

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Armstrong Telecommunications, Inc.	:	
	:	
v.	:	C-2010-2216205
	:	
Verizon Pennsylvania Inc.	:	
Armstrong Telecommunications, Inc.	:	
	:	
v.	:	C-2010-2216311
	:	
Verizon North LLC	:	
Armstrong Telecommunications, Inc.	:	
	:	
v.	:	C-2010-2216325
	:	
MCImetro Access Transmission	:	
Services LLC d/b/a Verizon Access	:	
Transmission Services	:	
Armstrong Telecommunications, Inc.	:	
	:	
v.	:	C-2010-2216293
	:	
MCI Communications Services Inc.	:	

INITIAL DECISION

Before
Dennis J. Buckley
Administrative Law Judge

INTRODUCTION

Armstrong Telecommunications, Inc., (Armstrong) filed four separate Complaints with the Pennsylvania Public Utility Commission (Commission) against: Verizon Pennsylvania Inc., Verizon North LLC, MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc. (collectively Verizon or Respondent) alleging that Verizon reduced payments to Armstrong to \$0.0007 per minute of use (MOU). Verizon reduced payments based on the assertion that after a Verizon call is delivered to Armstrong and thence to an underlying cable company provider using internet protocol (IP) as part of its fixed cable telephony service, the protocol conversion is analogous to Voice Over Internet Protocol (VoIP). The parties have resolved all claims set forth in Armstrong's original Complaint and Verizon's New Matter with respect to traffic exchanged during periods prior to and including December 31, 2011. The parties have not resolved claims with respect to traffic exchanged from January 1, 2012 forward and accordingly the case remains open as to charges of \$996,584. This Decision sustains Armstrong's Complaint that Verizon acted unilaterally in imposing its own interpretation of a decision of the Federal Communications Commission (FCC), that Verizon failed to pay Armstrong pursuant to Armstrong's lawfully filed tariff, and that consequently Verizon caused an economic loss to Armstrong. I am recommending the imposition of a \$1,000 civil penalty because not only did Verizon act unilaterally in changing the intercarrier compensation rate contrary to prior agreements and Armstrong's lawfully filed tariff, but also because Verizon did this anticipating the result of an FCC decision before that decision had been issued.

HISTORY

On December 16, 2010, Armstrong filed four separate Complaints with the Commission against Verizon alleging non-payment by Verizon for interconnection services rendered by Armstrong.

On December 21, 2010, the Secretary of the Commission served a copy of the Complaint on Verizon.

On January 10, 2011, Verizon filed an Answer and New Matter.

On January 31, 2011, Armstrong filed a Reply to New Matter.

This case was assigned to me as presiding officer on February 24, 2011, and on March 4, 2011, a prehearing Order was issued. On March 17, 2011, both Parties filed a prehearing memorandum identifying issues, and in the case of Verizon, informally requesting a stay of these proceedings.

On March 21, 2011, a prehearing conference was held in Harrisburg, Pennsylvania, as scheduled. The Parties agreed that the four separate Complaints in this proceeding may be consolidated, and they were consolidated by an Order issued on that date. Verizon also made an informal request for a stay of these proceedings, pending the outcome of a rulemaking proceeding initiated by the FCC on February 9, 2011. That rulemaking was to consider and perhaps to resolve the dispute over intercarrier compensation for VoIP traffic. Verizon's request for a stay was opposed at the prehearing conference by Armstrong, and I held a decision on the request in abeyance pending the filing of an appropriate Motion by Verizon and an Answer by Armstrong. At the prehearing conference, the Parties also jointly submitted a draft Protective Order dealing with "Proprietary Information," and "Highly Confidential Information." The Protective Order was approved without modification and signed at the prehearing conference.

On April 19, 2011, Armstrong filed its Motion for Partial Summary Judgment, (*Armstrong Motion*) and Verizon filed its Motion to Dismiss or Stay.

On May 19, 2011, the Parties cross-filed Answers to the respective Motions.

On May 24, 2011, an entity not a party to these proceedings, known as Bright House Networks Information Services (Bright House), filed a pleading purportedly responding to Verizon's Answer to Armstrong's Motion for Partial Summary Judgment. On June 1, 2011,

Verizon filed a letter asking that the letter from Bright House be stricken, and on July 18, 2011, an Order was issued striking the letter.

Both of the April 19, 2011 Motions were dismissed by Order entered July 18, 2011.

On August 19, 2011, Verizon filed a Petition for Interlocutory Review and Answer to a Material Question asking whether the Commission should suspend this proceeding pending the FCC determination on the same VoIP compensation issue presented in this case. The parties filed briefs with the Commission on August 29, 2011, but the Petition was subsequently withdrawn by Verizon on October 14, 2011.

On September 23, 2011, a hearing notice was issued setting November 9-10, 2011 as the dates for an evidentiary hearing.

On October 14, 2011, the parties notified me that through mediation they had reached an agreement in principle for a commercial transit agreement.

On November 9-10, 2011, an Initial hearing was held. A 245-page transcript was compiled. Suzan D. Paiva, Esquire, appeared on behalf of Verizon. Norman J. Kennard¹, Esquire and David Jamieson, Esquire, appeared on behalf of Armstrong. Armstrong presented the testimony of two witnesses: Bryan Cipoletti, Chief Financial Officer (CFO) of the Armstrong Companies and Michael Starkey, President of QSI Consulting, Inc. The direct testimony of Mr. Cipoletti and Mr. Starkey was admitted to the record together with Armstrong Exhibits 1-9, with associated Exhibit MS-1, Armstrong Cross-Examination Exhibit 1 (web printout, "About Verizon Pennsylvania" and Armstrong Cross-Examination Exhibit 2 (web printout, "FiOS Digital Voice"). Verizon presented the testimony of two rebuttal witnesses: Paul B. Vasington, Director of State Public Policy for Verizon, and William Munsell, Senior Consultant for Product Management and Development for Verizon. The direct testimony of Mr. Vasington and

¹ Then attorney (now Commissioner) Kennard withdrew his appearance in this case on April 25, 2014.

Mr. Munsell was admitted to the record together with Verizon Direct Exhibits 1-5, Verizon Rebuttal Exhibits 1 and 2, and Verizon Cross-Examination Exhibits 1-6.

On November 29, 2011, Verizon requested mediation in this matter without seeking a stay of proceedings. Mediation began on December 13, 2011, but was not conclusive of all the issues.

On December 6, 2011, the parties filed Main Briefs.

On January 6, 2012, the parties filed Reply Briefs.

Also on January 6, 2012, Verizon filed a Petition to Reopen the Record.

On January 17, 2012, Armstrong filed an Answer to Verizon's Petition to Reopen the Record.

On February 6, 2012, the parties jointly filed a letter with the Secretary of the Commission notifying the Commission that the parties resolved all claims set forth in Armstrong's Complaint and Verizon's New Matter with respect to traffic exchanged during periods prior to and including December 31, 2011, and that all such claims were withdrawn from this case with prejudice and marked satisfied. The parties, however, advised the Commission that they had not resolved claims with respect to traffic exchanged from January 1, 2012, forward.

On March 3, 2014, a hearing notice was issued setting April 24, 2014, as the date for a case status conference.

On April 24, 2014, a case status conference was held at the Commission's Harrisburg office between the parties and the presiding officer. The compensation period which remained at issue was limited to approximately the first six months of 2012, and the parties

desired to enter into mediation. An Order was issued requesting further mediation review of this case. Ultimately, mediation with respect to this issue was not successful.

On July 16, 2014, an Order was issued denying Verizon's petition to reopen the record and directing the scheduling of a further prehearing conference to address issues with respect to the scope of any additional evidence to be presented, whether further evidentiary hearings were necessary, whether supplemental briefs were warranted, and establishment of a procedural schedule to conclude the case.

On October 29, 2014, a further case status conference was held at the Commission's Harrisburg office between the parties and the presiding officer. The parties were unable to agree on whether the record should be reopened, but agreed to discuss the matter further and provide me with a status report no later than December 5, 2014 regarding their progress.

On December 5, 2014, the parties advised me that they were still at an impasse with respect to reopening the record, but had agreed on a procedure by which the issue could be decided and outlined a proposed course of action for the remainder of the case.

On December 17, 2014, I issued an Order adopting the parties' proposal defining how the parties proposed to proceed and directed Verizon to file its Petition to Reopen the Record by January 7, 2015 and Armstrong to file its answer by January 21, 2015.

