

November 30, 2018

*Via Electronic Filing*

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street – Filing Room (2<sup>nd</sup> Floor)  
Harrisburg, PA 17120

Re: Armstrong Telecommunications Inc. v. Verizon Pennsylvania Inc., Verizon North LLC, MCI metro 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 for electronic filing on behalf of Armstrong Telecommunications Inc. are its Replies to the Exceptions of Verizon in the above-referenced matter. Copies of the Replies are being served in accordance with the attached Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By



Charles E. Thomas, III

Enclosure

cc: Certificate of Service  
David Jamieson, Esq. (via email)

**Before The  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**REPLIES OF ARMSTRONG TELECOMMUNICATIONS INC.  
TO THE EXCEPTIONS OF VERIZON**

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Charles E. Thomas, III, Esq. (ID # 201014)  
THOMAS, NIESEN & THOMAS, LLC  
212 Locust Street, Suite 302  
Harrisburg, PA 17101  
Tel: (717) 255-7600  
cet3@tntlawfirm.com

David Reams Jamieson, Esq. (ID # 65678)  
General Counsel  
Armstrong Holdings, Inc.  
One Armstrong Place  
Butler, PA 16001  
Tel: (724) 283-0925  
djamieson@agoc.com

*Attorneys for  
Armstrong Telecommunications Inc.*

DATED: November 30, 2018

Pursuant to 52 Pa. Code § 5.335, Armstrong Telecommunications Inc. (“Armstrong”) files the following Replies to the Exceptions of 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”) to the Initial Decision (“I.D.”) of Administrative Law Judge Dennis J. Buckley (“ALJ”) dated September 28, 2018 and issued by Secretarial Letter dated October 4, 2018.<sup>1</sup>

## I. INTRODUCTION

This proceeding involves a formal complaint filed on December 16, 2010 by Armstrong against Verizon concerning the intercarrier compensation to be paid for terminating services provided by Armstrong to Verizon. While the parties negotiated a settlement of all claims relating to traffic exchanged on or before December 31, 2011, the parties could not resolve the appropriate intercarrier compensation rates to be paid to Armstrong by Verizon for termination of intrastate toll traffic exchanged between January 1, 2012 and July 1, 2013 (the “Dispute Period”), the onset of which coincided with the Federal Communications Commission’s (“FCC”) intercarrier compensation rules which went into effect following the November 18, 2011 *Connect America Order*.<sup>2</sup>

At stake is a total of \$996,584 in switched access charges, hinging on a single, straightforward issue: Whether Armstrong’s services meet the FCC’s definition of “VoIP-PSTN

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<sup>1</sup> The respective deadlines for submitting Exceptions and Replies to Exceptions were extended to November 8, 2018 and November 30, 2018, respectively. See ATI Letter filed Oct. 11, 2018 (requesting and confirming extension), available at <http://www.puc.pa.gov/pcdocs/1589372.pdf>.

<sup>2</sup> *In re Connect America Fund*, WC Docket 10-90 et al., FCC 11-161, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (Nov. 18, 2011), *petitions for review denied sub nom. In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) (“*Connect America Order*”). The *Connect America Order* has been referred to and short-cited in several ways in this proceeding: In the I.D. as the “*November 18, 2011 ICC/USF Order*”; in Armstrong’s Main and Reply Briefs as the “*FCC November 18th ICC/USF Order*”; and in Verizon’s Exceptions as the “*ICC Transformation Order*.”

traffic”? If Armstrong’s services do not fit the definition of VoIP-PSTN, the toll calls sent to Armstrong by Verizon for termination during the Dispute Period must be billed at the higher intrastate access rates. If, however, those services meet the definition of VoIP-PSTN, the calls must be billed at the lower interstate termination rates.

