line on which Verizon imposed its untariffed OSS charge and each resale call on which Verizon imposed its untariffed DUF charges; (c) declare that Verizon is precluded from filing a tariff supplement designed to implement the OSS and DUF charges in relation to CLEC Resale lines and service; and (d) grant such other relief as the Commission deems just and reasonable.

Respectfully submitted:



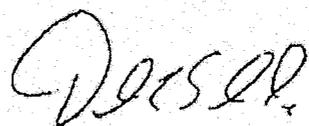
Alan C. Kohler, Esq.
Mark S. Stewart, Esq.
Wolf Block Schorr and Solis-Cohen LLP
913 Market Street, 9th Fl.
Harrisburg, PA 17101
717-237-7160

Date: January 19, 2006

discount rates for Verizon by adopting a settlement of the parties, changed this cost recovery method or removed Verizon's already existing cost recovery from its wholesale discount rates. *Wholesale Rate for Resale of Telecommunications Provided by Verizon Pennsylvania Inc. and Verizon North Inc.*, Docket No. R-00038516.

VERIFICATION

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

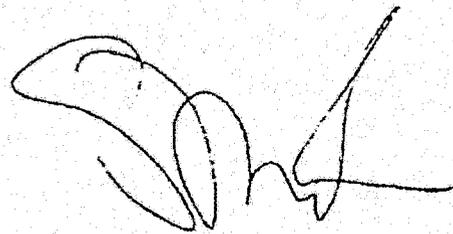


David E. Schwencke, President
Full Service Computing Corp.
t/a Full Service Network

Date: January 19, 2006

VERIFICATION

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

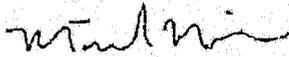
A handwritten signature in black ink, appearing to read 'Scott Dulin', written over a horizontal line.

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

Date: January 19, 2006

VERIFICATION

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


Michael Miller,
Line Systems, Inc.

Date: January 19, 2006

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

DATE SERVED: JANUARY 24, 2006

PENNSYLVANIA CARRIERS'
COALITION

Complainant

v.

Complaint Docket
No: C-20065798

VERIZON PENNSYLVANIA, INC.

Respondent

DOCUMENT
FOLDER

DOCKETED
JAN 24 2006

FORMAL COMPLAINT NOTICE TO RESPONDENT TO ANSWER OR SATISFY

TO: VERIZON PENNSYLVANIA, INC.

TAKE NOTICE:

That a complaint in the above entitled matter, of which the attached is a true and correct copy, has been presented and filed of record with the Pennsylvania Public Utility Commission. Section 702 of the Public Utility Code, 66 Pa. C.S. Section 702, requires the Commission to serve on each party named in a complaint a copy of the complaint and notice calling upon each party to satisfy the complaint, or to answer the same in writing within a specified time; THEREFORE,

1. You have twenty (20) days from the date on which this complaint is served to either satisfy this complaint or to file with the **Secretary of the Pennsylvania Public Utility Commission, P. O. Box 3265, Harrisburg, PA 17105-3265**, an answer (original and three copies), in writing, under oath, which, as required by Section 5.61 of the Commission's Rules of Practice and Procedure, 52 Pa. Code Section 5.61, either affirms or specifically denies the allegations in this complaint. You must also serve a copy of the answer upon the complainant. The date of service is the mailing date as indicated by the date at the top of this Notice. Section 1.56(a) of the Commission's Rules of Practice and Procedure, 52 Pa. Code Section 1.56(a).

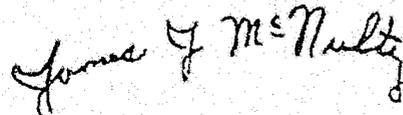
2. If you fail to either satisfy this complaint or to file answer or other responsive pleading within twenty (20) days, you will be deemed to have admitted all the allegations in this complaint in accordance with Section 5.61 of the Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code Section 5.61. In that event, the Commission may, without hearing, enter an order which either revokes or suspends any certificate or permit held by you or which imposes a fine or any other appropriate penalty or remedy authorized by the Public Utility Code, 66 Pa. C.S. Section 101, et seq.; and, if

you are a customer of a utility, an order may be entered which prescribes a payment schedule or which authorizes termination of utility services. The Commission is not limited to the relief sought by the complainant in paragraph 4 of the attached complaint.

3. If you elect to satisfy this complaint you must file, within twenty (20) days from the date on which this complaint is served, affidavits executed by each complainant that this complaint has been satisfied. Such affidavits must describe the basis on which this complaint was satisfied; any settlement agreement between the parties must be reduced to writing and attached to the affidavit. Such affidavits are to be filed with the Secretary of the Commission at the address set forth in paragraph 1. Upon receipt of affidavits of satisfaction from all complainants, this complaint may be dismissed by the Commission in accordance with Section 703(a) of the Public Utility Code, 66 Pa. C.S. Section 703(a), unless the Commission determines that such dismissal would be contrary to the public interest, in which event the Commission may direct that hearings be held upon the complaint.

4. If you file an answer which admits the allegations in this complaint, or which fails to specifically deny the allegations in this complaint, the Commission may, without hearing, enter an order which either revokes or suspends any certificate held by you or which imposes a fine or any other appropriate penalty or remedy authorized by the Public Utility Code, 66 Pa. C. S. Section 101, et seq.; and, if you are a customer of a utility, an order may be entered which prescribes a payment schedule or which authorizes termination of utility services. The Commission is not limited to the relief sought by the complainant in paragraph 4 of the attached complaint.

5. If you file a timely answer which specifically denies the allegations in this complaint, or which raises material questions of law or fact, this matter shall be referred to the Office of Administrative Law Judge for hearing and decision. If, after hearing on the issues raised by that answer, you are found to have committed any of the violations alleged in the complaint, the Administrative Law Judge may render a decision which either revokes or suspends any certificate or permit held by you or which imposes a fine or any other appropriate penalty or remedy authorized by the Public Utility Code, 66 Pa. C. S. Section 101, et seq.; and, if you are a customer of a utility, an order may be entered which prescribes a payment schedule or which authorizes termination of utility services. In the imposition of a penalty after a hearing the Administrative Law Judge is not bound by the relief sought by the complainant in paragraph 4 of the attached complaint.



James J. McNulty
Secretary

(SEAL)

Certified Mail
Return Receipt Requested



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

DATE SERVED: JANUARY 24, 2006

C-20065798

WILLIAM B PETERSEN
VERIZON PENNSYLVANIA INC
FLOOR 32SW
1717 ARCH ST
PHILADELPHIA PA 19103

DOCUMENT
FOLDER

Dear Mr. Petersen:

A complaint has been filed against you before the Pennsylvania Public Utility Commission by PENNSYLVANIA CARRIERS' COALITION. To defend yourself against the claims stated in the following pages, you must act within twenty (20) days by filing in writing with the Commission, either, personally or through your attorney, your defenses or objections to the claims stated against you. Or, you may satisfy the complaint by settling the matter with the Complainant and submitting proof of settlement to the Commission within twenty (20) days.

IF YOU FAIL TO RESPOND WITHIN TWENTY (20) DAYS, THE CASE MAY GO FORWARD IN YOUR ABSENCE AND A JUDGEMENT MAY BE ENTERED AGAINST YOU BY THE COMMISSION WITHOUT FURTHER NOTICE.

CUSTOMER OF A UTILITY

A payment schedule may be prescribed or a termination of utility services may be authorized. You may lose money or property or other rights important to you.

COMPANY/UTILITY

An Administrative Law Judge may revoke or suspend any certificate or permit held by you, or impose a fine, or any other appropriate penalty or remedy authorized by the Public Utility Code. You may lose money or property or other rights important to you.

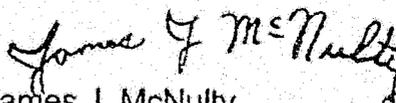
Detailed instructions on how to proceed are contained in the attached pages. You are advised to read them carefully.

JANUARY 24, 2006

Unless you are a corporation or other organization, you may proceed without a lawyer. However, if you want a lawyer and do not have one or cannot afford one, the office listed below can tell you where you can get legal help:

Pennsylvania Lawyer Referral Service
Pennsylvania Bar Association
P.O. Box 186
Harrisburg, PA 17108
(800) 692-7375

Very truly yours,


James J. McNulty
Secretary

JIH

Suzan DeBusk Paiva
Assistant General Counsel
Pennsylvania



ORIGINAL

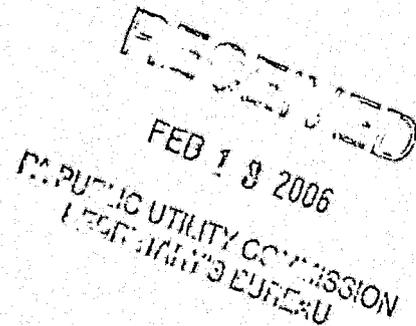
1717 Arch Street, 10W
Philadelphia, PA 19103

Tel: (215) 466-4755
Fax: (215) 563-2658
Suzan.D.Paiva@Verizon.com

February 13, 2006

VIA UPS OVERNIGHT

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120



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

Dear Mr. McNulty:

Enclosed please find an original and three (3) copies of Verizon Pennsylvania Inc.'s Answer to the Complaint of the Pennsylvania Carriers' Coalition, in the above named matter.

In addition, enclosed please find an original and three (3) copies of Verizon Pennsylvania Inc.'s Motion to Dismiss the Complaint of the Pennsylvania Carriers' Coalition, in the above named matter.

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

Very truly yours,

Suzan D. Paiva

SDP/slb

Enclosure

cc: Via E-Mail and First Class USPS
Mark Stewart, Esquire

DOCUMENT
FOLDER

140

CERTIFICATE OF SERVICE

I, Suzan D. Paiva, hereby certify that I have this day served a copy of Verizon Pennsylvania Inc.'s Answer to the Complaint, and of Verizon Pennsylvania Inc.'s Motion to Dismiss the Complaint, upon the participant 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 13th day of February, 2006.

