

Suzan DeBusk Paiva
Associate General Counsel



900 Race Street, 6th Floor
Philadelphia, PA 19107

Tel: (267) 768-6184
Suzan.D.Paiva@Verizon.com

November 8, 2018

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

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

Dear Secretary Chiavetta:

Enclosed please find Verizon's Exceptions, filed on behalf of Verizon Pennsylvania LLC, Verizon North LLC, MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc. (collectively, "Verizon") in the above captioned Matter.

If you have any questions, please feel free to contact me.

Very truly yours,

A handwritten signature in blue ink that reads "Suzan D. Paiva".

Suzan D. Paiva

SDP/sau
Enclosure

Via Email and Federal Express
cc: The Honorable Dennis J. Buckley
Attached Certificate of Service.

CERTIFICATE OF SERVICE

I, Suzan D. Paiva, hereby certify that I have this day served a copy of Verizon's Exceptions upon the participants 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 8th day of November, 2018.

VIA E-MAIL and FEDERAL EXPRESS

Charles E. Thomas III, Esquire
Thomas, Niesen & Thomas
212 Locust Street, Suite 302
Harrisburg, PA 17108
cet3@tntlawfirm.com



Suzan D. Paiva
Pennsylvania Bar ID No. 53853
600 Race Street, 6th Floor
Philadelphia, PA 19107
(267) 768-6184

Attorney for Verizon

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

VERIZON’S EXCEPTIONS TO INITIAL DECISION

Suzan DeBusk Paiva (Atty No. 53853)
Verizon
900 Race St., 6th Floor
Philadelphia, PA 19107
(267) 768-6184

Attorney for Verizon

Date: November 8, 2018

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Pursuant to 52 Pa. Code § 5.533, Verizon¹ excepts to the Initial Decision of Administrative Law Judge (“ALJ”) Dennis J. Buckley issued on October 4, 2018 (“ID”) in this complaint case brought by Armstrong Telecommunications, Inc. (“Armstrong”) against Verizon.²

I. INTRODUCTION

This case involves intercarrier compensation payments under Federal Communications Commission (“FCC”) rules to terminate calls placed by Verizon’s voice customers to Armstrong’s cable telephony customers. All other cable telephony providers, including Comcast and Time Warner, classify their traffic as “VoIP-PSTN” for intercarrier compensation under the FCC rules and charged a lower rate. Although Armstrong’s cable telephony service is no different from the others, it takes an extreme position marking itself as an outlier in the industry by contending that it should have been able to charge the higher terminating rates applicable to ordinary non-VoIP telephone traffic. The ID’s adoption of Armstrong’s theory is directly contrary to federal law – including an Eighth Circuit Court of Appeals decision issued a few weeks ago. The effect of the ID’s erroneous holding is to allow Armstrong to act as an unregulated VoIP provider for retail purposes but to collect higher access charges as if it were a regulated telephone company using ordinary circuit-switched technology.

Nearly seven years ago Verizon and Armstrong entered into a settlement resolving their differences over intercarrier compensation payments for traffic exchanged before December 31, 2011, which was the vast majority of this case. The impetus for the settlement was the FCC’s

¹ “Verizon” refers to the respondents in this case Verizon Pennsylvania LLC, Verizon North LLC, MCImetro Access Transmission Services Corp., and MCI Communications Services Inc.

² The parties jointly requested and were granted extensions until November 8, 2018 for the filing of Exceptions and November 30, 2018 for the filing of Replies to Exceptions. <http://www.puc.state.pa.us/pcdocs/1589372.pdf>.

November 2011 order preempting the states and setting intercarrier compensation rates for all traffic exchanged from January 1, 2012 forward.³ The only issue the parties could not agree upon was how the traffic terminated by Verizon to Armstrong should be treated after the new FCC rules took effect. The parties agreed that the FCC's rules would determine the rate, but disagreed on which rule governed this particular traffic.

Verizon contended that the applicable rate was the FCC's rate for "VoIP-PSTN" traffic under its new regulations. 47 C.F.R. § 51.913(a). Armstrong – while claiming unregulated VoIP status as a cable telephony provider for retail purposes – insisted that Verizon should pay the higher transitional rate under the FCC's rules for terminating ordinary circuit-switched intrastate traffic that is not VoIP. As a practical matter, this only made a difference for the first 18 months after the settlement (January 1, 2012 to July 1, 2013), after which there was no longer a difference under the FCC's rules between the rate for terminating VoIP-PSTN and other traffic. Today, terminating rates for all traffic have effectively been reduced to or near zero by the FCC rules.⁴

Contrary to the ID's claim that Verizon refused to pay Armstrong's tariffed rates while this dispute was pending, Verizon actually paid \$1.5 million to terminate the traffic at issue under the VoIP-PSTN rate (the same rate charged by all other cable telephony providers) during

³ *Connect America Fund; a National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers; Developing a Unified Intercarrier Compensation Regime, etc.*, WC Docket No, 10-90, etc., Report and Order and Further Notice of Proposed Rulemaking (Nov. 18, 2011) ("*ICC Transformation Order*").

⁴ The FCC's pricing regime is known as "bill-and-keep." Price cap carriers such as Verizon, and CLECS benchmarking their rates, are already at bill-and-keep. Rate-of-return carriers and their benchmarking CLECS will be at bill-and-keep by July 1, 2020.

this 18 month period from January 1, 2012 to July 1, 2013 – a fact that the ID fails to mention.⁵

Verizon has continued to pay Armstrong's tariffed rates going forward.