On January 7, 2015, Verizon filed a Petition to Reopen the Record.

On January 21, 2015, Armstrong filed an Answer opposing the Petition to Reopen the Record.

On October 27, 2015, an Order reopening the record for the limited filing of additional evidence and subsequent hearing was issued.

On September 15, 2017, I requested the position of both parties with respect to an informal conference to discuss the status of this case and its resolution. The parties agreed to this conference, hoping that it might restart settlement negotiations.

On November 20, 2017, an informal conference was held between the parties and myself at the Harrisburg office of the Commission. As the parties were unable to agree with respect to a resolution of this case, they agreed to file a joint stipulation of facts and provide additional testimony for the record on or before December 20, 2017.

On December 20, 2017, the parties filed a Joint Stipulation Regarding Admission of Testimony and Waiver of Hearing, consisting of Verizon Statement No. 2.0, the Supplemental Direct Testimony of Leslie Freet dated December 1, 2015, including Exhibits A through F thereto, and Armstrong Statement No.3, the Supplemental Rebuttal Testimony of Michael Starkey dated January 8, 2016, including Exhibits A through D thereto (subject to a stipulation regarding revisions to page 12 of the testimony and the first page of Exhibit D), in Proprietary and Public versions.² The parties agreed that on or before January 25, 2018, each party would file a supplemental brief limited to 20 pages. A brief extension of time was required by the parties, and Supplemental Briefs were filed on February 1, 2018.

On September 21, 2018, an Order was issued admitting Verizon Statement No. 2.0, the Supplemental Direct Testimony of Leslie Freet dated December 1, 2015, including Exhibits A through F thereto, and Armstrong Statement No.3, the Supplemental Rebuttal Testimony of Michael Starkey dated January 8, 2016, including Exhibits A through D thereto (subject to a stipulation regarding revisions to page 12 of the testimony and the first page of Exhibit D), to the record. That Order also formally closed the record in this case.

² The Parties further stipulated that Armstrong Statement No.3 and accompanying Proprietary Exhibit D were revised to account for the portion of the traffic that was VoIP-PSTN traffic because it was originated by Verizon in IP format. As a result of this revision, the figure on line 6 of page 12 of Armstrong Statement No.3 changed from \$1,139,611 to \$996,584, and the first page of Proprietary Exhibit D to Armstrong Statement No.3 was revised accordingly to reflect this updated figure.

The remaining issues in this matter relative to traffic exchanged from January 1, 2012, forward are ready for adjudication.

FINDINGS OF FACT

1. Armstrong Telecommunications, Inc. is a competitive local exchange carrier and as such is subject to the jurisdiction of the Commission.

2. Armstrong is a “telecommunications company,” and provides “local exchange service,” on both a retail and wholesale basis.

3. Verizon Pennsylvania Inc. and Verizon North LLC are incumbent local exchange carriers and as such are subject to the jurisdiction of the Commission.

4. MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services and MCI Communications Services Inc. are competitive local exchange carriers, and as such are subject to the jurisdiction of the Commission.

5. On August 30, 2005, the Commission entered Orders approving interconnection agreements between Armstrong and Verizon Pennsylvania Inc. and between Armstrong and Verizon North LLC.³

6. On August 27, 2010, Verizon sent a letter to Armstrong notifying Armstrong that Verizon was disputing a portion of the intercarrier compensation charges billed to Verizon and resetting the rate at reduced payments of \$0.0007 per minute of use.

³ *Joint Petition for Approval of an Interconnection Agreement and Amendment No. 1 Between Verizon Pennsylvania Inc. and Armstrong Telecommunications, Inc.*, under Section 252(e) of the Telecommunications Act of 1996, Docket No. A-311014F7000 (Order entered August 30, 2005); *Joint Petition for Approval of an Interconnection Agreement and Amendment No. 1 Between Verizon North, Inc. and Armstrong Telecommunications, Inc.*, under Section 252(e) of the Telecommunications Act of 1996, Docket No. A-311014F7000 (Order entered August 30, 2005).

7. Voice over Internet Protocol (VoIP) is an internet application that uses packet switching to transmit a voice communication over a broadband internet connection data network.

8. VoIP is significantly different from the traditional circuit switched Public Switched Telephone Network (PSTN).

9. The type of call in dispute originates in analog format via a customer's standard telephone equipment and is converted by AUI's Terminal Adapter to an IP format. Armstrong Main Brief at 39, Diagram 3; Armstrong Rebuttal Testimony at 26.

10. The call is transmitted in the same IP format across the AUI network to the trunking gateway located in the central office. Armstrong Main Brief at 39, Diagram 3; Armstrong Rebuttal Testimony at 26.

11. At the trunking gateway, the transmission is converted again, this time from an IP format back to the more traditional TDM (digital) format in which the call was originated. Armstrong Main Brief at 39, Diagram 3; Armstrong Rebuttal Testimony at 26.

12. The call is then transmitted by Armstrong to the intended third party carrier (e.g., Verizon), in standard TDM format. Armstrong Main Brief at 39, Diagram 3; Armstrong Rebuttal Testimony at 26.

13. Both protocol conversions take place inside the AUI Network and are undertaken solely for the purpose of interworking within the AUI Network. Armstrong Main Brief at 39, Diagram 3; Armstrong Rebuttal Testimony at 26.

14. No additional features, functions or services are made available to the end-user via the conversion of the signal to IP format in the middle of the AUI transmission. Armstrong Main Brief at 39, Diagram 3; Armstrong Rebuttal Testimony at 26.

15. Beginning with Armstrong's August 2010 carrier access bills, Verizon claimed a dispute and refused to pay the carrier access bills submitted by Armstrong, including those submitted for Exchange Access Services provided under Armstrong's State Access Tariff and Reciprocal Compensation services under the Verizon ICAs.

16. The calls at issue neither originate nor terminate in Internet protocol, but rather the protocol conversion occurring on the Armstrong network is an intranet work change to which the customer is indifferent.

DISCUSSION

1. The Commission's Jurisdiction

The Commission is a creature of the legislative body which created it. As such, it has only the powers, duties, responsibilities and jurisdiction given to it by the Legislature. *Western Pennsylvania Water Co. v. Pa. Pub. Util. Comm'n*, 10 Pa.Cmwlth. 533, 311 A.2d 370 (1973). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 157 Pa.Super. 595, 43 A.2d 348 (1945). Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. Cf., *Hughes v. Pa. State Police*, 152 Pa.Cmwlth. 409, 619 A.2d 390 (1992), app. denied, 536 Pa. 633, 637 A.2d 293 (1993). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 427 Pa. 581, 235 A.2d 602 (1967). Neither silence nor agreement of the parties will confer jurisdiction where it otherwise would not exist, *Commonwealth v. VanBuskirk*, 303 Pa.Super. 148, 449 A.2d 621 (1982), nor can jurisdiction be obtained by waiver or estoppel, *Scott v. Bristol Twp. Police Dep't*, 669 A.2d 457 (Pa.Cmwlth. 1995). Since the issue of subject matter jurisdiction may not be waived, it may be raised at any stage of a proceeding by a party, or *sua sponte* by the court or agency in which the case exists. *Blackwell v. State Ethics Comm'n*, 523 Pa. 347, 567 A.2d 630 (1989).

Verizon contends that the Commission does not have the jurisdiction to hear and adjudicate this case. Verizon argues that: (1) the issue in this case is one of federal law that

should not be before the Commission; (2) the FCC preempted state authority over intercarrier compensation; and (3) the VoIP Freedom Act removes Commission jurisdiction. Verizon further contends that the traffic was VoIP-PSTN under 47 C.F.R. § 51.913 (a)(3). Verizon further argues that the traffic is VoIP-PSTN under the plain language of federal law. Verizon also contends that all other members of the cable industry classify their traffic as VoIP-PSTN, and Armstrong concedes that its service is an unregulated VoIP service by its own conduct and admissions.⁴

Do Armstrong's services meet the FCC's definition of "VoIP-PSTN traffic?"

Verizon argued that the collection of tariffed access charges by Armstrong violates the Pennsylvania "Voice-Over-Internet Protocol Freedom Act"⁵ (*VoIP Freedom Act*) which proscribes regulation of "the rates, terms and conditions of VoIP service or IP-enabled service."⁶

Armstrong argues that there are three aspects of the *VoIP Freedom Act*.

First, the traffic network must either be providing "VoIP service" or "IP-enabled service" to be governed by the *VoIP Freedom Act*.

