

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held September 15, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
John F. Coleman, Jr., Vice Chairman
Ralph V. Yanora

Armstrong Telecommunications, Inc.

C-2010-2216205

v.

Verizon Pennsylvania Inc.

Armstrong Telecommunications, Inc.

C-2010-2216311

v.

Verizon North LLC

Armstrong Telecommunications, Inc.

C-2010-2216325

v.

MCImetro Access Transmission
Services LLC d/b/a Verizon Access
Transmission Services

Armstrong Telecommunications, Inc.

C-2010-2216293

v.

MCI Communications Services Inc.

OPINION AND ORDER

Table of Contents

I.	Matter before the Commission	1
II.	Background.....	1
III.	History of the Proceeding.....	5
IV.	Legal Standards	9
V.	Discussion.....	10
A.	Commission Jurisdiction	11
1.	Positions of the Parties	11
2.	Initial Decision	16
3.	Exceptions and Replies	20
4.	Disposition	24
B.	Whether the ALJ erred in finding that Armstrong’s traffic should not be designated as VoIP-PSTN Traffic.....	28
1.	Positions of the Parties	29
2.	Initial Decision	33
3.	Exceptions and Replies	39
4.	Disposition	47
C.	Whether the ALJ Erred in Recommending that a Civil Penalty be Assessed Upon Verizon	55
1.	Initial Decision	55
2.	Exceptions and Replies	56
3.	Disposition	59
VI.	Conclusion.....	61

BY THE COMMISSION:

I. Matter before the Commission

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the jointly filed Exceptions of Verizon Pennsylvania LLC¹ (Verizon PA), Verizon North LLC (Verizon North), MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services (Verizon Access), and MCI Communications Services Inc. (MCI) (collectively, Verizon), filed on November 8, 2018, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Dennis J. Buckley, which was issued on October 4, 2018. Armstrong Telecommunications, Inc. (Armstrong) filed Replies to Exceptions on November 30, 2018. For the reasons stated, *infra*, we shall grant the Exceptions of Verizon, in part, and deny them, in part.

II. Background

Armstrong operates as, *inter alia*, a retail competitive local exchange carrier (CLEC) and a wholesale CLEC in the incumbent service territories of Verizon Pennsylvania, Verizon North, Citizens Telephone Company of Kecksburg, Windstream Pennsylvania, and Consolidated Communications Pennsylvania. As a wholesale CLEC, Armstrong functions as an intermediary responsible for the public switched telephone network (PSTN) interconnection and intercarrier compensation obligations associated with traffic originating from, and terminating to, its cable affiliate, Armstrong Utilities,

¹ At the time of initiation of the instant proceeding, the Company was known as Verizon Pennsylvania Inc. However, the Company has since changed its name to Verizon Pennsylvania LLC, pursuant to a corporate restructuring at Docket No. A-2012-2295106.

Inc. (AUI), through its subsidiary Armstrong Digital Services (ADS).² Armstrong accepts traffic from its cable affiliate and sends it to and receives it from other carriers. As a result, Armstrong regularly exchanges traffic directly and indirectly with Verizon. Complaints at ¶8; Armstrong M.B. at 1; Verizon M.B. at 3-4.

This proceeding involves Formal Complaints (Complaints) filed by Armstrong against Verizon, representing Complaints against two incumbent local exchange carriers (ILECs), Verizon PA and Verizon North, and two CLECs, Verizon Access and MCI. Armstrong alleged, among other things, nonpayment or underpayment by Verizon, for reciprocal compensation and intrastate switched access traffic terminating services provided by Armstrong to Verizon, in violation of Armstrong's interconnection agreements (ICAs)³ with Verizon PA and Verizon North and Armstrong's Commission-approved switched access tariff.⁴ Armstrong M.B. at 1. More specifically, Armstrong argued that beginning on August 27, 2010, Verizon unilaterally sought to compensate Armstrong at a rate of \$0.0007 per minute of use for *all* traffic terminated by

² Except as noted in its Reply to Verizon's Exception No. 2, *infra*, Armstrong referred to AUI and ADS interchangeably throughout this proceeding. Therefore, in this Opinion and Order, we shall generally refer to AUI and ADS as Armstrong's cable affiliate or cable telephony affiliate.

³ See *Joint Petition for Approval of an Interconnection Agreement and Amendment No. 1 Between Verizon Pennsylvania Inc. and Armstrong Telecommunications, Inc., under Section 252(e) of the Telecommunications Act of 1996*, Docket No. A-311014F7000 (Order entered August 30, 2005); *Joint Petition for Approval of an Interconnection Agreement and Amendment No. 1 Between Verizon North, Inc. and Armstrong Telecommunications, Inc., under Section 252(e) of the Telecommunications Act of 1996*, Docket No. A-311014F7000 (Order entered August 30, 2005). The ICAs govern the terms, conditions and rates for reciprocal compensation (*i.e.*, local) traffic terminated from Armstrong to Verizon and vice versa. Complaints at ¶ 12.

⁴ Armstrong's switched access tariff is Tariff – Telephone PA P.U.C. No. 5. Armstrong's switched access tariff governs the terms, conditions, and rates for, *inter alia*, Armstrong's terminating intrastate exchange access (*i.e.*, toll) service and toll free Access service in Pennsylvania. Complaints at ¶ 15.

Armstrong, contrary to the rates specified in the ICAs and in Armstrong's switched access tariff, and contrary to its prior practice of paying such specified rates. Armstrong alleged that Verizon based this decision on its view that all of Armstrong's traffic is entirely internet protocol (IP)-originated or IP-terminated such that it should be deemed an information service. Armstrong further noted that at the same time, Verizon continued to bill Armstrong at the reciprocal compensation rates specified in the ICAs and at the switched access rates set forth in Verizon's switched access tariffs. Armstrong M.B. at 1, 5-6.

Subsequently, in late 2011, the Federal Communications Commission (FCC) released its order in *In the Matter of Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011), *aff'd In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 83 U.S.L.W. 3835, May 4, 2015 (*NARUC v. FCC*, S.Ct., No. 14-901, *Allband Com. Coop. v. FCC*, S.Ct., No. 14-900) (*USF/ICC Transformation Order*). In this order, the FCC, *inter alia*, created the new category of Voice over Internet Protocol - Public Switched Telephone Network (VoIP-PSTN) traffic and specified that toll VoIP-PSTN traffic should be compensated at interstate switched access rates. Armstrong R.B. at 1. As a result of the release of the *USF/ICC Transformation Order*, the Parties entered settlement negotiations and issued a letter to the Commission (Partial Settlement Letter) representing that they had resolved all claims with respect to traffic exchanged during periods prior to, and including, December 31, 2011, and that all such claims were withdrawn, with prejudice, and marked satisfied. However, the Parties specified that they were unable to resolve claims with respect to traffic exchanged from January 1, 2012 forward.⁵ Thus, the Parties explained that this proceeding remains open as to those issues only. Partial Settlement Letter at 1.

⁵ Armstrong attached a confidential settlement agreement between the Parties related to the Partial Settlement Letter as Proprietary Exhibit C to its Supplemental Rebuttal Testimony.

In light of the Parties' representation in the Partial Settlement Letter, only the following issues remain before this Commission: (1) Whether the Commission has the jurisdiction to adjudicate the subject matter of this proceeding; and (2) What switched access rates should be payable by Verizon to Armstrong for traffic terminated by Armstrong between January 1, 2012 and June 30, 2013 (Dispute Period).

Verizon is of the opinion that the Commission's jurisdiction is preempted both at the federal level and the state level. In addition, Verizon takes the position that Armstrong's traffic is VoIP-PSTN traffic because it originates and/or terminates in IP format such that Armstrong should be compensated for traffic at its interstate switched access rates that were in effect during the Dispute Period.⁶ Conversely, Armstrong submits that the Commission is not barred by either federal or state law from ruling on the issues in this proceeding. Further, Armstrong provides that contrary to Verizon's allegation, Armstrong's traffic neither originates nor terminates in IP format and, therefore, is not VoIP-PSTN traffic. Accordingly, Armstrong insists that it should be compensated at its intrastate switched access rates that were in effect during the Dispute Period.⁷

⁶ As will be discussed below, while the FCC specified that all toll VoIP-PSTN traffic should be immediately payable at interstate switched access rates, it set forth an eighteen-month glide path, covering the Dispute Period, wherein traffic that was not VoIP-PSTN traffic would continue to be payable at intrastate switched access rates. On July 1, 2013, and going forward, intrastate terminating switched access rates were set at parity with interstate rates and transitioned downward in accordance with the "glide path" transition to a bill-and-keep compensation regime set forth in Paragraph 801 of the *USF/ICC Transformation Order*.

⁷ As set forth in Paragraph 801 of the *USF/ICC Transformation Order*, on July 1, 2012, Armstrong and all other carriers reduced most intrastate terminating switched access rates to fifty percent of the differential between the carrier's previous intrastate rates and the carrier's interstate rates.

III. History of the Proceeding

The history of this proceeding that follows is summarized from the Initial Decision of ALJ Buckley, the majority of which may be found at pages two through seven of that decision.

On December 16, 2010, Armstrong filed Complaints against Verizon PA, Verizon North, Verizon Access, and MCI alleging non-payment by each entity for traffic termination services rendered by Armstrong.

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

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

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

On March 21, 2011, a prehearing conference was held. The Parties agreed that the four separate Complaints in this proceeding should be consolidated, and they were consolidated by an Order issued on that date.⁸ Verizon also made an informal request for a stay of this consolidated proceeding, pending the outcome of a rulemaking proceeding initiated by the FCC on February 9, 2011. That rulemaking was to consider and perhaps to resolve the dispute over intercarrier compensation for VoIP traffic. Verizon's request for a stay was opposed at the prehearing conference by Armstrong, and the ALJ held a decision on the request in abeyance pending the filing of an appropriate Motion by Verizon and an Answer by Armstrong.

⁸ As this proceeding has been consolidated, we shall therefore refer to the Complaints as Armstrong's Complaint.

On April 19, 2011, Armstrong filed a Motion for Partial Summary Judgment and Verizon filed a Motion to Dismiss or Stay.

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

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

On June 1, 2011, Verizon filed a letter asking that the letter from Bright House be stricken, and on July 18, 2011, an Order was issued striking the letter.

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

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

On November 9 and 10, 2011, an initial hearing (2011 Hearing) was held. Armstrong and Verizon were each represented by counsel. Armstrong presented the testimony of Mr. Brian Cipoletti and Mr. Michael Starkey. The direct testimony of Mr. Cipoletti and Mr. Starkey was admitted to the record together with Armstrong Exhibits 1 through 9, with associated Exhibit MS-1, Armstrong Cross-Examination Exhibit 1 (web printout, "About Verizon Pennsylvania") and Armstrong Cross-Examination Exhibit 2 (web printout, "FiOS Digital Voice"). Verizon presented

the testimony of Mr. Paul B. Vasington and Mr. William Munsell. The direct testimony of Mr. Vasington and Mr. Munsell was admitted to the record together with Verizon Direct Exhibits 1 through 5, Verizon Rebuttal Exhibits 1 and 2, and Verizon Cross-Examination Exhibits 1 through 6.

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

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

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

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

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

On February 6, 2012, the Parties filed their Partial Settlement Letter notifying the Commission that the Parties had resolved all claims set forth in Armstrong's Complaint and Verizon's New Matter with respect to traffic exchanged during periods prior to and including December 31, 2011, and that all such claims were withdrawn from this case, with prejudice, and marked satisfied. However, the Parties also advised the Commission that they had not resolved any claims with respect to traffic exchanged from January 1, 2012, forward.

On April 24, 2014, a case status conference was held between the Parties and the ALJ wherein the Parties stated their desire to enter into further mediation. An

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

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

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

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

On September 21, 2018, an Order was issued admitting Verizon's Supplemental Direct Testimony, and Armstrong's Supplemental Rebuttal Testimony

(subject to a stipulation regarding revisions to page 12 of the testimony and the first page of Exhibit D), into the record. That Order also formally closed the record in this case.

On October 4, 2018, the Commission issued the Initial Decision of ALJ Buckley wherein he recommended that Armstrong's Complaint be sustained, and that Verizon be assessed a civil penalty of \$1,000.