By Initial Decision dated September 28, 2018, the ALJ sustained Armstrong’s Complaint, finding that Armstrong’s traffic is not “VoIP-PSTN traffic” since the calls at issue neither originate or terminate in IP format, nor do they require Internet protocol-compatible customer premises equipment, as defined by the FCC.<sup>3</sup> Consequently, the ALJ concluded, *inter alia*, that Verizon acted unilaterally by refusing to pay Armstrong’s lawfully tariffed switched access rates in violation of Section 1303 of the Public Utility Code (“Code”), 66 Pa.C.S. § 1303.<sup>4</sup> The ALJ ordered Verizon to pay Armstrong the full \$996,584 and also recommended the imposition of a \$1,000 civil penalty against Verizon for its actions.<sup>5</sup>

On November 8, 2019, Verizon filed Exceptions to the I.D., objecting to the decision on four grounds. Armstrong submits the following Replies to those Exceptions.<sup>6</sup> For the reasons set forth herein, the Commission should deny all of Verizon’s exceptions and adopt the I.D. without modification.

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<sup>3</sup> See I.D. at 10 (FF # 16), 28-29, 31.

<sup>4</sup> I.D. at 34, 39 (CL # 15).

<sup>5</sup> I.D. at 37.

<sup>6</sup> Pursuant to 52 Pa. Code § 5.535, Armstrong will incorporate into its Replies to Exceptions, by reference and citation, relevant pages of its previously filed Main, Reply, and Supplemental Briefs.

## II. REPLIES TO EXCEPTIONS

### Reply to Verizon Exception No. 1 – “VoIP-PSTN” Traffic

Verizon Exception No. 1 excepts to the I.D.’s conclusion that Armstrong’s traffic is not “VoIP-PTSN” as defined by the FCC’s regulations. Despite twelve pages of argument, this Exception is merely a restatement of Verizon’s prior arguments already on record in this proceeding. In fact, Verizon adds nothing new in the form of additional record evidence not already found in its prior pleadings, nor does it provide any new legal theory in support of its position. Instead, it posits the same arguments already considered and rejected by the ALJ’s I.D. – e.g., that Armstrong’s media terminal adapter (“MTA”) is customer premise equipment (“CPE”) and that the FCC’s “internetworking” exception does not apply to Armstrong. The only novel argument set forth in Verizon’s first exception to the substantial evidence and legal argument which comprise the record in this proceeding (and upon which the I.D. is based) is a reference to the Eighth Circuit Court of Appeals’ recent decision in *Charter Advanced Servs. (MN), LLC v. Lange*, which, it believes, proves that Armstrong’s traffic is VoIP-PSTN.<sup>7</sup> Unfortunately for Verizon, the Eighth Circuit’s decision in *Charter Advanced* is specific to facts surrounding services offered by Charter Advanced Services in Minnesota, services that are distinguishable from those offered by Armstrong in Pennsylvania.

For nearly thirty years, the FCC has held that the question of whether a service (or a network configuration) represents a telecommunications service versus an information service (e.g., Voice over Internet Protocol or “VoIP”) requires a fact-specific, and even a “case-by-case,” examination. The FCC reaffirmed this three-decade old requirement in its December 2016 decision overturning the Universal Service Administrative Company’s (“USAC”) evaluation of

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<sup>7</sup> 903 F.3d 715 (8th Cir. 2018) (“*Charter Advanced*”).

voice-traffic accommodated by Cisco's WebEx service, and the extent to which that traffic should be considered telecommunications or an information service, noting that:

The relevant analysis is fact specific and turns on the factual particulars of how the service is offered to the end user and how the service at issue works.<sup>8</sup>

Based upon facts specific to WebEx, the FCC determined that the voice component of Cisco's web-based application was so "functionally integrated" with the enhanced, web-based components of the service so as to make the entirety of the service an information service. Importantly, the FCC cited the Supreme Court's decision in *Brand X, supra*, to support its "fact specific" analysis. In fact, it went on in the same decision to remind USAC that the Supreme Court, in *Brand X*, determined that the facts surrounding the "finished product" must be evaluated to properly understand the difference between a telecommunications versus an information service, not the "discrete components."