"Internet protocol-enabled service" or "IP-enabled service" is "a service, capability, functionality or application provided using Internet protocol or any successor protocol that *enables an end user to send or receive a communication in Internet protocol format or any successor format*, regardless of whether the communication is voice, data or video.

⁴ Verizon Supplemental Brief at 3-12.

⁵ 73 Pa. C.S. § 2251.1 *et seq.* ("*VoIP Freedom Act*").

⁶ 73 Pa. C.S. § 2251.4. ("Except as set forth in sections 5 and 6, notwithstanding any other provision of law, no department, agency, commission or political subdivision of the Commonwealth may enact or enforce, either directly or indirectly, any law, rule, regulation, standard, order or other provision having the force or effect of law that regulates, or has the effect of regulating, the rates, terms and conditions of VoIP service or IP-enabled service.").

“Voice-over-Internet protocol service” or “VoIP service” is “[a] service that:

(1) enables real-time, two-way voice communications that *originate or terminate from the user’s location in Internet protocol* or any successor protocol;

(2) *uses a broadband connection* from the user’s location; *and*

(3) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.⁷

Armstrong contends that the first definition of VoIP service does not apply in this case because, as explained in the “System Configuration,” section, below, the end user does not, “send or receive a communication in Internet protocol.” The use of IP in the network is unrelated to the manner in which the customer uses the network.

Armstrong also contends that the second definition of VoIP service is also inapplicable. When describing Armstrong’s network, Verizon appropriately relied upon the factual testimony presented by Armstrong’s witnesses on that topic. However, as to whether a broadband connection is required, Verizon relies upon a generalized description on the cable company’s customer website where it states that its telephone service, “. . . connects to our broadband network to the telephone wiring inside your home.”⁸ Verizon then argues that there is “no dispute” that AUI’s telephone service “requires a broadband network connection. . . .”⁹ Armstrong disputes this point. Its witnesses testified that the cable company’s voice service does not rely upon a customer’s “broadband connection.” Specifically, the Armstrong-owned Multimedia Terminal Adapter (MTA) that exists within the Armstrong network converts the network’s IP format into standard analog format, which is then transmitted to the customer via the narrowband, analog equipment (both inside wire and telephone) inside the customer’s

⁷ 73 Pa. C.S. § 2251.3 (emphasis added).

⁸ Verizon Main Brief at 12 (citing Verizon Exhibit 4).

⁹ Verizon Main Brief at 19.

home.¹⁰ On this exact point, the cable customer is not required to subscribe to broadband service, as the company offers stand-alone voice service without any broadband or television subscriptions necessary.¹¹

While it is true that an Armstrong customer *may* also have an Armstrong broadband (Internet) connection to his/her home, the customer does not use that connection for Armstrong voice services and broadband service is not required to obtain voice service.¹² The fact that the network may also be used for broadband is irrelevant. Traditional TDM-based telephone companies regularly provide both voice and (DSL-based) broadband services simultaneously over the same copper wires. DSL service does not make that telephone service an information service.

Armstrong's witnesses were asked by Verizon whether the "VoIP Freedom Act" definitions applied to the Armstrong cable affiliate's network. They responded, "No."¹³

Armstrong acknowledged that it has revised its position with respect to how calls are originated from and terminated to the end use customers of its affiliate cable company AUI. Initially, Armstrong held a position based upon a general understanding that the cable company's services originated and terminated in Internet protocol.¹⁴ Upon receipt of Verizon's direct testimony and further discovery, Armstrong reviewed in greater detail the cable company's

¹⁰ Armstrong Rebuttal Testimony at 17.

¹¹ Armstrong Rebuttal Testimony at 6-7.

¹² The Armstrong cable company provides stand alone voice service. Neither broadband nor cable TV service is required. NT at 6-7.

¹³ NT at 88-89.

¹⁴ NT at 89.

provision of services and determined that, as a factual matter, calls do not originate/terminate in IP, but are only converted to and from Internet protocol only *on* the cable company network.¹⁵

Armstrong's Chief Financial Officer, Bryan Cipoletti, readily conceded that this may well mean that Armstrong's cable company is subject to regulation by the Commission.¹⁶ However, Armstrong has not changed its description of its network.

The "*VoIP Freedom Act*" does not affect the Commission's jurisdiction over: Switched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company.¹⁷

On its face, the exemption applies. Armstrong is a "telecommunications company," and provides "local exchange service," on both a retail and wholesale basis. Verizon argues, by reference to 66 Pa. C.S. § 3012, that the term "local exchange telecommunications company,"¹⁸ is limited to an incumbent local exchange carrier (ILEC).¹⁹ This is nowhere reflected in Title 73. Nor is there any indication that the General Assembly either intended to adopt one or restrict it to a definition in another act and another title. In the *Palmerton v. Global*

¹⁵ Armstrong Exhibit 10 ("After further investigation in preparing responses to Verizon Set II discovery, Armstrong again confirmed that IP is used by Armstrong's cable affiliate only within its own network. Therefore, while it remains true that Armstrong's cable affiliate maintains an IP-based network, calls are neither originated by nor terminated to the customer in IP. It also remains true, as previously admitted, that: all voice traffic on Armstrong's network is in TDM format; all voice traffic exchanged between Verizon and Armstrong is in TDM format; and all voice traffic exchanged between Armstrong and its cable affiliate is in TDM format.")

¹⁶ NT at 89.

¹⁷ 73 Pa. C.S. § 2251.6(1)(iv) ("Powers and duties retained").

¹⁸ 66 Pa. C.S. § 3012 (Definition of "local exchange telecommunications company").

¹⁹ Verizon Main Brief at 14.

NAPs Opinion,²⁰ the Commission, in ruling whether the service was “switched network access,” did not limit its ruling to ILECs only. The common usage of the terms should be applied.²¹

Finally, Armstrong contends that the third definition of VoIP service is inapplicable. By regulating Armstrong under its existing wholesale certificate and tariffs, the Commission is not also regulating “the rates, terms and conditions” of retail service.²² This “indirectly-regulating-VoIP-services” theory has been repeatedly rejected. The Commission ruled, when Global NAPs asserted the same contention:

. . . [W]e are not dealing here with the retail services of an interconnected albeit nomadic VoIP service provider. Neither are we trying to apply regulation that would have had the potential of touching the intrastate retail operations of an interconnected nomadic VoIP provider . . .²³

As further demonstration of the Commission’s jurisdiction, subsequent to the enactment of the Act, the Commission has continued to find that wholesale competitive local exchange carriers (CLECs) serving cable companies are jurisdictional telecommunications carriers and has certificated them and approved their tariffs.²⁴

²⁰ *Palmerton Telephone Co. v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates*, Docket C-2009-2093336 (Opinion and Order entered March 16, 2010).

²¹ Chapter 30, which contains the specific definition of “local exchange telecommunications company” that Verizon seeks to extend to Title 73, is an “ILEC-specific” piece of legislation intended to impose (network modernization) and revise (alternative ratemaking) obligations on ILECs that did *not* apply to CLECs. Because of its ILEC-targeted subject matter, it specifically had to distinguish between ILECs and CLECs, thus the ILEC/CLEC definitional distinction. There is no evidence of legislative intent to make such a distinction in Title 73.

²² Verizon Main Brief at 16.

²³ *Palmerton Opinion* at 27; See also *Palmerton Opinion* at 29 (“Again, in contrast to the *Vonage v. NE PSC* federal court decisions, this Commission is not dealing here with jurisdictional traffic allocations that relate to the retail operations, services, and revenues of a nomadic VoIP provider.”).

²⁴ *Application of Comcast Business Communications, LLC d/b/a Comcast Long Distance for expanded Authority to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier to the Public in the Commonwealth of Pennsylvania in the Service Territories of Windstream Pennsylvania, Inc. et al.*, Docket Nos. A-2008-2029089, A-2008-2029091, A-2008-2029092, and A-2008-2029093 (Order entered July 18, 2008) (“CBC proposes to provide “Local Interconnection Service” (LIS) which acts as a gateway to the public switched telephone network for local qualifying cable-based voice over Internet protocol (VOIP) service providers in these rural territories.”).