On October 11, 2018, Armstrong, on behalf of both Parties, filed a Letter indicating that the Commission's Office of Special Assistants had, for good cause shown, granted extensions until November 8, 2018 for the filing of Exceptions and until November 30, 2018 for the filing of Replies to Exceptions.

As previously noted, Verizon filed Exceptions to the Initial Decision on November 8, 2018. Armstrong filed Replies to Exceptions on November 30, 2018

IV. Legal Standards

In this proceeding, Armstrong, as the Complainant, seeks enforcement of its Commission-approved tariff. Section 332(a) of the Public Utility Code (Code) provides that the party seeking relief from the Commission has the burden of proof. 66 Pa. C.S. § 332(a). Therefore, as the party seeking relief from the Commission, Armstrong bears the burden of proof.

To establish a sufficient case and satisfy the burden of proof, Armstrong must show that Verizon is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990), *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 134 Pa. Cmwlth. 218, 221- 222, 578 A.2d 600, 602 (1990),

app. denied, 529 Pa. 654, 602 A.2d 863 (1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Armstrong must initially produce sufficient credible evidence to establish a prima facie case in order that it not lose summarily. *Morrissey v. Dep't of Highways*, 424 Pa. 87, 225 A.2d 895 (1967). If it does so, the burden of going forward with evidence shifts to Verizon to produce credible evidence of at least co-equal weight. This burden of going forward with evidence may shift back and forth between the Parties, but the ultimate burden of persuasion remains with Armstrong. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

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

V. Discussion

As a preliminary matter, we note that any issue that we do not specifically delineate shall be deemed to have been duly considered and will be denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the Parties. *Consolidated Rail Corp. v. Pa. PUC*,

625 A.2d 741 (Pa. Cmwlth. 1993); also see, generally, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

In his Initial Decision, ALJ Buckley made sixteen Findings of Fact and reached seventeen Conclusions of Law. I.D. at 8-10, 37-39. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

A. Commission Jurisdiction

A threshold issue over which the Parties disagreed is whether the Commission has jurisdiction over the subject matter in this proceeding. As discussed below, Verizon asserted that the Commission lacks such jurisdiction based upon both federal and state law. Conversely, Armstrong asserted that the subject matter of this proceeding falls squarely within the Commission's purview. Therefore, before examining the underlying compensation issue, we must first establish whether we have the jurisdiction to adjudicate Armstrong's Complaint. As noted in our summary of the ALJ's recommendation on this issue, *infra*, the Commission is a creature of the legislative body which created it. As such, it has only the powers, duties, responsibilities, and jurisdiction given to it by the Legislature. *Western Pennsylvania Water Co. v. Pa. PUC*, 10 Pa. Cmwlth. 533, 311 A.2d 370 (1973). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. PUC*, 157 Pa. Super. 595, 43 A.2d 348 (1945).

1. Positions of the Parties

Verizon took the position that federal law prohibits the Commission from adjudicating this proceeding. More specifically, Verizon points to the FCC's *USF/ICC*

Transformation Order. According to Verizon, in the *USF/ICC Transformation Order*, the FCC established a new regime for intercarrier compensation concerning VoIP-PSTN traffic. In addition, Verizon submitted that the FCC explicitly supersede[d] the traditional access charge regime, and placed all traffic within the scope of Section 251(b)(5) of the Federal Telecommunications Act of 1996 (*TA96*), 47 U.S.C. § 251(b)(5). As will be discussed in detail in Section V.B of this Opinion and Order, *infra*, Verizon argued that the traffic exchanged on Armstrong’s network is VoIP-PSTN traffic. Verizon claimed, however, that even if the Commission determines that such traffic is not VoIP-PSTN traffic, the FCC has preempted state authority over all intercarrier compensation and has brought intercarrier compensation under its own jurisdiction. Verizon M.B. at 8-9; Verizon Supp M.B. at 3-4.

Verizon claimed that the Commission is also barred from adjudicating this proceeding in light of the Pennsylvania Legislature’s passage of the Pennsylvania Voice-Over-Internet Protocol Freedom Act, 73 P.S. § 2251.1, et seq. (VoIP Freedom Act). According to Verizon, the Pennsylvania Legislature, through the VoIP Freedom Act, determined that services using IP technology should be free from regulations governing traditional telephone service, and thereby prohibited the Commission from exercising jurisdiction over issues related to IP-enabled and VoIP services. Verizon M.B. at 9-10 (citing 73 P.S. § 2251.2). Throughout this proceeding, Verizon asserted that the traffic for which Armstrong seeks payment from Verizon is IP-enabled. Thus, Verizon submitted that Armstrong’s attempt to collect switched access charges violates the VoIP Freedom Act. Verizon M.B. at 10-11. In addition, Verizon argued that Armstrong’s cable telephony affiliate provides VoIP telephone service, which the Commission does not regulate by virtue of the VoIP Freedom Act. *Id.* at 12 (citing Tr. at 46-47).

Verizon acknowledged that Section 6 of the VoIP Freedom Act preserves limited Commission jurisdiction over “[s]witched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange

telecommunications company.” Verizon Supp. M.B. at 5 (citing 73 P.S. § 2251.6(1)(iv)). However, Verizon posited that because the term “local exchange telecommunications company” is not defined in the VoIP Freedom Act, the Commission must look to other statutes upon the same or similar subjects to obtain the proper meaning of this term. According to Verizon, under Section 3012 of the Code, 66 Pa. C.S. § 3012, the term “local exchange telecommunications company,” applies only to an ILEC. Verizon claimed that because Armstrong is a CLEC, the limited preservations of Commission jurisdiction outlined in the VoIP Freedom Act do not apply. Verizon Supp. M.B. at 5-6.

Verizon further posited that Armstrong itself agrees that the Commission lacks jurisdiction over Armstrong’s cable telephony affiliate. Verizon noted that Armstrong has neither applied for, nor has it received, a certificate of public convenience for its cable affiliate, nor has it otherwise submitted that the Commission has thereto. Verizon Supp. M.B. at 6. Verizon also pointed to Armstrong’s testimony that the voice products of its cable affiliate are not tariffed. *Id.* (citing Tr. at 47-50).

In light of the above, Verizon submitted that if the Commission were to do anything other than dismiss Armstrong’s Complaint, then it would run afoul of both state and federal law. Verizon R.B. at 10, n.18.

Armstrong countered that the Commission has the authority under both federal and state law to rule on the issues in this proceeding. Armstrong R.B. at 16-22; Armstrong Supp. M.B. at 4.

As to Verizon’s claim that federal law preempts the Commission’s jurisdiction over this proceeding, Armstrong submitted that the *USF/ICC Transformation Order* clearly contemplates an interpretative role for the states in implementing and enforcing intercarrier compensation reform. Armstrong R.B. at 21-22; Armstrong Supp. M.B. at 4.

As to Verizon's claim that Pennsylvania law preempts the Commission's jurisdiction over this proceeding, Armstrong submitted that there are three components of the VoIP Freedom Act. Armstrong took the position that in examining the services provided by an entity, all three of these components must be present for the Commission's jurisdiction to be preempted. Armstrong continued that the first component of the VoIP Freedom Act contemplates that the traffic exchanged on the network must either be a "VoIP service" or an "IP-enabled service" in order for the VoIP Freedom Act to apply. Armstrong noted that the VoIP Freedom Act defines these terms, as follows:

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

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

- (1) enables real-time, two-way voice communications that originate or terminate from the user's location in Internet protocol or any successor protocol;
- (2) uses a broadband connection from the user's location; and
- (3) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

Armstrong R.B. at 16 (citing 73 Pa. C.S. § 2251.3). Armstrong claimed that the definition of IP-enabled service is not applicable to its own network because the end-user customers of its cable affiliate do not send or receive traffic in IP format. As discussed at length in Section V.B, *infra*, Armstrong insisted that the use of IP within its network is

completely unrelated to the manner in which the customer uses the network. Armstrong R.B. at 16-17.

Armstrong also claimed that its own service is not properly classified as a VoIP service. In this regard, Armstrong submitted that the Armstrong-owned Multimedia Terminal Adapter (MTA) that exists within the Armstrong network converts the network's IP format into standard analog format, which is then transmitted to the customer via the narrowband, analog equipment (*i.e.* both standard inside wire and telephone equipment) inside the customer's home. Armstrong stressed that an end user customer of its cable affiliate is not required to subscribe to broadband service, as the company offers stand-alone voice service that does not require a broadband connection or a television subscription. According to Armstrong, while it is true that an Armstrong customer may also have an Armstrong broadband (*i.e.* internet) connection to his or her home, the facts are clear that the customer does not "use" that connection for its Armstrong voice services, nor is broadband service required to obtain voice service. Armstrong R.B. at 17-19.

Next, Armstrong stated that the second component of the VoIP Freedom Act, as set forth in 73 Pa. C.S. §§ 2251.5 and 2251.6, *supra*, preserves the Commission's jurisdiction over switched access services or other intercarrier compensation rates provided by a local exchange telecommunications company. Armstrong stated that is a "telecommunications company" and provides "local exchange service" on both a retail and wholesale basis. Armstrong dismissed Verizon's argument that the term "local exchange telecommunications company" applies only to an ILEC. According to Armstrong, such a definitional handicap is nowhere reflected in the VoIP Freedom Act, nor is there any indication that the General Assembly, in Title 73, intended to restrict the term "local exchange telecommunications company" to a definition set forth in Title 66. Armstrong R.B. at 19-20.

Armstrong noted that the third component of the VoIP Freedom Act prohibits the Commission from regulating the rates, terms, and conditions of VoIP service or IP-enabled service. Armstrong contended that by regulating Armstrong under its existing wholesale CLEC certificate and tariffs, the Commission is not also regulating the rates, terms, and conditions of the retail service of Armstrong's cable affiliate. Armstrong pointed out that subsequent to the enactment of the VoIP Freedom Act, the Commission has continued to find that wholesale CLECs serving cable companies are jurisdictional telecommunications carriers and has certificated them and approved their associated tariffs. Therefore, Armstrong submitted that Verizon cannot collaterally attack Armstrong's certificate and tariffs by invoking the underlying cable company. Armstrong R.B. at 20-21.

Accordingly, Armstrong maintained that the Commission retains the appropriate authority to adjudicate Armstrong's Complaint. Armstrong Supp. M.B. at 4.

2. Initial Decision

The ALJ began by stating as follows:

The Commission is a creature of the legislative body which created it. As such, it has only the powers, duties, responsibilities and jurisdiction given to it by the Legislature. *Western Pennsylvania Water Co. v. Pa. Pub. Util. Comm'n*, 10 Pa. Cmwlth. 533, 311 A.2d 370 (1973). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 157 Pa. Super. 595, 43 A.2d 348 (1945). Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. Cf., *Hughes v. Pa. State Police*, 152 Pa. Cmwlth. 409, 619 A.2d 390 (1992), app. denied, 536 Pa. 633, 637 A.2d 293 (1993). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 427 Pa. 581, 235 A.2d 602 (1967). Neither silence nor agreement of the parties will confer jurisdiction

where it otherwise would not exist, *Commonwealth v. VanBuskirk*, 303 Pa. Super. 148, 449 A.2d 621 (1982), nor can jurisdiction be obtained by waiver or estoppel, *Scott v. Bristol Twp. Police Dep't*, 669 A.2d 457 (Pa.Cmwlt. 1995). Since the issue of subject matter jurisdiction may not be waived, it may be raised at any stage of a proceeding by a party, or *sua sponte* by the court or agency in which the case exists. *Blackwell v. State Ethics Comm'n*, 523 Pa. 347, 567 A.2d 630 (1989).

I.D. at 10. After discussing each Party's position, *supra*, as to whether the Commission has jurisdiction over the subject matter of this proceeding, the ALJ concluded that the Commission has the required jurisdiction to determine the nature of the traffic on Armstrong's network and to determine the appropriate compensation for the traffic at issue. *Id.* at 10-16.

According to the ALJ, although the FCC established the category of VoIP-PSTN traffic in the *USF/ICC Transformation Order*, it clearly contemplated an interpretive role for the states, and has left implementation of the *USF/ICC Transformation Order* to the states. In support of this finding, the ALJ cited to Paragraph 813 of the *USF/ICC Transformation Order*, which states, in pertinent part, as follows:

[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[.]

I.D. at 16.