VIA E-MAIL AND FIRST CLASS USPS DELIVERY

Mark Stewart, Esquire
Wolf, Block, Schorr & Solis-
Cohen
212 Locust Street, Suite 300
Harrisburg, PA 17101-1236



Suzan D. Paiva
Assistant General Counsel
Verizon Pennsylvania Inc.
1717 Arch Street, 10W
Philadelphia, PA 19103
(215) 466-4755

RECEIVED

FEB 15 2006

PA PUBLIC UTILITY COMMISSION
REGISTRY'S ED. DIV

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RECORDED
FEB 15 2006
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

VERIZON PENNSYLVANIA INC.'S ANSWER TO THE COMPLAINT OF THE PENNSYLVANIA CARRIERS' COALITION

Respondent Verizon Pennsylvania Inc. ("Verizon PA") hereby answers the Complaint of the Pennsylvania Carriers' Coalition ("PCC")¹ challenging Verizon PA's application of the Access to Operations Support Systems ("Access to OSS") and Daily Usage File ("DUF") charges to resold lines.

The application of these rates to resold lines should come as no surprise to the PCC. This Complaint is nothing but an attempt to collaterally attack the Commission's prior orders in the *Generic UNE* case, in which it specifically approved these rates to be applied to resellers in a proceeding in which PCC members fully participated.

Accordingly, Verizon PA also moves to dismiss the Complaint as set forth in its separately filed Motion to Dismiss.²

ANSWER

DOCUMENT FOLDER

1. Verizon PA lacks sufficient information to admit or deny these factual allegations concerning complainant ATX.

DOCKETED
FEB 16 2006

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

² Pursuant to 52 Pa. Code § 5.101(b), Verizon PA's Motion to Dismiss is being filed along with this Answer.

2. Verizon PA lacks sufficient information to admit or deny these factual allegations concerning complainant FSN.

3. Verizon PA lacks sufficient information to admit or deny these factual allegations concerning complainant LSI.

4. This paragraph, which simply identifies the PCC's attorneys, requires no response.

5. Denied as stated. The Commission's orders at Docket R-00963578 are in writing and speak for themselves and all characterizations of them are denied. This paragraph also contains conclusions of law to which no response is required. To the extent any response is necessary, it is specifically denied that the result of this proceeding was a "just and reasonable" wholesale discount rate. To the contrary, the federal courts held the resulting discount to be illegal – providing too deep a discount to resellers and failing to allow Verizon to recover all of its costs – because it did not comply with federal law. Moreover, the discount resulting from the cited orders is not the wholesale discount in effect for Verizon PA today. The current discount was set through a Commission-approved settlement between Verizon PA and the PCC.³

6. Denied as stated. The *Generic UNE* investigation at Docket R-00016683 was initiated by order entered August 31, 2001 (not September 17) and this order is in writing and speaks for itself and all characterizations of it are denied. Contrary to PCC's mischaracterizations, the Commission was clear from the outset that the proposed Access to OSS rate in that case would apply to resold lines as well as to UNE loops and UNE-P. Indeed, had the relevant costs not been spread over a larger pool of estimated lines

³ The parties to the settlement also included Verizon North Inc., the Office of Trial Staff and Office of Small Business Advocate.

including resold lines, but instead been calculated to apply only to UNE lines, the resulting rate would have been higher.⁴

Verizon PA'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,"⁵ 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*."⁶ The Commission's *Tentative Order* in the *Generic UNE* case recognized that the proposed rate was a "charge on all UNE loops, UNE-P, *and resale loops*, to recover expenses associated with the initial development necessary to provide access to operation support systems and ongoing maintenance and provisioning of OSS."⁷ The Commission adopted ALJ Schnierle's Recommended Decision on this issue, which had agreed that Verizon could impose its proposed charge on "all UNE loops, UNE platforms *and resale loops*."⁸ The issue was not addressed in

⁴ *Generic UNE*, VZ St. 1.0 filed 12/7/01 at 129 (Verizon "proposes to recover the total costs through monthly recurring charges to CLECs that are based on the number of UNE loops, platform/combinations and *resold lines* that are forecasted to be in service in Pennsylvania in the 10-year forecast period.") (emphasis added); *id* at 129-30 (CLECs "will only be responsible for their fair share of such costs based on the projected demand of UNE loops, platforms/combinations and *resold lines*.") (emphasis added). See also Verizon PA's Access to OSS cost study, Part F-5, Workpaper 4, Section 1, page 13 (demonstrating that the demand assumption included resale lines as well as UNE loops and UNE-P).

⁵ *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).

⁶ *Id* at 129. See also *id* at 131 ("costs were incurred specifically to satisfy the Telecommunications Act's requirements and permit CLECs to obtain UNEs *and resale* in an efficient manner.") (emphasis added).

⁷ *Generic UNE*, Tentative Order entered Nov. 4, 2002, at 169 (emphasis added).

⁸ *Generic UNE*, Recommended Decision, May 3, 2002 at 63 (emphasis added).

the December 11, 2003 *Final Order* because no party challenged the holding from the *Tentative Order*, which therefore became the Commission's final holding on this rate. PCC members FSN and ATX were parties to the *Generic UNE* case and filed joint comments to the *Tentative Order* in April of 2003, but did not challenge the approval of the Access to OSS rate (either generally or as applied to resellers).⁹

7. Denied as stated. It is admitted that Verizon PA proposed DUF rates in the *Generic UNE* investigation. As with the Access to OSS rate, it was clear from the outset that this rate would apply to resellers. As described in Verizon PA'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."¹⁰ AT&T/WorldCom in their rebuttal testimony recognized that the proposed DUF rate was based on Verizon PA's "projected *resale* and UNE platform/combination demand" and that this rate would apply for "*resale usage*."¹¹ In his Recommended Decision, ALJ Schnierle noted that the DUF rate was based on an "assumed demand" that included "*resale services*."¹² The Commission's *Tentative Order* adopted the ALJ's conclusion on the DUF rate.¹³ PCC members FSN and ATX were parties to the *Generic UNE* case and filed joint comments to the *Tentative Order* on April 9, 2003, but did not challenge the approval of the DUF

⁹ LSI belatedly sought to intervene in the *Generic UNE* proceeding in February of 2004. Although the Commission denied its petition on the grounds that its interests were already well-represented by existing parties, the Commission did consider the pleading that LSI had sought to submit, because existing party FSN was a co-signatory to the pleading. See *Generic UNE*, July 16, 2004 Final Compliance Order. LSI did not attempt to challenge the application of the Access to OSS or DUF rates to resellers.

¹⁰ *Generic UNE*, VZ St. 1.0 filed 12/7/01 at 171 (emphasis added).

¹¹ *Generic UNE*, AT&T/WCom St. 3.0 (Recurring Panel Rebuttal) at 168-170 (emphasis added).

¹² *Generic UNE*, Recommended Decision, May 3, 2002 at 65 (emphasis added).

¹³ *Generic UNE*, Tentative Order entered Nov. 4, 2002, at 172.

rate (either generally or as applied to resellers). Later, the PCC filed Comments to Verizon PA's compliance filing making other challenges to the DUF rate, but again did not challenge its application to resellers.¹⁴ Contrary to the PCC's description, moreover, DUF is not a rate that applies to "each call." To the contrary, DUF is an optional service to which a reseller or UNE purchaser may subscribe, but these carriers are not required to purchase the service.¹⁵ Accordingly, if the PCC members are being charged for DUF on their resold lines it is because they affirmatively ordered this service for those lines.

8. Denied as stated. The Commission's orders in the *Generic UNE* case are in writing and speak for themselves, and all characterizations of them are denied. Moreover, as discussed in response to paragraphs 6 and 7, above, the Commission and the parties (which included PCC members ATX and FSN) were well-aware that these rates would apply to resold lines, and no party opposed the application of these rates to resold lines. Indeed, if the Commission and the parties had *not* assumed that the relevant costs would be spread across both UNE and resold lines, then the per-line rate for each UNE line would have been higher than the rate the Commission approved.

9. Denied as stated. The Commission's orders in the *Generic UNE* case are in writing and speak for themselves, and all characterizations of them are denied. Moreover, as discussed in response to paragraphs 6 and 7, above, the Commission and the parties were well-aware that these rates would apply to resold lines.¹⁶

¹⁴ *Generic UNE*, The Pennsylvania Carriers' Coalition's Comments to Verizon's Compliance Filing, filed February 25, 2003.

¹⁵ *See, e.g., Generic UNE*, AT&T/WCom St. 8.0 (Recurring Panel Rebuttal) at 169, n.171 (noting that Verizon has assumed for purposes of the study that 75% of resellers will purchase the DUF product)

¹⁶ While PCC contends that "[n]otably the Recommended Decision did not mention the applicability of the OSS charge to Resale service," (Complaint at 5, n. 17), this characterization is incorrect. The RD specifically concluded that Verizon could impose its proposed charge on "all UNE loops, UNF

10. Denied as stated. Verizon PA's compliance filing in the *Generic UNE* case is in writing and speaks for itself and all characterizations of it are denied. It is admitted that the Commission made certain modifications to the compliance filing (none of which involved the application of the Access to OSS and DUF rates to resellers). The Commission's orders in this regard are in writing and speak for themselves and all characterizations of them are denied.

11. Denied as stated. It is admitted that Verizon PA's Commission-approved Access to OSS and DUF rates are set forth in its tariff Pa. PUC 216. The PCC's contention that these rates should have been tariffed in some other unspecified manner in order to apply to resellers is a conclusion of law to which no response is required. To the extent any response is necessary, however, this contention is denied. The Commission approved Verizon PA's compliance filing placing these charges in Tariff 216 in the *Generic UNE* case. Tariff 216 makes clear that "[t]his tariff applies to services provided by [Verizon PA] to Other Telephone Companies that have been authorized by the [PUC] to provide local exchange service in Pennsylvania," which plainly can include rates applicable to resellers as well as to CLECs that lease UNEs. (Tariff 216, Sec. 1(A), Third Revised Sheet 1). Moreover, while the resale discount itself and other provisions relating to resale appear in Verizon PA's retail tariff, Tariff Pa. PUC 1, Sec. 8.1, that tariff also makes clear that other tariffs may also contain provisions applicable to resold lines. Specifically, the retail tariff 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

platforms and resale loops." *Generic UNE*, Recommended Decision, May 3, 2002 at 63 (emphasis added).

extent they conflict with the language of this Section.” (Tariff 1, Sec. 8.1(A)(1), First Revised Sheet 4A). It further states that “[t]he regulations contained in this Section are intended to supplement the regulations contained in other sections of this or other Telephone Company tariffs to the extent such other regulations do not conflict with the regulations contained herein.” (*Id.*, Sec. 8.1(A)(2)).