There were only two substantive questions that the ID needed to resolve:

- Does the Commission have jurisdiction to address the issue of what intercarrier compensation applies for this traffic under the FCC's rules?
- If it does have jurisdiction, was the traffic terminated to Armstrong during that 18 month period "VoIP-PSTN" as that term is defined in the FCC's rules? If it was, then Verizon owes no more than the \$1.5 million it already paid. If it was not, then Verizon owes Armstrong an additional \$996,584.

Unfortunately, as discussed in the exceptions below, the ID got the answers to both of these questions wrong.

As a threshold matter, this Commission lacks jurisdiction to address this dispute because it has been preempted by federal law and it involves an IP-enabled/VoIP service exempt from the Commission's jurisdiction under the state VoIP Freedom Act. Thus, the Commission should not reach the merits.

If it reaches the merits, the Commission should reject Armstrong's attempt to exempt itself from the VoIP-PSTN pricing regulation that applies to every other cable telephony provider. Armstrong's argument turns on its claim that a piece of equipment known as a "Terminal Adaptor" or "Multimedia Terminal Adaptor (MTA)" that Armstrong places at the customer's home or business to convert voice signals between IP and TDM protocol is not "Internet protocol-compatible customer premises equipment" as classified by the FCC. Armstrong's tortured reading of the FCC's rule has been proven wrong by a decision of the United States Court of Appeals for the Eighth Circuit issued on September 7, 2018 rejecting the exact same arguments made by Armstrong and accepted by the ID here and holding that a cable

⁵ See Armstrong St. 3.0 (Supplemental Rebuttal of Starkey), Proprietary Exhibit D.

telephony MTA is “customer premises equipment” under the FCC’s classifications. *Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715, 717, 2018 U.S. App. LEXIS 25478 (8th Cir., 2018) (“Under FCC classifications for hardware, the eMTA is considered Customer Premises Equipment (‘CPE’)”). Armstrong’s traffic therefore is VoIP-PSTN under the plain language of the rule and Verizon does not owe any more than the amount it already paid.

In addition to misinterpreting the FCC’s rule, the ID ignores the fatal inconsistency of allowing Armstrong to continue to operate free of retail regulation as a cable telephony VoIP provider when its decision to force Verizon to pay higher intercarrier compensation rates hinges specifically on a finding that Armstrong’s cable telephony service is not VoIP and is not exempt from retail regulation. The ID failed to address significant evidence in the record, including evidence showing that Armstrong represents its retail service as unregulated VoIP, that it benefits from treating its service as VoIP for retail purposes by avoiding Commission regulation and other regulatory burdens, and that statewide and nationwide all other cable telephony providers uniformly classify their traffic as retail VoIP and VoIP-PSTN for intercarrier compensation and charge the lower rate. There is no reason Armstrong should be treated differently.

The ID’s decision seems to be colored by its prejudicial views about the relative merits of the parties’ positions on the disputes from before December 31, 2011 that were settled and withdrawn with prejudice – as demonstrated by the gratuitous civil penalty for pre-settlement actions and positions taken by Verizon. The Commission should reject the ID and make an objective decision based on the facts and the law, including – if it reaches the merits – the recent Eighth Circuit decision.

II. EXCEPTIONS

Verizon Exception #1: Verizon Expects To The ID's Conclusion That Armstrong's Traffic Is Not "VoIP-PSTN" As Defined By The FCC's Regulations.

As explained in Verizon Exception #4, the Commission's authority over this issue has been preempted by federal law and the state VoIP Freedom Act and it lacks jurisdiction to decide this issue. But if the Commission determines that it has jurisdiction to interpret the FCC's intercarrier compensation rules to resolve the dispute in this case, then it should reject the ID's erroneous conclusion that the traffic terminated to Armstrong is not "VoIP-PSTN" as defined by those rules.

This dispute is governed exclusively by the FCC's regulations, which have completely preempted this Commission's authority over compensation for this traffic. Effective January 1, 2012, the FCC took exclusive authority over "all traffic exchanged with a local exchange carrier, including intrastate calls."⁶ This preemption was affirmed by the United States Court of Appeals for the Tenth Circuit in 2014 and the Supreme Court declined to review.⁷

Starting January 1, 2012, if the traffic was classified as "VoIP-PSTN" under the FCC rules, it was immediately subject to interstate switched access rates (which were normally lower than intrastate rates). The FCC explained that traffic:

exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format shall be subject to a rate equal to the relevant interstate access charges specified by this subpart.

47 C.F.R. § 51.913(a) (emphasis added). This traffic was referred to as "VoIP-PSTN" traffic in the FCC's *ICC Transformation Order*.

⁶ *Direct Communs. Cedar Valley, LLC v. FCC*, 753 F.3d 1015, 1113 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (U.S., May 4, 2015). The court specifically recognized that the FCC had preempted Pennsylvania law regarding intrastate access charges. *Id.* at 1121.

⁷ *Id.*

Ordinary circuit switched traffic that was not VoIP-PSTN also fell immediately under the FCC's rules as of January 1, 2012. But for that traffic the FCC's rules set an 18-month glide path from January 1, 2012 to July 1, 2013 to reduce those rates from their generally higher intrastate level down to equal intrastate rates. After July 1, 2013, all terminating rates (interstate, intrastate, and VoIP) were the same and they transitioned down together from that point. 47 C.F.R. § 51.911(c). These different glide paths down to bill-and-keep were intended to “carefully balance[]the potential industry disruption for both payers and recipients of intercarrier compensation as we transition to a new intercarrier compensation regime more broadly.”⁸ But regardless of the status of the traffic as VoIP-PSTN or not, the FCC's intercarrier compensation rules applied immediately and this Commission's authority to set rates for any intrastate traffic exchanged with a local exchange carrier was preempted by federal law.⁹

The narrow question that determines the applicable rate here is whether or not Armstrong's traffic “originates and/or terminates in IP format” as stated in 47 C.F.R. § 51.913(a). If it does, then it is VoIP-PSTN and was subject to the lower interstate rates as of January 1, 2012 – the rates Verizon already paid. The FCC rules further explain that:

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.