Finally, on July 18, 2011, before the issuance of the FCC's November 18, 2011 ICC/USF Order, I issued an Order denying Verizon's Motion to Dismiss having reviewed the public comments filed by the Commission in the *Connect America Fund NPRM*.²⁵ In the Order issued on July 18, 2011, I stated that I believe that as a matter of policy as well as law that the Commission would not countenance dismissal of this Complaint on jurisdictional grounds. In the final analysis I must agree with Armstrong that the *November 18, 2011 ICC/USF Order* clearly contemplates an interpretive role for the states. While the FCC has established the category of VoIP-PSTN, it has left implementation to the states. The *FCC November 18, 2011 ICC/USF Order* contemplates this compliance role for the states, noting that:

[S]tates will play a critical role implementing and enforcing intercarrier compensation reforms. In particular, state oversight of the transition process is necessary to ensure that carriers comply with the transition timing and intrastate access charge reductions outlined above. Under our framework, rates for intrastate access traffic will remain in intrastate tariffs. As a result, to ensure compliance with the framework ... state commissions should monitor compliance with our rate transition; review how carriers reduce rates to ensure consistency with the uniform framework[.]²⁶

In conclusion, and after a review of the Commission's decision in *Global NAPS* and the *November 18, 2011 ICC/USF Order*, I see no reason to reverse my original ruling when I denied Verizon's Motion to Dismiss or Stay on jurisdictional grounds on July 18, 2011.

²⁵ *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform - Mobility Fund*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, we Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WT Docket No. 03-109, WT Docket No. 10-208, Report and Order And Further Notice Of Proposed Rulemaking released November 18, 2011 ("November 18, 2011 ICC/USF Order").

²⁶ *FCC November 18, 2011 ICC/USF Order* at ¶ 813; See also ¶¶ 776, 790, 803 and 812 ("... states will play a key role in implementing the framework we adopt today. In particular, states will oversee changes to intrastate access tariffs to ensure that modifications to intrastate tariffs are consistent with the framework and rules we adopt today.").

2. Burden of Proof

While Armstrong states that it is the Complainant in this proceeding, Armstrong argues that the burden of proof in this case is Verizon's, because Verizon is the party challenging existing rates.²⁷ Citing 66 Pa. C.S. § 315 and *Schellhammer v. Pa. Pub. Util. Comm'n*, 639 A.2d 189 (Pa. Cmwlth. 1993), Armstrong contends that although it is the Complainant, that role was "thrust upon it," by Verizon's refusal to abide by lawful rates. Armstrong proposes that if Verizon had not unilaterally changed the rate, then Verizon would have been the Complainant and would have had the burden of proof.²⁸

Verizon, however, is not the Complainant. Armstrong is the Complainant seeking enforcement of its tariff. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a). Armstrong is the party seeking relief. As the party seeking relief from the Commission, Armstrong bears the burden of proof.

To establish a sufficient case and satisfy the burden of proof, Armstrong must show that Verizon is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990), *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 134 Pa.Cmwlth. 218, 221-222, 578 A.2d 600, 602 (1990), app. denied, 529 Pa. 654, 602 A.2d 863 (1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Armstrong must initially produce sufficient credible evidence to establish a *prima facie* case in order that it not lose summarily. *Morrissey v. Dep't of Highways*, 424 Pa. 87, 225 A.2d 895 (1967). If it does so, the burden of going forward with evidence shifts to Verizon to produce credible evidence of at least co-equal weight. This burden of going forward with evidence may shift back and forth between the

²⁷ Armstrong Main Brief at 14-15.

²⁸ Armstrong Main Brief at 16.

parties, but the ultimate burden of persuasion remains with Armstrong. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 67 Pa.Cmwlth. 597, 447 A.2d 1100 (1982), *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 154 Pa.Cmwlth. 21, 623 A.2d 6 (1993), 2 Pa.C.S. § 704. Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Bd.*, 531 Pa. 287, 612 A.2d 434 (1992). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa.Super. 278, 166 A.2d 96 (1960); *Murphy v. Dep't of Public Welfare*, 85 Pa.Cmwlth. 23, 480 A.2d 382 (1984).

3. System Configuration

Essential to the resolution of this case is an understanding of how the system works. VoIP is an internet application that uses packet switching to transmit a voice communication over a broadband internet connection data network.

VoIP is significantly different from the traditional circuit switched Public Switched Telephone Network (PSTN). The FCC has repeatedly refused to classify interconnected VoIP service as either telecommunications service or information service under the Telecommunications Act of 1996.

The type of call in dispute originates in analog format via a customer's standard telephone equipment and is converted by AUI's Terminal Adapter to an IP format. The call is transmitted in the same IP format across the AUI network to the trunking gateway located in the central office. At the trunking gateway, the transmission is converted again, this time from an IP format back to the more traditional TDM (digital) format in which the call was originated. The call is then transmitted by Armstrong to the intended third party carrier (e.g., Verizon), in

standard TDM format. Both protocol conversions take place inside the AUI Network and are undertaken solely for the purpose of interworking within the AUI Network. No additional features, functions or services are made available to the end-user via the conversion of the signal to IP format in the middle of the AUI transmission.²⁹

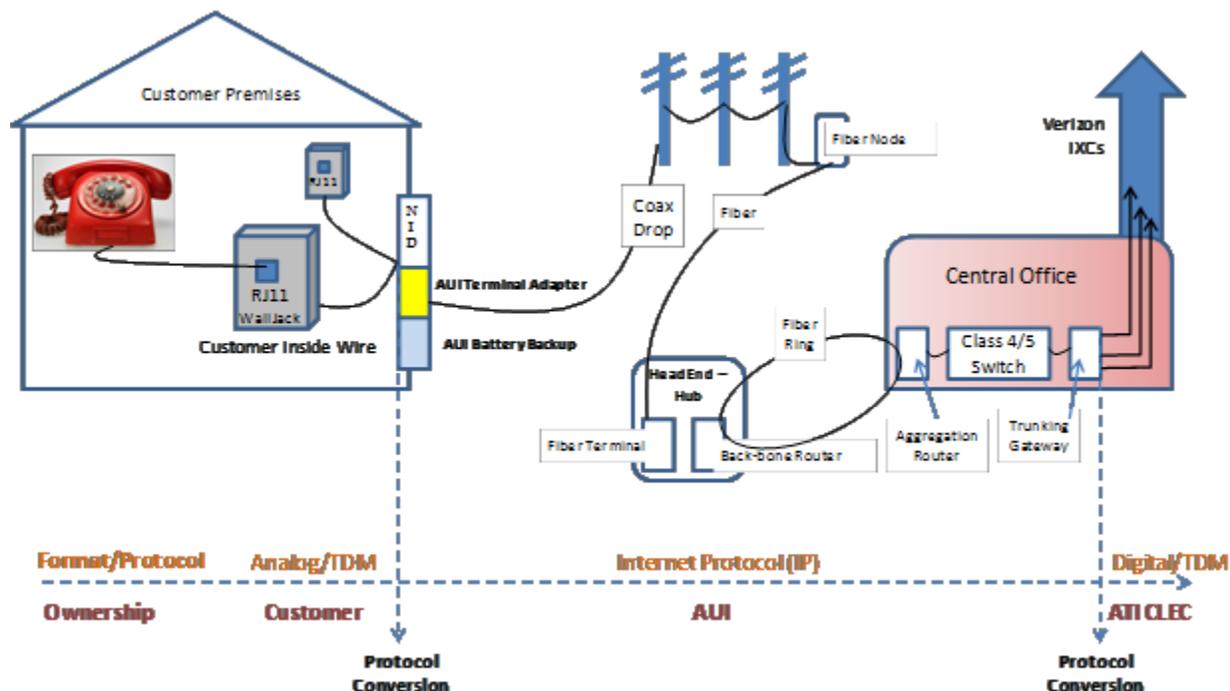


Diagram 3.

The calls at issue neither originate nor terminate in Internet protocol, but rather the protocol conversion occurring on the Armstrong network is simply an intranet work change to which the customer is completely indifferent.

4. Armstrong's Position with Respect to the Compensation Issue

In its Main Brief, Armstrong identifies three issues which can be reduced to one basic proposition before the Commission; that is, did Verizon violate state law and Armstrong's switched access tariff by refusing to pay the tariffed rate and by attempting to establish rates different than those in Armstrong's switched access tariff (i.e., a violation of 66 Pa. C.S. § 1303)? Armstrong contends that Verizon has violated the law.

²⁹ Armstrong Main Brief at 39, Diagram 3; Armstrong Rebuttal Testimony at 26.