12. Denied as stated. It is admitted that the Commission initiated a proceeding at Docket No. R-00038516 to set a new resale discount for Verizon PA as required by the United States Court of Appeals for the Third Circuit.¹⁷ The applicable orders of this Commission and the federal courts are in writing and speak for themselves, and all characterizations of them are denied. This paragraph also contains conclusions of law to which no response is required.

13. Denied as stated. Verizon’s testimony in Docket R-00038516 is in writing and speaks for itself, and all characterizations of it are denied. In any event, this proceeding was resolved through a settlement with Verizon to which the PCC was the primary other party. The PCC’s claim that Verizon did not “indicate” during the litigation of the resale case that resellers would still pay the Access to OSS and (optional) DUF charges is irrelevant. PCC member companies actively participated in and were represented by counsel in both the *Generic UNE* case and this resale case. The Settlement Stipulation in the resale case was dated October 29, 2004. By that time the Commission had issued its *Tentative Order* (November 4, 2004) and its *Final Order* (December 11, 2003) in the *Generic UNE* case, and Verizon’s tariffed compliance rates had gone into effect (October 1, 2004). Throughout the *Generic UNE* proceedings it was

¹⁷ *MCI Telecom. Corp. v. Bell Atlantic-PA, Inc.*, 271 F.3d 491, 519-20 (3d Cir. 2001), cert. denied, 123 S.Ct. 340 (2002).

clear to the Commission and the parties that these rates would apply to resold lines, and the participating PCC members never challenged that fact. They therefore knew or should have known that these rates would apply to resold lines when they entered into the Settlement Stipulation in the resale case.

14. Denied as stated. It is admitted that the parties to the resale proceeding at Docket R-00038516 entered into a Settlement Stipulation, which was approved by the Commission by order entered March 4, 2005. The settlement documents and Commission order are in writing and speak for themselves and all characterizations of them are denied.¹⁸

15. Denied as stated. It is admitted that Verizon PA began applying its Access to OSS charge to resale lines in April of 2005, retroactive to the rate's effective date of October 1, 2004.

16. Denied as stated. It is admitted that Verizon PA's new DUF rates approved in the *Generic UNE* proceeding began to be applied to all resold lines that had ordered DUF, commencing in April of 2005 and retroactive to the new rates' effective date of October 1, 2004. However, Verizon already had pre-existing rates for DUF before October 1, 2004, which were already tariffed in Pa PUC Tariff 216, and those rates were already being charged to resold lines that had affirmatively ordered DUF.

17. This paragraph contains conclusions of law to which no response is required. To the extent any response is needed, Verizon PA's Access to OSS and DUF rates are tariffed in Pa. PUC 216 and apply to resold lines, as set forth in response to Paragraph 11,

¹⁸ While the PCC now claims that "Verizon was the primary drafter of the Settlement Stipulation," (Complaint at 7, n. 24), the PCC members were represented by outside counsel in that settlement (the same counsel representing them in this proceeding) and the Settlement Stipulation was approved by an ALJ and this Commission.

above. Moreover, the tariffs must be read in conjunction with the Commission's orders approving these rates, which plainly approved them for application to resold lines.

18. The paragraph requires no response because it simply quotes a portion of 66 Pa.C.S. § 1302, which is in writing and speaks for itself.

19. This paragraph contains conclusions of law to which no response is required. To the extent any response is needed, Verizon PA's Access to OSS and DUF rates are tariffed in Pa. PUC 216 and apply to resold lines, as set forth in response to Paragraph 11, above. Moreover, the tariffs must be read in conjunction with the Commission's orders approving these rates, which plainly approved them for application to resold lines.

20. It is admitted that Verizon PA has charged its Access to OSS and DUF rates to the PCC members for resold lines. Verizon denies that such charges are "untariffed," for the reasons discussed in response to paragraph 11, above. Verizon PA is unable to verify the precise dollar figure of \$67,000 quoted in paragraph 20.

21. This paragraph contains conclusions of law to which no response is required. To the extent any response is needed, Verizon PA's Access to OSS and DUF rates are tariffed in Pa. PUC 216 and apply to resold lines, as set forth in response to Paragraph 11, above. Moreover, the tariffs must be read in conjunction with the Commission's orders approving these rates, which plainly approved them for application to resold lines.

22. This paragraph contains conclusions of law to which no response is required. To the extent any response is needed, Verizon PA's Access to OSS and DUF rates are tariffed in Pa. PUC 216 and apply to resold lines, as set forth in response to Paragraph 11, above. Moreover, the tariffs must be read in conjunction with the Commission's orders approving these rates, which plainly approved them for application to resold lines.

23. This paragraph contains conclusions of law to which no response is required. To the extent any response is needed, Verizon PA's Access to OSS and DUF rates are tariffed in Pa. PUC 216 and apply to resold lines, as set forth in response to Paragraph 11, above. Moreover, the tariffs must be read in conjunction with the Commission's orders approving these rates, which plainly approved them for application to resold lines.

24. Denied as stated. Verizon admits that it charges this rate to resellers per resold line. This is the basis upon which the rate was approved. The remainder of this paragraph contains conclusions of law to which no response is required.

25. Denied as stated. Verizon PA admits that it charges LSI the Access to OSS rate for each of LSI's resold lines, as required by Tariff 216, which states that this rate applies "per line, per month." (Tariff 216, Sec. 3.C.12.e., Third Revised Sheet 14). The cost study upon which this Commission approved the Access to OSS rate assumed that it would apply to each resold line, without regard for how the "traffic for those lines is carried."¹⁹

26. Denied. This paragraph contains conclusions of law to which no response is required. To the extent any response is necessary, Verizon PA is properly applying this rate.

27. Denied. This paragraph contains conclusions of law to which no response is required. To the extent any response is necessary, Verizon PA is properly applying this rate.

28. This paragraph contains conclusions of law to which no response is required. Moreover, Section 331(f) of the Public Utility Code and Section 5.42 of the

¹⁹ See *Generic UNE, Verizon PA Access to OSS cost study, Part F-5, Workpaper 4, Section 1, page 13* (demonstrating that the study assumed application to all resale "lines")

Commission's regulations are in writing and speak for themselves and all characterizations of them are denied.

29. This paragraph contains conclusions of law to which no response is required. Moreover, Section 252(d)(3) of the Telecommunications Act of 1996 and the applicable (unreferenced) PUC orders are in writing and speak for themselves and all characterizations of them are denied. To the extent any response is necessary, the PCC's contention that Verizon "selectively picks and chooses" rates from its tariff 216 to apply to resold lines is baseless. As discussed above, the Commission expressly approved these particular two rates for application to resold lines and calculated them based on the assumption that resellers would be paying their portion of the costs, and the rates are appropriately tariffed for application to resold lines.

30. This paragraph contains conclusions of law to which no response is required. To the extent any response is necessary, the Commission has already approved the application of these rates to resold lines, and specifically rejected the argument that these costs were already recovered through the resale discount.²⁰ Moreover, the Commission did not require OSS-related costs to be accounted for as an offset to avoided costs because it specifically allowed them to be recovered instead through the Access to OSS charge applied to resellers. Although the current resale discount is the product of a negotiated settlement, Verizon's cost study in that case did not include an offset to avoided costs for OSS-related expenses.

²⁰ In the *Generic UNE* case, AT&T/WCom 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." *Generic UNE*, AT&T/WCom Main Brief at 169-70. The Commission rejected AT&T/WCom's arguments.

31. This paragraph contains conclusions of law to which no response is required. To the extent any response is necessary, see response to Paragraph 30.

32. This paragraph contains conclusions of law to which no response is required.

WHEREFORE, the Commission should dismiss the PCC's Complaint, deny the relief sought and grant such other relief as the Commission deems just and reasonable.

NEW MATTER

Pursuant to 52 Pa. Code § 5.62, Verizon PA asserts the following affirmative defenses, which are more fully described in its Motion to Dismiss.

1. The Complaint is barred by 66 Pa.C.S. § 316.
2. The Complaint is barred by the doctrines of *res judicata*, collateral estoppel and waiver.

Respectfully submitted,

Date: February 13, 2006



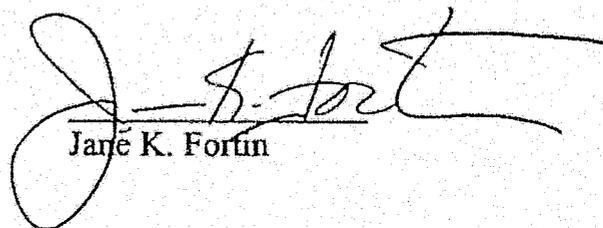
William B. Petersen
Suzan DeBusk Paiva
Verizon
1717 Arch Street, 10th Floor
Philadelphia, PA 19103
(215) 466-4755

Attorneys for Verizon Pennsylvania
Inc.

VERIFICATION

I, Jane K. Fortin, state that I am the Director, Regulatory of Verizon Pennsylvania Inc. ("Verizon PA"), and that as such I am authorized to make this verification on its behalf. I have reviewed Verizon PA's Answer to the Complaint of the Pennsylvania Carriers' Coalition at Docket C-20065798, and verify that the facts contained therein are true to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

Date: February 13, 2006



Jane K. Fortin

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

FEB 19 2006
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Carriers' Coalition,
Complainant,

No. C-20065798

v.

Verizon Pennsylvania Inc.,
Respondent.