47 C.F.R. §51.913 (a)(3). Thus, the even narrower question over which the parties disagree, is whether or not Armstrong's service “requires Internet protocol-compatible customer premises

⁸ *ICC Transformation Order* ¶ 810.

⁹ The ID appears to be under the mistaken notion that the FCC rules only apply to VoIP-PSTN traffic, when in fact they apply to all traffic exchanged with a local exchange carrier. The ID states: “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.” ID at 26. To the extent the ID assumes that the FCC rules do not apply if the traffic is not VoIP-PSTN, that assumption is plainly wrong.

equipment.” There is no factual dispute over the configuration of Armstrong’s network generally. The dispute is over the regulatory classification for purposes of this FCC rule of the piece of equipment referred to as a Terminal Adaptor, or sometimes a Multimedia Terminal Adaptor or MTA.¹⁰ Armstrong claims that it is not “customer premises equipment.” Its entire argument hinges on acceptance of this erroneous assertion.

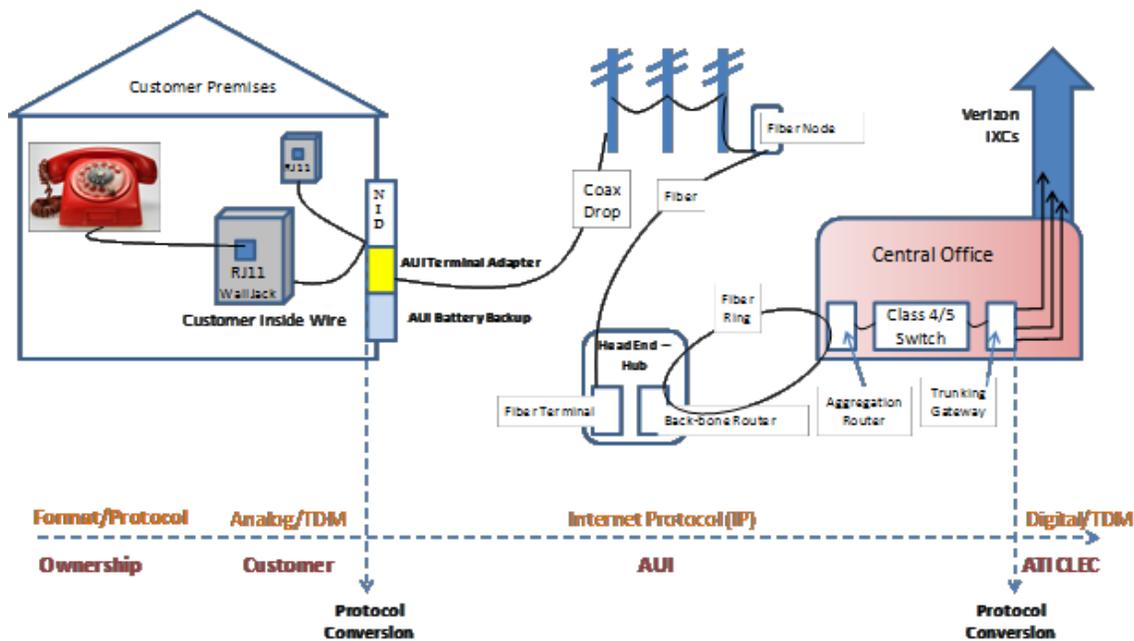
Armstrong does not deny that its cable telephony service depends on IP technology, unlike ordinary circuit-switched or “TDM” telephone service.¹¹ As Armstrong’s witness explains, “it is true that Armstrong uses VoIP technology between its central office/head-end equipment and a ‘Terminal Adapter’ that it places at the customer’s home/business.”¹² Armstrong provided a diagram, which is reprinted at page 19 of the ID and below, and may be helpful to visualizing the process.¹³

¹⁰ See, e.g., Armstrong Reply Brief, January 6, 2012, at 6 (referring to the same device as a “Multimedia Terminal Adapter” or “MTA”).

¹¹ As the Eighth Circuit explained, in contrast to a VoIP network, which relies on packet switched Internet Protocol to carry traffic, “[t]raditional telephone networks (collectively known as the public switched telephone network or ‘PSTN’) utilize ‘circuit switching’ technology, which establishes a dedicated pathway for the duration of a call. A technique called Time Division Multiplexing (“TDM”) allows multiple circuit-switched calls to share the same line.” *Charter Advanced*, 903 F.3d at 718.

¹² Armstrong Supplemental Reply Brief, February 1, 2018, at 7 (quoting Starkey testimony).

¹³ Armstrong Main Brief, December 6, 2011, at 39.



As the Armstrong witness explained, using the above diagram, the voice traffic in Armstrong’s cable telephony service undergoes two “protocol conversions” between IP and TDM as it travels between the end user and the PSTN (Public Switched Telephone Network):

... the first protocol conversion would take place at the cable company's Terminal Adapter. The call (represented by the dotted line at the bottom of the diagram), which originates in analog format via the customer’s standard telephone equipment, is converted by AUI’s Terminal Adapter to an IP format. The call is transmitted in that 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.¹⁴

One protocol conversion happens at the Terminal Adaptor, marked in yellow on the side of the house in the diagram, so that within the house the customer is able to use ordinary phone jacks and handsets. Outside the house and throughout Armstrong’s cable affiliate’s network the traffic

¹⁴ *Id.* (citing Armstrong Rebuttal Testimony at 26). AUI is Armstrong’s cable affiliate that provides the retail cable telephony service.

is carried in IP. It is converted again at the trunking gateway so that it can be exchanged with Verizon's (or another LEC's) circuit switched network in TDM.