Classification depends on the functional nature of the end-user offering (i.e., whether the end user is receiving a single, integrated information service) or whether, functionally, the consumer is receiving two separate and distinct services (a telecommunications service and an information service). In *NCTA v. Brand X*, the Supreme Court found "[i]t is common usage to describe what a company 'offers' to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product." **Thus, classification turns on an analysis of both the factual particulars of how the service works and how it is provided.**<sup>9</sup>

In *Charter Advanced*, the Eighth Circuit determined that Charter's *embedded* MTA ("eMTA") was CPE, based upon the manner by which Charter provided its network in the context of its "Spectrum Voice" service. Specifically, the Court determined that, with respect to

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<sup>8</sup> *In the Matter of Universal Service Contribution Methodology; Request for Review of a Decision of the Universal Service Administrator by Cisco WebEx LLC*, 31 FCC Rcd. 13220, 13224 ¶12 ("FCC Cisco WebEx Decision") (citing *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, 545 U.S. 967, 990 (2005) ("*Brand X*"); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, CC Docket No. 02-33 et al., Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, 14892 ¶ 73, 14895-6 ¶ 78 (2005)).

<sup>9</sup> *FCC Cisco WebEx Decision*, 31 FCC Rcd. at 13226 ¶17 (emphasis added).

Charter's Spectrum Voice service, Charter's eMTA was located on the customer's side of the network demarcation and, as a result, was "new CPE" customers needed to utilize Spectrum Voice.<sup>10</sup> Because the eMTA was determined to be CPE based upon the nature of Charter's service (and hence, calls terminated in Internet Protocol – "IP"), Spectrum Voice was considered by the Court to be an "information service."

The I.D., based upon the substantial evidentiary record developed in this proceeding regarding the way in which Armstrong uses its MTA to provision its telephone service, makes a different factual finding. Specifically, unlike the Court in *Charter Advanced*, the I.D. correctly concludes that Armstrong's MTA is provisioned on the carrier-side (*i.e.*, the Armstrong side) of the network and, thus, cannot be CPE:

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.<sup>11</sup>

Contrary to Verizon's exception, the I.D. does not arrive at this fundamental, evidentiary conclusion simply because Armstrong owns the MTA.<sup>12</sup> Rather, the I.D. evaluated the facts in this case in light of the FCC's rules defining the demarcation between Armstrong's network and other equipment at the customer's premises (*i.e.*, CPE) and then applied the FCC's definition to those facts (as anticipated by the FCC's "case-by-case" direction).

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:

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<sup>10</sup> *Charter Advanced*, 903 F.3d at 720.

<sup>11</sup> I.D. at 33.

<sup>12</sup> *See* Verizon Exceptions at 10.

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.<sup>13</sup>

The I.D.'s analysis does not end there with its finding that Armstrong's MTA is not CPE. Instead, it goes one step further by describing exactly what type of equipment Armstrong's MTA is – *i.e.*, “Telecommunications Equipment”<sup>14</sup> – which is defined by the Telecommunications Act of 1996 as follows:

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).<sup>15</sup>

Finally, unlike the Eighth Circuit in *Charter Advanced*, the I.D. describes the Armstrong-specific facts that support its conclusions:<sup>16</sup>

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.<sup>17</sup>

Verizon has failed to evince any evidence that would refute the factual finding in the I.D. regarding how Armstrong deploys and uses its MTA. Furthermore, other than a backhanded and relatively ambiguous reference to the products and services offered by AUI as being “typical of

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<sup>13</sup> I.D. at 33 (quoting 47 C.F.R. § 68.3).

<sup>14</sup> *Id.* at 33.

<sup>15</sup> 47 U.S.C. § 153(52).

<sup>16</sup> ID, pg. 31

<sup>17</sup> I.D. at 31 (footnote omitted).

cable companies in the United States,”<sup>18</sup> Verizon offers no evidence in its Exceptions that Charter and Armstrong provision their networks or use their MTAs (or in the case of Charter an eMTA) in the same fashion.<sup>19</sup> Indeed, even though Verizon states that “Armstrong’s service is no different than the cable telephony service offered by any other Pennsylvania cable telephony provider,” it provides no cite to record evidence or to any other authority for that position.<sup>20</sup> This is not surprising given that Verizon made no attempt in the evidentiary phase of this proceeding to compare the specific network architecture employed by Armstrong with the networks of other providers,<sup>21</sup> preferring instead to rely upon its flawed legal theory (as it does once again in its exceptions). Yet, given the FCC’s long-established practice of viewing each case on a case-by-case (and fact intensive) basis, such evidence should have been an obvious avenue for Verizon if it thought such comparisons were helpful to its cause.