Armstrong is a CLEC that serves as a wholesale provider of telecommunications services in support of its cable affiliate, Armstrong Utilities, Inc., which provides cable telephony services to end use customers in Pennsylvania. Armstrong contends that it is a telecommunications carrier and not, as Verizon would have it, an “information service provider.” Armstrong argues that there has been no change in the technical facts associated with this case since 2006, and that Verizon is trying to reference a case decided in 2004 (the *Vonage* case)³⁰ as a basis to unilaterally reduce interconnection payments to Armstrong.

In support of this proposition, Armstrong points out that the entities involved here are telecommunications companies certificated by the Commission, and the calls involved originate and terminate in Pennsylvania, so they are intrastate in nature.

Armstrong asserts that Verizon, an ILEC, unilaterally changed the intercarrier compensation rate contrary to prior agreements and tariff on the theory that the Commission no longer has jurisdiction over this compensation. Armstrong argues that Verizon has premised its action in reducing payments to \$0.0007 per minute of use on the theory that after a Verizon call is delivered to Armstrong and thence to an underlying cable company provider that uses internet protocol (IP) as part of its fixed cable telephony service, the protocol conversion is analogous to VoIP. Armstrong argues that Verizon has erred in equating fixed/terminating service with nomadic/originating service.

Armstrong disagrees with Verizon’s reliance on the FCC’s *Vonage* decision as a rationale for non-payment of the previously agreed upon intercarrier compensation rate. Armstrong states that Verizon’s reliance on the *Vonage* decision is specious and contrary to the Commission’s decision in *Palmerton v. Global NAPs* and because the FCC has not exempted intrastate traffic, VoIP or otherwise, from the application of either intrastate switched access

³⁰ *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267 (Memorandum Opinion and Order, released November 12, 2004).

charges or reciprocal compensation.³¹ Armstrong contends that the *Vonage* decision is not applicable to Verizon-originated traffic that terminates to a cable company network.³²

Armstrong denies participating in a scheme, which it claims that Verizon “concocted,” to deny Verizon payment from interexchange carriers (IXCs). In this sense, Armstrong argues that the Verizon traffic study used in Verizon’s New Matter does not provide factual support for Verizon’s claims, and that Armstrong is not secondarily liable for carriers that fail to pay Verizon.³³

Armstrong contends that Verizon has misread the Commission’s *Palmerton* decision as allowing Verizon to ignore its contracts and tariff obligations when using another companies’ switched access service, provided that Verizon offers compensation at a level other than “nothing.” Armstrong contends that if Verizon had acted in good faith in this matter, then Verizon would have used established contractual and statutory procedures to reduce the compensation rate, namely: (1) notice of interconnection agreement termination and renegotiation; (2) a prior challenge to the interconnection rates; or (3) file a complaint with the Commission according to tariff.³⁴

Armstrong requests that the Commission direct Verizon to pay Armstrong reciprocal compensation at the interconnection agreement level and switched access rates at tariffed levels until such time as Verizon follows proper procedure to pay a different amount, and then only after due process and Commission authorization.³⁵

³¹ *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other affiliates* (Opinion and Order entered March 16, 2010).

³² Armstrong Motion at 4.

³³ Armstrong Motion at 5, 7.

³⁴ Armstrong Motion at 6.

³⁵ Armstrong Motion at 8.

5. Verizon's Position with Respect to the Compensation Issue

Verizon asserted that there are material facts in dispute in this case with respect to both Verizon's attempts to negotiate with Armstrong and the payment of \$0.0007 per minute of use.³⁶ Verizon argues that the facts in this case are materially different from those in *Palmerton v. Global NAPs* in that Global NAPs refused to pay anything to Palmerton and only brought up negotiation in the late stages of the litigation.³⁷ Verizon contends that it offered, in good faith, to negotiate mutual and reciprocal terms for the exchange of VoIP traffic, and that Verizon is paying Armstrong for termination of traffic. Verizon claims that Armstrong refused to negotiate.³⁸ Verizon takes issue with the characterization of the \$0.0007 per minute of use rate as "virtually nothing," and asserts that the rate is already widely used in the industry, citing agreements that Verizon has entered into with other carriers.³⁹ Verizon states:

[T]here is no basis for the Commission to conclude as a matter of law, without consideration of facts such as those Verizon points to here, that the \$0.0007 rate is tantamount to nothing, as Armstrong asserts.

Verizon Answer at 10.

Verizon goes on to list what it asserts are essential factual differences between the present controversy and *Palmerton v. Global NAPs* that require the development of a factual record in this case, including: (1) Palmerton's status as a Rural Local Exchange Carrier (RLEC); (2) the difference between Global NAPs, which refused to pay or negotiate with Palmerton, as compared to Verizon which was willing to negotiate and is paying Armstrong; and (3) the fact that Global NAPs had no interconnection agreement with Palmerton or direct connection with Palmerton while Global NAPs was streaming Time Dimension Multiplexing (TDM) and VoIP

³⁶ Verizon Answer at 4, 8.

³⁷ Verizon Answer at 6-7.

³⁸ Verizon Answer at 7.

³⁹ Verizon Answer at 9.

traffic through a tandem provider with no means of identifying VoIP traffic whereas all of the traffic at issue in this case is IP-originated or IP-terminated.⁴⁰

Verizon characterizes Armstrong’s practices as “anti-competitive” in effect with asymmetrical revenue flows for traffic exchanged between Verizon and Armstrong (and its cable affiliate).⁴¹

Verizon asked that a record be developed relative to Armstrong’s VoIP service and the nature of the specific traffic that is in dispute between the parties.⁴² This goes to Verizon’s jurisdictional argument that the traffic is interstate in nature and jurisdiction, relying on the *Vonage* decision.⁴³ Verizon argues that the Commission must determine whether the traffic is “information service” traffic, which requires the development of an evidentiary record.⁴⁴ Verizon then accuses Armstrong of providing a “misleading” description of facts:

Armstrong fails to make clear that it only has two [Interconnection Agreements (ICAs)] with the two Verizon ILECs—Verizon Pennsylvania Inc. and Verizon North Inc. These ICAs do not apply to the other two respondents, MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services and MCI Communications Services Inc.

* * *

Moreover, neither the ICAs nor the tariff require Verizon to pay Armstrong the billed rate pending resolution of the dispute even if the documents applied to VoIP traffic (which they do not) as Armstrong claims . . . The ICA goes on to require the parties to engage in good faith negotiation for at least 45 days, and ‘[i]f the Parties have been unable to resolve the dispute within 45 days of

⁴⁰ Verizon Answer at 10-11.

⁴¹ Verizon Answer at 11.

⁴² Verizon Answer at 14.

⁴³ *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267, Memorandum Opinion and Order, released November 12, 2004.

⁴⁴ Verizon Answer at 17.

the date of the initiating Party's written notice, either Party may pursue any remedies available to it under this Agreement, at law, in equity, or otherwise, including, but not limited to, instituting an appropriate proceeding before the Commission, the FCC, or a court of competent jurisdiction. (ICA § 14.2) . . . Thus, if the Commission were to conclude erroneously that the ICA governed this dispute, it would need to consider as an evidentiary matter whether Armstrong engaged in good faith negotiations to rule on compliance with this provision.

Verizon Answer at 21-22.

6. Analysis

Armstrong's Complaint is cast as five separate but related Counts: (1) Refusal to Pay Tariffed Access Charges in Violation of State Law; (2) Refusal to Pay Tariffed Access Charges In Violation of Armstrong's State Access Tariff; (3) Attempt To Negotiate A Different Rate Than Specified in Armstrong's State Access Tariff in Violation of State Law; (4) Failure to File Dispute With the Commission in Violation of Armstrong's State Access Tariff and State Law; and (5) Refusal to Pay Reciprocal Compensation in Breach of the Verizon ICAs (Interconnection Agreements). Armstrong requests the following relief: (1) that the Commission sustain Armstrong's Complaint; (2) that the Commission direct Verizon to immediately pay Armstrong all amounts outstanding for services provided, plus late payment charges and attorney fees, as specified in Armstrong's State Access Tariff and the Verizon ICAs; (3) that the Commission direct Verizon and affiliates to cease sending any traffic to Armstrong, and cease requiring Armstrong to send 800 traffic to Verizon unless and until such time as Verizon pays to Armstrong all amounts outstanding under Paragraph 2; (4) that the Commission direct that, in the future, Verizon shall timely pay Armstrong all amounts for services provided; and (5) grant such other relief as may be just and reasonable.