DOCKETED
FEB 16 2006

MOTION TO DISMISS

Pursuant to 52 Pa. Code § 5.101, Respondent Verizon Pennsylvania Inc. ("Verizon PA") hereby moves to dismiss the Complaint of the Pennsylvania Carriers' Coalition ("PCC")¹ challenging Verizon PA's application of its Access to Operations Support Systems ("Access to OSS") and Daily Usage File ("DUF") charges to resold lines. This Complaint is insufficient to establish the PCC's right to relief. These claims are barred by 66 Pa.C.S. § 316 and by the doctrines of waiver, *res judicata* and collateral estoppel because the Commission already decided in its *Generic UNE* proceeding that these rates apply to resold lines, and the PCC members had the opportunity to make their arguments in that case. The contention that the rates are not tariffed with respect to resellers is also barred by the Commission's prior decision approving the compliance tariffs memorializing the Commission's *Generic UNE* decision, and is contrary to the plain language of Verizon PA's tariffs.

**DOCUMENT
FOLDER**

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

I. BACKGROUND

The PCC members claim to be surprised to find that Verizon PA is charging them Access to OSS and DUF rates on their resold lines, but these companies participated in the very proceeding through which these rates were set – a proceeding in which this Commission held and no party challenged the fact that the rates would be applied to resellers. Leaving out crucial parts of the history of this issue, the PCC's carefully-worded Complaint attempts to obscure the fact that this Commission has already decided that these rates should apply to resellers and has already approved Verizon PA's placement of these rates in Tariff 216.

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

Throughout the litigation of the *Generic UNE* case, the Commission was clear that the Access to OSS and DUF rates would apply both to UNE lines and to resold lines.

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

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

⁴ *Id.* at 172.

⁵ *See, e.g., Generic UNE*, AT&T/WCom St. 8.0 (Recurring Panel Rebuttal) at 169, 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.

Both these rates were set by spreading the relevant costs over the estimated demand for the service, which included both UNE carriers and resellers. 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.⁶

Verizon PA'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,"⁷ 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*."⁸ The Commission's *Tentative Order* in the *Generic UNE* case recognized that the proposed rate was a "charge on all UNE loops, UNE-P, *and resale loops*, to recover expenses associated with the initial development necessary to provide access to operation support systems and ongoing maintenance and provisioning of OSS."⁹ The Commission adopted ALJ Schnierle's Recommended Decision on this issue, which had held that Verizon could impose its proposed charge on

⁶ *Generic UNE*, VZ St. 1.0 filed 12/7/01 at 129 (Verizon "proposes to recover the total costs through monthly recurring charges to CLECs that are based on the number of UNE loops, platform/combinations and *resold lines* that are forecasted to be in service in Pennsylvania in the 10-year forecast period.") (emphasis added); *id* at 129-30 (CLECs "will only be responsible for their fair share of such costs based on the projected demand of UNE loops, platforms/combinations and *resold lines*.") (emphasis added). See also Verizon PA's Access to OSS cost study, Part F-5, Workpaper 4, Section 1, page 13 (demonstrating that the demand assumption included resale as well as UNE loops and UNE-P).

⁷ *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).

⁸ *Id* at 129. See also *id* at 131 ("costs were incurred specifically to satisfy the Telecommunications Act's requirements and permit CLECs to obtain UNEs *and resale* in an efficient manner.") (emphasis added).

⁹ *Generic UNE*, Tentative Order entered Nov. 4, 2002, at 169 (emphasis added).

“all UNE loops, UNE platforms *and resale loops*.”¹⁰ 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.¹¹ As described in Verizon PA’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.”¹² The CLEC rebuttal testimony submitted by AT&T/WorldCom recognized that the proposed DUF rate was based on Verizon PA’s “projected *resale* and UNE platform/combination demand” and that this rate would apply for “*resale usage*.”¹³ In his Recommended Decision, ALJ Schnierle found that the DUF rate was based on an “assumed demand” that included “*resale services*,” and approved the proposed rate.¹⁴ The Commission’s *Tentative Order* adopted the ALJ’s conclusion on the DUF rate, which became the final holding in the December 11, 2003 *Final Order* because no party challenged it.¹⁵

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

¹¹ Indeed, Verizon had already been applying its previous DUF rates to resellers.

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

¹³ *Generic UNE*, AT&T/WCom St. 8.0 (Recurring Panel Rebuttal) at 168-170 (emphasis added).

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

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

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

In its *Final Compliance Order* entered July 16, 2004 the Commission approved Verizon PA's rates resulting from the *Generic UNE* proceeding, as well as Verizon PA's proposed tariff modifications to incorporate the results of the case. The tariff revisions with modifications directed by the Commission went into effect October 1, 2004, pursuant to the Commission's Order. The new Access to OSS and DUF rates were included in Verizon PA's tariff Pa. PUC 216. (Tariff 216, Sec. 3C. 12.e., Third Revised Sheet 14).

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

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

On January 19, 2006, FSN, ATX and LSI filed this Complaint contending that Access to OSS and DUF charges should not be applied to resold lines and are not properly tariffed as applied to resellers.

II. MOTION TO DISMISS

The Commission's rules require summary dismissal where it is apparent from the face of the complaint that, even accepting as true the "well-pleaded, material and relevant" facts (but *not* accepting as true the conclusions of law), the complaint is "clearly insufficient to establish the complainant's right to relief."¹⁸ 52 Pa. Code § 5.101(a)(3). In this case, the PCC's Complaint must be dismissed because the Commission has already determined that the Access to OSS and DUF rates apply to resold lines, and these parties may not collaterally attack the Commission's prior decision through this Complaint. Moreover, their contention that the rates are not properly tariffed is contrary to the plain language of Verizon PA's tariffs and is also barred by the Commission's approval of Verizon PA's compliance tariffs when it approved these rates.

A. The PCC Is Barred By 66 Pa. C. S. § 316 And By The Doctrines Of Waiver, *Res Judicata* And Collateral Estoppel From Challenging The Application Of The Access to OSS and DUF Rates To Resold Lines

The PCC's attempt to re-litigate here the question of whether the Access to OSS and DUF rates should apply to resold lines is a clear violation of 66 Pa. C.S. § 316, which provides that:

Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts

¹⁸ *York RBR, Inc. v. Best Western Conference Center v. UGI Utilities, Inc.*, No. C-00956675, 1995 Pa. PUC LEXIS 84 (Opinion and Order entered September 19, 1995) (adopting decision of ALJ Schnierle without further Commission action) ("a motion to dismiss a complaint which challenges the sufficiency of the complaint [under 52 Pa.Code § 5.101(a)(3)] is similar to a preliminary objection in the nature of a demurrer" and requires dismissal of the complaint where based on the well-pleaded, material, relevant facts the complainant is not entitled to relief as a matter of law).

found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.

"This section of the Public Utility Code precludes a collateral attack upon a Commission order that has not been reversed upon appeal."¹⁹ By failing to challenge the application of these rates to resold lines in the *Generic UNE* case, or to raise the issue on appeal of that case, the PCC has waived the arguments it now makes here.²⁰

Similarly, the doctrines of *res judicata* and collateral estoppel apply to proceedings before this Commission to bar "a second litigation between the same parties of the same claims or issues."²¹ Once the Commission has entered a final judgment on the merits of an issue, under the doctrine of *res judicata* the "parties to that case and their privies are thereafter bound 'not only as to every matter which was offered and received, but also as to any other admissible matter which might have been offered.'"²² Similarly, collateral estoppel binds the parties to the Commission's decision on "those matters or issues in points controverted upon which the finding of fact was rendered."²³ As the Commonwealth Court has observed, "there is no reason that an administrative agency should have to relitigate identical issues."²⁴

It is unquestionable that the Commission already determined in the *Generic UNE* case that these rates apply to resellers. The Commission's *Tentative Order* in the *Generic*

¹⁹ *Jordan v. The United Telephone Co. of PA*, C-00946430, 1995 Pa PUC LEXIS 158 (Initial Decision of ALJ Corbett, December 22, 2005) at * 24.

²⁰ *Peoples Natural Gas Co. v. PUC*, 523 Pa. 370, 376, 567 A.2d 642, 644-45 (1989).

²¹ *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, 2005) (recognizing that these doctrines apply to Commission proceedings "to avoid repetitious litigation based on immutable facts.")

²² *Suprick*, 1995 Pa PUC LEXIS at * 7 (quoting *Commission v. Sunnen*, 333 US 591 (1948)).

²³ *Id.*

²⁴ *Mobilfone of Northeastern PA, Inc. v. PUC*, 73 Pa. Commw. 340, 458 A.2d 1030 (1983).

UNE case recognized that the Access to OSS rate was a “charge on all *UNE* loops, *UNE*-*P*, and *resale loops*.”²⁵ The Commission adopted ALJ Schnierle’s Recommended Decision on this issue, which had agreed that Verizon could impose its proposed charge on “all *UNE* loops, *UNE* platforms and *resale loops*.”²⁶ Similarly, the Recommended Decision held that the DUF rate was based on an “assumed demand” that included “*resale services*,”²⁷ and even Verizon PA’s opponents acknowledged that this rate would apply for “*resale usage*.”²⁸ The Commission’s *Tentative Order* adopted the ALJ’s conclusion on the DUF rate.²⁹ The December 11, 2003 *Final Order* adopted the *Tentative Order*’s holdings on both these rates because no party challenged them, and they therefore became the Commission’s final holding on Access to OSS and DUF.

Accordingly, under 66 Pa.C.S. § 316, the Commission’s holding that these rates apply to resellers is “conclusive” on the PCC and bars this attempt to relitigate the issue now. The claims are also barred by *res judicata* and collateral estoppel because it is unquestionable that FSN and ATX were parties to the *Generic UNE* case with every opportunity to challenge the application of these rates to resellers.³⁰

It would be particularly inequitable to allow the PCC to collaterally attack the application of these rates to resale lines now, after the new rates have gone into effect, because the Commission set the amount of the rate in each case under the assumption that

²⁵ *Generic UNE*, Tentative Order entered Nov. 4, 2002, at 169 (emphasis added).

²⁶ *Generic UNE*, Recommended Decision, May 3, 2002 at 63 (emphasis added).

²⁷ *Id.* at 65 (emphasis added).

²⁸ *Generic UNE*, AT&T/WCom St. 8.0 (Recurring Panel Rebuttal) at 168-170 (emphasis added).