As Armstrong witness Starkey explained:

...[T]he FCC’s definition of VoIP-PSTN traffic is technologically specific to the service being offered by the company at issue. Without information from Ms. Freet or Verizon indicating that Comcast Phone, Comcast Business, Time Warner and/or Sprint provision their voice services using the same technical design used by Armstrong, this information is relatively meaningless. Moreover, this information does nothing to discount the technological reality that Armstrong’s service specifically (and intentionally) does not require Internet-compatible CPE (regardless of how these other companies may provide their services or classify their traffic).<sup>22</sup>

Thus, whether traffic originated/terminated by other Pennsylvania cable companies or Charter in Minnesota is “VoIP-PSTN” is irrelevant and immaterial to the critical question in this

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<sup>18</sup> Verizon Exceptions at 13 n.25.

<sup>19</sup> The record evidence is devoid of any evidence whatsoever concerning the configuration of Charter’s network, and any attempts to inject such extra record evidence at this stage of the proceeding and after the record closed should be categorially rejected.

<sup>20</sup> See Verizon Exceptions at 13.

<sup>21</sup> See Armstrong Supplement Br. at 13-16.

<sup>22</sup> Armstrong St. No. 3 at 10.

proceeding of whether *Armstrong's traffic* meets the FCC definition of "VoIP-PSTN traffic." As the record reflects, Verizon has failed to show in any way that Armstrong's traffic meets this definition.

Armstrong, on the other hand, offered substantial testimony describing its network and the telephone services it provides, even comparing and contrasting its own service and network configuration to services offered by other carriers, like AT&T and Vonage.<sup>23</sup> Armstrong identified the unique characteristics of its network (*e.g.*, the use of its MTA in the internetworking functions of its telephone service) and compared and contrasted those functions with network configurations the FCC had previously determined to comprise information services (rather than telecommunications). The I.D. correctly relied upon that evidence to determine that Armstrong's MTA was used as a critical component of its network and, as such, was telecommunications equipment, not CPE.

Simply put, the Commission should not be distracted by Verizon's attempt now, after having failed in the evidentiary phase of this proceeding to refute that evidence, to assert that the evidence is meaningless in the face of a single Eighth Circuit decision which is based upon a different service, a different network, and a different set of facts – none of which are part of the record in this proceeding. This is especially true in view of the FCC's long-standing and continuous finding, as affirmed by the U.S. Supreme Court in *Brand X*, that the question of whether traffic meets the definition of "VoIP-PSTN" is fact-specific inquiry to be determined on a case-by-case basis.

For these reasons, the Commission should deny Verizon Exception No. 1.

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<sup>23</sup> Armstrong St. No. 2 at 10-29.

## **Reply to Verizon Exception No. 2 – Armstrong’s Treatment of Its Cable Telephony Service**

Verizon Exception No. 2 excepts to the purported failure of the I.D. to address what Verizon sees as Armstrong’s “inconsistent treatment” of its retail services with traffic at issue in this proceeding. Verizon argues that Armstrong’s retail cable telephony service offered by an Armstrong affiliate, not a party to this case, cannot be unregulated VoIP service for retail purposes, yet carry ordinary (non-VoIP) traffic for intercarrier compensation purposes.<sup>24</sup> According to Verizon, if the I.D. is correct in concluding Armstrong’s service is not VoIP-PSTN or subject to the Pennsylvania VoIP Freedom Act,<sup>25</sup> then the I.D. erred because it failed to address “the fact that Armstrong’s cable affiliate [Armstrong Utilities, Inc. (“AUI”)] 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.”<sup>26</sup> Verizon again rehashes stale arguments<sup>27</sup> that were fully addressed on record and duly considered and rejected by the ALJ in reaching the I.D.