Armstrong claims that, even though it uses IP technology to operate its network, this Terminal Adapter is not "Internet protocol-compatible customer premises equipment" as that term is used in 47 C.F.R. §51.913 (a)(3) and so Armstrong's traffic is not "VoIP-PSTN." There is no question that the Terminal Adaptor is "IP-compatible" given its function to convert traffic from TDM to IP. But Armstrong denies that it is "customer premises equipment" or "CPE." The ID erroneously accepts that argument. ID at 30. But it is plainly wrong.

If there was any doubt that Armstrong's Terminal Adaptor is "customer premises equipment" – which there should never have been – it was laid to rest several weeks ago when the United States Court of Appeals for the Eighth Circuit discussed the identical configuration of Charter's "Spectrum Voice" cable telephony service and made clear that the Terminal Adapter is customer premises equipment. As the Court explained:

Spectrum Voice subscribers receive an embedded Multimedia Terminal Adapter ("eMTA") from Charter Advanced. . . . The eMTA transforms voice calls from analog electrical signals into IP "packets," which are then carried on Charter's network. ***Under FCC classifications for hardware, the eMTA is considered Customer Premises Equipment ("CPE").***¹⁵

The district court decision that the Eighth Circuit affirmed specifically rejected the Minnesota state commission's argument that the Terminal Adaptor was "part of Charter Advanced's network," which is the same argument Armstrong made here. The district court held that "[t]his argument is flawed for the simple reason that it mischaracterizes the demarcation point of

¹⁵ *Charter Advanced*, 903 F.3d at 717.

Charter Advanced's network. Under FCC precedent, CPE is, by definition, outside the carrier's network."¹⁶

This Eighth Circuit conclusion that the Terminal Adaptor is "customer premises equipment" confirms the FCC's own explanation in its *ICC Transformation Order* of what it meant by the term "Internet protocol-compatible customer premises equipment." According to the FCC, "[c]ustomer premises equipment (CPE)" refers to any equipment "typically managed by a broadband provider as the last connection point to the managed network," including a "cable modem" or an "optical networking terminal (ONT)."¹⁷ As examples of that "[c]ustomer premises equipment (CPE) typically managed by a broadband provider," the FCC listed "DSL modem, cable modem, satellite modem, optical networking terminal (ONT), etc." (*Id.*) Armstrong admits that the Terminal Adapter is a cable modem.¹⁸ To the extent Armstrong argues that the "customer premises equipment" for its cable telephony service is not the Terminal Adapter but the customer's telephone handset, this claim directly conflicts with the FCC's holdings. The FCC defines the handset or other device used in the home that is connected to the modem as a "Consumer Device," not "Customer Premises Equipment."¹⁹

To the extent Armstrong or the ID assumes that "customer premises equipment" can only refer to equipment actually owned by the customer (Armstrong claims that it owns the Terminal

¹⁶ *Charter Advanced*, 259 F. Supp. 3d at 989.

¹⁷ *ICC Transformation Order* ¶ 111, Figure 3.

¹⁸ Armstrong's website informs customers that if they also purchase internet service they can use the MTA as a replacement for the non-voice capable cable modem. (Verizon St. 1, Exhibit 4 (FAQs – "How does it work?")). The FCC has also explained that a "multimedia terminal adapter" in the context of cable VoIP service is simply a part of the cable modem that is "used to enable voice services over a cable modem." *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, ¶ 235, n. 835 (Rel. March 3, 2006).

¹⁹ *ICC Transformation Order* ¶ 111, Figure 3.

Adapter, although Verizon disputes that claim),²⁰ that presumption is wrong. The FCC rejected that limitation in paragraph 111 of its order when it described the “customer premises equipment” in this service context as “typically managed by a broadband provider.” Because the FCC’s regulations do not contain a definition of customer premises equipment, the Telecommunications Act definition of that term applies. The following is the statutory definition of “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 USCS § 153(16). This definition does not require customer ownership, but only that the equipment be “employed on the premises of a person” — a standard that the Terminal Adapter clearly satisfies, as seen in Armstrong’s diagram above.²¹ The status of the Terminal Adapter is not one that Armstrong can change at its whim simply by declaring either that the company owns the equipment or the customer owns it. As is evident from the above statutory definition and the explanation in the *ICC Transformation Order*, a Terminal Adapter is “Internet protocol-compatible customer premises equipment” under federal law, making Armstrong’s traffic VoIP-PSTN. As the Eight Circuit explained, “[u]nder FCC classifications for hardware, the eMTA is considered Customer Premises Equipment (“CPE”).²²

²⁰ Armstrong’s claim that the MTA is part of Armstrong’s network is contradicted by the pre-litigation statement on its website telling prospective customers that “Armstrong provides the Multimedia Terminal Adapter at no additional charge,” a statement that would not be necessary if the MTA were merely part of Armstrong’s network. (VZ St. 1.0, Ex. 4, “FAQs”).

²¹ For decades, end-users were *prohibited* from owning their own equipment, and the very term “CPE” or “customer premises equipment” had its origins in equipment that was *always* owned by the carrier, not the customer. See *In re Procedures for Implementing the Detariffing of Customer Premises Equip. & Enhanced Servs.*, 95 F.C.C.2d 1276, 1279 (FCC 1983) (“For purposes of this proceeding, customer premises equipment includes any equipment provided by a common carrier and located on the premises of a customer”); *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541, 20543 (FCC 1996).