²⁹ *Generic UNE*, Tentative Order entered Nov. 4, 2002, at 172.

³⁰ LSI’s claims are plainly barred by 66 Pa.C.S. § 316. Given that LSI also submitted comments to the compliance filing, the substance of which the Commission did consider due to FSN’s participation in the pleading, and that LSI never challenged the application of these rates to resellers, the Commission could also find LSI’s claims to be barred by *res judicata* and collateral estoppel.

the relevant costs would be spread over a larger pool of lines that included resale lines.³¹ Had the Commission determined not to apply the rate to resold lines, then the demand over which the costs were spread would have been smaller and the resulting rate for UNE lines would have been larger.

Accordingly, the PCC's Complaint attempting to collaterally attack these holdings from the *Generic UNE* case should be dismissed.

B. The PCC's Contention That The Access to OSS and DUF Charges Are Not Properly Tariffed For Resellers Is Baseless On Its Face And Must Be Dismissed

The PCC contends that the Access to OSS and DUF rates are "untariffed and unlawful" charges as applied to resale service, and that for this reason they should not be required to pay these charges. (Complaint ¶ 15-23). This argument is also barred by 66 Pa.C.S. § 316 and the doctrines of *res judicata* and collateral estoppel because the Commission approved Verizon PA's tariff filings memorializing the results of the *Generic UNE* case.³² Again, no party challenged the placement of these rates that applied to resellers in Tariff 216, even though all the PCC members filed comments to the compliance filing.

The PCC's tariff argument is also baseless because it is founded upon a narrow and unsupported portrayal of the applicable tariffs. The PCC attempts to characterize Tariff 216 narrowly as a "UNE Tariff" that cannot contain rates applicable to resold lines.

³¹ *Generic UNE*, VZ St. 1.0 filed 12/7/01 at 129 (Verizon "proposes to recover the total costs through monthly recurring charges to CLECs that are based on the number of UNE loops, platform/combinations and *resold lines* that are forecasted to be in service in Pennsylvania in the 10-year forecast period.") (emphasis added); *id* at 129-30 (CLECs "will only be responsible for their fair share of such costs based on the projected demand of UNE loops, platforms/combinations and *resold lines*." (emphasis added). See also Verizon PA's Access to OSS cost study, Part F-5, Workpaper 4, Section 1, page 13 (demonstrating that the demand assumption included resale as well as UNE loops and UNF-P)

³² *Generic UNE*, Final Compliance Order, July 16, 2004.

But the Application of the Tariff section states more broadly that “[t]his tariff applies to services provided by [Verizon PA] to Other Telephone Companies that have been authorized by the [PUC] to provide local exchange service in Pennsylvania,” language which clearly describes resellers as well as UNE purchasers. (Tariff 216, Sec. 1(A), Third Revised Sheet 1).

Likewise, the applicable tariff language does not support the PCC’s theory that any rate applicable to a resold line must appear in Verizon PA’s retail tariff, Pa. PUC 1. The resale discount itself and other provisions relating to resale appear in Verizon PA’s retail tariff, Tariff Pa. PUC 1, Sec. 8.1. That tariff also makes clear, however, that other tariffs may contain provisions applicable to resale lines. It 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, Sec. 8.1(A)(1), First Revised Sheet 4A). It further states that “[t]he regulations contained in this Section are intended to supplement the regulations contained in other sections of this or other Telephone Company tariffs to the extent such other regulations do not conflict with the regulations contained herein.” (*Id.*, Sec. 8.1(A)(2)).

Accordingly, the PCC’s theory that these rates are “untariffed” as applied to resellers is baseless. The argument is also disingenuous, because the PCC admits that the underlying basis of its tariff argument is the claim that, because the rates were placed in Tariff 216, it had “no clear notice” that the Access to OSS and DUF charges would apply to resold lines. (Complaint ¶ 19). This argument is completely refuted by the public record of the *Generic UNE* case, described above, in which the PCC companies

participated and in which it was abundantly apparent that these rates would apply to resellers, a proposition the PCC never challenged.

Accordingly, the PCC's contention that Access to OSS and DUF are "untariffed and unlawful" as applied to resale service must be dismissed.

C. The PCC's Contention That The Rates Are Or Should Be Recovered Through The Resale Discount Was Rejected In The Generic *UNE* Case And Is Without Merit

The PCC contends that "OSS-related" costs may only be recovered as an "offset" to avoided costs – in other words built into the resale discount—and cannot be recovered through per-line charges of the type at issue here. (Complaint ¶ 28-32). This argument itself is barred by 66 Pa.C.S. § 316 and the doctrines of *res judicata* and collateral estoppel, because the Commission already determined in the *Generic UNE* case that these costs could and should be recovered from resellers through the separate rates approved in that proceeding.³³ There is no dispute that Verizon PA's costs associated with providing Access to OSS and DUF to resellers are *not* costs that "will be avoided" in a resale context, and accordingly 47 U.S.C. § 252(d)(3) requires the Commission to set rates that allow Verizon to recover these costs. The Commission already did so in the *Generic UNE* case by setting the per-line Access to OSS and the optional DUF rates applicable to resellers.³⁴

³³ While Access to OSS may be considered an "OSS-related" cost, the PCC's attempt to shoe-horn DUF into this argument makes no sense. DUF recovers the costs of providing wholesale customers with the toll calling records of its end-users, and does not involve wholesale customers' access to Verizon PA's operations support systems. Moreover, since DUF is an optional service only purchased by some resellers, it is not logical or fair to argue that its costs should be recovered through the resale discount and thus paid for by *all* resellers whether they use the service or not.

³⁴ Contrary to the PCC's baseless assertion, nothing in the Telecommunications Act requires all costs to be recovered from resellers through the resale discount, and this Commission is free to set per line rates to recover costs such as Access to OSS and DUF, which it did.

In fact, the argument that the PCC seeks to raise again here — that OSS-related costs were somehow already built into the resale discount — was already considered and rejected by the Commission in the *Generic UNE* case. AT&T/WCom 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.”³⁵ The Commission rejected AT&T/WCom’s arguments in approving Verizon PA’s proposed rates.³⁶

Besides having already been rejected, the PCC’s attempt to reargue this issue by contending that “OSS-related” costs were already recovered in the resale discount set in 1996 cannot be correct based on the subsequent appellate history of that case. The 1996 discount was ruled to be illegal by the federal courts because it did not allow Verizon PA to recover from resellers the full costs it was entitled to recover.³⁷ Therefore, Verizon PA was already under-recovering its costs with this discount, and certainly cannot now be found to have recovered its costs for access to OSS. In any event, the 1996 discount is not even the resale discount that is currently in effect, but rather has been replaced with the discounts approved by the Commission on March 4, 2005.³⁸ The current discounts resulted from a settlement with the PCC itself. In agreeing to the discount the PCC had full knowledge that the Commission had approved the recovery of Access to OSS and

³⁵ *Generic UNE*, AT&T/WCom Main Brief at 169-70

³⁶ “It is well-settled that the Commission is not required to consider expressly or at length each contention or argument raised by the parties,” and any argument or issue that is not specifically addressed is deemed to have been duly considered and denied. *PUC v. Superior Water Co.*, R-00994672, 2000 Pa PUC LEXIS 14 (Opinion and Order entered March 3, 2000) (citing *Consolidated Rail Corp. v PUC*, 625 A.2d 741 (Pa. Commw. 1993)).

³⁷ *MCI Telecom. Corp. v. Bell Atlantic-PA, Inc.*, 271 F.3d 491, 519-20 (3d Cir. 2001), cert. denied, 123 S.Ct. 340 (2002).

³⁸ *Wholesale Rate for Resale of Telecommunications Provided by Verizon Pennsylvania Inc. and Verizon North Inc.*, Docket No. R-00038516 (Opinion and Order entered March 4, 2005).

DUF costs through a separate charge to resellers, and must be presumed to have taken that fact into account.³⁹

Accordingly the PCC's claim that Verizon PA may not recover its costs for Access to OSS and DUF through a separate charge to resellers should be dismissed.

III. CONCLUSION

For the foregoing reasons, the PCC's Complaint should be dismissed.

Respectfully submitted,

Date: February 13, 2006



William B. Petersen
Suzan DeBusk Paiva
Verizon
1717 Arch Street, 10th Floor
Philadelphia, PA 19103
(215) 466-4755

Attorneys for Verizon Pennsylvania
Inc.

³⁹ PCC member companies actively participated in and were represented by counsel in both the *Generic UNE* case and this resale case, both of which were proceeding simultaneously before this Commission. The Settlement Stipulation in the resale case was dated October 29, 2004. By that time the Commission had issued its *Tentative Order* (November 4, 2002) and its *Final Order* (December 11, 2003) in the *Generic UNE* case, and Verizon's tariffed compliance rates had gone into effect (October 1, 2004). Throughout the *Generic UNE* proceedings it was clear to the Commission and the parties that these rates would apply to resold lines, and the participating PCC members never challenged that fact. They therefore knew or should have known that these rates would apply to resold lines when they entered into the Settlement Stipulation in the resale case.

213 Market Street, 9th Floor, P.O. Box 865, Harrisburg, PA 17108-0865
Tel: (717) 237-7160 ■ Fax: (717) 237-7161 ■ www.WolfBlock.com

Mark S. Stewart
Direct Dial: (717) 237-7191
Direct Fax: (717) 237-2771
E-mail: mstewart@wolfblock.com

ORIGINAL

February 23, 2006

VIA HAND DELIVERY

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

DOCUMENT FOLDER

SECRETARY'S BUREAU
2006 FEB 23 P11 3:53

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

Dear Secretary McNulty:

Enclosed are the original and 3 copies of the Answer of the Pennsylvania Carriers' Coalition to Verizon's Motion to Dismiss. A copy has been served on the parties of record as indicated by the attached Certificate of Service. If you have any questions regarding this filing, please contact me.