Throughout this proceeding, Verizon has tried to attack, without success, Armstrong’s characterization of its cable telephony service by calling into question information about Armstrong’s two cable affiliates – AUI and Armstrong Digital Services, Inc. (“ADS”) – and by attempting to lump Armstrong together with other Pennsylvania cable telephone providers’ characterization of traffic as VoIP-PSTN. Verizon’s argument is a red herring that the I.D. clearly saw through. Nonetheless, Verizon continues to try to obfuscate the relatively straightforward analysis of the network architecture Armstrong uses to terminate the Verizon

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<sup>24</sup> See generally Verizon Exceptions at 14-16.

<sup>25</sup> 73 Pa. C.S. § 2251.1 *et seq.* (“VoIP Freedom Act”).

<sup>26</sup> *Id.* at 16.

<sup>27</sup> See, e.g., Verizon Supplemental Br. at 11-13.

traffic at issue in this case, choosing instead to point to retail, end-user services offered by Armstrong's affiliates. Putting aside Verizon's attempted sleight of hand, the evidence Verizon submitted on this matter lacks any probative value and the conclusions drawn by Verizon are erroneous, as Armstrong explained at length in Section V.B. of its Supplemental Brief.<sup>28</sup>

The provision of services by Armstrong's affiliates is irrelevant to the issue of whether Armstrong's service falls under the definition of "VoIP-PSTN traffic." As Armstrong witness Starkey explained:

AUI [Armstrong's affiliate] does not provide the switched access service Verizon purchases to originate/terminate its toll traffic, nor does AUI provide voice telephony services in Pennsylvania. Instead, Armstrong provides the switched access services Verizon purchases, and ADS provides voice telephony services to Armstrong's end users (the same voice telephony service extensively described and detailed on record in this proceeding).<sup>29</sup> As a result, whether or not AUI describes itself as a public utility has no bearing on the proper designation of services provided by ADS or Armstrong.<sup>30</sup>

Likewise, the manner in which other Pennsylvania cable companies treat their retail telephony service has no bearing on the validity of Armstrong's position in this case, nor does it provide evidence useful to the Commission in evaluating (or, in Verizon's case, disproving) Armstrong's position. As Armstrong notes above, such information is immaterial and irrelevant and misses the salient point:

...[T]he FCC's definition of VoIP-PSTN traffic is technologically specific to the service being offered by the company at issue. Without information from Ms. Freet or Verizon indicating that Comcast Phone, Comcast Business, Time Warner and/or Sprint provision their voice services using the same technical design used by Armstrong, this information is relatively meaningless. Moreover, this

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<sup>28</sup> See Armstrong Supplemental Br. at 9-13 (addressing Armstrong's cable affiliates) and 13-16 (addressing comparisons with other Pennsylvania cable telephone providers), which Armstrong incorporates herein by reference.

<sup>29</sup> Armstrong St. No. 3 at 8. As the facts established by Armstrong on the record in this proceeding demonstrate, the traffic originating and/or terminating to the customers of AUI, which use Armstrong's exchange access facilities and arrangements with AUI, are decidedly not VoIP-PSTN traffic as defined by the FCC.

<sup>30</sup> Armstrong St. No. 3 at 8; Armstrong Supplemental Br. at 10.

information does nothing to discount the technological reality that Armstrong's service specifically (and intentionally) does not require Internet-compatible CPE (regardless of how these other companies may provide their services or classify their traffic).<sup>31</sup>

Ultimately, Verizon's position is not supported by the evidence of record, particularly the evidence Verizon submitted. The I.D. was correct to conclude that Armstrong's service is not VoIP-PSTN or subject to the VoIP Freedom Act and recognize that the services of Armstrong's affiliates were not germane to reaching that conclusion. For these reasons, the Commission should deny Verizon Exception No. 2.

### **Reply to Verizon Exception No. 3 – Imposition of a Civil Penalty**

In Exception No. 3, Verizon excepts to the ALJ's recommendation to impose a \$1,000 civil penalty against Verizon for unilaterally changing the intercarrier compensation rate to be paid to Armstrong contrary to prior agreements and Armstrong's lawfully filed tariff. Verizon contends the civil penalty should be rejected because it was not requested by Armstrong and relates to disputes that were voluntarily settled by the parties.<sup>32</sup> Verizon's exception is without merit, and Armstrong fully supports the ALJ's proposed civil penalty for Verizon's action in this proceeding.