Next, the ALJ discussed the Parties' opposing viewpoints regarding the VoIP-Freedom Act. The ALJ accepted the position of Armstrong that its cable telephony service is not a "VoIP" or "IP-enabled" service because the end user does not, "send or receive a communication in Internet protocol." The ALJ agreed with Armstrong that the use of IP in its network is unrelated to the manner in which the customer uses the network. The ALJ highlighted Armstrong's argument that while it is true that an end user customer of Armstrong's cable telephony affiliate may also have an Armstrong broadband connection to his or her home, the customer does not use that connection for voice services, and having broadband service is not a prerequisite for the customer to obtain voice service. The ALJ further agreed with Armstrong that the fact that the network may also be used for broadband is irrelevant. The ALJ pointed out that while traditional Time Division Multiplexing (TDM)-based telephone companies regularly provide both voice and digital subscriber line (DSL)-based broadband services simultaneously over the same copper wires, the provision of DSL service does not make the telephone service an information service. I.D. at 11-13.

Additionally, the ALJ noted that the VoIP Freedom Act does not preclude the Commission's jurisdiction over: [s]witched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company. I.D. at 14 (citing 73 Pa. C.S. § 2251.6(1)(iv)). The ALJ agreed with Armstrong's position that it is a "telecommunications company," and provides "local exchange service," on both a retail and a wholesale basis. At the same time, the ALJ disagreed with Verizon's position that under Section 3012 of the Code, 66 Pa. C.S. § 3012, the term "local exchange telecommunications company" is applicable only to an ILEC, and not a CLEC. Rather, the ALJ agreed with Armstrong that the intent to limit the applicability of this term only to an ILEC is not expressed anywhere in the VoIP Freedom Act. The ALJ also opined that there is not any indication that the General Assembly intended to restrict the applicability of this definition to only ILECs when it crafted the VoIP Freedom Act. I.D. at 14.

The ALJ also cited to *Palmerton Telephone Co. v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates*, Docket C-2009-2093336 (Order entered March 16, 2010) (*Palmerton v. Global NAPs*) wherein the Commission, in ruling whether the service in that proceeding was “switched network access,” did not limit its ruling to ILECs only. Thus, the ALJ explained, the common usage of the terms should be applied. The ALJ continued that Chapter 30 of the Code, which is set forth in 66 Pa. C.S. §§ 3011-3019, is an “ILEC-specific” piece of legislation intended to impose network modernization and revised alternative ratemaking obligations on ILECs. As such, the ALJ stated that Chapter 30 did not apply to CLECs. According to the ALJ, because of its ILEC-targeted subject matter, Chapter 30 specifically had to distinguish between ILECs and CLECs, resulting in the ILEC/CLEC definitional distinction. In contrast, the ALJ concluded that there is no evidence of any legislative intent to make such a distinction in the VoIP Freedom Act. I.D. at 15, 15 n.21.

Further, the ALJ concluded that by regulating Armstrong under its existing wholesale certificate and tariffs, the Commission is not also regulating “the rates, terms and conditions” of the retail service of its cable telephony affiliate. The ALJ cited to *Palmerton v Global Naps* wherein the Commission stated:

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

I.D. at 15 (citing *Palmerton v Global NAPs* at 23). Moreover, the ALJ echoed the position of Armstrong that even after the passage of the VoIP Freedom Act, the Commission has found that wholesale CLECs serving cable companies are jurisdictional telecommunications carriers and has certificated them and approved their tariffs.

I.D. at 15 (citing *Application of Comcast Business Communications, LLC d/b/a Comcast Long Distance for expanded Authority to Offer, Render, Furnish or Supply*

Telecommunications Services as a Competitive Local Exchange Carrier to the Public in the Commonwealth of Pennsylvania in the Service Territories of Windstream Pennsylvania, Inc. et al., Docket Nos. A-2008-2029089, A-2008-2029091, A-2008-2029092, and A-2008-2029093 (Order entered July 18, 2008)).

3. Exceptions and Replies

In its Exception No. 4, Verizon disputes the ALJ's conclusion that the Commission has jurisdiction over the subject matter of this proceeding. Verizon remains of the opinion that both federal and state law have preempted the Commission's jurisdiction. Verizon Exc. at 19.

First, Verizon reiterates its position that in the *USF/ICC Transformation Order*, the FCC preempted state regulation over intercarrier compensation for all traffic exchanged with a local exchange carrier and assumed exclusive jurisdiction. Verizon further claims that in 2014, the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) affirmed the FCC's authority to preempt the jurisdiction of the states in *Direct Communs. Cedar Valley*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S.Ct. 2072 (May 4, 2015) (*Tenth Circuit Decision*). Verizon continues that in the *Tenth Circuit Decision*, the Tenth Circuit found 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. Verizon Exc. at 19-20 (citing *Tenth Circuit Decision* at 1121). According to Verizon, the Tenth Circuit recognized that the FCC was "exercising authority over all traffic exchanged with a local exchange carrier," specifically "including intrastate calls" that had formerly been under state commission authority. *Id.*

Verizon reinforces its claim that 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.” Thus, Verizon argues that in light of this federal preemption, the question of whether Armstrong’s traffic is VoIP-PSTN traffic as that term is defined in the FCC’s regulations at 47 C.F.R. §51.701(b)(3) is not a matter that should be decided by the Commission. Verizon Exc. at 20.

Verizon submits that in finding that the FCC contemplated an interpretative role for the states and left implementation to the states, the ALJ reached too broad a conclusion regarding the states’ role with regard to the FCC’s intercarrier compensation rules. Verizon reasons that in the *USF/ICC Transformation Order*, the FCC instructed the state commissions to: (1) help implement its new rate regime by incorporating the FCC-required rates and rate reductions into intrastate tariffs; (2) review those tariff filings; (3) require carriers to provide additional information and/or refile intrastate access tariffs that do not follow the framework or rules adopted by the FCC; and (4) 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. Verizon Exc. at 20 (citing *USF/ICC Transformation Order* at ¶ 13). In Verizon’s view, 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 set of rules. According to Verizon, piecemeal state interpretations of the FCC’s intercarrier compensation rules would undercut the FCC’s policy of establishing “a more unified approach” to intercarrier compensation. Verizon further opines that it would be a “waste of administrative and party resources” for the Commission to decide these issues of federal law because the dissatisfied party in this proceeding would likely appeal to a federal court, which would review any Commission decision, *de novo*, and ultimately defer to the interpretation of the FCC. Verizon Exc. at 20-21.

Next, Verizon restates its position that even if the Commission’s jurisdiction has not been preempted by federal law, then the Commission still lacks authority over this issue in light of the passage of the VoIP Freedom Act. Verizon insists that Armstrong is not a “local exchange telecommunications company” under the applicable law. Verizon remains of the opinion that because this term is not defined in the VoIP Freedom Act, the Commission must look to “other statutes upon the same or similar subjects.” Verizon insists that the best source of a definition for this same term is Chapter 30 of the Code, under which the Commission has already decided that the defined term “local exchange telecommunications company” applied only to ILECs and does not include CLECs such as Armstrong. Accordingly, Verizon claims that while the VoIP Freedom Act preserves the Commission’s jurisdiction over switched access and intercarrier compensation rates for ILECs, it does not do so for CLECs, including Armstrong. Further, Verizon submits that the ALJ pointed to no common usage of the term “local exchange telecommunications company” aside from its usage in Chapter 30. In Verizon’s view, Chapter 30 is the only logical place to look for the meaning of this term. Verizon Exc. at 20-21.

In its Replies to Exceptions, Armstrong rebuts that the arguments Verizon has made in its Exception No. 4 are nothing more than a restatement of the arguments it has previously made on the record in this proceeding. Armstrong takes the position that the ALJ thoroughly weighed, and properly rejected Verizon’s arguments in his Initial Decision. Armstrong submits that contrary to Verizon's claims, the Commission is not federally preempted from deciding the question of whether the traffic at issue is VoIP-PSTN traffic. Rather, Armstrong contends that the ALJ correctly ruled that although the FCC, in the *USF/ICC Transformation Order*, established the category of VoIP-PSTN traffic, it left implementation of the *USF/ICC Transformation Order* to the states. Armstrong also argues that in light of Armstrong’s continued obligation to file tariffs with the Commission for the purpose of offering intrastate switched access services and the Commission's authority and obligation to review and approve those

tariffs, 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 intercarrier compensation framework via Armstrong's intrastate tariff. In Armstrong's view, if the Commission were to accept Verizon's position that the role of the states is "too broad," then the Commission would be reduced to a role of "rubber stamping" Verizon's position. Armstrong contends that this is not at all what the FCC intended. Armstrong R. Exc. at 14-15.

Next, Armstrong argues that although the Tenth Circuit upheld the *USF/ICC Transformation Order*, Verizon's citation to the *Tenth Circuit Decision* as affirmation that the FCC's authority preempts the states' involvement with intercarrier compensation issues is inapposite. In this regard, Armstrong claims that this instant proceeding is not about the Commission usurping the FCC's authority over intrastate access charges. Rather, Armstrong argues that after evaluating 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, the Commission can require Verizon to pay one of two rates required by the FCC: (1) the lower interstate rates applicable to VoIP-PSTN traffic; or (2) the higher intrastate rates applicable to traffic exchanged in traditional TDM format between January 1, 2012 and July 1, 2013. As will be discussed in Section V.B, *infra*, Armstrong submits that based upon his analysis of Armstrong's network and service delivery, the ALJ has correctly found that the higher intrastate rates that were in effect during the Dispute Period are payable to Armstrong. Further, Armstrong asserts that Verizon's assertion that the Commission is wasting administrative and party resources to decide issues of federal law is nothing more than a thinly veiled threat aimed at coercing the Commission into issuing a decision favorable to Verizon. Armstrong R. Exc. at 15-17.

Finally, citing to arguments set forth in its own Reply Briefs, Armstrong reinforces its position that the VoIP Freedom Act does not divest jurisdiction from this

Commission to decide the substantive question in this proceeding, *i.e.* whether Armstrong’s traffic is VoIP-PTSN traffic. Armstrong R. Exc. at 17 (citing Armstrong R.B. at 16-21). Accordingly, Armstrong submits that the Commission should deny Verizon’s Exception No. 4.

4. Disposition

We are not persuaded by the arguments of Verizon that this Commission’s jurisdiction over the subject matter of this proceeding has been barred by either federal or state law. First, we concur with Armstrong and the ALJ that although the FCC, through the *USF/ICC Transformation Order*, established the new category of VoIP-PSTN traffic, the FCC clearly contemplated an interpretative rule for the states in applying the directives it set forth. We find this to be evident in our review of several passages of the *USF/ICC Transformation Order*. In Paragraph 776, the FCC noted that “states will retain important responsibilities in the implementation of a bill-and-keep framework.” The FCC continued that “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.” *USF/ICC Transformation Order* at ¶ 803. Additionally, the FCC noted, as follows:

[W]e preserve a role for tariffing charges for toll traffic during the transition. Pursuant to the transition set forth above, we permit LECs to tariff the default charges for intrastate toll traffic at the state level, and for interstate toll traffic with the Commission, in accordance with the timetable and rate reductions set forth above.

* * *

Because carriers will be revising intrastate access tariffs to reduce rates for certain terminating switched access rate

elements, and capping other intrastate rates, states 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 and to ensure carriers are not taking actions that could enable a windfall and/or double recovery, state commissions should monitor compliance with our rate transition; review how carriers reduce rates to ensure consistency with the uniform framework[.]

* * *

Thus, we will be working in partnership with states to monitor carriers' compliance with our rules, thereby ensuring that consumers throughout the country will realize the tremendous benefits of ICC reform.

Id. at ¶¶ 812, 813 (footnotes omitted). Thus, we find that contrary to Verizon's arguments, the FCC charged the states with applying federal law. In addition, we agree with Armstrong that in charging the states with applying federal law, the FCC did not reduce the role of the states to merely "rubber stamping."

