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July 6, 2009

**Via Electronic Filing**

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, PA 17120

Re: AT&T Communications of Pennsylvania, LLC,  
TCG New Jersey, Inc. and TCG Pittsburgh, Inc.  
v. Armstrong Telephone Company-Pennsylvania, et al.  
Docket Nos. C-2009-2098380, et al., C-2009-2099805, et al.,  
C-2009-2098735, et al.

Dear Secretary McNulty:

Enclosed please find Verizon's Brief in Response to the RLECs' Petition for Interlocutory Review and Answer to Material Questions, being filed electronically on behalf of Verizon Pennsylvania Inc., Verizon North Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services, Inc., in the above captioned consolidated matter.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Suzan D. Paiva", with a horizontal line extending to the right.

Suzan D. Paiva

SDP/slb  
Enc.

cc: **Via UPS Delivery**  
Chairman James H. Cawley  
Vice Chairman Tyrone J. Christy  
The Honorable Kim Pizzingrilli  
The Honorable Wayne E. Gardner  
The Honorable Robert F. Powelson

cc: **Via E-Mail and UPS Delivery**  
ALJ Kandace F. Melillo  
Cheryl Walker Davis, OSA  
Attached Certificate of Service

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of Verizon's Brief in Response to the RLECs' Petition for Interlocutory Review and Answer to Material Questions, upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 6<sup>th</sup> day of July, 2009.

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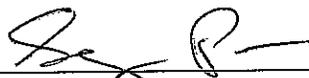
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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

AT&T Communications of	:	
Pennsylvania, LLC,	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2009-2098380, et al.
	:	
Armstrong Telephone Company -	:	
Pennsylvania, et al.,	:	
Respondents.	:	

**VERIZON'S BRIEF IN RESPONSE TO THE RLECS'  
PETITION FOR INTERLOCUTORY REVIEW  
AND ANSWER TO MATERIAL QUESTIONS**

The Rural Incumbent Local Exchange Carriers (“RLECs”)<sup>1</sup> ask this Commission to halt active litigation before an Administrative Law Judge (“ALJ”) arising out of AT&T’s contention that the RLECs’ intrastate switched access rates violate 66 Pa. C.S. § 1301 and other statutory provisions because they are unjust and unreasonable. The RLECs ask this Commission either to dismiss the complaint or to consolidate it with a long dormant generic investigation and then stay the entire matter indefinitely. Such an outcome would allow the RLECs to continue to charge intrastate switched access rates that are many multiples higher than other carriers charge for the exact same service, without the substantive review this Commission ordered nearly ten years ago. The Commission should not halt the proceedings before the ALJ, but instead should allow the ALJ to develop a record so that the Commission can address an issue that the Commission itself has already concluded needs to be reviewed.

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<sup>1</sup> The June 26, 2009 Petition was filed by the United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania and the Pennsylvania Telephone Association (collectively the “RLECs”), as representatives of the thirty-two companies against which AT&T Communications of Pennsylvania, LLC, TCG New Jersey, Inc. and TCG Pittsburgh, Inc. (collectively “AT&T”) filed a formal complaint on March 19, 2009. Verizon Pennsylvania Inc., Verizon North Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, MCI metro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services and MCI Communications Services Inc., d/b/a Verizon Business Services (collectively “Verizon”) were permitted to intervene on June 26, 2009.

**First Material Question: The ALJ Correctly Denied The RLECs' Preliminary Objections Seeking To Dismiss The Complaint**

The RLECs first challenge the ALJ's order denying their preliminary objections to the complaint. (6/22/09 ALJ Order). They argue that the ALJ should have dismissed AT&T's complaint for failure to state a claim for "any violation of the Public Utility Code" because the question of whether RLEC access rates are set at excessively high and anticompetitive levels raises nothing but "policy issues," and that AT&T should be limited to litigating those issues in the pending generic investigation at Docket I-00040105. (Petition at 2). According to the RLECs, because they are governed by alternative regulation under Chapter 30 of the Public Utility Code, the Commission has no authority to review whether their switched access rates are just and reasonable under 66 Pa. C.S. § 1301, but rather the matter of whether to rebalance revenue from those access rates to other regulated rates is nothing but a policy issue to be decided within the confines of their alternative regulation plan. (*Id.*)