²² *Charter Advanced*, 903 F.3d at 717.

The ID also erroneously finds that “[t]he 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.” ID at 19. According to the ID, “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.” ID at 28. This conclusion is plainly wrong, since by its own admission Armstrong is a cable telephony provider using IP technology and not an “ordinary CLEC,” whatever that means. But the ID’s discussion here does not relate specifically to the FCC’s VoIP-PSTN definition and therefore is not relevant to the decision. This issue relates more broadly to whether a VoIP service is properly classified as an “information service,” which would make it subject to the FCC’s exclusive jurisdiction for another reason. The reference to “intranet work change” appears to be to “internetworking,” which is one of the three categories of protocol processing service exceptions under which IP-based services could be considered telecommunications services instead of information services.²³ The Eight Circuit specifically rejected the internetworking argument with respect to cable telephony, finding that “the ‘internetworking’ exception does not apply” because a net protocol conversion occurs in the Terminal Adaptor, which is “located outside of the carrier’s network by definition” and therefore Charter’s cable telephony service at issue in that case was an “information service” exempt from state regulation.²⁴ The same answer holds true here with respect to Armstrong’s cable telephony service and the ID’s conclusion on this point is wrong. However, as long as the service “terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment” – which it

²³ *Charter Advanced*, 259 F. Supp. 3d at 988-89.

²⁴ *Charter Advanced*, 903 F.3d at 720.

clearly does – then it is VoIP-PSTN for intercarrier compensation purposes under the FCC rules. It is not necessary to further consider whether or not the service is an “information service” generally.

To the extent the ID assumed that Armstrong’s cable telephony service is somehow unique or different from the telephony provided by other cable companies, that conclusion also is plainly wrong. Armstrong admits that its network configuration is typical of cable VoIP providers.²⁵ Moreover, a comparison of the Eighth Circuit and district courts’ network description of Charter’s “Spectrum Voice” service to Armstrong’s network description shows that they are the same in all material respects.²⁶ Armstrong’s service is no different than the cable telephony service offered by any other Pennsylvania cable telephony provider, all of which classify their traffic as VoIP-PSTN. The ID failed to acknowledge or address the substantial record evidence showing that Armstrong’s theory that its cable VoIP traffic is outside the FCC’s VoIP-PSTN compensation regime brands Armstrong as an outlier in the cable telephony industry, and that accepting it would lead to a lack of uniformity that would undermine the FCC’s rule.²⁷ All cable VoIP providers use equipment like the Terminal Adapter to enable their IP networks to communicate through ordinary analog handsets, and Armstrong is no different. But unlike Armstrong, other cable companies operating in Pennsylvania agree that their service is VoIP-PSTN traffic under the FCC’s rule. Although the ALJ reopened the record to admit this evidence, the ID ignores the tariff filings by companies known to be CLEC intermediaries for

²⁵ According to Armstrong’s own testimony, “[t]he products and services offered by AUI are typical of cable companies in the United States.” (Armstrong St. 2 at 6).

²⁶ *Charter Advanced*, 903 F.3d at 717-18; *Charter Advanced*, 259 F. Supp. 3d at 982.

²⁷ Maintaining uniformity was, in the FCC’s view, critical to achieving the pro-consumer goals of intercarrier compensation reform, including elimination of arbitrage opportunities across providers and across jurisdictions. *See, e.g., ICC Transformation Order* ¶ 740 (“a national, uniform framework best advances our goals”).

cable telephony providers showing that they uniformly take the position that traffic originated by or terminated to them is VoIP-PSTN under the FCC's rules. These companies include Comcast, Time Warner Cable and Sprint.²⁸

If the Commission reaches the merits, then it should reject the ID's erroneous conclusion that Armstrong's traffic is not VoIP-PSTN under the FCC's rules.

Verizon Exception #2: Verizon Expects To The ID's Inconsistent Treatment Of Armstrong's Cable Telephony Service As Unregulated VoIP For Retail Purposes But Denying That It Is VoIP For Intercarrier Compensation.

Cable telephony companies rely on their status as interconnected VoIP providers to exempt themselves from retail regulation. They do not seek certification by the Commission, do not file tariffs for their cable telephony service, and are not subject to the Commission's regulations.²⁹ The record shows that Armstrong has consistently treated its retail cable telephony service as unregulated in the same manner as Comcast, Time Warner and other Pennsylvania cable companies. For example, its affiliated cable telephony provider has not requested and does not have a certificate of public convenience authorizing it to offer public utility service, its voice products are not tariffed, and it does not report its retail end user revenue to the Commission.³⁰ Even as this matter was pending, Armstrong represented its cable telephony service as unregulated in pleadings filed with this Commission.³¹ Armstrong cannot have it both ways. If

²⁸ VZ St. 2.0 (Supplemental Direct Testimony of Leslie Freet) at 7-8 and Exhibits C-F. Verizon's witness Ms. Freet explained that the positions of these cable telephony intermediaries in their Commission tariff filings are "consistent with my experience reviewing bills to Verizon for terminating traffic to CLEC intermediaries for cable VoIP providers. Cable VoIP providers or their CLEC intermediaries bill Verizon at the VoIP-PSTN rate." *Id.* at 7-8.

²⁹ As determined by the Eighth Circuit, these cable VoIP providers may also be exempt from Commission regulation due to federal preemption if they are classified as "information services." *Charter Advanced*, 903 F.3d at 719.

³⁰ *See* Tr. at 47-50.