In our view, this proceeding centers on the implementation of the FCC's intercarrier compensation directives, as applied to Armstrong's intrastate switched access tariffed that was in effect during the Dispute Period. This Commission approved this tariff consistent with the FCC's intercarrier compensation framework. As Armstrong observed, implementation and enforcement of the FCC's rules will involve interpretation. Therefore, it is within our purview to evaluate the nature of the traffic on Armstrong's network during the Dispute Period and to apply either the lower interstate rates that were then applicable to VoIP-to-PSTN traffic or the higher intrastate rates that were applicable to traffic exchanged in traditional TDM format. Accordingly, only if we were to rule on

the nature of Armstrong’s traffic and then require Verizon to pay some rate other than that authorized by the FCC for the Dispute Period would we be operating outside of our jurisdiction. *See* Armstrong R. Exc. at 15.

We likewise find that although we are barred under the VoIP Freedom Act from regulating the retail rates, terms, and conditions of VoIP or IP-enabled services, the VoIP Freedom Act does not preempt this Commission from determining the nature of the traffic at issue in this proceeding or from applying the appropriate intercarrier compensation thereto.⁹ Section 6 of the VoIP Freedom Act states, in pertinent part, as follows:

Nothing in this Act shall be construed to modify any of the following:

(1) The Authority of a Commonwealth department, agency, or Commission to enforce applicable federal or state statutes or regulations relating to any of the following:

* * *

(IV) Switched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company.

(V) Rates, terms, or conditions of protected services provided under tariffs which are subject to approval by the Pennsylvania Public Utility Commission.

73 Pa. C.S. § 2251.6(1)(iv-v). We find Verizon’s argument that the above powers and duties retained apply only to ILECs to be inapposite. Verizon argues that because the term “local exchange telecommunications company” is not specifically defined in the

⁹ As previously noted, we shall specifically examine whether the traffic exchanged on Armstrong’s network is VoIP-PSTN traffic in Section V.B, *infra*.

VoIP Freedom Act, the definition, as set forth in Chapter 30 must be applied. We disagree. As the ALJ observed, Chapter 30 was an ILEC-specific piece of legislation which charged ILECs with modernizing their networks and which set forth certain incentives to do so. Therefore, within Chapter 30, a local exchange telecommunications company is defined as “[a]n incumbent carrier authorized by the commission to provide local exchange telecommunications services.” 66 Pa. C.S. § 3012.

The preamble to the VoIP Freedom Act describes this piece of legislation as an Act “[p]rohibiting the regulation of [VoIP] and other [IP]-enabled products . . .” However, as the ALJ observed, we find no indication that the Pennsylvania Legislature, in preserving the above powers and duties, intended to restrict the preservation of our authority only with respect to ILECs. This Commission has jurisdiction over **both** ILECs and CLECs, including wholesale CLECs such as Armstrong, and the associated tariffs they have on file with the Commission. It is through these tariffs that all ILECs and CLECs under our jurisdiction outline the rates, terms, and conditions of their switched access services. Additionally, all Pennsylvania ILECs and CLECs filed revisions to their switched access tariffs, for review by the Commission, to implement the transition to a bill and keep compensation regime that was set forth in the *USF/ICC Transformation Order*. Therefore, we find that the VoIP Freedom Act preserved our authority to enforce applicable federal or state statutes or regulations regarding the switched access rates for **all** local exchange carriers in Pennsylvania.

Based on the forgoing, we find that this Commission has the authority under both federal and state law to address the underlying compensation issue below. Accordingly, we shall deny Verizon’s Exception No. 4.

B. Whether The ALJ erred In Finding That Armstrong’s Traffic Should Not Be Designated As VoIP-PSTN Traffic

In this section of this Opinion and Order, we shall examine the appropriate intercarrier compensation rates that should be payable to Armstrong by Verizon for the termination of intrastate toll traffic exchanged between January 1, 2012 and June 30, 2013, *i.e.* the Dispute Period. This Dispute Period coincided with the December 29, 2011 effective date of the *USF/ICC Transformation Order*, which set forth the FCC’s prospective intercarrier compensation rules. The Parties’ dispute centers on a single substantive issue: whether Armstrong’s services meet the FCC’s definition of VoIP-PSTN traffic. The FCC, through the *USF/ICC Transformation Order*, required that beginning January 1, 2012, intrastate or interstate, interexchange traffic that originated or terminated in IP format (*i.e.* VoIP-PSTN traffic) was to be exchanged at rates equal to a carrier’s interexchange switched access rates, while intrastate interexchange traffic that was not VoIP-PSTN traffic could be terminated at a carrier’s intrastate rates during the eighteen months that coincided with the Dispute Period. As of July 1, 2013, the FCC rules required carriers to reduce their intrastate rates for terminating switched access service to the same level as their interstate rates. As the transition to bill and keep continued, with rate reductions effective each July 1 until the transition was complete, the terminating intrastate and interstate rates were the same from that time forward. 47 C.F.R. § 51.911(c).¹⁰ The total amount in dispute is \$996,584 in switched access charges, which Armstrong claimed Verizon improperly withheld during the Dispute Period. Armstrong Supp. M.B. at 2; Verizon Supp. M.B. at 1; Verizon St. 2 at 3.

¹⁰ In accordance with the *USF/ICC Transformation Order*, ILECs and LECs continued the phase down of their terminating switched access rates until they were reduced to bill and keep. This transition was completed for price cap carriers on July 1, 2018; and for rate of return carriers on July 1, 2020. *USF/ICC Transformation Order* at ¶ 801, Verizon Supp. M.B. at 7. Because intrastate switched access rates were at parity with interstate switched access rates from July 1, 2013 forward, there is no dispute between the Parties regarding the appropriate intercarrier compensation after June 30, 2013, regardless of whether or not such traffic was VoIP-PSTN traffic.

1. Positions of the Parties

Armstrong submitted that its service is a telecommunications service, which is defined in *TA96* as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” *Armstrong M.B.* at 19, 29 (citing 47 U.S.C. § 153 (53)). Armstrong continued that a telecommunications service contains an intrastate component that is eligible for switched access payments. Armstrong noted that Verizon is required under the *USF/ICC Transformation Order* to pay switched access charges for the termination of intrastate toll traffic exchanged during the Dispute Period regardless of whether the traffic originated or terminated in IP-format. Although Armstrong acknowledged that the lower interstate access charges were payable for traffic that is properly classified as VoIP-PSTN traffic, it insisted that the service it provides does not originate or terminate in IP-format, and thus, is not VoIP-PSTN traffic. Therefore, Armstrong took the position that the higher, per-minute, intrastate access rates are payable for the intrastate toll traffic it terminated to Verizon during the Dispute Period. *Armstrong M.B.* at 19; *Armstrong Supp M.B.* at 6.

According to Armstrong, simple reliance on whether IP technology is present is not determinative of whether the traffic exchanged is VoIP-PSTN traffic. In this regard, Armstrong stated that the *USF/ICC Transformation Order* established the new category of VoIP-PSTN traffic, which is codified in 47 C.F.R. § 51.701(b)(3), and is defined, in pertinent part as “... telecommunications traffic exchanged between a LEC and another telecommunications carrier in [TDM] format that ... originates from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment.” Armstrong insisted that this is not the type of traffic that is exchanged on its network. *Armstrong Supp. M.B.* at 6; *Armstrong R.B.* at 8-9.

Armstrong explained that while its network uses IP technology, this technology as it relates to Armstrong's voice services is limited to inter-networking functions within its own network. In this regard, Armstrong argued that when traffic originates with or terminates to the customers of Armstrong's cable telephony affiliate using Armstrong's exchange access facilities and arrangements with its affiliate, the end-user customers of its cable telephony affiliate specifically do not need (*i.e.*, require) IP-compatible customer premises equipment (CPE) to use the voice service. Rather, Armstrong stated that all conversions are accomplished by Armstrong's equipment that is located, owned, and operated within its own network. Armstrong Supp. M.B. at 7; Armstrong R.B. at 9-10.

More specifically, Armstrong provided that while it does accept the call in analog TDM signaling format and converts it to IP format, this is done only for the purpose of transport within its own network. Armstrong stated that the call is then converted back to TDM on the MTA equipment owned by its cable telephony affiliate and located on its own side of the network demarcation point, before being delivered to the end user customer and received on an analog handset. Armstrong continued that the identical backward conversion is accomplished in its network after accepting the signal in analog format from the end-user. Thus, Armstrong explained, the call is received by Armstrong in traditional circuit-switched format and is terminated to the end-user customer in this same format, specifically so that the customer can use standard inside wire and telephone equipment to use the service. Armstrong M.B. at 36.

Based on the above, Armstrong contended that, when analyzed, it is irrefutable that its traffic is **not** VoIP-PSTN traffic. Armstrong opined that although Verizon is aware of Armstrong's position that its services are not IP-originated or terminated, Verizon nowhere explains why its interpretation, *infra*, is a fair reading of the *USF/ICC Transformation Order* as it relates to Armstrong's access traffic. Armstrong R.B. at 4, 15. Therefore, Armstrong posited that, rather than being instructed to institute

the immediate phase-down of its rates to interstate levels for all traffic exchanged during the Dispute Period, the better approach would be for Armstrong to follow the CLEC Benchmarking Rule.¹¹ Armstrong explained that, as set forth in the *USF/ICC Transformation Order*, the FCC permitted CLECs to step their rates down in a “glide path” at the same time, and in the same magnitude, as the ILECs serving the same geographic area until an eventual transition to a bill and keep compensation regime. *Id.* at 15 (citing 47 C.F.R. § 61.26; *USF/ICC Transformation Order* at ¶ 870).

In reply, Verizon reinforced its argument that its primary position in this proceeding was that the Commission is barred by both federal and state law from adjudicating Armstrong’s Complaint. However, in response to Armstrong’s position above, Verizon countered that if the Commission finds that it has the jurisdiction to rule on the merits of Armstrong’s Complaint, then it should find that the traffic the Parties exchanged during the Dispute Period was VoIP-PSTN traffic. Verizon submitted that it has already paid more than \$1.5 Million to Armstrong for the traffic terminated during the Dispute Period based upon payment at the interstate switched access rates that were in effect, as required by the FCC’s rules for VoIP-PSTN traffic. Verizon insisted that it correctly paid these rates to Armstrong, consistent with how it paid all other cable telephony providers in Pennsylvania for VoIP-PSTN traffic exchanged during the eighteen-month period from January 1, 2012 to June 30, 2013. Thus, Verizon asserted that Armstrong’s claim for an additional \$996,584 based on the intrastate terminating switched access rates that were in effect during the Dispute Period should be denied. Verizon Supp. M.B. at 1-2, 6-7.

According to Verizon, the MTA of Armstrong’s cable telephony affiliate is a cable modem and is IP-compatible CPE under federal law, which results in Armstrong’s traffic being properly classified as VoIP-PSTN traffic. Verizon R.B. at 4;

¹¹ An explanation of the CLEC Benchmark Rule will be provided *infra*.

Verizon Supp. M.B. at 11. In this regard, Verizon submitted that in the *USF/ICC Transformation Order*, the FCC explained that 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).” Verizon Supp M.B. at 9 (citing *USF/ICC Transformation Order* at ¶111, Figure 3). Verizon reasoned that the MTA of Armstrong’s cable telephony affiliate fits squarely within the FCC’s description of CPE because it is a device installed at the customer’s home that connects Armstrong’s broadband network to the telephone wiring inside an end-user customer’s home. Verizon stated that at the MTA, the customer’s voice, an analog signal, is converted to IP packets for outgoing calls, and the IP packets are converted to analog signals for incoming calls. Verizon continued that the signals are carried on the network of Armstrong’s cable affiliate, in IP, which is necessary to communicate with AUI’s head-end equipment. As a result, Verizon argued that the MTA is the IP-compatible CPE managed by a broadband provider, in this case Armstrong’s cable telephony affiliate, that serves as the last connection point between Armstrong’s managed IP network and the end user customer, and includes the function of a cable modem and/or ONT. Verizon R.B. at 4-5. Thus, Verizon claimed that Armstrong’s argument that the CPE for its cable telephony service is the customer’s telephone handset, and not the MTA, directly conflicts with the FCC’s holding that the handset or other device used in the home that is connected to the modem is a “Consumer Device,” not “Customer Premises Equipment.” Verizon Supp M.B. at 9 (citing *USF/ICC Transformation Order* at ¶ 111, Figure 3).