First, while it did not *expressly* request the imposition of a civil penalty, Armstrong clearly left the door open for the Commission to do so by requesting in its Complaint that the Commission “[g]rant such other relief as may be just and reasonable.”<sup>33</sup> Irrespective of that prayer for relief, it is well within the Commission's authority under Section 3301 of the Code, 66 Pa.C.S. § 3301, to impose *sua sponte* civil penalties for violations of the Code, Commission

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<sup>31</sup> Armstrong St. No. 3 at 10; *see also* Armstrong Supplemental Br. at 13-16.

<sup>32</sup> *See generally* Verizon Exceptions at 16-19.

<sup>33</sup> Armstrong Complaint at 10.

orders, or its regulation. This power, as the Commission has held, “is not dependent on a Complainant's request that the Commission impose a fine.”<sup>34</sup> As such, it was proper for the I.D. to recommend a civil penalty even if Armstrong did not expressly ask for such a penalty to be levied.

Second, Verizon misconstrues the I.D.’s bases for assessing the civil penalty, arguing the I.D. “makes clear” that the only reason for the recommended penalty is “Verizon’s alleged actions before the settlement.”<sup>35</sup> The I.D. specifically states:

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.<sup>36</sup>

As the ALJ correctly recognized, the settlement of certain claims does not excuse Verizon’s behavior, which was contrary to Section 1303 of the Code from the moment it decided to invoke self-help and unilaterally change the intercarrier compensation rate.<sup>37</sup> Verizon overlooks the fact that its actions before the settlement are the genesis for the claims relating to the Dispute Period which were fully litigated in this proceeding, are the subject of the I.D., and serve as the basis for Verizon’s substantive violation of the Code. Indeed, Verizon’s unilateral refusal to pay the previously honored rates set forth in Armstrong’s lawfully filed and approved

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<sup>34</sup> *Richard Kaufman v. Verizon Pennsylvania Inc.*, 103 Pa.P.U.C. 529, Docket No. C-20055680 (Order entered Nov. 19, 2008) (rejecting Verizon’s argument that the Commission should not impose a fine because the Complainant did not ask it to do so).

<sup>35</sup> Verizon Exceptions at 18.

<sup>36</sup> I.D. at 37.

<sup>37</sup> *Id.*; *see also id.* at 25 (“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.”).

tariff<sup>38</sup> and the Verizon Interconnection Agreements are what created the situation and necessitated the filing of Armstrong's Complaint in the first instance.<sup>39</sup> Rather than electing to act on its own by refusing to pay and imposing its own rate design, Verizon should have instead acted in good faith by presenting a formal legal challenge to terms of the ICAs and tariff rates.<sup>40</sup> It chose not to do so and must now face the consequences for its willful and intentional misconduct in direct violation of Section 1303. A civil penalty is wholly appropriate under the circumstances.

Verizon also asserts in Exception No. 3 that the Commission cannot assess a civil penalty without first finding a substantive violation of the Code, Commission order, or regulation.<sup>41</sup> That is not the case here, however, as the I.D. unequivocally finds Verizon violated Section 1303 of the Code by "unilaterally seeking to supplant a lawfully tariffed rate with one of Verizon's own devising[.]"<sup>42</sup> Moreover, it is only *after* finding a clear violation of the Code had occurred that the ALJ turned to consider the imposition of a civil penalty.<sup>43</sup>

With respect to that consideration, the ALJ correctly analyzed each of the ten factors set forth in Section 69.1201 of the Commission's regulations, 52 Pa. Code § 69.1201, to determine

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<sup>38</sup> It is well established that a utility's tariff has the force and effect of law and is legally binding on the utility, its customers, and the public. 66 Pa.C.S. § 1303; *DiSanto v. Dauphin Consolidated Water Supply Co.*, 436 A.2d 197 (Pa. Super. 1981); *Brockway Glass Co. v. Pa. P.U.C.*, 437 A.2d 1067 (Pa. Cmwlth. 1981).

<sup>39</sup> See Armstrong Main Br. at 16-22.