³¹ *See* VZ St. 2.0 (Freet Supplemental Direct Testimony) at 6-7 and Exhibits A and B. In fact, early in this case, Armstrong admitted that its cable affiliate's service was originated and terminated in IP, but only later, when it

it is providing an unregulated VoIP service for purposes of avoiding retail regulation, then it cannot claim the higher access charges of a traditional provider of regulated circuit-switched telephone service.

Verizon excepts to the ID's failure to address Armstrong's inconsistent treatment of its retail services – including the ID's failure to acknowledge the evidence Verizon submitted on this issue. In the course of accepting Armstrong's argument that it is entitled to charge Verizon the higher switched access rates applicable to ordinary non-VoIP traffic, the ID concluded that Armstrong's traffic is not subject to the VoIP Freedom Act, which removes jurisdiction for this Commission to regulate “the rates, terms and conditions of VoIP service or IP-enabled service.” 73 P.S. § 2251.4. If that finding were correct, then Armstrong's cable affiliate would have to operate as a regulated voice provider in Pennsylvania, which it does not. The ID also found that Armstrong's cable telephony services calls do not “originate/terminate in IP” and a “broadband connection from the user's location” is not required. ID at 12-14. According to the ID, Armstrong's telephony traffic is not VoIP, but rather “is traffic of an ordinary CLEC that happens to use modern technology in the middle of its network.” ID at 28. The ID went on to note that “Armstrong's witnesses were asked by Verizon whether the ‘VoIP Freedom Act’ definitions applied to the Armstrong cable affiliate's network. They responded, ‘No,’” and instead they “readily conceded that this may well mean that Armstrong's cable company is subject to regulation by the Commission.” ID at 13-14.³² While the ID made these observations,

advantaged Armstrong's attempt to seek higher access charges, did it purport to take back that admission and argue that the traffic is not VoIP. Verizon Reply Br. at 3; VZ St. 2.0 at 7 and Exhibit B.

³² The ID's conclusion is contrary to this Commission's own holding on the regulatory status of Armstrong's service in a decision the ID fails to cite. This Commission has already held that Armstrong's voice service is an unregulated “IP-enabled” or “VoIP” service subject to the VoIP Freedom Act. *Sandra Brown v. Armstrong Digital Services, Inc., d/b/a Armstrong Telephone*, C-2008-2079810, 2009 Pa. PUC LEXIS 211 (ID of ALJ Corbett, May 12, 2009, adopted as the Commission's final order June 30, 2009).

it did not address the consequences of its finding that Armstrong's service is not VoIP and that the VoIP Freedom Act does not apply. The ID simply accepted Armstrong's inconsistent treatment of its retail service as unregulated even though that treatment is directly contrary to the ID's holding.

If the ID is correct in concluding that Armstrong's service is not subject to the VoIP Freedom Act and is not "VoIP-PSTN" (conclusions that Verizon asserts are wrong), then the ID erred in failing to address the fact that Armstrong's cable affiliate has been offering a regulated service without seeking a certificate of public convenience or complying with any of the other requirements applicable to providers of regulated voice service. Both things cannot be true – Armstrong's retail cable telephony service cannot be unregulated VoIP for retail purpose but regulated ordinary traffic for intercarrier compensation purposes. Either the ID was wrong in requiring Verizon to pay switched access to Armstrong as if it were a regulated voice provider, or, if the ID is correct on the regulatory status of Armstrong's voice service, then Armstrong must be ordered immediately to comply with the obligations of a regulated carrier.

Verizon Exception #3: Verizon Expects To The ID's Recommendation To Impose A Civil Penalty On Verizon For Disputes That The Parties Settled.

Verizon expects to the ID's recommendation of a civil penalty against Verizon that was not requested by Armstrong and relates to events that were part of disputes that the parties voluntarily settled and were never decided by the Commission, rather than the actual dispute that is before the Commission in this case.

After the 2011 evidentiary hearings on the original complaint, but before briefing or any decision on the merits, on November 18, 2011 the FCC entered its *ICC Transformation Order* and issued its regulations to take effect January 1, 2012. That development provided the impetus

for a settlement of all disputes up to the effective date of the FCC's new rules. On February 6, 2012 the parties filed a joint letter with the Commission stating that:

The parties have 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 all such claims are hereby withdrawn from this case with prejudice and marked satisfied.

The parties have not resolved claims with respect to traffic exchanged from January 1, 2012 forward and accordingly the case remains open as to those issues only. Those matters have been addressed in briefs filed on January 6, 2012 and are pending before Administrative Law Judge Buckley.

Neither the ALJ nor the Commission ever made a decision regarding the substance of the disputes predating the FCC rules for periods before December 31, 2011, which were settled, withdrawn with prejudice and marked satisfied.

With regard to the traffic exchanged from January 1, 2012 forward that was excluded from the settlement, there was never a claim that Verizon withheld all payment. Rather, it is undisputed that Verizon paid Armstrong \$1.5 million pursuant to the rate for VoIP-PSTN traffic set forth in Armstrong's tariff for the eighteen month period for which there is a dispute over the applicable rate (which was the amount Armstrong billed Verizon).³³ Verizon continued to pay after that period (where there was no longer a dispute over the rate).

The ID states that "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." ID at 2. This description obviously does not apply to Verizon's conduct from January 1, 2012 forward –

³³ See Armstrong St. 3.0 (Supplemental Rebuttal of Starkey), Proprietary Exhibit D, showing what was billed, what was paid, and Armstrong's calculation of the additional amount that would be due if the traffic was not VoIP-PSTN.

which is the only matter before the Commission. The ID determined to penalize Verizon based on alleged actions that were subsumed in the settlement, even though “Armstrong did not request the imposition of a civil penalty.” ID at 35. The ID makes clear that the only basis for this recommended penalty is Verizon’s alleged actions before the settlement – disputes that were never decided by the ALJ or the Commission and that the parties jointly withdrew with prejudice and marked satisfied.