Verizon posited that Armstrong’s argument for why its traffic is not VoIP-PSTN traffic seems to turn exclusively on the proposition that CPE can only refer to equipment actually owned by the end user customer. In Verizon’s view, although Armstrong contends that it owns the MTA is part of its own network such that it cannot be CPE, the FCC, in paragraph 111 of the *USF/ICC Transformation Order*, rejected the notion that CPE must be owned by the customer when it described the CPE in this service context as “typically managed by a broadband provider.” Verizon claimed that because

the FCC's regulations do not contain a definition of CPE, the *TA96* definition, set forth in 47 USC § 153(16) must be applied. Verizon continued that *TA96* defines CPE as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications." According to Verizon, this definition does not require customer ownership, but only that the equipment be "employed on the premises of a person." In Verizon's view, the MTA satisfies this standard. Verizon Supp. M.B. at 10-11.

2. Initial Decision

The ALJ noted that Armstrong's Complaint consisted of five separate, but related counts, wherein Armstrong alleged, as follows:¹²

- (1) Verizon Refused to Pay Tariffed Access Charges in Violation of State Law;
- (2) Verizon Refused to Pay Tariffed Access Charges In Violation of Armstrong's State Access Tariff;
- (3) Verizon Attempted To Negotiate A Different Rate Than Specified in Armstrong's State Access Tariff in Violation of State Law;
- (4) Verizon Failed to File a Dispute With the Commission in Violation of Armstrong's State Access Tariff and State Law; and
- (5) Verizon Refused to Pay Reciprocal Compensation in Breach of the Parties' ICAs

¹² The following five counts, described by the ALJ, are set forth in Armstrong's original Complaint. See Armstrong Complaint at ¶¶ 27-39. As previously noted, on February 6, 2012, the Parties filed a Partial Settlement Letter stating that they had resolved all claims with regard to traffic exchanged prior to December 31, 2011. Such claims were withdrawn from this proceeding, with prejudice and marked satisfied. Therefore, the only traffic at issue in this proceeding is the traffic exchanged during the Dispute Period, and we must determine whether such traffic meets the FCC's definition of VoIP-PSTN traffic.

In addition, the ALJ noted that Armstrong sought the following relief:

- (1) That the Commission sustain Armstrong's Complaint;
- (2) That the Commission direct Verizon to immediately pay Armstrong all amounts outstanding for services provided, plus late payment charges and attorney fees, as specified in Armstrong's State Access Tariff and the Verizon ICAs;
- (3) That the Commission direct Verizon and affiliates to cease sending any traffic to Armstrong, and cease requiring Armstrong to send 800 traffic to Verizon unless and until such time as Verizon pays to Armstrong all amounts outstanding under Paragraph 2;
- (4) That the Commission direct that, in the future, Verizon shall timely pay Armstrong all amounts for services provided; and
- (5) That the Commission grant such other relief as may be just and reasonable

I.D. at 24.

The ALJ explained that with respect to Armstrong's request that the Commission direct Verizon to pay attorney fees, the Commission is not authorized to award such fees. Thus, the ALJ denied this request. I.D. at 25.

Next, the ALJ examined the balance of Armstrong's Complaint in light of each Party's position regarding the issue of the appropriate compensation for the traffic exchanged. According to the ALJ, if one concludes, as he has, *supra*, that the Commission has jurisdiction over this proceeding, then this issue becomes relatively straightforward. In this regard, the ALJ also concluded that by its action in unilaterally refusing to pay the rates that were in effect, as set forth in Armstrong's lawful switched

access tariff, Verizon has violated Section 1303 of the Code, 66 Pa. C.S. § 1303 regarding adherence to the rates specified in a utility's tariff. I.D. at 25.¹³

The ALJ agreed with Armstrong that a finding that a reduction to interstate access rates, as outlined in the *USF/ICC Transformation Order*, immediately applied to Armstrong's intrastate access rates during the Dispute Period would require a finding that Armstrong's traffic is VoIP-PSTN traffic. However, the ALJ accepted, as credible, Armstrong's position that the calls on Armstrong's network neither originate nor terminate in Internet protocol, but rather that the protocol conversion occurring on the Armstrong network is simply an intra-network change to which the end-user customer is indifferent. As such, the ALJ concurred with Armstrong that its traffic is not VoIP-PSTN traffic, as defined by the FCC's regulations in 47 C.F.R § 51.701(b)(3), *supra*. I.D. at 26-27.

The ALJ noted Armstrong's observation that in the *USF/ICC Transformation Order*, the FCC established a "CLEC Benchmarking Rule" wherein it set a CLEC's tariffed interstate access charges at a level no higher than the tariffed rate for such services offered by the ILEC serving the same geographic area. The ALJ explained that the *USF/ICC Transformation Order* specified that this provision would continue under the transition to a "bill and keep" compensation regime. I.D. at 27-28 (citing 47 C.F.R. § 61.26; *USF/ICC Transformation Order* at ¶ 807). Thus, the ALJ stated, under this provision, Armstrong, as the CLEC, would follow the access rates of Verizon, the underlying ILEC, as they transitioned downward to bill and keep. According to the ALJ, because Armstrong's traffic is not VoIP-PSTN traffic, no "flash-cut" to interstate

¹³ In his Initial Decision the ALJ, in presenting the positions of the Parties cited to Armstrong's Motion for Partial Summary Judgment and Verizon's Answer thereto. In doing so, the ALJ described certain Armstrong claims related to traffic exchanged between the Parties prior to and including December 31, 2011. As previously noted, these claims were withdrawn and deemed satisfied in the Partial Settlement Letter.

access rates would apply for the traffic exchanged during the Dispute Period. I.D. at 28, 34.

The ALJ also agreed with Armstrong that although Verizon is aware of Armstrong's position in this proceeding that its services are not IP originated or terminated, Verizon does not explain why its interpretation that Armstrong must *immediately* reduce all intrastate access compensation to the interstate level is a fair reading of the *USF/ICC Transformation Order* as it relates to Armstrong access traffic. The ALJ opined that if the intent of the FCC was to classify all traffic to and from Armstrong's cable affiliate, or all cable company services, as "VoIP-PSTN traffic," the CLEC Benchmarking Rule did not do so. In the ALJ's view, there is no indication that the FCC intended its new VoIP-PSTN traffic classification to be so broad. Rather, the ALJ concluded, the FCC set forth fact-specific definitions wherein each carrier's network must be reviewed before the traffic at issue can be classified as either VoIP-PSTN traffic or traditional traffic. The ALJ found that applying such definitions to the traffic at issue in this current proceeding, it is clear that the traffic on Armstrong's network is not "VoIP-PSTN traffic," but is instead traffic of an ordinary CLEC that happens to use modern technology in the middle of its network. I.D. at 27, 28.

The ALJ also found that the Commission, and not Verizon, should decide the applicability of Armstrong's tariff and should define its voice service under existing law. According to the ALJ, the definition of VoIP-PSTN traffic would have some application to Armstrong if the carrier on the other end of the call (*i.e.*, the carrier sending traffic to or receiving traffic from Armstrong) could be considered a VoIP carrier under the new definition. In this scenario, the ALJ explained, Armstrong, along with all other ILECs and CLECs, would charge the interstate switched access rate during the Dispute Period. However, the ALJ concluded that based upon the facts established by Armstrong in this proceeding, the traffic originating from and terminating to the customers of

Armstrong's cable affiliate using Armstrong's exchange access facilities are not "VoIP-PSTN traffic" as defined by the FCC. I.D. at 29-31.

Additionally, the ALJ reinforced his finding that Armstrong made clear that the customers of its cable affiliate specifically do not need IP-compatible CPE to use the cable telephony service because all conversions are accomplished by Armstrong equipment located, owned, and operated within its network. Thus, the ALJ reinforced his conclusion that Armstrong's 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. I.D. at 31 (citing *USF/ICC Transformation Order* at ¶ 940).¹⁴

Next, the ALJ rejected the position of Verizon that Armstrong's MTA fits squarely within the FCC's description of CPE. Instead, the ALJ found that the location of the MTA was provided by the Armstrong witnesses, establishing that the MTA is used on the Armstrong (*i.e.* carrier) side of the network demarcation point. I.D. at 31 (citing Tr. at 80-82). According to the ALJ, the terms "originate" and "terminate" hold specific, precedential meaning. The ALJ continued that under the FCC's long-held "end-to-end analysis," a call originates at "the end point at the inception of a communication" and terminates at "the end point at its completion." I.D. at 31 (citing *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 Memorandum Opinion and Order, Adopted: November 9, 2004, Released: November 12, 2004 (Vonage Order)). The ALJ found that a call from a Verizon long distance customer, routed by Armstrong's terminating access service to a subscriber of Armstrong's cable telephony service, terminates at the customer's telephone in analog format, and does not, under any

¹⁴ The ALJ noted that the third component is that the traffic be "exchanged over PSTN facilities." The ALJ further noted that Verizon and Armstrong do exchange traffic over PSTN facilities. I.D. at 31, n.61.

description used by the FCC, “terminate” within the Armstrong network. The ALJ stated that if it did, the subscriber would be unable to access the communication because the communication would have terminated/ended within the Armstrong network.

I.D. at 31-32.

The ALJ restated that the *USF/ICC Transformation Order* has mandated interstate access charges for all VoIP-PSTN traffic. Thus, the ALJ continued, to the extent a cable operator delivered calls to its subscriber in IP format and, thereafter, requires the customer to use an IP device or CPE that provides the IP to analog conversion, that cable operator would also be terminating VoIP-PSTN traffic. The ALJ noted that the differences that exist between carriers’ networks is exactly why the analysis is designed by the FCC to be network specific. I.D. at 32.

The ALJ also noted that pursuant to 47 U.S.C. § 153, the FCC has defined CPE as “equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.” In addition, the ALJ stated that the FCC has defined telecommunications equipment as “equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).” I.D. at 32 (citing 47 U.S.C. § 153). The ALJ found that because Armstrong’s MTA is part of its network, it cannot be CPE. Rather, the ALJ concluded, the MTA, regardless of whether it is physically attached to the customer’s premise, is telecommunications equipment used by Armstrong to provide telecommunications services to its subscribers. The ALJ further noted that because the MTA is located on the carrier side of the demarcation point separating the carrier’s network from the customer’s equipment, this lends further support to a finding that the MTA cannot be CPE. I.D. at 32-33.

Finally, the ALJ stated that the FCC has held that the extent to which the protocol conversion is done within the carrier’s network, or by the customer via CPE, has

always been an important distinction, and is one which the FCC carried forward in the *USF/ICC Transformation Order* in defining VoIP-PSTN traffic. Therefore, the ALJ concluded that because any IP conversion is done within the Armstrong network, and not by the CPE, Armstrong's service is not an "information service," nor is it "VoIP-PSTN traffic" as the FCC defines that term. I.D. at 33.

Based on the forgoing, the ALJ found that Armstrong has met its burden of proof by demonstrating that Verizon violated the Code in unilaterally seeking to supplant a lawfully tariffed rate with one of Verizon's own devising in violation of 66 Pa. C.S. § 1303. Therefore, the ALJ recommended that Armstrong's Complaint, as amended by the Partial Settlement Letter withdrawing claims related to traffic exchanged before the Dispute Period, be sustained.¹⁵ I.D. at 34.

3. Exceptions and Replies

In its Exception No. 1, Verizon submits that contrary to the ALJ's conclusion, Armstrong's traffic is VoIP-PTSN traffic, as defined by the FCC in the *USF/ICC Transformation Order*. Thus, Verizon insists that beginning on January 1, 2012, such traffic was immediately subject to interstate switched access rates in accordance with the *USF/ICC Transformation Order*. Verizon reemphasizes that it has already compensated Armstrong at these rates for traffic that was exchanged during the Dispute Period. Similarly, Verizon objects to the ALJ's finding that Armstrong's service does not require IP-compatible CPE. Verizon claims that Armstrong does not deny that its cable telephony service depends on IP technology, unlike ordinary circuit-switched, TDM telephone service. Namely, Verizon notes that the voice traffic in

¹⁵ In his Initial Decision, ALJ Buckley treated the Partial Settlement Letter as an Informal Petition to Withdraw Claims. The ALJ recommended that the Informal Petition to Withdraw Claims with respect to traffic exchanged during periods prior to and including December 31, 2011 be granted. I.D. at 40, Ordering Paragraph No. 1.