Very truly yours,



Mark S. Stewart

For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP

MSS/jls
Enclosures

cc: Certificate of Service (w/enc)

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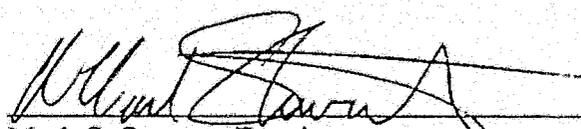
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CERTIFICATE OF SERVICE

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

VIA FIRST CLASS MAIL

Suzan D. Paiva
Assistant General Counsel
Verizon
1717 Arch St., 10W
Philadelphia, PA 19103


Mark S. Stewart, Esquire

Date: February 23, 2006

ORIGINAL

2006 FEB 23 11 3: 53
SECRETARY'S BUREAU

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Carriers' Coalition
Complainant

v.

Verizon Pennsylvania, Inc.
Respondent

Docket No. C-20065798

SECRETARY'S OFFICE
2006 FEB 23 11:3:53

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ANSWER OF
THE PENNSYLVANIA CARRIERS' COALITION
TO VERIZON'S MOTION TO DISMISS

DOCKETED
MAR 1 - 2006

The Pennsylvania Carriers' Coalition ("PCC"),¹ by and through its counsel, respectfully submits this Answer to the Motion to Dismiss filed by Verizon Pennsylvania Inc. ("Verizon") in the above-captioned proceeding. Verizon cannot meet the heavy burden required to sustain its Motion for the simple fact that public utilities are precluded from charging untariffed rates – exactly what the PCC has complained about. Accepting all well-pleaded allegations of fact in the PCC's Complaint as true (as the PUC must), the PCC has stated a claim on which relief can be granted regarding Verizon's unlawful imposition of untariffed charges. Even assuming *arguendo* that Verizon's claims about the scope and impact of the Commission's decision in the *Generic UNE* proceeding² were correct (which they are not), the facts, as pleaded by the PCC, establish that Verizon has never tariffed the contested Operation Support Systems ("OSS") and Daily Usage File ("DUF") charges. This statement of fact must be accepted, and none of the

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

² *Generic Investigation Re Verizon Pennsylvania, Inc.'s Unbundled Network Element Rates* ("Generic UNE proceeding"), Docket No. R-00016683, Order (August 31, 2001).

legal claims raised by Verizon mitigates its violations of Sections 1302, 1303 and 1501 of the Public Utility Code resulting from its imposition of the untariffed charges on the PCC.

Beyond this primary flaw in Verizon's Motion, the Motion must also be denied because (1) Verizon failed to address in any way its misapplication of the OSS charge as alleged in paragraphs ¶¶ 24-27 of the Complaint (and thus, at a minimum, that portion of the Complaint must survive); and (2) Verizon has overstated the PUC's decisions in the *Generic UNE* rate proceeding which, by its terms, directed Verizon to adjust its UNE rates.

Finally, Verizon's claims of *res judicata* and collateral estoppel are misplaced. The doctrines do not and cannot apply to persons who were not parties to the initial proceeding producing the determination that purports to bar a subsequent claim or relitigation of an issue.³ Here, Verizon admits that LSI was not a party to the *Generic UNE* proceeding. The fact that parties deemed by the PUC to hold similar interests to LSI were participants in the *Generic UNE* proceeding is insufficient to invoke preclusion against LSI. Furthermore, under collateral estoppel, the subject issue must be identical to the issue subsequently raised, must have been actually litigated, and must have been essential to the decision of the PUC.⁴ As the Complaint sets forth in detail and as is more fully explained herein, none of these requirements apply here, particularly the need for the application of these charges to Resale to be "essential" to the PUC's

³ See, *Temple University v. W.C.A.B.*, 753 A.2d 289, 291-92 (Pa. Cmwlth. 2000) (*res judicata* requires identity of the parties and collateral estoppel can only be applied against person who had full and fair opportunity to litigate in prior action); *Chada v. Chada*, 756 A.2d 39, 42-43 (Pa. Super. 2000) (same).

⁴ *Id.* Likewise, *res judicata* requires identity of the subject matter and cause of action between the prior and subsequent proceedings. *Id.* Assuming *arguendo* that such identity exists as to the PCC's substantive challenge to the charges (Section V of the Complaint), no such identity exists as to the PCC's claim for the charging of untariffed rates (Section III) and misapplication of the OSS charge (Section IV).

decision in what the Commission itself described as a proceeding dedicated to a review of Verizon's UNE rates.⁵

In addition, under Section 1309 of the Code, a customer always has the right to challenge a utility's tariff by complaint. Under Verizon's theory, a proceeding like the *Generic UNE* proceeding would forever bar Verizon's wholesale customers who were parties to the matter from challenging the justness and reasonableness of each and every UNE rate charged by Verizon. Indeed, under Verizon's theory, in which even a non-party like LSI would be precluded simply because its interests were similar to other CLEC parties, *all CLECs* in Pennsylvania would be forever precluded from challenging any or all of Verizon's UNE rates by a general investigation such as the *Generic UNE* proceeding. Far from this radical outcome, the only impact of the Commission approval of the OSS and DUF charges would be the shifting of the burden of proof on the lawfulness of the rates to the PCC and the potential unavailability of refunds.

In further response to Verizon's Motion, the PCC answers as follows:

I. STANDARD FOR PRELIMINARY MOTIONS

1. Verizon's Motion challenges the legal sufficiency of the PCC's Complaint, and thus is, in essence, a demurrer.⁶ Preliminary motions under 52 Pa. Code §§ 101(a)(3) are substantively equivalent to preliminary objections under the Rules of Civil Procedure, Pa. R.C.P.

⁵ Complaint at ¶¶ 6, 9 (citing *Generic UNE proceeding*, Order (August 31, 2001) at 1 and Final Opinion and Order (December 11, 2003) at 1 and 14).

⁶ See, *Nationwide Mut. Ins. Co. v. Wickett*, 763 A.2d 813, 817 (Pa. 2000) (A preliminary objection in the nature of a demurrer alleges that a pleading is legally insufficient).

No. 1028(a)(4).⁷ Accordingly, in ruling on Verizon's Motion, the Commission must accept as true all well-pleaded material allegations in the PCC's Complaint, as well as all inferences reasonably deduced therefrom.⁸ In ruling on Verizon's preliminary motion in the nature of a demurrer, the Commission is limited to the facts contained in the challenged pleading, *i.e.*, the PCC's Complaint.⁹ Furthermore, in order to sustain Verizon's Motion, the Commission must find with certainty that the law will not permit recovery, and any doubt on that question must be resolved by refusing to sustain the Motion.¹⁰ Under these standards, as the PCC's inability to recover on its Complaint is very far from certain, it is easily shown that Verizon's Motion must be denied.

II. THE PCC HAS STATED A LEGALLY SUFFICIENT CLAIM CONTESTING VERIZON'S UNLAWFUL IMPOSITION OF UNTARIFFED CHARGES.

2. Separate and apart from its claim for declaratory relief challenging the OSS and DUF charges substantively, the PCC has pleaded a simple and straightforward claim for the unlawful imposition of untariffed charges. It is axiomatic that public utilities must state the rates and fees they intend to charge customers in their tariffs. To wit, Section 1302 of the Public Utility Code states:

⁷ Pa. R.C.P. No. 1028(a)(4) ("Preliminary objections may be filed by any party to any pleading and are limited to the following grounds: . . . (4) legal insufficiency of a pleading (demurrer). . .").

⁸ *See, Pennsylvania Chiropractic Federation v. Foster*, 583 A.2d 844, 847 (Pa. Cmwlth. 1990).

⁹ *See, Mazzagatti v. Everingham by Everingham*, 516 A.2d 672, 675 (Pa. 1986) (A demurrer may be sustained only when the complaint, on its face, fails to establish a legal right to relief under any theory of law).

¹⁰ *Pennsylvania State Troopers Association v. Com'n.*, 606 A.2d 586, 587 (Pa. Cmwlth. 1992).

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

66 Pa. C.S. § 1302 (emphasis added). Equally clear is the rule that utilities may only charge customers those rates and fees that are stated in their tariffs. Section 1303 of the Code prescribes: "No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person . . . a greater or lesser rate *for any service rendered* . . . than that specified in the tariffs of such public utility *applicable thereto*." 66 Pa. C.S. § 1303 (emphasis added).¹¹

3. Considering all well-pleaded facts in the Complaint, the PCC has stated a valid and sufficient claim as to Verizon's violations of these requirements. The PCC has pleaded that: (a) Verizon has imposed an OSS and DUF charge in relation to its Resale service (§§ 15-16); (b) that those charges do not appear in Verizon's retail tariff, Verizon Pa. PUC 1, which contains provisions setting forth the wholesale discount and rates applicable to Resale (§§ 10-11, 17); and (c) that nothing in the provisions of Verizon's UNE tariff, Tariff 216, related to the OSS and DUF charges, or the compliance filings effecting those tariff amendments, states that the charges apply to Resale service (§§ 10-11, 19). Assuming that all of these facts are true, as the Commission must, the PCC has plainly stated a claim upon which relief can be granted and Verizon's Motion must be denied. To the extent there is any doubt, which there should not be, the Commission must resolve the doubt in favor of the PCC.

4. Verizon claims that its Tariff 216 filings were sufficient to impose the OSS and DUF charges on Resale, that the PCC is somehow barred from arguing now that those tariff

¹¹ Charging a customer a fee or rate not in the utility's tariff also constitutes unreasonable service in violation of Section 1501 of the Code.

amendments – which said nothing about Resale service – did not apply the charges to Resale service, and that vague and ambiguous general statements in its retail tariff about the potential applicability of rates from other tariffs to the retail services included therein enable it to impose the OSS and DUF charges on Resale despite the lack of any specific tariff support. For the reasons set forth herein, all of these arguments fail.