With respect to the request for attorney fees, that request can be dispensed with from the outset. It is well established in the courts of this Commonwealth that legal fees are not generally recoverable except where permitted by statute or other recognized exception to this general rule. *Corace v. Balint*, 418 Pa. 262, 271 (1965); *Becker v. Borough of Schuylkill Haven*,

200 Pa. Super. 305, 312 (1963); 11 Pa. Law Encyclopedia Damages § 33 (1970). Nothing in the Commission's statutes, regulations or orders gives the Commission the power to grant attorney fees in the factual setting of the present Complaint. See *Capitol Bus Company v. Leonard M. Smith*, Docket No. 20830 (Final Order entered September 23, 1975) 1975 Pa. PUC LEXIS 24; 49 Pa. PUC 428; see also *Pa. Pub. Util. Comm'n v. Duquesne Light Company*, 61 Pa. PUC 495 (1986); *Pa. Pub. Util. Comm'n v. National Fuel Gas Distribution Corporation*, 63 Pa. PUC. 68, 71 (1987) (The Commission does not have jurisdiction to award attorney fees and costs); *Edward Dugas v. PECO Energy Company*, Docket No. Z-01417035, 2004 Pa. PUC LEXIS 50 (June 10, 2004) (The Commission was not empowered to award damages, attorney fees or costs); *James H. Joseph v. Bell Telephone Company of Pennsylvania*, Docket No. C-00924568, 1993 Pa. PUC LEXIS 55 (The Commission is without authority to award attorney fees). Consequently, the part of the present Complaint requesting attorney fees is denied.

If we accept that the Commission has jurisdiction in this matter, which I do for the reasons articulated above, then this becomes a relatively straightforward case. As will be explained below, by its action in unilaterally refusing to pay Armstrong's lawful switched access tariff Verizon has violated the Pennsylvania Public Utility Code (Code) at 66 Pa. C.S. § 1303, which states in pertinent part:

§ 1303. Adherence to tariffs.

No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part. . . .

66 Pa. C.S. § 1303.

Whether Verizon sought to negotiate with Armstrong prior to Verizon's unilateral act or *post-facto* is irrelevant because it does not justify Verizon's action in failing to pay Armstrong's lawful rate.

Armstrong knows its system which was described on the record by the credible testimony of its witnesses, and argued that the configuration of the system supports a conclusion that the calls at issue neither originate nor terminate in Internet protocol, but rather the protocol conversion occurring on the Armstrong network is an intranet work change to which the customer is indifferent. Verizon takes the same system and attempts to change the jurisdictional and regulatory framework by preempting the Commission's jurisdiction and by describing the system in accord with Verizon's interpretation of other agencies' decisions. As the Commission does have jurisdiction in this case, Verizon's argument cannot be accepted.

Verizon's contentions center on the jurisdictional issue (already addressed, above), and Verizon's application of its interpretation of the *FCC November 18, 2011 ICC/USF Order* to what Verizon sees are the facts of this case. If one accepts Verizon's jurisdictional argument, then the case defaults to a determination of compensation for traffic after December 31, 2011.⁴⁵ As stated above, I do not accept Verizon's jurisdictional argument. For that argument to be persuasive, one must accept Verizon's description of how its interconnection with Armstrong works in light of Verizon's attempts to interpret interconnection through FCC decisions.

I agree with Armstrong that a finding that the *FCC November 18, 2011 ICC/USF Order* immediately applies to Armstrong's intrastate access rates would require a finding that Armstrong's traffic is "VoIP-PSTN traffic." Paradoxically, Verizon maintains that, "Armstrong's attempt to remove its traffic from the FCC's VoIP-PSTN compensation regime deserves no serious consideration."⁴⁶ On the contrary, consideration of Armstrong's configuration of its system deserves serious consideration as it is at the heart of this matter, and I accept the testimony of Armstrong's witnesses, which I find credible, in their description of the configuration of Armstrong's system. Armstrong's Main Brief recapitulates the testimony of its witnesses that calls neither originate nor terminate in Internet protocol, but rather that the protocol conversion occurring on the Armstrong network is simply an intra-network change to

⁴⁵ Verizon Reply Brief at 1.

⁴⁶ Verizon Reply Brief at 6.

which the customer is completely indifferent. Armstrong's cable affiliate owns and maintains, as part of its own network, the equipment that makes the intra-networking conversion.

As Armstrong states, the FCC's definition of the new calling category at 47 C.F.R. § 51.701(b)(3) defines "VoIP-PSTN" traffic as "... telecommunications traffic exchanged between a LEC and another telecommunications carrier in Time Division Multiplexing (TDM) format that ... originates from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment."⁴⁷ I accept Armstrong's contention that this is not what happens on Armstrong's network and, thus, the new rule is not applicable to it.

Armstrong is correct that the FCC Order specifies a service that "originates from and/or terminates to an end-user customer" in Internet protocol and "requires 'Internet protocol-compatible customer premises equipment.'" Nowhere does the FCC specify that it intends this definition to apply to any particular type of service provider (all cable companies for example). Rather, the definition describes the placement of the technology in the network and, thus, each network must be reviewed before the label can attach. The FCC Order expressly rejects any wider application of the new rule.⁴⁸ As Armstrong states, the new definition is fact specific.

The FCC's November 18, 2011 ICC/USF Order which sets a CLEC's tariffed interstate access charges at a level no higher than the tariffed rate for such services offered by the ILEC serving the same geographic area applies to Armstrong.⁴⁹ The FCC has stated this provision will continue under the transition to bill and keep: "Application of our access reforms will generally apply to competitive LECs via the *CLEC Benchmarking Rule*."⁵⁰ Thus,

⁴⁷ *FCC November 18th ICC/USF Order*, Appendix A at 500; *November 29th Federal Register*, 76 Fed. Reg. at 73855 (emphasis added).

⁴⁸ *FCC November 18, 2011 ICC/USF Order* at ¶ 941 n.1895.

⁴⁹ 47 C.F.R. § 61.26; *see also Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 F.C.C.R. 9925, ¶ 3.

⁵⁰ *FCC November 18, 2011 ICC/USF Order* at ¶ 807.

Armstrong will follow the underlying ILEC access rates as they transition downward, rather than adopt a flash-cut immediately to the interstate rate for Armstrong's traffic.

Verizon asserts in its Main Brief that, under the new FCC rules, Armstrong must *immediately* reduce all intrastate access compensation to the interstate level. I agree with Armstrong that even though Verizon is aware of Armstrong's position in this proceeding that its services are not IP originated or terminated, Verizon does not explain why its interpretation is a fair reading of the FCC's order as it relates to Armstrong access traffic. Verizon's Main Brief fails to set forth any rationale under which it claims application to Armstrong. It simply asserts, in a conclusory fashion, that the FCC order "disposes of the issues."⁵¹

Simply asserting that the FCC's latest action provides clarity is not enough to justify Verizon's action. Again, I agree with Armstrong that if the intent of the FCC was to classify *all* traffic to/from Armstrong's cable voice service, or all cable company services, as "VoIP-PSTN traffic," the *CLEC Benchmarking Rule* did not do so. There is no indication that the FCC intended its new traffic classification to be so broad. Instead, the FCC set forth fact-specific definitions. As Armstrong states, the FCC has long recognized that there are meaningful differences between service configurations that often must be addressed on a case-by-case basis. The information and documentation needed to perform the required analysis of its network and the new FCC definition is before the Commission in this proceeding. Armstrong's telephony traffic is not "VoIP-PSTN traffic." It is traffic of an ordinary CLEC that happens to use modern technology in the middle of its network.

Armstrong has analyzed both the "originate/terminate" element of the FCC VoIP-PSTN definition, as well as the "customer premises equipment" aspect, in its Main Brief.⁵² On Armstrong's network, the device which converts traffic from IP to traditional TDM⁵³ signals, and vice versa, the Multimedia Terminal Adapter (MTA), is owned and operated exclusively

⁵¹ Verizon Main Brief at 1.

⁵² Armstrong Main Brief at 49-50.

⁵³ Time Division Multiplexing.

within Armstrong's network. It is not owned, controlled or otherwise accessible by the customer. The IP-compatible device that supports Armstrong's cable voice service is not customer premise equipment (CPE) as would be required by the FCC. As Armstrong's witnesses concisely explained: "In sum, the call is received by Armstrong in traditional circuit-switched format and is terminated to the end-user customer in that same format, specifically so that the customer can use standard inside wire and telephone equipment to use the service."⁵⁴

Verizon states that it, "intends to comply with" the *FCC November 18, 2011 ICC/USF Order* "by compensating Armstrong at the FCC-required rates (interstate access and reciprocal compensation, as applicable)," adding that "[t]his FCC order is binding and cannot be challenged in this forum."⁵⁵ I agree with Armstrong that the Commission, not Verizon, should decide the applicability of Armstrong's tariff and define its voice service under existing law.