Armstrong's cable telephony service undergoes two "protocol conversions" between IP format and TDM format as it travels between the end user and the PSTN: once at the MTA to allow an end-user customer of Armstrong's cable telephony affiliate to use an ordinary phone jack and handset, and once at the trunking gateway in Armstrong's central office so that Armstrong can exchange the traffic with another LEC's circuit switched network in TDM format. In Verizon's view, there is no question that Armstrong's MTA is IP-compatible CPE given its function to convert traffic from TDM format to IP format. Verizon Exc. at 5-9.

Next, Verizon submits that the ALJ's findings that Armstrong's MTA is not CPE, and that Armstrong's traffic is not VoIP-PSTN traffic, run contrary to the 2018 decision of the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) in *Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715, 717, 2018 U.S. App. LEXIS 25478 (8th Cir., 2018) (*Eighth Circuit Decision*). Verizon notes that the Eighth Circuit, in upholding a decision rendered by the United States District Court for the District of Minnesota – Minneapolis, discussed the cable telephony service of Charter Advance Services (Charter), known as Spectrum Voice. Namely, Verizon notes that the Eighth Circuit stated as follows:

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").

Verizon Exc. at 9 (citing *Eighth Circuit Decision* at 717). Thus, according to Verizon, the Eighth Circuit found that an MTA is CPE and rejected the finding of the Minnesota state commission that an MTA was part of Charter's network. Verizon Exc. at 9-10.

Verizon continues that under FCC precedent, CPE is, by definition, outside the carrier's network. In addition, Verizon argues that the Eighth Circuit's conclusion that the MTA is CPE confirms the FCC's own explanation in the *USF/ICC Transformation Order* as to what it meant by the term "Internet protocol-compatible customer premises equipment." Verizon restates that in the *USF/ICC Transformation Order*, the FCC listed examples of CPE typically managed by a broadband provider, including DSL modem, cable modem, satellite modem, and ONT. Verizon Exc. at 10 (citing *USF/ICC Transformation Order* at ¶ 111, Figure 3). Verizon claims that to the extent Armstrong argues that the CPE for its cable telephony service is not the MTA, but is instead the customer's telephone handset, this runs contrary to the FCC's holding that a handset is a "consumer device" and not CPE. Verizon Exc. at 10.

Verizon also maintains that because the FCC's regulations do not contain a definition of CPE, the following definition, outlined in *TA96*, applies:

The term "customer premises equipment" means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications

Verizon Exc. at 11 (citing 47 USCS § 153(16)). Verizon submits that this definition does not require customer ownership, but only that the equipment be "employed on the premises of a person." Accordingly, Verizon emphasizes its position that an MTA is IP-compatible CPE under federal law such that Armstrong's traffic is VoIP-PSTN traffic. Verizon Exc. at 11.

Next, Verizon disputes the ALJ's finding that the calls at issue in this proceeding neither originate nor terminate in Internet protocol, but rather the protocol conversion occurring on the Armstrong network is simply an intra-network change to which the customer is completely indifferent. According to Verizon, the ALJ's conclusion that this traffic is not VoIP-PSTN traffic, but is instead traffic of an ordinary

CLEC that happens to use modern technology in the middle of its network, is erroneous given that Armstrong has admitted that it is a cable telephony provider that uses IP technology. Verizon posits that the ALJ's reference to "intra-network 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. Verizon Exc. at 12. However, Verizon asserts that in the *Eighth Circuit Decision*, 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 MTA, 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. *Id.* (citing *Eighth Circuit Decision* at 720).

Verizon claims that the above holds true with Armstrong's service. In Verizon's view, because Armstrong's service terminates to an end-user customer of a service that requires Internet protocol CPE, then the traffic at issue is VoIP-PSTN traffic for intercarrier compensation purposes under the FCC's rules. As such, Verizon contends that it is not necessary to reach a conclusion as to whether or not the service is an information service generally. Verizon Exc. at 11-12.

Verizon further claims that to the extent the ALJ concluded that Armstrong's cable telephony service is unique or different from the telephony services provided by other cable companies, this conclusion is erroneous. For example, Verizon argues that the Eighth Circuit's description of Charter's Spectrum Voice Service, when compared to Armstrong's network description, indicates that they are identical in all material respects. In Verizon's view, Armstrong's service is no different than the cable telephony service offered by any other Pennsylvania cable telephony provider. Verizon argues that because such providers classify their traffic as VoIP-PSTN, the ALJ erred by

ruling to the contrary. Verizon submits that all other cable VoIP provider operators in Pennsylvania utilize equipment like the MTA to enable their IP networks to communicate through ordinary handsets. Verizon stresses its position that unlike Armstrong, these cable VoIP providers agree that their traffic is VoIP-PSTN traffic under the FCC's rules. Verizon Exc. at 13.

Finally, Verizon points to the tariff filings by the CLEC intermediaries for other cable telephony providers in Pennsylvania, including Comcast, Time Warner Cable, and Sprint, indicating that they uniformly take the position that traffic originated by or terminated to them is VoIP-PSTN traffic. Therefore, Verizon submits that if the Commission determines that it has jurisdiction over this proceeding, then it should reverse the ALJ's conclusions and should find that Armstrong's traffic is also VoIP-PSTN traffic. Verizon Exc. at 13-14.

In its Replies to Exceptions, Armstrong responds that the ALJ found, based upon the substantial evidentiary record, that Armstrong's MTA is provisioned on the carrier side (*i.e.* Armstrong's side) of the network, and thus cannot be CPE. In addition, Armstrong argues that the ALJ correctly concluded that its traffic is not VoIP-PSTN traffic. Armstrong submits that the arguments Verizon sets forth in its Exception No. 1 are merely a restatement of Verizon's prior arguments already on record in this proceeding. Armstrong reasons that even Verizon's discussion of the *Eighth Circuit Decision* fails to demonstrate that Armstrong's traffic is VoIP-PSTN traffic. Armstrong R. Exc. at 3.

In this regard, Armstrong contends that the *Eighth Circuit Decision* is specific to the facts surrounding the services offered by Charter's affiliate, Spectrum Voice, in Minnesota, which are distinguishable from those offered by Armstrong and its cable telephony affiliate in Pennsylvania. Armstrong continues that for nearly three decades, the FCC has held that the question of whether a service, or network

configuration, represents a telecommunications service versus an information service requires a fact-specific examination that is often done on a case-by-case basis. Armstrong Exc. at 3-4. Applying this approach to the *Eighth Circuit Decision*, Armstrong argues that the Eighth Circuit determined that Charter's embedded MTA (eMTA) was CPE, based upon the manner by which Charter configured its network in the context of its "Spectrum Voice" service. More specifically, Armstrong contends that the Eight Circuit determined that with respect to Charter's Spectrum Voice service, Charter's eMTA was located on the customer's side of the network demarcation point and was, therefore, "new CPE" that customers needed to utilize Spectrum Voice Service. Armstrong submits that because the Eight Circuit determined that the eMTA was CPE based upon the nature of Charter's service, Spectrum Voice was considered to be an information service. Armstrong R. Exc. at 4-5 (citing *Eighth Circuit Decision* at 720).

In contrast, Armstrong claims that the ALJ correctly made a different factual finding in this current proceeding, based upon substantial record evidence submitted by and specific to Armstrong. According to Armstrong, the ALJ correctly concluded that Armstrong's MTA is on the carrier-side (*i.e.* the Armstrong side) of the network demarcation point such that it cannot be CPE. Armstrong continues that the ALJ did not reach this conclusion based simply on the fact that Armstrong owns the MTA. Rather, Armstrong submits that the ALJ evaluated the facts of this proceeding in light of the FCC's rules defining the demarcation between Armstrong's network and other equipment at the customer's premises and then applied the FCC's definition to those facts, based on the FCC's direction to evaluate them on a case-by-case basis. Armstrong reasons that the ALJ then found that Armstrong's MTA is telecommunications equipment, and not CPE. Further, Armstrong asserts that the ALJ described Armstrong--specific facts to support his conclusion, including his finding that Armstrong's traffic does not meet two of the three fundamental components necessary to be classified as VoIP-PSTN traffic, as defined by the FCC. Armstrong R. Exc.at 5-6.

Next, Armstrong submits that Verizon has offered no evidence to indicate that Armstrong and Charter provision their networks or use their MTAs in the same fashion. In addition, Armstrong refutes Verizon's claim that Armstrong's service is no different than the cable telephony service offered by any other Pennsylvania cable telephony provider, arguing that Verizon failed to cite to any record evidence to support this claim. Armstrong continues that Verizon did not attempt to compare Armstrong's specific network architecture with the networks of other these providers. Armstrong R. Exc. at 6-7.

Armstrong takes the position that whether traffic originated or terminated by other Pennsylvania cable companies or by Charter in Minnesota is VoIP-PSTN traffic is irrelevant and immaterial to the central question in this proceeding as to whether Armstrong's traffic satisfies the FCC's definition of VoIP-PSTN traffic. Armstrong reinforces its position that the traffic at issue in this proceeding fails to meet this definition. Armstrong insists that it identified unique characteristics of its network to indicate that its MTA is used as a critical component of its network such that it is telecommunications equipment, and not CPE. Therefore, Armstrong submits that the Commission should deny Verizon's Exception No. 1. Verizon R. Exc. at 7-8.

In its Exception No. 2, Verizon claims that the ALJ failed to address Armstrong's inconsistent treatment of its cable telephony service. In this regard, Verizon argues that the ALJ has overlooked that Armstrong has treated its retail cable telephony service as an unregulated service such that it has not requested a certificate of public convenience and that it does not tariff its voice products. Verizon notes that, at the same time, Armstrong denies that its traffic is VoIP-PSTN traffic for intercarrier compensation purposes. According to Verizon, if Armstrong 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 Exc. at 14-15.

Verizon restates its objection to the ALJ's conclusion 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." Verizon Exc. at 15 (citing 73 P.S. § 2251.4; I.D. at 14-15). Verizon reasons that if such a finding were correct, then Armstrong's cable affiliate would have to operate as a regulated voice provider in Pennsylvania, which it currently does not do. Verizon Exc. at 15.

In addition, Verizon reiterates its objection to the ALJ's findings that: (1) Armstrong's cable telephony services calls do not "originate/terminate in IP" and a "broadband connection from the user's location" is not required; and (2) Armstrong's traffic is not VoIP, but rather "is traffic of an ordinary CLEC that happens to use modern technology in the middle of its network." In Verizon's view, if the ALJ is correct in concluding that Armstrong's service is not subject to the VoIP Freedom Act and is not "VoIP-PSTN" traffic, then the ALJ has erred by failing to address 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 that are applicable to providers of regulated voice service. Verizon Exc. at 16.

In its Replies to Exceptions, Armstrong counters that the ALJ was correct to conclude that Armstrong's traffic is not VoIP-PSTN traffic and that it is not subject to the VoIP Freedom Act. According to Armstrong, Verizon, in its Exception Number 2, has attempted to complicate the relatively straightforward analysis of the network architecture Armstrong uses to terminate the Verizon traffic at issue in this proceeding by attempting to point to the retail, end-user services offered by Armstrong's cable telephony affiliates. Armstrong insists that 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. Namely, Armstrong argues that its affiliate AUI does not provide voice telephony services in Pennsylvania and does not provide the switched

access service that Verizon purchases to originate or terminate its toll traffic. Rather, Armstrong states that, as a wholesale CLEC, it provides the switched access services that Verizon purchases, while its affiliate ADS, a subsidiary of AUI, provides voice telephony services to Armstrong's end users. Armstrong R. Exc. at 9-10, 11.

Armstrong further contends that the manner in which other Pennsylvania cable companies treat their retail cable telephony service has no bearing on the validity of Armstrong's position in this proceeding. Instead, Armstrong argues that the FCC's definition of VoIP-PSTN traffic is technology specific to the service being offered by the company at issue. Armstrong insists that its service specifically, and intentionally, does not require IP-compatible CPE, regardless of how other companies may provide their services or classify their traffic. Therefore, Armstrong submits that Verizon's position is not supported by the record evidence and must be rejected. Armstrong R. Exc. at 10-11.