But this Commission has already rejected that argument. The Commission has held that Chapter 30's alternative form of regulation did not strip it of "the statutory mandate, authority and responsibility" to ensure that rates for noncompetitive services such as switched access continue to be "just and reasonable and non-discriminatory respectively under sections 1301 and 1304 of the Public Utility Code, 66 Pa. C.S. § 1301 and 1304."<sup>2</sup> AT&T has a statutory right to bring this complaint and have this Commission determine if the rates it pays for regulated switched access service violate the legal standard set forth in Section 1301. *See* 66 Pa. C.S. § 701 (providing a right to file a complaint "setting forth any act or thing done or

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<sup>2</sup> *Commonwealth Telephone Company PSI/SPI Filing for Year 2005*, No. R-00050551 (Opinion and Order entered August 31, 2005) at 7. Indeed, as the ALJ pointed out, the Commission is currently defending before the Commonwealth Court its legal holding in the D&E litigation that it retains authority to adjudicate whether regulated switched access rates are just and reasonable under Section 1301 and whether excessive switched access rates violate that statutory standard, even if a company is governed by alternative regulation. (6/22/09 ALJ Order at 7). That ruling has not been stayed. *Buffalo Valley Telephone Company v. PUC*, No. 847 C.D. 2008

omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer.”). Moreover, the ALJ correctly concluded that AT&T’s complaint states a claim for a violation of the Public Utility Code and must be heard on its merits. As the ALJ properly found, “for purposes of ruling on preliminary objections” the “factual assertions as contained in the Complaints must be accepted as true,”<sup>3</sup> and “[t]hese factual averments constitute allegations of unjust and unreasonable rates, in violation of 66 Pa. C.S. §1301.” (6/22/09 ALJ Order at 9). Where the Commission is faced with a complaint that states a “reasonable ground” that access rates violate the Public Utility Code, “it shall be the duty of the commission to fix a time and place for a hearing,” which the ALJ correctly did. 66 Pa. C.S. § 703(a). *See also Duquesne Light Co. v. PUC*, 715 A.2d 540, 544-545 (Pa. Commw. Ct. 1998) (under Sections 701 and 703(a) a “public utility customer may challenge an existing rate by filing a complaint with the Commission” and “[e]ach complainant has a right to have the Commission hear and consider its evidence.”).

The fact that reducing the RLECs’ access rates might also require the Commission to consider other issues inherent in Chapter 30’s alternative regulation, such as rebalancing the revenue to retail rates to the extent required by 66 Pa. C.S. § 3017(a), does not mean that the RLECs’ access customers can be deprived of their statutory right to bring a complaint to this Commission and have the Commission promptly hear that complaint. 66 Pa. C.S. §§ 701 and 703. Accordingly, the Commission should deny the first material question.

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<sup>3</sup> *See, e.g., County of Allegheny v. Commonwealth of Pa.*, 507 Pa. 360, 490 A.2d 402 (1985).

**Second Material Question: Whether Or Not The Case Is Consolidated With Docket I-00040105, Litigation Should Continue Before The ALJ For The Prompt Development Of A Record And Should Not Be Stayed**

The RLECs' second material question argues that the AT&T complaint should be consolidated with the generic investigation at Docket I-00040105, and then should be stayed. The ALJ ruled that she lacked authority to consolidate the cases because the generic investigation had not been delegated to her as an ALJ, (6/22/09 ALJ Order at 14), and the RLECs do not challenge that holding. (Petition at 3). The RLECs instead ask the Commission to step in, consolidate the matters itself, and stay the combined proceedings. The Commission should reject this request.