<sup>40</sup> The I.D. correctly recognizes that Verizon had several established contractual and statutory procedures available at its disposal to challenge and/or reduce the compensation rate. I.D. at 34.

<sup>41</sup> Verizon Exceptions at 18.

<sup>42</sup> I.D. at 34.

<sup>43</sup> *Id.* at 35 ("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 [Section 1303].").

an appropriate civil penalty. The ALJ's analysis is reasonable and well supported by the totality of record evidence in this proceeding.

In conclusion, the ALJ did not err in recommending a civil penalty be imposed against Verizon for its actions in this proceeding. The Commission should deny Verizon Exception No. 3 and adopt I.D. Ordering Paragraph #6 directing Verizon to pay a \$1,000 civil penalty within thirty days.

#### **Reply to Verizon Exception No. 4 – Commission Jurisdiction**

In Exception No. 4, Verizon excepts to the I.D.'s conclusion that this Commission has jurisdiction to adjudicate this case and decide the issue of whether Armstrong's traffic is VoIP-PSTN, arguing that this issue is preempted by federal and state law.<sup>44</sup> The specific arguments advanced by Verizon in this Exception (including the cases it cites) are the very same arguments Verizon has made throughout this proceeding and in its main, reply, and supplemental briefs on this issue. The ALJ thoroughly weighed and properly rejected those arguments in reaching the I.D. Continuing to restate these same arguments by way of exceptions does not change the I.D.'s well-reasoned conclusion that the Commission has jurisdiction over the subject matter of this Complaint. It only shows that Verizon has no other substantive support for its position beyond that which it has already argued and lost.<sup>45</sup>

Armstrong set forth detailed arguments in its Main and Reply Briefs explaining why the Commission has both state and federal authority to decide whether Armstrong's traffic is VoIP-PSTN.<sup>46</sup> Rather than repeat those same arguments as Verizon has done, Armstrong refers the

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<sup>44</sup> See generally Verizon Exceptions at 19-23.

<sup>45</sup> See I.D. at 10-16.

<sup>46</sup> See Armstrong Main Br. at 21-35 and Reply Br. at 16-22.

Commission to and incorporates herein by reference, pursuant to 52 Pa. Code § 5.535, the discussions in Section III.A. of its Main Brief (pages 21-35) and Section III.C. of its Reply Brief (pages 16-22) in reply to Verizon Exception No. 4.

By way of further reply, Armstrong reiterates that contrary to Verizon's arguments, the Commission is not federally preempted from deciding the question of whether the traffic at issue is VoIP-PSTN. As the I.D. correctly recognizes, even though the FCC established the VoIP-PSTN category, it left implementation to the states.<sup>47</sup> Indeed, Armstrong remains obligated under the FCC's revised intercarrier compensation framework to file tariffs with the Commission for purposes of offering intrastate switched access services and the Commission's authority and obligation to review and approve those tariffs is unchanged.<sup>48</sup> In this light, it is not at all surprising that the Commission would need to interpret certain FCC policies and/or rules in order to implement and enforce the FCC's inter-carrier framework via Armstrong's intrastate tariff. Implementation and enforcement inevitably involve interpretation, and thus the Commission is acting well within the parameters of its role by applying the FCC's VoIP-PSTN regulation to Armstrong's traffic. Verizon suggests this view of a state's role is "too broad," but the reality is that anything less would reduce the role of this Commission to nothing more than a rubber stamp of Verizon's view.

The Tenth Circuit Court of Appeals case Verizon cites as affirmation that the FCC's authority preempts the states' involvement with intercarrier compensation issues is another red herring.<sup>49</sup> This proceeding is not about the Commission usurping the FCC's authority over

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<sup>47</sup> I.D. at 16; *see also* *Connect America Order* at ¶¶ 813, 776, 790, 803, and 812.

<sup>48</sup> 47 C.F.R. §51.911(b).