The VoIP-PSTN rule would have some application to Armstrong if the carrier on the other end of the call (i.e., sending traffic to Armstrong or receiving traffic from Armstrong) could be considered VoIP under the new definition (e.g., *Vonage*), then Armstrong would, along with all other carriers (ILECs and CLECs), charge the interstate rate. Armstrong states that it will mirror this effect under the *CLEC Benchmarking Rule*. As the underlying ILECs' access rates move down to interstate parity and, eventually, zero (i.e., bill and keep), Armstrong will move down in tandem.⁵⁶ Armstrong maintains that despite this, Verizon seems poised to dispute Armstrong's access invoices unless Armstrong *immediately* mirrors its interstate rates for all intrastate traffic which is the source of the continuing dispute.

Both parties have had the opportunity to develop a record on all relevant issues and facts. All necessary facts have been adduced, the parties were aware of the coming change,

⁵⁴ Armstrong Rebuttal Testimony at 26.

⁵⁵ Verizon Main Brief at 9.

⁵⁶ Under the FCC rules, the ILECs' intrastate access rates will equal their interstate rates on July 1, 2013. This is the transition that Armstrong intends to follow.

and had the opportunity to develop their arguments. To the extent either Verizon or Armstrong have “VoIP-PSTN traffic,” both parties appear to agree that the FCC’s new rules would apply. However, to the extent Armstrong’s traffic is not “VoIP-PSTN traffic,” those rules do not apply.

The new 47 C.F.R. § 51.701 (b)(3) defines “VoIP-PSTN” traffic as:
. . . telecommunications traffic exchanged between a LEC and another telecommunications carrier in Time Division Multiplexing (TDM) format *that originates and/or terminates in IP format* and that otherwise meets the definitions in paragraphs (b)(1) or (b)(2) of this section.⁵⁷ Telecommunications *traffic originates and/or terminates in IP format if it originates from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment.*⁵⁸

The *FCC November 18th ICFC/USF Order* confirms this definition: The prospective intercarrier compensation regime we adopt for a LEC’s exchange of VoIP traffic with another carrier focuses on what we refer to as “VoIP-PSTN” traffic.... ‘VoIP-PSTN traffic’ is ‘traffic exchanged over PSTN facilities that originates and/or terminates in IP format.’ [fn. omitted]

Specifying that the service “require ‘Internet protocol-compatible customer premises equipment,’” the FCC Order expressly rejects the suggestion that the “VoIP-PSTN” rules be applied to a broader classification of IP-related traffic or “IP-enabled services.”⁵⁹

The facts established by Armstrong in this proceeding are that traffic originating and/or terminating to the customers of Armstrong’s cable affiliate, Armstrong Utilities, Inc.

⁵⁷ 47 C.F.R. § 51.701(b)(1) or (b)(2) include the following:

(1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (*see* FCC 01–131, paragraphs 34, 36, 39, 42–43); or

(2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

⁵⁸ *FCC November 18th ICC/USF Order*, Appendix A at 500; *November 29th Federal Register*, 76 Fed. Reg. at 73855 (emphasis added).

⁵⁹ *FCC November 18, 2011 ICC/USF Order* at ¶ 941 n.1895.

(AUI), using Armstrong's exchange access facilities and arrangements with AUI, are not "VoIP-PSTN traffic" as defined by the FCC.⁶⁰

Armstrong's witnesses made clear that AUI's customers specifically do not need IP-compatible CPE to use the AUI service because all conversions are accomplished by Armstrong equipment located, owned and operated within its network. Armstrong traffic does not "originate and/or terminate in IP format," nor does it "require Internet protocol-compatible customer premises equipment" - thereby failing two of the three fundamental components of "VoIP-PSTN traffic" as defined by the FCC.⁶¹

Verizon contends that . . . "Armstrong's MTA fits squarely within the FCC's description of CPE."⁶² As described by the Armstrong witnesses, equipment used on the customer side of the demarcation point is CPE, while equipment used on the carrier side is carrier network equipment. The only evidence in the record as to the location of the MTA was provided by the Armstrong witnesses, establishing that the MTA is used on the Armstrong (carrier) side of the demarcation point.⁶³

The terms "originate" and "terminate" hold specific, precedential meaning. Under the FCC's long-held "end-to-end analysis," a call originates at "the end point at the inception of a communication" and terminates at "the end point at its completion."⁶⁴ In short, a call from Verizon's long distance customer, routed by Armstrong's terminating access service to an AUI subscriber, terminates at the customer's telephone (in analog format) - it does not, under any description used by the FCC, "terminate" within the Armstrong network. If it did, the

⁶⁰ Armstrong Rebuttal Testimony at 25, Diagram 3.

⁶¹ *FCC November 18th ICC/USF Order*, ¶ 940. The third component is that the traffic be "exchanged over PSTN facilities." Verizon and Armstrong do exchange traffic over PSTN facilities.

⁶² Verizon Reply Brief at 4.

⁶³ NT at 80-82.

⁶⁴ *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 Memorandum Opinion and Order, Adopted: November 9, 2004, Released: November 12, 2004 ("Vonage Order").

subscriber would be unable to access the communication (because the communication would have terminated/ended within the Armstrong network).

As Armstrong states, the *FCC November 18, 2011 ICC/USF Order* has mandated interstate access charges for all *Vonage*-type VoIP. To the extent a cable operator delivered calls to its subscriber in IP format and, thereafter, requires the customer to use an IP device or CPE that provides the IP/analog conversion, that cable operator would also be terminating VoIP-PSTN traffic. The differences that exist between networks is exactly why the analysis is designed by the FCC to be network specific.

Armstrong's MTA (the device that converts the IP signals to TDM) is a part of its network. It is not CPE. The Act defines two types of equipment at 47 U.S.C. § 153:

47 U.S.C. § 153(16) CUSTOMER PREMISES EQUIPMENT - The term "customer premises equipment" means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.

* * *

47 U.S.C. § 153(52) TELECOMMUNICATIONS EQUIPMENT - The term "telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).

47 U.S.C. § 153.

Given these definitions, equipment cannot be simultaneously defined as customer premises equipment and telecommunications equipment - it must be one, or the other.⁶⁵ Clearly, the MTA, regardless of whether it is physically attached to the customer's premise, is "telecommunications equipment . . . used by [Armstrong] to provide telecommunications services" to its subscribers.

⁶⁵ See 47 U.S.C. § 273 which provides Bell operating companies divergent authority as it relates to "CPE" versus "telecommunications equipment."

Likewise, the MTA is located on the *carrier* side of the “demarcation point” separating the carrier’s network from the customer’s equipment. The FCC defines “demarcation point” as follows:

47 C.F.R. § 68.3 *DEMARCATIION POINT (ALSO POINT OF INTERCONNECTION)*. As used in this part, the point of demarcation and/or interconnection between the communications facilities of a provider of wireline telecommunications, and terminal equipment, protective apparatus or wiring at a subscriber’s premises.

47 C.F.R. § 68.3.

As Armstrong established, the demarcation point is located with the “facilities of a provider of wireline telecommunications,” on the one side, and the customer’s phone (terminal equipment), protective apparatus, and inside wire, on the other. Because the MTA is part of Armstrong’s facilities, it is on the Armstrong side of the demarcation point (and, hence, “telecommunications equipment”). It cannot also be CPE.

As discussed in Armstrong’s testimony, the FCC has held that “protocol processing ... involving internetworking technology (conversions taking place solely within the carrier’s network to facilitate provision of a basic network service, that result in no net protocol conversion to the end user)”⁶⁶ is representative of a telecommunications service. In other words, the extent to which the protocol conversion is done within the carrier’s network, or by the customer via CPE, has always been an important distinction - one which the FCC has now carried forward in its *FCC November 18, 2011 ICC/USF Order* defining “VoIP-PSTN traffic.” Because any IP conversion is done *within* the Armstrong network, and not by CPE, Armstrong’s service is not an “information service,” nor is it “VoIP-PSTN traffic” as the FCC defines that term.