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.”

ID at 37.³⁴

The Commission should reject the recommended civil penalty. Penalizing a party for positions taken more than seven years ago, during the course of a dispute that was ultimately settled and withdrawn from the Commission with prejudice and without a decision on the merits, is contrary to this Commission’s policy to encourage settlements. 52 Pa. Code § 5.231(a). Moreover, penalizing a party where the Commission never found a violation on the merits is beyond the authority for civil penalties provided by 66 Pa. C.S. § 3303. The Commission cannot impose a penalty without first finding that there was a substantive violation of the Public Utility Code or an order or regulation, but there was never a decision on the merits regarding these disputes that were settled and withdrawn with prejudice.³⁵ Even the FCC never decided what intercarrier

³⁴ Likewise the discussion of the \$0.0007 rate and the *Palmerton v. GNAPs* case at pages 22-23 of the ID is irrelevant to the matter before the Commission because those issues relate to the pre-settlement disputes.

³⁵ “If any public utility, or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission, or any order of the commission prescribing temporary rates in any rate proceeding, or to comply with any final judgment, order or decree made by any court, such public utility, person or corporation for such violation, omission, failure, neglect,

compensation, if any, should have applied for terminating VoIP traffic before January 1, 2012.³⁶

Accordingly, the Commission should reject the recommendation for a civil penalty.

Verizon Exception #4: Verizon Expects To The ID's Conclusion That This Commission Has Jurisdiction To Interpret The FCC's ICC Regulations.

The ID correctly finds that the “Commission must act within, and cannot exceed, its jurisdiction,” that jurisdiction cannot be created by the parties, that lack of jurisdiction cannot be waived, and that the issue of jurisdiction can be raised at any time. ID at 10. But the ID erroneously concludes that the Commission has jurisdiction to address the compensation for the traffic at issue here. It is wrong because that issue has been preempted by federal and state law.

i. Federal Preemption

Prior to 2012 the Commission had authority over intercarrier compensation for intrastate toll traffic.³⁷ But the FCC's November 2011 *ICC Transformation Order* preempted state regulation and assumed exclusive jurisdiction over intercarrier compensation for all traffic exchanged with a local exchange carrier. The FCC's authority to preempt the states was affirmed by the United States Court of Appeals for the Tenth Circuit in 2014, finding that “in deciding to preempt regimes for state access charges, the FCC did not act arbitrarily or capriciously” but rather acted reasonably and within its statutory authority, and the Supreme Court declined to review.³⁸ The Tenth Circuit recognized that the FCC was “exercising authority over all traffic exchanged with a local exchange carrier,” specifically “including

or refusal, shall forfeit and pay to the Commonwealth a sum not exceeding \$ 1,000, to be recovered by an action of assumpsit instituted in the name of the Commonwealth.” 66 Pa. C.S. § 3301.

³⁶ *ICC Transformation Order* ¶ 945.

³⁷ It is still an open question whether or not this Commission ever had jurisdiction over intercarrier compensation for intrastate VoIP traffic even before the FCC order, based on whether the service was properly classified as jurisdictionally interstate as an “information service.” Due to the settlement the Commission was never called upon to decide this question.

³⁸ *Direct Communs. Cedar Valley*, 753 F.3d at 1121. The court specifically recognized that the FCC had preempted Pennsylvania law regarding intrastate access charges. *Id.*

intrastate calls” that had formerly been under state commission authority.³⁹ The FCC “explicitly supersede[d] the traditional access charge regime,” and placed “all traffic within the section 251(b)(5) regime,” underscoring the importance of treating these matters uniformly under federal law and “eliminating the thicket of disparate intercarrier compensation rates and payments that are ultimately borne by consumers.”⁴⁰ In light of this federal preemption, the question of whether Armstrong’s traffic is “VoIP-PSTN” as that term is defined in the FCC’s regulation at 47 C.F.R. §51.913(a) is not a matter that should be decided by this Commission.

The ID disagreed with Verizon on this point, concluding that the FCC “contemplates an interpretive role for the states” and “left implementation to the states” so there was no federal preemption. ID at 16. But this view of the states’ role with regard to the FCC’s intercarrier compensation rules is too broad. The FCC asked the states to help implement its new rate regime by incorporating the FCC-required rates into intrastate tariffs and reviewing those tariff filings.⁴¹ The FCC found that, in connection with these tariff filings, “states could require carriers to provide additional information and/or refile intrastate access tariffs that do not follow the framework or rules adopted in this Order. Moreover, state commissions will continue to review and approve interconnection agreements and associated reciprocal compensation rates to ensure that they are consistent with the new federal framework and transition.”⁴² The FCC did not provide an additional broader role for the states in interpreting the substance of its regulations because this would have been inconsistent with the FCC’s underlying purpose of achieving a uniform nationwide rules. Piecemeal state interpretations of the FCC’s intercarrier

³⁹ *Id.* at 1113.

⁴⁰ *ICC Transformation Order* ¶ 764.

⁴¹ *Id.* ¶ 813.