The determination whether to consolidate cases presenting "a common question of law or fact" is discretionary, not mandatory. 52 Pa. Code § 5.81. Accordingly, the Commission is not required to consolidate AT&T's complaint with the investigation and is free to address them separately. Given the Commission's statutory "duty" to address complaints filed before it in a timely manner and "to fix a time and place for a hearing," (66 Pa. C.S. § 703(a)), the Commission should exercise its discretion to allow the ALJ to develop a record on the issues raised in the complaint and make a recommendation on whether the RLECs' access rates are unjust and unreasonable and require immediate reduction.<sup>4</sup>

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<sup>4</sup> The RLECs argue that because the Commission in 2002 consolidated an AT&T complaint against Verizon North Inc. ("Verizon North") with an ongoing access investigation, this somehow compels the Commission to consolidate the present complaint with an access investigation as well. (Petition at 2). But consolidation is a matter of Commission discretion, and there were material differences between this case and the 2002 Verizon North case. The relief requested in AT&T's complaint against Verizon North was to reduce that company's switched access rates to the same level as Verizon Pennsylvania Inc., because those two companies had recently become affiliated due to a merger. But there was never any doubt that those reductions would happen – the dispute was a matter of timing. As a merger approval condition, Verizon was required to make a proposal by December 31, 2002 to achieve access rate parity for the two companies. By the time the Commission addressed the AT&T complaint and issued its December 24, 2002 order consolidating the complaint with the investigation, Verizon was just days away from making its proposal that would satisfy AT&T's complaint. The Commission thus reasonably concluded that the complaint and the proposal could be handled together in one proceeding. *AT&T Communications of Pennsylvania, Inc. v. Verizon North Inc.*, Docket No. C-20027195 (Opinion and Order entered December 24, 2002). Verizon complied with its

But even if the Commission chooses to consolidate the complaint with the generic investigation, it does not follow – as the RLECs assert – that the complaint must then be stayed. The RLECs suggest that the generic investigation is already “stayed,” (Petition at 3), but that is not the case. The third stay granted in that case expired on April 24, 2009, and Verizon and other access ratepayers have urged the Commission to reject the RLECs’ request for a *fourth* stay – a request on which the Commission has not yet ruled. If AT&T’s complaint is consolidated with the generic investigation, then the Commission should deny the requested stay and should immediately proceed to address the reduction of the RLECs’ access rates.

Ten years ago the *Global Order* concluded that RLEC access rates needed to be reduced,<sup>5</sup> yet most of the RLECs have continued to charge rates that are many times higher than what Verizon and other carriers charge for the same service – in some cases as high as 10 cents per minute. The RLECs have advanced no good reason to continue to hold back on fulfilling the Commission’s promise to rationalize their access rates and reduce the subsidies that other carriers are forced to pay to the RLECs.

There is no risk here of duplication of effort. Even if the cases are consolidated, the Commission should allow this ALJ to complete her task of assembling a record and making a recommendation to the Commission regarding the reduction of the RLECs’ access rates as part of the consolidated proceeding. Doing so will ensure that the common issues in the two cases are resolved in an expeditious manner.

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merger condition and voluntarily reduced Verizon North rates to Verizon PA’s levels through a settlement and thereby satisfied the relief requested in AT&T’s complaint. *AT&T Communications of Pennsylvania, Inc. v. Verizon North Inc.*, Docket No C-20027195 (Opinion and Order entered July 28, 2004). Here, by contrast, there is a fundamental dispute about the level of the rates and whether they will be reduced at all, requiring substantive adjudication of the complaint.

<sup>5</sup> *Joint Petition of Nextlink Pennsylvania, Inc.*, Docket Nos. P-00991648; P-00991649, 196 P.U.R.4th 172 (Opinion and Order entered September 30, 1999) (“*Global Order*”).