⁶⁶ *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-149, released December 24, 1996 (“*Non-Accounting Safeguards Order*”), ¶ 106.

I agree with Armstrong that if we evaluate Armstrong's service based upon the FCC's express definitions, then Armstrong's traffic is not VoIP-PSTN traffic, and rather than impose an immediate phase-down of rates to interstate levels for all traffic, the correct approach is that Armstrong follow the ILECs' rates down at the same time and in the same magnitude as the FCC intends for all carriers under the *CLEC Benchmarking Rule*.⁶⁷

7. Conclusions

As established in the preceding Analysis, by its action in unilaterally refusing to pay Armstrong's lawful switched access tariff Verizon has violated the Code at 66 Pa. C.S. § 1303. A utility tariff has the force and effect of law in Pennsylvania, and is legally binding upon the utility, its customers and the public. 66 Pa. C.S. § 1303; *DiSanto v. Dauphin Consolidated Water Supply Company*, 436 A.2d 197 (Pa. Super. 1981); *Brockway Glass Co. v. Pa. Pub. Util. Comm'n.*, 437 A.2d 1067 (Pa. Cmwlth. 1981).

I agree with Armstrong that if Verizon had acted in good faith in this matter, then Verizon could have used established contractual and statutory procedures to reduce the compensation rate, namely: (1) notice of interconnection agreement termination and renegotiation; (2) a prior challenge to the interconnection rates; or (3) file a complaint with the Commission according to tariff.

Based on the facts and the application of the law discussed herein, I find that Armstrong has met its burden of proof by demonstrating that Verizon has violated the Code in unilaterally seeking to supplant a lawfully tariffed rate with one of Verizon's own devising in violation of 66 Pa. C.S. § 1303. Armstrong's consolidated Complaints, as amended by the informal Petition to Withdraw counts related to traffic before December 31, 2011, must be sustained.

⁶⁷ 47 C.F.R. § 61.26; see also *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 F.C.C.R. 9925, ¶ 3.

8. Assessment of a Civil Penalty

While Armstrong did not request the imposition of a civil penalty, a penalty must be considered in that Verizon unilaterally changed an intercarrier compensation rate contrary to prior agreements and Armstrong's lawfully filed tariff. By its action in refusing to pay Armstrong's lawful switched access tariff, Verizon violated the Pennsylvania Public Utility Code (Code) at 66 Pa. C.S. § 1303.

Section 3301 of the Public Utility Code provides that if any public utility fails to comply with any Commission regulation, it shall forfeit and pay to the Commonwealth a sum not exceeding \$1,000.00 per day of violation. To implement this section, the Commission has adopted standards that should be applied when imposing a civil penalty for violations of Commission directives and regulations.

Section 69.1201 of the Commission's regulations states:

- (a) The Commission will consider specific factors and standards in evaluating litigated . . . cases involving violations of 66 Pa.C.S. (relating to the Public Utility Code) and this title. These factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate. .

..

* * *

- (c) The factors and standards that will be considered by the Commission include the following:

(1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing, or technical errors, it may warrant a lower penalty.

(2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

52 Pa Code. § 69.1201.

Applying the factors in Section 69.1201, I find the following: (1) the conduct was willful and of a serious nature; (2) while there was no serious injury involved here, Verizon's action affected the finances of another public utility, and but for the fact that parties resolved all claims set forth in Armstrong's Complaint and Verizon's New Matter with respect to traffic exchanged during periods prior to and including December 31, 2011, and that all such claims were withdrawn from this case with prejudice and marked satisfied, the recommended penalty would be higher; (3) Verizon's misconduct was intentional; (4) internal practices are not relevant in this determination; (5) while Armstrong's customers were not directly affected by Verizon's

actions, Armstrong unquestionably was to the extent that almost \$1,000,000 remained unpaid to Armstrong during the pendency of this litigation; (6) the record contains no evidence on this point; (7) there was no investigation in this matter; (8) it is not possible to determine the amount of a fine that would deter Verizon from such conduct in the future - the purpose of the civil penalty is to formally sanction Verizon for its deliberate and unlawful act; (9) I see no past situation analogous to this case that would provide additional guidance in establishing a civil penalty; (10) the additional relevant factor is that the parties appear to have expended a great deal of time and effort in attempting to resolve this matter - however, this only partially mitigates a situation that was brought about in the first place by Verizon's unlawful act.

The principle reason that I am recommending the imposition of a civil penalty in this case is because not only did Verizon act unilaterally in changing the intercarrier compensation rate contrary to prior agreements and Armstrong's lawfully filed tariff, but also because Verizon did this anticipating the result of an FCC decision before that decision had even been issued. The fact that those claims predating the issuance of the FCC decision were ultimately settled does not mitigate the offense, because had the offense not occurred, there would have been no claim to settle. Likewise, the proposed amendment of Armstrong's original Complaint (which I note was never accomplished) does not preclude Commission action in sanctioning a violation of the Code. Given the factors explained above, I recommend the imposition of a \$1,000 civil penalty.

CONCLUSIONS OF LAW

1. The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly as contained in the Public Utility Code. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992) *alloc. denied*, 637 A.2d 293 (Pa. 1993).

2. The Commission has jurisdiction over this Complaint. 66 Pa.C.S. § 701.

3. The party seeking affirmative relief from the Commission bears the burden of proof. 66 Pa.C.S. § 332(a).
4. The burden of proof in this case rests with Armstrong as the Complainant.
5. As a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the Complaint in order to prevail. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. PUC 300 (1976).
6. The burden of proof must be shown by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 134 Pa.Cmwlth. 218, 221-222, 578 A.2d 600, 602 (1990), alloc. denied, 529 Pa. 654, 602 A.2d 863 (1992).
7. A preponderance of evidence is that which is more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).
8. Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa.Cmwlth. 1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993); 2 Pa.C.S. § 704.
9. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa.Super. 1960); *Murphy v. Dep't. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa.Cmwlth. 1984).
10. The offense must be a violation of the Public Utility Code, the Commission's regulations, or an outstanding order of the Commission. 66 Pa.C.S. § 701.

11. The “VoIP Freedom Act” does not affect the Commission’s jurisdiction over switched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company. 73 Pa. C.S. § 2251.6.

12. The FCC November 18, 2011 ICC/USF Order maintains that states will play a critical role implementing and enforcing intercarrier compensation reforms. *FCC November 18, 2011 ICC/USF Order* at ¶ 813.

13. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

14. The Public Utility Code requires that a complaint must be filed challenging an existing tariffed rate. 66 Pa.C.S. §§ 315 (a), 316, 701, 703 (g), and 1309 (a).

15. By its action in unilaterally refusing to pay Armstrong’s lawful switched access tariff Verizon has violated the Pennsylvania Public Utility Code (Code) at 66 Pa. C.S. § 1303.

16. If any public utility subject to the Pennsylvania Public Utility Code shall violate any of the provisions of the Code, such public utility shall forfeit and pay to the Commonwealth a sum not exceeding \$1,000 per occurrence. 66 Pa. C.S. § 3301.

17. The Commission does not have the statutory authority to award attorney’s fees and costs. *Pennsylvania Public Utility Commission v. Duquesne Light Company*, 61 Pa. P.U.C. 495 (1986); *Pennsylvania Public Utility Commission v. National Fuel Gas Distribution Corporation*, 63 Pa. P.U.C. 68, 71 (1987).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the informal Petition of the parties filed on February 6, 2012, to withdraw all claims set forth in Armstrong's Complaint and Verizon's New Matter with respect to traffic exchanged during periods prior to and including December 31, 2011, is granted.
2. That Armstrong's request for attorney's fees is denied.
3. That the remaining counts in the Complaints filed by Armstrong Telecommunications, Inc., at Docket Nos. C-2010-2216205, C-2010-2216311, C-2010-2216325 and C-2010-2216293 are sustained.
4. That Verizon Pennsylvania Inc., is directed to abide by the provisions of the lawfully filed tariff of Armstrong Telecommunications, Inc.
5. That Verizon Pennsylvania Inc., is directed to refund or credit the Complainant the outstanding sum of \$996,584.
6. That Verizon Pennsylvania, Inc., is directed to pay a civil penalty of \$1,000 by sending a certified check or money order payable to the Commonwealth of Pennsylvania, within thirty (30) days from the entry of the Final Commission Order to:

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

7. That upon payment of the penalty, the Secretary shall mark this matter closed.

Date: September 28, 2018

/s/
Dennis J. Buckley
Administrative Law Judge