<sup>49</sup> Verizon Exceptions at 19 (citing *Direct Comms. Cedar Valley, LLC v. FCC*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S.Ct. 2072 (May 4, 2015)).

intrastate access charges, but merely the implementation of the FCC’s intercarrier compensation directives in intrastate tariffs, a role specifically contemplated by the FCC for state commissions:<sup>50</sup>

[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[.]<sup>51</sup>

As such, it is clearly within the purview of this Commission to evaluate the nature of Armstrong’s network and service delivery in light of its intrastate tariffs previously approved consistent with the FCC’s intercarrier compensation framework. Based upon its analysis in that regard, the Commission can require Verizon to pay one of two rates required by the FCC – either the lower interstate rates applicable to VoIP-to-PSTN or the higher intrastate rates applicable to traditional Time Division Multiplexing (“TDM”). Appropriately, based upon its analysis of Armstrong’s network and service delivery, the I.D. has chosen TDM.<sup>52</sup> If and only if the Commission were to find Armstrong’s traffic to be VoIP-to-PSTN and *then* require Verizon to pay some rate other than that authorized by the FCC would the Commission be in conflict with the FCC’s preemption of the issue. That, clearly, is not the case here.

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<sup>50</sup> I.D. at 16.

<sup>51</sup> *Connect America Order* at ¶ 813; *see also id.* at ¶¶ 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.”); I.D. at 16.

<sup>52</sup> I.D. at 28 (“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.”).

Verizon also argues the Commission is wasting administrative and party resources to decide “issues of federal law” because the dissatisfied party will likely appeal to federal court and the Commission will be forced to incur time and expense participating as a party to defend its litigation. This argument, however, is nothing more than a thinly veiled threat aimed at coercing the Commission into issuing a decision favorable to Verizon and should be rejected as being wholly inappropriate.

Armstrong also reiterates that, despite Verizon’s assertions, the VoIP Freedom Act, which prohibits regulation of “the rates, terms and conditions of VoIP service or IP-enabled service,”<sup>53</sup> does not divest jurisdiction from this Commission to decide the substantive question of VoIP-PTSN in this case.<sup>54</sup> For a detailed explanation of why the VoIP Freedom Act does not remove jurisdiction from this Commission, please refer to Section III.C.1. of Armstrong’s Reply Brief (pages 16-21), which Armstrong incorporates herein by reference.

In sum, the ALJ’s analysis of the jurisdictional issue was exact and well-reasoned. Verizon Exception No. 4 should be denied.

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<sup>53</sup> 73 Pa. C.S. § 2251.4.

<sup>54</sup> In order for the VoIP Freedom Act to govern, it must be shown, *inter alia*, that Armstrong’s traffic network must be providing either “VoIP service” or “IP-enabled service” as those terms are defined under that Act. I.D. at 11. The record evidence clearly demonstrates that Armstrong’s network provides neither, and Verizon has failed to prove that either label applies.

### **III. CONCLUSION**

For the reasons set forth herein and in its Main, Reply and Supplemental Briefs, Armstrong respectfully requests that the Commission deny Verizon's Exceptions and adopt the Initial Decision, including the Findings of Fact, Conclusions of Law, and Ordering Paragraphs contained therein, without modification.

Respectfully submitted,



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Charles E. Thomas, III, Esq. (ID # 201014)  
THOMAS, NIESEN & THOMAS, LLC  
212 Locust Street, Suite 302  
Harrisburg, PA 17101  
Tel: (717) 255-7600  
cet3@tntlawfirm.com

David Reams Jamieson, Esq. (ID # 65678)  
General Counsel  
Armstrong Holdings, Inc.  
One Armstrong Place  
Butler, PA 16001  
Tel: (724) 283-0925  
djamieson@agoc.com

*Attorneys for  
Armstrong Telecommunications Inc.*

DATED: November 30, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 30th day of November, 2018, served a true and correct copy of the foregoing document upon the persons listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

**VIA EMAIL AND FIRST CLASS MAIL**

Honorable Dennis J. Buckley  
Administrative Law Judge  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265  
[debuckley@pa.gov](mailto:debuckley@pa.gov)

Suzan D. Paiva, Esquire  
Verizon  
900 Race St., 6th Floor  
Philadelphia, PA 19107  
[Suzan.D.Paiva@Verizon.com](mailto:Suzan.D.Paiva@Verizon.com)

  
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Charles E. Thomas, III (PA ID # 201014)