⁴² *Id.*

compensation rules would undercut the FCC's policy of "a more unified approach" to intercarrier compensation.⁴³

From this Commission's perspective, it would also be a waste of administrative and party resources to decide these issues of federal law because the dissatisfied party will likely appeal to federal court, where the Commission would have to incur the expense of participating as a party to defend its decision. A federal court would review any Commission decision *de novo*,⁴⁴ and ultimately the court would defer to the FCC interpretation of its own rules if it submits an amicus brief.⁴⁵

ii. Pennsylvania's VoIP Freedom Act

Even if federal law did not preempt this Commission's jurisdiction (which it does) then the Commission still lacks authority over this issue due to Pennsylvania's VoIP Freedom Act, which removes jurisdiction for this Commission to regulate "the rates, terms and conditions of VoIP service or IP-enabled service," including intercarrier compensation rates. 73 P.S. § 2251.4. The ID found that Armstrong's cable telephony service is not a "VoIP" or "IP-enabled" service and therefore is not subject to the VoIP Freedom Act, an erroneous conclusion discussed above.

⁴³ *Id.* ¶ 764. The Pennsylvania Supreme Court has also recognized that the overriding goal of the federal Telecommunications Act was to establish a regulatory scheme that is "governed *uniformly* by standards established by federal law." *MCI Worldcom, Inc. v. PUC*, 577 Pa. 294, 313 (Pa. 2004) (emphasis added).

⁴⁴ "We review a state utility commission's . . . interpretation of the 1996 Act and its associated regulations *de novo*." *Qwest Corp. v. Colo. Pub. Utils. Comm'n*, 656 F.3d 1093, 1098 (10th Cir. 2011); *see also MCI Telecomm. Corp. v. Bell Atl. Pa.*, 271 F.3d 491, 517 (3d Cir. 2001) (declining to defer to a state utility commission's interpretation of federal law).

⁴⁵ *See Auer v. Robbins*, 519 U.S. 452, 461-462, 117 S. Ct. 905, 137 L. Ed. 2d 79(1997) (federal courts must defer to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is "plainly erroneous or inconsistent with the regulation or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.") *See also Verizon Pa., Inc. v. Pa. PUC*, 484 Fed. Appx. 735, 735-736, 2012 U.S. App. LEXIS 11292, *1-2, 2012 WL 1995025 (3rd Cir. 2012) (rejecting this Commission's federal law interpretation because "[d]eferring to the interpretation of that provision offered by the FCC as *amicus curiae*, we hold that the District Court properly granted summary judgment in favor of Verizon. Accordingly, we will affirm.")

As an alternative, the ID found that, if the VoIP Freedom Act applies to Armstrong’s traffic, jurisdiction over intercarrier compensation was still preserved by the Act’s exception for “[s]witched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company.” 73 P.S. § 2251.6(1)(iv). But Armstrong is not a “local exchange telecommunications company” under applicable law. That term is not defined in the VoIP Freedom Act, so the Commission must look to “other statutes upon the same or similar subjects.”⁴⁶ The best source of a definition for the exact same term is Chapter 30 of the Public Utility Code, under which the Commission has already decided that the defined term “local exchange telecommunications company” only includes incumbent local exchange carriers and does not “include[] CLECs” such as Armstrong.⁴⁷ Accordingly, the VoIP Freedom Act only preserves Commission jurisdiction over switched access and intercarrier compensation rates for incumbent local exchange carriers, which Armstrong is not. The ID rejected this argument, holding that, instead of the Chapter 30 definition of “local exchange telecommunications company,” the “common usage of the terms should be applied.” ID at 15. But the ID pointed to no “common usage” of this term other than its use in Chapter 30, which is the only logical place to look for its meaning.

⁴⁶ “When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters . . . *other statutes upon the same or similar subjects.*” 1 Pa.C.S. § 1921(c)(5) (emphasis added). It is well-established that “[w]here a court needs to define an undefined term, it may consult definitions in statutes.” *H.E. Rohrer, Inc. v. Zoning Hearing Bd. of Jackson Twp.*, 808 A.2d 1014 (Pa. Cmwlth. 2002). See also *Tink-Wig Mt. Lake Forest Prop. Owners Ass’n v. Lackawaxen Twp. Zoning Hearing Bd.*, 986 A.2d 935 (Pa. Commw. Ct. 2009); *Adams Outdoor Adver., L.P. v. Zoning Hearing Bd.*, 909 A.2d 469 (Pa. Commw. Ct. 2006).

⁴⁷ Chapter 30 defines “local exchange telecommunications company” as “[a]n *incumbent carrier* authorized by the commission to provide local exchange telecommunications services.” 66 Pa. C.S. § 3012 (emphasis added). This Commission held that CLECs and cable telephony providers come under the Chapter 30 term “alternative service provider” and not “local exchange telecommunications company,” which is limited to ILECs. *Petition of MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services for a Waiver of the Commission’s Regulations at 52 Pa. Code §§ 53.58 and 53.39 to Permit Detariffing of Services to Enterprise and Large Business Customers*, Docket No. P-2009-2082991 (Opinion and Order entered June 3, 2009) (“*MCI Detariffing Order*”) at 6.

The Commission should find that it lacks jurisdiction due to federal preemption, but if it does not, then it lacks jurisdiction under the VoIP Freedom Act.

III. CONCLUSION

For the foregoing reasons, the Commission should reject the ID and dismiss Armstrong's complaint. If it determines that it has jurisdiction to address the dispute (which it does not), the Commission should find that the \$1.5 million that Verizon paid Armstrong for the period at issue complied with the FCC's rules and no further payment is due and should reject the recommendation for a civil penalty.

Respectfully submitted,

A handwritten signature in blue ink that reads "Suzan D. Paiva".

Suzan D. Paiva (Atty ID No. 53853)
Verizon
900 Race St., 6th Floor
Philadelphia, PA 19107
Telephone: 267-768-6184
E-mail: Suzan.D.Paiva@verizon.com

Counsel for Verizon

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