

October 28, 2022

Via Electronic Filing

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

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

Dear Secretary Chiavetta:

The Commission's September 15, 2022 final order directed Verizon "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," and stated "[t]hat upon payment of the outstanding sum outlined above, this proceeding shall be marked closed." Verizon paid Armstrong the \$996,584 and Armstrong has confirmed receipt of that payment. Accordingly, the plain language of the Commission's order requires that this proceeding "shall be marked closed."

There is no basis for Armstrong's eleventh-hour request in its October 20, 2022 letter that this docket "remain open" so Armstrong can seek "mutual resolution" of a newly concocted demand that Verizon pay it millions of additional dollars in late payment fees. After more than a decade of litigation, during which Armstrong provided no evidence or legal analysis supporting a claim for late payment fees, this argument has been well and truly waived.

Armstrong's written testimony failed to provide any evidence of a contractual or tariff basis for late payment fees or how they would be calculated.¹ To the contrary, Armstrong's witness simply stated that "that amount in dispute totals \$996,584."² In the parties' December 10, 2017 Joint Stipulation regarding the admission of testimony, the parties agreed that the amount that would be owed under the higher rates Armstrong advocated was \$996,584 and that

¹ As the party with the burden of proof, Armstrong was responsible to "initially produce sufficient credible evidence to establish" any claim for late payment fees, and "[m]ore is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established." (9/15/22 Order at 9-10).

² Armstrong St. 3.0 (Starkey Rebuttal Revised) at 12 and Exhibit D.

“[t]his figure is exclusive of any interest that might apply (Verizon is not conceding that interest applies), and the Parties reserve the right to address the application of interest in their supplemental briefs.” The stipulation did not mention late payment fees.

At this point, Armstrong was on notice that it at least needed to substantiate any such claim in its supplemental brief, but it failed to do so. Armstrong’s February 1, 2018 supplemental brief stated that “[a]t stake is a total of \$996,584 in switched access charges,” and only mentioned in passing the vague possibility of “any applicable interest” but failed to present any analysis of the tariff or contractual basis for interest and did not mention late fees at all or state how they would be calculated.³ Verizon’s supplemental brief, on the other hand, made clear that late payment fees did not apply. Verizon stated that “[i]f Armstrong argues for the first time in its Supplemental Brief that it is entitled to interest or late payment charges on the additional sum it seeks, then the Commission should take administrative notice of the fact that Armstrong’s switched access tariff states that ‘[t]he late payment charge does not apply to unpaid balances associated with disputed amounts.’ *Armstrong Telecommunications, Inc. Tariff Pa. PUC No.5, Section 2.5.6(b)*. This is certainly a disputed amount.”⁴ Armstrong did not seek leave to challenge Verizon’s reading of the tariff or make any other effort to resurrect an argument for interest or late payment fees.

Understandably, since the argument was not raised, the Initial Decision issued on October 4, 2018 did not award interest or late payment fees. Its ordering paragraphs explicitly stated that Verizon must “refund or credit . . . the outstanding sum of \$996,584,” with no mention of late payment fees or interest being due in addition to that amount. Armstrong did not file exceptions to the Initial Decision and its reply to Verizon’s exceptions did not mention late payment fees. Instead, it said that “[a]t stake is a total of \$996,584 in switched access charges” and that the Initial Decision “ordered Verizon to pay Armstrong the full \$996,584.”⁵ If Armstrong believed it was entitled to millions of dollars above that amount, it would have and could have at least attempted to file exceptions on that issue. It is well-settled that the failure to preserve issues in exceptions results in a waiver of those arguments.⁶

Similarly, Armstrong did not petition for reconsideration of the September 15, 2022 Order, which adopted the Initial Decision by finding that the “total amount in dispute is

³ Armstrong Supp. Br., February 1, 2018, at 2, 3, 17.

⁴ Verizon Supp. Br., February 1, 2018, at 7-8, n. 16.

⁵ Armstrong Replies to Exceptions, November 30, 2018, at 1-2.

⁶ See *HIKO Energy, LLC v. Pa. Public Utility Com.*, 209 A.3d 246, 263 (Pa. 2019); *Springfield Township v. Pa. Public Utility Com.*, 676 A.2d 304, 309 (Pa. Cmwlth. 1996).

\$996,584” and “we shall direct Verizon to pay Armstrong an additional \$996,584.”⁷ It also did not raise this issue in a state court appeal within 30 days of the order’s entry.⁸

Now that it has waived this argument at every stage of the litigation and the Commission’s order has become final, Armstrong claims that late payment fees are “self-effectuating” based on general language in the final order stating that Verizon “is directed to abide by the provisions of the lawfully filed tariff of Armstrong Telecommunications, Inc.”⁹ But of course the obvious fact that Verizon must abide by the tariff does not establish that late fees are due under the language of the tariff or the facts of the case. Acceptance at this late stage of Armstrong’s “self-effectuating” claim would deprive Verizon of due process right to have notice of the basis for Armstrong’s argument for late payment fees and an opportunity to respond during the litigation of the case, which is why Armstrong has waived the claim.¹⁰ Had Armstrong properly raised this claim during the litigation, Verizon would have been able to argue (and the Commission would have been able to consider) the numerous reasons why late payment fees do not apply, including:

- The tariff in effect during the January 1, 2012 to June 30, 2013 period when Armstrong claimed the additional payments were due did not provide for late payment fees on disputed amounts. Section 2.5.6(B) of Armstrong’s tariff that was in effect at that time stated that “[u]ndisputed amounts . . . are subject to the late payment charge,” but that the “late payment charge does not apply to unpaid balances associated with disputed amounts.” As Verizon pointed out in its supplemental brief, these amounts were certainly disputed. Even for undisputed balances the 2012 tariff did not contain a rate or method of calculation. Because Armstrong never challenged Verizon’s reading of the tariff,

⁷ September 15, 2022 Order at 28, 54 and Ordering Paragraph 5. It was too late to raise the issue on reconsideration in any event, since “[a]s a general rule in matters before the Commission a petition for a rehearing may be refused where it is not apparent that the evidence which the petition states would be offered was not available at the hearings in the proceeding.” *Philadelphia v. Pa. Public Utility Com.*, 138 A. 2d. 698, 185 Pa. Super. 598, 609-610 (Pa. Super 1958).

⁸ It was also too late to raise the issue on appeal. *See Retail Energy Supply Ass'n v. Pa. Public Util. Com.*, 185 A.3d 1206, 1230 (Pa. Cmwlth.2018)(“issues raised for the first time on appeal are waived”); *Hudock v. Pa. Dep't of Pub. Welfare*, 808 A.2d 310, 313 n.4 (Pa. Cmwlth. 2002) (“When a party fails to raise an issue, even one of a constitutional dimension, in an agency proceeding, the issue is waived and cannot be considered for the first time in a judicial appeal”).

⁹ Armstrong confusingly argues that late payment fees are required by the tariff for certain of the Verizon entities and by its interconnection agreements (ICAs) for others, but the Commission already concluded that all of Armstrong’s claims arose under the tariff and so the ICAs are not relevant. *See* 9/15/22 Order 9 (“In this proceeding, Armstrong, as the Complainant, seeks enforcement of its Commission-approved tariff.”)

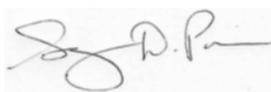
¹⁰ “The Commission, as an administrative body, is bound by the due process provisions of constitutional law and by the principles of common fairness. . . . Among the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.” *Hess v. Pa. Public Util. Com.*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014)(citations omitted). “Due process in matters before the Commission requires that a party be afforded a reasonable opportunity to know the nature of its opponents’ contentions so that it can prepare a suitably responsive answer.” *Duquesne Light Co. v. Pa. Public Util. Com.*, 507 A. 2d 433, 96 Pa. Commw. 168, 176-177 (Pa. Cmwlth 1986).

never argued for late payment fees and never presented any calculations in the litigation, further arguments regarding this tariff language were not developed.

- The tariff language Armstrong relies on its demand letter to Verizon was added in 2018, long after the relevant time period. Armstrong made a tariff filing on January 12, 2018, effective February 12, 2018, to add language stating that a late payment charge of 0.000493 per day will “apply to unpaid balances associated with disputed amounts” if “the dispute is resolved in favor of” Armstrong. However, Armstrong never brought the new language to the presiding officer’s attention (even though it was filed on January 12, 2018, shortly before the Supplemental Briefs were due). Armstrong never presented any argument as to how this new language added 5 years after the fact could apply to amounts due from 2012-13. Accordingly, it has waived these arguments.
- Armstrong’s tariff — both the version in effect at the relevant time and the current version — says that “[p]ayment will be due as specified on the Customer bill” (§ 2.5.6(A)) and that late payment charges apply to “any past due balance” (§ 2.5.2(F)). Nothing in the tariff says that late payment charges apply to unbilled amounts. The record shows Armstrong never billed Verizon the additional \$996,584. It only billed the lower rate, which Verizon paid. (9/15/2022 Order at 60). Spreadsheets tracking the additional amount were not “billed” but were only provided to Verizon’s counsel when the parties were preparing the stipulation of the amount in dispute.¹¹ Because Armstrong never argued for late payment fees in the litigation, it has waived any claim that these amounts were billed as required by the tariff.

For the foregoing reasons, the Commission should close this proceeding and decline to consider any filings from Armstrong arguing for late payment fees.

Very truly yours,



Suzan D. Paiva

Via Email

cc: Norman J. Kennard, Esquire
David Reams Jamieson, Esquire

¹¹ Armstrong claimed it did not bill Verizon because of the 2011 Settlement Agreement, but the language of this confidential settlement agreement is in the record and available for Commission review. Armstrong St. 3.0 (Starkey Rebuttal Revised) at 11 and Exhibit C. It only addressed what Verizon would pay pending litigation, and did not address or limit what Armstrong was permitted to bill. The ICAs (which do not apply as discussed above) also speak in terms of late fees only for amounts “billed” but not paid by a “due date” stated on a bill.