4. Disposition

On consideration of the record evidence, we shall deny Verizon's Exception Nos. 1 and 2, consistent with the following discussion. At the outset, it is useful to restate that VoIP-PSTN traffic is defined as follows:

[T]elecommunications traffic exchanged between a LEC and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format . . . 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 § 51.701(b)(3). In Paragraph 940 of the *USF/ICC Transformation Order*, the FCC specified that VoIP-PSTN traffic is "traffic exchanged over PSTN facilities that originates and/or terminates in IP format." Additionally, in Paragraph 944 of the

USF/ICC Transformation Order, the FCC stated that “[d]efault charges for ‘toll’ VoIP-PSTN traffic will be equal to interstate access rates applicable to non-VoIP traffic, both in terms of the rate level and rate structure.”

The central dispute still to be resolved in this proceeding is whether Armstrong’s traffic originates and/or terminates in IP format. As noted above, underlying this dispute is the disagreement between the Parties as to whether the MTA constitutes CPE. Accordingly, determining the side of the network demarcation point on which the MTA is located is germane to establishing whether Armstrong’s traffic originates and/or terminates in IP format such that it should be classified as VoIP-PSTN traffic. We note that the term demarcation point is defined in *TA96*, as follows:

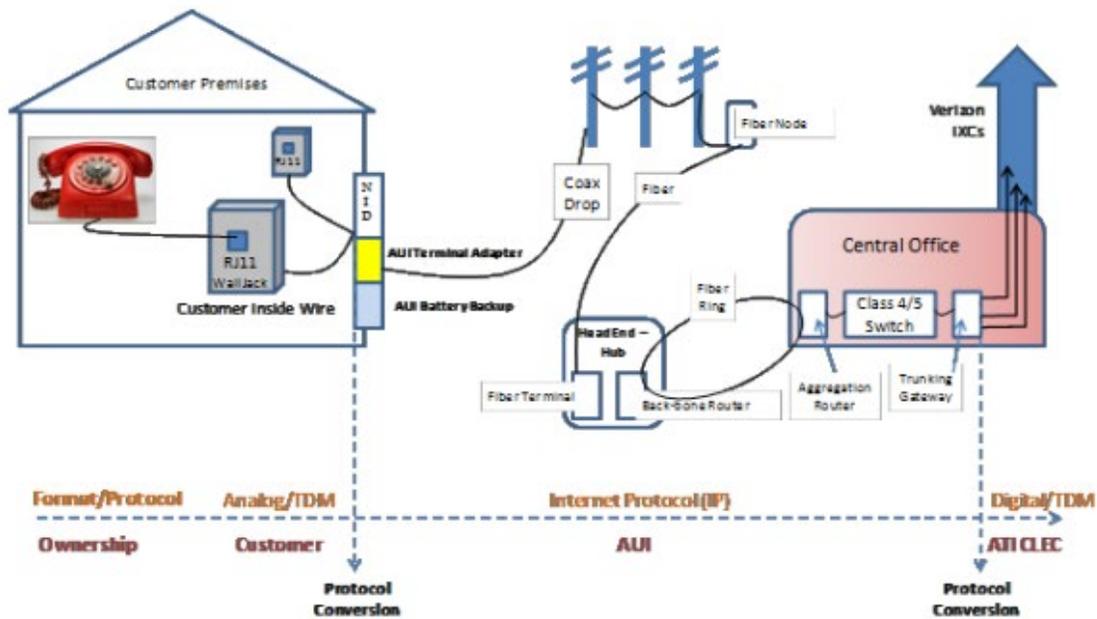
DEMARCATIION POINT (ALSO POINT OF INTERCONNECTION). As used in this part, the point of demarcation and/or interconnection between the communications facilities of a provider of wireline telecommunications, and terminal equipment, protective apparatus or wiring at a subscriber's premises.

47 C.F.R. § 68.3. Thus, the demarcation point is the physical point of distinction between: (1) the network of Armstrong, the provider of wireline telecommunications; and (2) the CPE, *i.e.* the terminal equipment, protective apparatus, or wiring at the subscriber’s premises.

In its Exceptions, Verizon cites to the *Eighth Circuit Decision* in support of its position that the MTA at issue in this proceeding should be considered CPE. Verizon Exc. at 9-10. As Armstrong observes in its Replies to Exceptions, however, the *Eighth Circuit Decision* was issued in light of the facts specific to Charter’s network. In *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 Red. 13220, 13224 (*Cisco*), the FCC’s wireline bureau reinforced that each unique service offering must be

examined closely in determining its appropriate classification. Namely, the FCC noted that “[t]he 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.” *Cisco* at ¶ 12 (citing *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 992-93 (2005)). Therefore, in determining the appropriate intercarrier compensation that is payable to Armstrong, we must examine the facts specific to the services offered by Armstrong and its cable telephony affiliate.

In conducting a fact specific analysis, we find that the record supports Armstrong’s contention that the traffic on its network neither originates nor terminates in internet protocol. We begin by noting the following protocol conversion diagram for a call on Armstrong’s network, which Armstrong provided on the record in this proceeding:



Armstrong M.B. at 39; *See also* Armstrong St. 3; I.D. at 19; Verizon Exc. at 8. Using an outgoing call to illustrate the process and moving from left to right in the above diagram, Armstrong explained that the call, represented by the dotted line at the bottom of the

diagram, originates in analog format via the end-user customer's standard telephone equipment. The first protocol conversion takes place at the terminal adapter (*i.e.* the MTA) wherein the call is converted from TDM format to IP format. The call is transmitted in that same IP format across the AUI network to the trunking gateway located in Armstrong's central office. The second protocol conversion takes place at the trunking gateway where the call is converted from IP format back to TDM format. The call is then transmitted by Armstrong to the intended third-party carrier, in this case Verizon, in standard TDM format. *See* Armstrong M.B. at 39-40.

At the 2011 Hearing, Armstrong's witness, Mr. Starkey, referencing the above diagram, presented the following testimony on cross examination to demonstrate that the MTA is on the Armstrong side of the demarcation point:

A. . . . The AUI service, . . . the terminal adapter, the connection to the AUI network which does similar protocol conversion that's done by the Vonage service at the CPE is actually done in the Armstrong network. That's an important point.

Q. So if I understand you correctly, then, the first distinction is where the device is placed that converts the analog signal to an IP signal?

A. (Starkey) Not so much where it's placed, it's who owns it, if it's in the telecom network or if it's the customer premise equipment. . . . The distinction here is that you cannot take that piece of the AUI network that does the protocol conversion and take it with you. You just can't. It's in their network, part of their network. It's not yours. You have no right or ability to move it or use it.

* * *

A. . . . Because the AUI equipment that does the protocol conversion is in this network, you can't move it.

Q. The piece of equipment that you're referring to is the terminal adapter, correct?

A. Yes.

Q. And you say it's in AUI's network but it is actually at the customer's home, correct?

A. (Starkey) It is at the customer's home just like a NID would be. That's one of the reasons I put the NID on here. The NID, the network interface device, is the demarcation point between . . . the telephone network and the customer's network, the inside wire and the CPE they may have there. As we've drawn it here, the terminal adapter sits on the telephone network side of the NID and then hooks into the inside wire that's owned by the customer on the other side.

Tr. at 79-81. We note that this is the only evidence on the record as to the location of the MTA¹⁶ with respect to Armstrong. Armstrong R.B. at 10.

As noted, *supra*, the terms telecommunications equipment and CPE are defined, respectively, 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).

47 U.S.C. § 153(52)

CUSTOMER PREMISES EQUIPMENT - The term “customer premises equipment” means equipment employed

¹⁶ The record indicates that in his supplemental rebuttal testimony, Mr. Starkey testified that the basic engineering design of Armstrong’s cable affiliate, whereby the MTA converts any IP-formatted voice communications to standard analog service prior to delivering it to Armstrong’s voice-service customers, has remained the same since the 2011 hearing, including during the Dispute Period at issue. Armstrong St. 3 at 6.

on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.

47 U.S.C. § 153(16). Based on the record evidence, we concur with the ALJ and Armstrong that while some cable operators require their subscribers to lease, or otherwise procure, the MTA device that accomplishes the conversion between TDM format and IP format, Armstrong maintains this functionality within its own network. *See* Armstrong R.B. at 11, n.32. As such, the MTA at issue in this proceeding is owned and operated exclusively within Armstrong's network and is not owned, controlled, or otherwise operated by the end-user customer. Therefore, given the configuration of Armstrong's network, the MTA is telecommunications equipment located on Armstrong's side of the network demarcation point and does not constitute CPE.

The record also confirms that as a result of the above network design, the end-user customers of Armstrong's cable telephony affiliate are not required to subscribe to a broadband service or to have IP-compatible CPE. Instead, Armstrong's voice service can be used on a stand-alone basis. Accordingly, the end-user customers are not provided with the ability to utilize multiple service features that access different websites or IP addresses during the same communication session. Rather, they are provided the same traditional calling features that any other ILEC or CLEC would provide, including three-way calling, voice mail, caller ID. Armstrong St. 3 at 4; Armstrong M.B. at 41-42; Armstrong R.B. at 17. We find that this underscores that the traffic on Armstrong's network neither originates nor terminates in IP format, but that the conversion from TDM to IP format and vice versa is accomplished on Armstrong's side of the network demarcation point at the MTA and again at the trunking gateway in Armstrong's central office. Thus, a call is received by Armstrong in traditional circuit switched format and is terminated to the end-user customer in that same format, specifically so that the customer can use standard inside wire and telephone equipment to use the service.

Additionally, we find no merit in Verizon's argument that the ALJ's Recommendation should be modified in light of the way that CLEC intermediaries for other Pennsylvania cable telephone providers characterize their services.¹⁷ Verizon provided, as Exhibits C through F of its Supplemental Direct Testimony the VoIP-PSTN tariff revisions and the associated Commission-issued Secretarial Letters allowing these revisions to go into effect for the following CLEC intermediaries: Comcast Phone of Pennsylvania LLC d/b/a Comcast Digital Phone (Comcast Digital Phone), Comcast Business Communications, LLC (Comcast Business), Time Warner Cable Information Services, LLC (Time Warner), and Sprint Communications Company, L.P. (Sprint), respectively.¹⁸

Verizon correctly states that each of these CLEC intermediaries included in their tariff revisions language indicating that all traffic to or from their end user customers fits the definition of VoIP-PSTN traffic. For example, the Secretarial Letter permitting the VoIP-PSTN tariff revisions for Comcast Digital Phone to go into effect includes the following discussion:

In its filing Comcast Phone of Pennsylvania LLC d/b/a Comcast Digital Phone (Comcast Digital Phone or Company) affirms that all of its Pennsylvania traffic either originates from or terminates to a VoIP end user and is therefore, VoIP-PSTN traffic. In its data request, Commission staff

¹⁷ As previously noted, Verizon claims that the ALJ failed to address an inconsistency with the treatment of the retail cable telephony service provided by Armstrong's unregulated affiliate. We note that Armstrong is a certificated public utility in Pennsylvania and that the formal complaint was filed by Armstrong, not by Armstrong's affiliates AUI or ADS. We further note that the complaint concerns compensation for switched access services that were provided to Verizon by Armstrong, not by AUI or ADS. Thus, we agree with Armstrong that the provision of services by its unregulated affiliates is irrelevant to the issue of whether the traffic in dispute exchanged between Armstrong and Verizon is VoIP-PSTN traffic as defined by the FCC.

¹⁸ In its supplemental rebuttal testimony, Armstrong observes that Sprint does not manage a cable television/telephony network. Armstrong St. 3 at 9-10.

asked Comcast Digital Phone whether there are any instances where traffic would not originate from or terminate to a VoIP end user and whether the Company would have any provisions for the calculation and application of a Percent-VoIP Usage (PVU) factor in this event in order to determine the total percentage of VoIP-PSTN Traffic exchanged. In Response, the Company reaffirmed that at present, there are no instances on its network where traffic does not originate from or terminate to a VoIP End User. However Comcast Digital Phone also noted that if this situation would change in the future, the Company would modify its tariff to account for this.

Verizon St. 2, Exh. C at 3. We note that the Secretarial Letters permitting the VoIP-PSTN tariff revisions for Comcast Business, Time Warner, and Sprint to go into effect all contain similar language to the above. *See* Verizon St. 2 at Exhs. D-F.