5. First, Verizon's amendments to its UNE tariff, Tariff 216, did not in any way apply the OSS and DUF charges to Verizon's Resale service. As noted in the Complaint – and acknowledged by Verizon in its Motion – the provisions addressing Resale service are predominantly in Verizon's retail tariff, Tariff 1. Verizon's Tariff 216 addresses UNE rates. This was recognized by the Commission in its Final Order in the *Generic UNE* proceeding, when it ordered:

4. That Verizon Pennsylvania, Inc., shall file a tariff or tariff supplement, and supporting data and documentation, implementing revisions to the UNE rates in its Tariff Pa. P.U.C. No. 216, and any related tariffs or tariff amendments, which conform to and are in compliance with the modifications and directives set forth in this Final Opinion and Order¹²

Plainly, as the emphasized text reveals, the Commission understood and expected Verizon to implement any revisions to its UNE rates in Tariff 216. Equally clear is the fact that Verizon was ordered to make any revisions to its non-UNE rates in "any related tariffs or tariff amendments." Verizon never did so – and the PCC's Complaint pleaded the same, making it legally sufficient.

6. While the PCC contests Verizon's claim that the PUC endorsed the OSS and DUF's charges' application to Resale service, even under Verizon's argument, the application of

¹² *Generic UNE proceeding*, Final Opinion and Order at Ordering ¶ 4 (emphasis added).

those charges to Resale as a result of a proceeding dedicated to the setting of *UNE rates*¹³ would, at best, fall within the “related tariff amendments” proviso. Because Verizon never followed the Commission’s directive to file a related tariff or tariff amendment as to the OSS and DUF charges’ application to Resale, its revisionist history as to its compliance filing in the *Generic UNE* proceeding fails to support its Motion.

7. Even if Verizon could have implemented its Resale-based OSS and DUF charges via its *UNE* tariff, the actual text of Verizon’s tariff amendments related to those charges offers no clue whatsoever that the charges are applicable to Resale service.¹⁴ Nor does anything in Tariff 1, and specifically Section 1, Paragraph 8 addressing rates and provisions applicable to Resale service, expressly state that the OSS and DUF charges apply to Resale.¹⁵ As such, Verizon’s has failed to properly tariff the charges as required by Section 1302 of the Code, and the PCC’s Complaint averring the same states a claim upon which relief could be granted.

8. Verizon’s second argument is that the PCC, or select members thereof, are barred by *res judicata* and collateral estoppel – not only from arguing that the OSS and DUF charges are unlawful as applied to Resale – but also that Verizon failed to tariff those charges. Apparently, FSN and ATX, the PCC members that actually participated in the *Generic UNE* proceeding, were expected to surmise that Verizon’s placement of such Resale-based charges in the tariff that the PCC itself described as Verizon’s *UNE tariff* was actually intended to apply the

¹³ *Generic UNE proceeding*, Final Opinion and Order at 1, 14 (“This proceeding is the continuing investigation to consider whether the existing tariffed rates for Verizon’s . . . unbundled network elements (UNEs) continue to be just and reasonable”); *Id.*, Order (August 31, 2001) at 1.

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

¹⁵ Verizon Tariff Pa. P.U.C. No. 1, Section 1, First Revised Sheet 4A—Fifth Revised Sheet 4C, are attached hereto as Appendix A.

charges to Resale, despite the fact that nothing in the language of the amendments to Tariff 216 indicated their application to Resale and despite the fact that the Commission directed Verizon to implement such rates in non-Tariff 216, or "related tariff amendments." The PCC's Complaint cannot be barred because FSN and ATX did not object to something Verizon never even did!¹⁶

9. Moreover, Verizon's *res judicata* and collateral estoppel arguments cannot be sustained because the claims and issues in the two proceedings are not the same.¹⁷ 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."¹⁸ Assuming Verizon's version of the *Generic UNE* proceeding is correct (which the PCC does not), the claim and issue in that proceeding involved the application of the OSS and DUF charges to Resale. Here, as to Section III of the Complaint, the claim and issue involves Verizon's charging of untariffed rates and fees. These claims and issues are not identical.¹⁹ Whether Verizon's rates are substantively lawful on their face is a different claim/issue than whether Verizon has actually and properly tariffed and implemented those rates.

¹⁶ *Temple University*, 753 A.2d at 291-92 (both claim and issue preclusion require subject claims and issues to have been actually litigated and determined); *Chada*, 756 A.2d at 42-43 (same); *LP Water and Sewer Co. v. Pa. P.U.C.*, 722 A.2d 733, 739 (Pa. Cmwlth. 1998) (claims must have been fully and actually litigated for determined before *res judicata* applies).

¹⁷ *Temple University*, 753 A.2d at 291-92 (issue preclusion applies only where issues in two proceedings are "identical," while claim preclusion requires identity of subject matter and causes of action) (emphasis added); *Chada*, 756 A.2d at 42-43.

¹⁸ *Chada*, 756 A.2d at 44 (emphasis added).

¹⁹ See, e.g., *Temple University*, 753 A.2d at 292 (issue of insurer's reimbursement for medical expense compensation not same as reimbursement for wage-loss compensation on same facts); *National Fuel Gas Distribution Corp. v. Pa. P.U.C.*, 677 A.2d 861, 867 n.

Furthermore, at best, the claims and issues are related, but, as the Superior Court explained, being related is not sufficient to trigger *res judicata*.²⁰ Nothing essential to the PCC's recovery on its claim for the charging of untariffed rates was "determined" in the *Generic UNE* proceeding. Contrary to Verizon's claims, the plain text of the PUC's Final Opinion and Order and its Compliance Filing Order show that the Commission made no determination that Verizon had tariffed a Resale rate via its Tariff 216 amendments -- and, in fact, establish just the opposite.²¹ Accordingly, Verizon's assertion of claim and issue preclusion on this count of the PCC's Complaint is completely misplaced.

10. Finally, Verizon's claim that it can charge these untariffed fees based on some vague proviso in its retail tariff, Tariff 1, that other, unidentified charges in its 225 pages of tariffs²² might apply is totally meritless. Such an interpretation of the Public Utility Code would turn Sections 1302 and 1303 on their heads, allowing utilities to hide rates and fees, picking and choosing the rates applicable to any given service from hundreds of tariff pages, and leaving consumers with no way of knowing what the applicable charges are for specific services. The language Verizon relies on offers the following:

To the extent that services are available for resale subject to terms and conditions set out in other provisions of this Tariff or other Telephone Company Tariffs, those terms and conditions remain

4 (Pa. Cmwlth. 1996) (issue of whether utility could recover interest on take or pay payments was not same as issue of whether utility could retain such interest payments).

²⁰ *Chada*, 756 A.2d at 44.

²¹ *Generic UNE proceeding*, Final Opinion and Order at Ordering ¶ 4 (quoted above); *Id.*, Order (July 14, 2004) at 25 ("We shall approve tariff revisions for Verizon's UNE rates which conform to and are consistent with the attached schedule of rates") (emphasis added).

²² This count only accounts for Tariffs 216 and 218.

applicable except to the extent they conflict with the language of this Section.²³

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

11. Ultimately, Verizon's verbal gymnastics cannot avoid the fundamental rule that it cannot charge untariffed rates. Verizon's ambiguous attempt at a catch-all provision is simply inconsistent with the clear mandate of Sections 1302 and 1303 that Verizon must show all rates applicable to a service in its tariffs and that it cannot charge rates for a service that are greater than those set forth in its tariff. Therefore, Verizon's pick-and-choose argument does nothing to render the PCC's Complaint legally insufficient, and thus its Motion must be denied.

III. VERIZON'S MOTION FAILS TO ADDRESS ALL THE CLAIMS IN THE COMPLAINT.

12. Verizon's Motion seeks the dismissal of the PCC's entire Complaint. Yet, the Motion does not address in any way the allegations set forth in Section IV of the Complaint, paragraphs 24-27, in which the PCC alleges that Verizon has misapplied the OSS charge by collecting it on a per telephone number, instead of a per loop, basis. Notably, throughout Verizon's Motion (*see, e.g.*, pp. 3, 4, 8), it references portions of PUC decisions which described Verizon's proposal in the *Generic UNE* proceeding as seeking to apply the OSS charge on a "per

²³ Verizon Motion at 10.

loop” basis. As Verizon’s Motion does not address this portion of the Complaint, the requested relief of having the entire Complaint dismissed cannot be granted.

IV. THE PCC’S REQUEST FOR DECLARATORY RELIEF STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

13. Finally, Verizon cannot satisfy its burden of showing that, assuming all facts in a light most favorable to the PCC, the Complaint is legally insufficient and fails to state a claim upon which declaratory relief could be granted regarding the inapplicability of the OSS and DUF charges to Resale. The PCC’s claim for declaratory relief is set forth in Section V of the Complaint. Verizon’s Motion is based on a claim that the PCC’s request is barred by *res judicata* and collateral estoppel. Verizon’s argument on this point must be free and clear from doubt, based on the four corners of the Complaint and assuming all facts in the PCC’s favor, in order for Verizon’s Motion to be granted. The claim cannot meet that standard.

14. First, as to *res judicata*, Verizon can only invoke the doctrine if the parties to the *Generic UNE* proceeding and this matter are identical.²⁴ The parties are plainly not identical, as LSI was not a party to the *Generic UNE* proceeding. Likewise, with collateral estoppel, or issue preclusion, the party against whom the doctrine is asserted must have been a party to the prior proceeding and had a full and fair opportunity to litigate the issue.²⁵ Again, LSI was not a party to the *Generic UNE* proceeding, and Verizon cannot foreclose LSI’s rights to litigate this issue. Verizon’s claim that LSI should be precluded despite not being a party to the *Generic UNE* proceeding is tantamount to saying that any time a CLEC raises an issue, or is a party to a proceeding where an issue is tangentially raised even if not actually litigated or essential to the

²⁴ *Temple University*, 753 A.2d at 291; *Chada*, 756 A.2d at 42.

²⁵ *Id.*

outcome, all other CLECs in Pennsylvania are forever barred and precluded from raising that issue in subsequent litigation. Clearly, such an assertion has no support whatsoever in law.

15. Second, in order to claim issue preclusion, the issues in the *Generic UNE* proceeding and this matter must be identical, must have been actually litigated, and must have been essential to the PUC's decision in the *Generic UNE* case.²⁶ As to each test, Verizon's Motion fails. The PCC's challenge to Verizon's manner of setting its wholesale rates for the resale of its telecommunications service, as explained in paragraph 29 of the Complaint, was never addressed, much less litigated, in the *Generic UNE* proceeding.²⁷ Additionally, as set forth in the Complaint, the issues of the application of the OSS and DUF charges to Resale generally,

²⁶ *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).

²⁷ While Verizon contends that another party to the *Generic UNE* proceeding raised the separate issue of Verizon's OSS charge constituting a double recovery of OSS costs already recovered in its Resale rates (Motion at 12), there is nothing to indicate that this issue was actually litigated by the PCC or that it was decided by the Commission. Moreover, The law calls for the PUC not to apply issue preclusion where the determination relied on as preclusive is inconsistent with a another determination 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's Complaint relies on an earlier Order of the Commission that expressly found that OSS-related costs were already included in and recovered by the Resale rates established by the PUC (Complaint at ¶¶ 5, 12-14, 30) and Verizon relies upon a decision which did not address the double recovery argument and merely invokes the generic "any argument not addressed is deemed denied" language (Motion at 12, n. 36). Finally, the double recovery issue is not the sole basis for the requested declaratory relief in Section V of the Complaint.

and particularly the specific claim set forth by the PCC in paragraph 29 of its Complaint, were not actually litigated by the parties to the proceeding.²⁸

16. Perhaps most damaging to Verizon's Motion is the fact that the application of the OSS and DUF charges to Resale were by no means "essential" to the PUC's decision in the *Generic UNE* proceeding.²⁹ The Commission made abundantly clear, both at the onset of the *Generic UNE* proceeding and upon issuance of its Final Opinion and Order, that the proceeding's scope, focus, and intent was to review the just and reasonableness of Verizon's UNE rates. As the Commission declared when initiating the *Generic UNE* proceeding:

This order directs the initiation of a proceeding effective September 17, 2001, to consider whether the existing tariffed rates for Verizon Pennsylvania, Inc.'s (Verizon's) unbundled network elements (UNEs) continue to be just and reasonable.³⁰

Likewise, in its Final Opinion and Order, the Commission identified the same purpose for the proceeding,³¹ 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."³² As noted in the Complaint, in its Final Opinion and Order, the Commission discussed neither the OSS nor the DUF charges, and instead adopted the findings of its Tentative

²⁸ Complaint at ¶¶ 8-11.

²⁹ *Temple University*, 753 A.2d at 292; *Chada*, 756 A.2d at 43; *Estate of Pew*, 655 A.2d at 536-37.

³⁰ *Generic UNE proceeding*, Order (August 31, 2001) at 1 (emphasis added).

³¹ *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).

³² *Id.* at 14 (emphasis added).

Order, which in turn adopted the recommendation of the Administrative Law Judge – which recommendation did not focus on the charges’ applicability to Resale.³³

17. Beyond its statements as to the scope of the *Generic UNE* proceeding, the Commission’s actual decisions and Orders in that proceeding also demonstrate that the applicability of the OSS and DUF charges to Resale was not essential to its action in the *Generic UNE* proceeding. For instance, in its Final Order, the Commission directed that: “Verizon shall file a tariff or tariff supplement . . . implementing revisions to the UNE rates in its Tariff Pa. P.U.C. No. 216, and any related tariffs or tariff amendments . . .”³⁴ 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.”³⁵ 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.³⁶

18. 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

³³ Complaint at ¶¶ 8-9.

³⁴ *Generic UNE proceeding*, Final Opinion and Order at Ordering ¶ 4 (emphasis added).

³⁵ *Id.* at Ordering ¶ 7 (emphasis added).

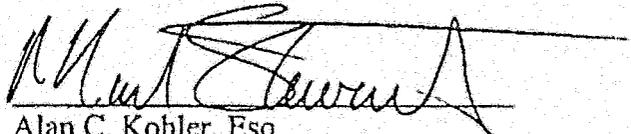
³⁶ *Id.*, Order (July 16, 2004) at 25 (emphasis added).

Opinion and Order, or the final Compliance Order. Verizon's attempts to expand the scope of the *Generic UNE* proceeding, and introduce new Resale rates as part of that proceeding, cannot and did not alter the Commission's scope or somehow render those Resale charges "essential" to the PUC's decisions in the *Generic UNE* proceeding. Furthermore, given the predominance of UNE rates and UNE-P both as issues in the *Generic UNE* proceeding and as a service arrangement for the participating CLECs, the issue of the OSS and DUF charges' application to Resale did not provide FSN and ATX with a sufficient level of incentive to litigate the issue necessary to invoke issue preclusion.³⁷

19. For all of the foregoing reasons, Verizon's assertions of claim and issue preclusion as to the declaratory relief sought by the PCC are erroneous. As those assertions are the sole basis for Verizon's claim that Section V of the PCC's Complaint is legally insufficient, the Motion must be denied.

WHEREFORE, for all of the foregoing reasons, the PCC requests that the Commission deny Verizon's Motion to Dismiss.

Respectfully submitted:



Alan C. Kohler, Esq.
Mark S. Stewart, Esq.
Wolf Block Schorr and Solis-Cohen LLP
913 Market Street, 9th Fl.
Harrisburg, PA 17101
717-237-7160

Date February 23, 2006

³⁷ See *Restatement of the Law, Second, Judgments*, § 29 (Comment g).

APPENDIX A

GENERAL REGULATIONS

2.1 INTERIM RESALE PROVISIONS

(C)

A. General

1. Notwithstanding other provisions of this Tariff or other Telephone Company Tariffs, the Telephone Company's telecommunications services are available for resale as set forth hereunder. 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.
2. The regulations contained in this Section are intended to supplement the regulations contained in other sections of this or other Telephone Company tariffs to the extent such other regulations do not conflict with the regulations contained herein.

B. Regulations

1. Services provided by the Telephone Company may be resold only to a telecommunications carrier that has been duly authorized to transact business within the Commonwealth of Pennsylvania. Such carrier shall, as part of its initial application to the Telephone Company, for any service that it intends to resell, provide the Telephone Company with sufficient documentation that it has been duly authorized to transact business within the Commonwealth of Pennsylvania. Such carrier shall promptly notify the Telephone Company in writing of any subsequent judicial or administrative decision or act affecting such carrier's right to operate as a reseller of telephone service.
2. The provision of services by the Telephone Company to a resale carrier, pursuant to this or other Telephone Company tariff, does not constitute a joint undertaking with such resale carrier for the furnishing of any service.
3. Services that are offered at retail by the Telephone Company only to a limited category or class of subscribers are available for resale consistent with applicable F.C.C. and Pennsylvania P.U.C. rules and decisions that implement the Federal Telecommunications Act of 1996.
4. Services which are not available to new customers, i.e., grandfathered services, are available for resale to customers already subscribed to those services.

GENERAL REGULATIONS

8.1 INTERIM RESALE PROVISIONS (Cont'd)

(C)

B. Regulations (Cont'd)

5. A resale carrier is the Telephone Company's customer of record, and shall therefore be the single and exclusive point of contact for such carrier's subscribers in all matters pertaining to such subscribers' use of the resold service. Applications for service and requests for additions and rearrangements to or discontinuances of any resold service will be accepted by the Telephone Company only from the customer of record. Customer notification will be provided by the Telephone Company only to the customer of record.
6. A resale carrier, as the customer of record, is subject to and must comply with all conditions, limitations, and regulations that are applicable by Telephone Company tariff to the service being furnished to it by the Telephone Company and shall, in reselling such service to its subscribers, undertake in good faith to ensure that its subscribers fully comply with such of those conditions, limitations, and regulations as may be applicable to their use of the resold service, including without limitation, the Use of Service provisions of the Telephone Company's General Regulations Tariff No. 1.
7. The Telephone Company's liability, if any, for any loss or damage arising out of or in connection with its provision of service to a resale carrier is, as to both such carrier and its subscribers, limited by and subject to the provisions of Sections 2.1.3(A-H), 2.3.1, and 2.3.11(A-D) of the Telephone Company's Access Service Tariff No. 302, which sections are specifically incorporated herein by reference. For purposes of the incorporation and application of such sections to this Section, the terms "customer" and "IC" shall mean the resale carrier, and the term "end-user" shall mean any subscriber of such resale carrier.
8. To permit listings for the resale carrier's customers in the Statewide 911 data base, the resale carrier shall, as appropriate, provide to the Telephone Company the names, telephone numbers and addresses of all of its customers. Any change in the customer name, address or telephone number (including addition or deletion of a customer or a change in customer name, telephone number or address) shall be reported by the resale carrier to the Telephone Company within one day after the change occurs.

GENERAL REGULATIONS

8.1 INTERIM RESALE PROVISIONS

(C)

C. WHOLESALE DISCOUNT

1. Two permanent wholesale discount rates have been established by the Commission for the resale of retail telecommunications services:
 - a. A rate of 22.00%, inclusive of the Pennsylvania Gross Receipts Tax, for the resale of retail services if the CLEC provides its own operator services platform; (C)
 - b. A rate of 18.34%, inclusive of the Pennsylvania Gross Receipts Tax, for the resale of retail services if the CLEC does not provide its own operator services platform. (C)
2. The resale of retail telecommunications services is available at these wholesale rates pursuant to agreement with the Company.



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Office of Administrative Law Judge
P O. BOX 3265, HARRISBURG, PA 17105-3265
March 1, 2006

IN REPLY PLEASE
REFER TO OUR FILE

In Re: C-20065798

(See attached list)

Pennsylvania Carrier's Coalition v. Verizon Pennsylvania, Inc.

NOTICE

This is to advise you that Administrative Law Judge Marlane R. Chestnut has been assigned as the presiding officer in the above-captioned proceeding. Judge Chestnut can be contacted at the following:

Administrative Law Judge Marlane R. Chestnut
1302 Philadelphia State Office Building
1400 West Spring Garden Street
Philadelphia, PA 19130
Telephone: 215.560.2105
Fax: 215.560.3133

A pre-hearing conference may be scheduled at a later date and the parties will be promptly notified by mail of the date and location for that proceeding.

pc: Judge Chestnut
Susan Licon
Beth Plantz
Docket Section
Calendar File

**DOCUMENT
FOLDER**

DOCKETED
MAR 09 2006