Nonetheless, as Armstrong points out, Verizon made no attempt in the evidentiary phase of this proceeding to compare the specific network architecture employed by Armstrong with the networks of these other CLEC intermediaries. We have established above that regardless of how these other companies may provide their services or classify their traffic, Armstrong's service does not require IP-compatible CPE.

In view of the above, we concur with the ALJ and Armstrong that the traffic at issue in this proceeding is not VoIP-PSTN traffic. For this reason, we find that the higher intrastate switched access rates that were in effect during the Dispute Period and were set forth in Armstrong's Commission-approved Switched Access Tariff PA P.U.C. No. 5 are payable to Armstrong. Therefore, while Verizon has paid \$1.5 Million to Armstrong based on the interstate switched access rates that were in effect during the Dispute Period, we shall direct Verizon to pay Armstrong an additional \$996,584. This is the additional amount attributable to the intrastate switched access rates that were in effect during the Dispute Period. *See* Armstrong St. 3 at 12. Finally, as it is Armstrong, and not its cable affiliate, that provides the switched access services at

issue in this proceeding, we shall decline to address the balance of Verizon's arguments in its Exception No. 2.

Accordingly, Verizon's Exception Nos. 1 and 2 are denied.

C. Whether The ALJ Erred In Recommending That A Civil Penalty Be Assessed Upon Verizon

1. Initial Decision

The ALJ found that although Armstrong did not request that a civil penalty be imposed upon Verizon, the assessment of a penalty must be considered. The ALJ reasoned that because Verizon acted unilaterally in imposing its own interpretation of the *USF/ICC Transformation Order* and failed to pay Armstrong pursuant to Armstrong's lawfully filed tariff, Verizon caused an economic loss to Armstrong. According to the ALJ, Verizon violated Section 1303 of the Code, 66 Pa. C.S. § 1303 by refusing to pay the rates outlined in Armstrong's switched access tariff. The ALJ found that if Verizon had acted in good faith in this matter, then Verizon could have used established contractual and statutory procedures to reduce the compensation rate, namely:

- (1) providing notice of interconnection agreement termination and renegotiation;
- (2) utilizing a prior challenge to the interconnection rates; or
- (3) filing a complaint with the Commission according to Armstrong's tariff. I.D. at 1, 34, 35.

In reaching a determination regarding the appropriate civil penalty to levy upon Verizon, the ALJ considered Section 3301(a) of the Code, 66 Pa. C.S. §3301(a), which provides that if any public utility fails to comply with any Commission regulation, it shall forfeit and pay to the Commonwealth a sum not to exceed \$1,000.00 per day, per violation. In addition, the ALJ considered the Commission's Policy Statement at Section 69.1201 of the Commission's Regulations, 52 Pa. Code § 69.1201, which

contains ten factors and standards that are utilized in determining if a fine for violating a Commission order, regulation or statute is appropriate. I.D. at 35-37.

Applying these factors, the ALJ recommended the imposition of a \$1,000 civil penalty on Verizon. The ALJ concluded that not only did Verizon act unilaterally in changing the intercarrier compensation rate contrary to prior agreements and Armstrong's lawfully filed tariff, it also did so in anticipation of the result of an FCC decision, *i.e.* the *USF/ICC Transformation Order*, before that decision had even been issued. In the ALJ's view, the fact that the Parties ultimately settled the claims that predated the issuance of the *USF/ICC Transformation Order* does not mitigate Verizon's offense. The ALJ reasoned that had this offense not occurred, there would have been no claim to settle. Further, the ALJ noted that the Informal Petition to Withdraw Counts, set forth in the Partial Settlement Letter, does not preclude the Commission from issuing sanctions for violations of the Code. I.D. at 37.

2. Exceptions and Replies

In its Exception No. 3, Verizon finds fault with the ALJ's recommendation to impose a \$1,000 civil penalty. Verizon stresses that Armstrong did not request that such a penalty be levied. In addition, Verizon argues that the civil penalty is tied to events that the Parties voluntarily settled, and not to the actual dispute that is presently before the Commission. Verizon continues that after the 2011 Hearing, but before briefing or the rendering of any decision on the merits of Armstrong's Complaint, the FCC entered its *USF/ICC Transformation Order*, which was effective on or about January 1, 2012. Verizon stresses that as a result of the *USF/ICC Transformation Order*, the Parties reached a settlement of all disputes up for traffic exchanged prior to and including December 31, 2011. According to Verizon, the ALJ clearly stated that the only basis for his recommended civil penalty is Verizon's alleged actions before the settlement. Thus, Verizon contends that with respect to traffic exchanged from

January 1, 2012 forward, which was excluded from the settlement reached by the Parties, there was never a claim that Verizon withheld payment. Verizon Exc. at 16-17.

Accordingly, Verizon asserts that the Commission should reverse the ALJ's recommendation that a civil penalty be assessed. Verizon takes the position that penalizing a party for a position it has taken during the course of a dispute that was ultimately settled and withdrawn from the Commission with prejudice, and without a decision on the merits, runs contrary to this Commission's policy to encourage settlements, as set forth in 52 Pa. Code § 5.231(a). In addition, Verizon claims that the Commission cannot impose a civil penalty without first finding a substantive violation of the Code or a Commission Order or Regulation. Verizon Exc. at 17-18.

In its Replies to Exceptions, Armstrong states that it fully supports the ALJ's decision to recommend the imposition of a civil penalty on Verizon. Armstrong explains that although it did not expressly request that a civil penalty be imposed, it did request in its Complaint that the Commission grant other such other relief as may be just and reasonable. Armstrong R. Exc. at 11 (citing Armstrong Complaint at 10). Armstrong submits that regardless of any prayer relief set forth in a complaint, 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 or Commission Regulations or Orders. Armstrong R. Exc. at 11-12.

Next, Armstrong contends that in arguing that the ALJ clearly stated that the only reason for recommending a civil penalty was "Verizon's alleged actions before the Settlement," Verizon has misconstrued the ALJ's bases for assessing the civil penalty. Armstrong points to the ALJ's conclusions that: (1) not only did Verizon act unilaterally in changing the intercarrier compensation rate contrary to prior agreements and Armstrong's lawfully filed tariff, it also did so while anticipating the result of an FCC decision before that decision had even been issued.; and (2) 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. Armstrong R. Exc. at 12 (citing I.D. at 37). According to Armstrong, the ALJ correctly recognized that 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 rates set forth in the ICAs and Armstrong's switched access tariff. Armstrong takes the position that instead of 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 the terms of the Parties' ICAs and tariff rates. In Armstrong's view, because Verizon chose not to do so, it must now face the consequences for its willful and intentional misconduct in direct violation of Section 1303 by paying the civil penalty. Armstrong R. Exc. at 12-13.

In addition, Armstrong rebuts Verizon's contention that the Commission cannot assess a civil penalty without first finding a substantive violation of the Code or a Commission order or Regulation. Armstrong asserts that the ALJ definitively found that Verizon violated Section 1303 of the Code by unilaterally seeking to supplant a lawfully tariffed rate with a rate of its own choosing. Armstrong stresses its position that only after finding a clear violation did the ALJ consider imposing a civil penalty. According to Armstrong, the ALJ carefully considered the ten factors set forth in Section 69.1201 of the Commission's Regulations at 52 Pa. Code § 69.1201 to arrive at the appropriate civil penalty to recommend. Accordingly, Armstrong submits that the Commission should deny Verizon's Exception No. 3 and should assess a civil penalty of \$1,000. Armstrong R. Exc. at 13-14.

3. Disposition

Armstrong correctly notes in its Replies to Exceptions that 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 Orders, or Regulations. Armstrong R. Exc. at 11-12; *See also, Richard Kaufman v. Verizon Pennsylvania Inc.*, Docket No. C-20055680 (Order entered Nov. 19,2008). Nonetheless, on review, we shall decline to adopt the ALJ's recommendation as to the imposition of a civil penalty on Verizon in this proceeding.

As previously mentioned, as a result of the FCC's issuance of the *USF/ICC Transformation Order*, the Parties entered into voluntary settlement negotiations and resolved certain of their disputes related to Armstrong's Complaint, filed in 2010. Namely, in the Partial Settlement Letter, the Parties stated, as follows (emphasis added)

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.**

Partial Settlement Letter at 1. Consistent with the Partial Settlement Letter, Armstrong's Complaint was marked satisfied with respect to the traffic exchanged between the Parties prior to the Dispute Period. Therefore, this Commission never reached a decision on the associated merits of Armstrong's Complaint with regard to its allegations that Verizon engaged in self-help, in violation of federal and Commission Regulations, or that Verizon breached the Parties' ICAs or violated the terms of Armstrong's switched access tariff. Further, given the Parties' representation that such issues have been settled and withdrawn, with prejudice, these issues are no longer before the Commission for consideration.

Rather, as discussed extensively above, the only issues still before this Commission pertain to the traffic exchanged between the Parties during the Dispute Period. Although we have ruled in Armstrong's favor on these issues and have directed that Verizon compensate Armstrong at the intrastate switched access rates that were then in effect, there has been no allegation with regard to Verizon withholding *all* payment for traffic terminated by Armstrong on or after January 1, 2012. The record indicates that under the terms of the confidential settlement agreement, which is set forth in Armstrong's Statement No. 3, Exhibit C, the Parties agreed that Armstrong would invoice Verizon at the lower, interstate switched rates until the issuance of a Commission decision on the issue of whether the disputed traffic is VoIP-PSTN traffic. Between February 2012 and July 2013, the relevant period whereby, per Paragraph 801 of the *USF/ICC Transformation Order*, interstate terminating switched access rates differed from intrastate terminating switched access rates, Armstrong created two access invoices each month relative to the traffic it terminated to Verizon. One invoice, which applied Armstrong's interstate switched access rates, was sent each month to Verizon for payment pursuant to the agreement reached between the Parties. The other invoice, applying the intrastate switched access rates based on Armstrong's position that its traffic is not VoIP-PSTN traffic, was made available to Verizon's counsel for purposes of tracking the amounts in dispute. Armstrong St. 3 at 11, 12.¹⁹ As previously noted, Verizon paid Armstrong approximately \$1.5 million during the Dispute Period based upon the invoices issued at the interstate switched access rates that were in effect. Verizon Supp. M.B. at 2. Additionally, in section B.V.4, *supra*, we directed Verizon to pay Armstrong an additional \$996,584 based upon the invoices made available to Verizon's counsel at the intrastate switched access rates that were in effect.

¹⁹ We note that while the settlement agreement between the Parties was marked confidential, the portion of Armstrong's testimony cited to here does not contain any information that was marked as proprietary.

As Verizon notes in its Exceptions, Commission policy promotes settlements. 52 Pa. Code § 5.231. Settlements, by their very nature, reflect a compromise between the parties entering into them. Accordingly, we agree with Verizon that to issue a civil penalty related to claims and issues that have been voluntarily settled and marked satisfied, and are no longer before this Commission, could have a chilling effect on the willingness among parties to enter into voluntary settlement negotiations.

For the above reasons, we shall grant Verizon's Exception No. 3 and shall modify the Initial Decision by removing the ALJ's recommendation to levy a civil penalty upon Verizon.

VI. Conclusion

Based upon our review of the record in this proceeding, we shall: (1) adopt the Initial Decision of ALJ Buckley, as modified; and (2) grant the Exceptions of Verizon, in part, and deny them, in part, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by Verizon Pennsylvania LLC, Verizon North LLC, MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc. on November 8, 2018 are granted, in part, and denied, in part, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Dennis J. Buckley, issued on October 4, 2018, is adopted, as modified, consistent with this Opinion and Order.

3. That the Formal Complaints filed by Armstrong Telecommunications, Inc. against Verizon Pennsylvania LLC, Verizon North LLC, MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc., at Docket Nos. C-2010-2216205, C-2010-2216311, C-2010-2216325 and C-2010-2216293, are sustained with respect to traffic exchanged on or after January 1, 2012.

4. That Verizon Pennsylvania LLC is directed to abide by the provisions of the lawfully filed tariff of Armstrong Telecommunications, Inc.

5. That Verizon Pennsylvania LLC is directed to refund or credit Armstrong Telecommunications Inc. the outstanding sum of \$996,584, no later than thirty (30) days after the date of entry of this Opinion and Order.

6. That upon payment of the outstanding sum outlined above, this proceeding shall be marked closed.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: September 15, 2022

ORDER ENTERED: September 15, 2022