**Third Material Question: Whether Or Not 66 Pa. C.S. § 1309(b) Applies To This Case, Litigation Should Continue Before The ALJ For The Prompt Development Of A Record**

The RLECs' third material question asks the Commission to declare that AT&T's complaint is not subject to 66 Pa. C.S. § 1309(b). That statute provides that the Commission must resolve a complaint alleging that "the existing rates of any public utility for any service are unjust, unreasonable, or in anywise in violation of any provision of law" within nine months of the date the complaint is filed, or alternatively must make any resulting rate reduction retroactive to that nine-month deadline. The nine-month deadline and retroactivity provisions of 66 Pa. C.S. § 1309(b) apply "only when the requested reduction in rates affects more than 5% of the customers and amounts to in excess of 3% of the total gross annual intrastate operating revenues of the public utility." 66 Pa. C.S. § 1309(b).

The RLECs argue in their petition that this limitation removes this case from the nine-month deadline and retroactivity requirements because, among other reasons, "[g]iven Petitioners' statutory right to revenue-neutrality for mandated access rate reductions under 66 Pa. C.S. § 3017(a), Petitioners cannot be required to reduce access rates in any manner which would mandate a reduction of total gross annual intrastate operating revenues in *any* amount." (Petition at 2).

Verizon agrees with the RLECs on this point. Because the Commission cannot mandate net reductions in gross intrastate operating revenue as a result of AT&T's complaint due to the application of Section 3017(a), but may only order access reductions on a revenue-neutral basis, "the requested reduction in rates" does not "amount[] to in excess of 3% of the

total gross annual intrastate operating revenues of” any of the RLEC defendants.<sup>6</sup> As a result, the nine-month deadline and retroactivity provisions of Section 1309(b) do not apply.<sup>7</sup>

However, simply because the Commission is not *required* by Section 1309(b) to decide the case in nine months does not mean that the Commission should not decide the matter promptly under the schedule set by the ALJ.<sup>8</sup> Moreover, although expedited, the schedule set by the ALJ is not unreasonable. AT&T and other aligned parties have already submitted one round of testimony as of the date of this filing, and the RLECs will either have submitted their own responsive testimony, or be one day away from doing so, by the time the Commission considers their petition. Thus, there is no practical reason why the matter cannot be heard on the scheduled hearing dates of August 13-14, 2009. Regardless of what it

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<sup>6</sup> To Verizon’s knowledge, this question of the interplay between Section 1309 and the provisions of Chapter 30 regarding alternative regulation is a matter of first impression before this Commission. According to 66 Pa. C.S. § 3019(h), Chapter 30 does not “specifically supersede” Section 1309, which means that AT&T may still bring a complaint under Section 1309(a) against an alternatively regulated company alleging that its regulated rates “are unjust, unreasonable, or in anywise in violation of any provision of law.” The question presented, however, is whether the deadline and retroactivity provisions of Section 1309(b) apply in this instance, and as discussed above, they do not.

<sup>7</sup> While Verizon agrees with the RLECs that Section 1309(b) does not apply to the present case, Verizon does not agree with their assertion that the present complaint against their access rates is “identical” to AT&T’s complaint against Verizon North at Docket C-20027195. (Petition at 2). The RLECs suggest that they cannot be subject to the nine-month deadline or retroactive rate reductions under Section 1309, because Verizon North was not “held . . . liable” for such refund. (*Id.*) But the Verizon North case was very different and on the face of that case Section 1309(b) could not have applied. There was never a finding that Verizon North’s former switched access rates were “unjust, unreasonable, or in anywise in violation of any provision of law,” which is a necessary prerequisite for Section 1309(b)’s retroactivity provision to apply. 66 Pa. C.S. § 1309(a). Verizon voluntarily reduced its access rates on the timeline order by the Commission as a merger condition and satisfied AT&T’s complaint, without any adverse finding regarding the reasonability or merits of those rates (in fact, since the Commission explicitly allowed Verizon North to charge those rates for a period of time after the merger, it necessarily found that it was just and reasonable for Verizon North to do so). Further, Section 1309 itself specifically exempts from the nine month deadline and the retroactivity provisions any “voluntary changes in rates,” and Verizon North voluntarily reduced its rates. 66 Pa. C.S. § 1309(b). Accordingly, the only question before the Commission is whether Section 1309(b) applies to the present complaint against the RLECs’ access rates – not whether it applied to a seven-year-old complaint that Verizon has long ago satisfied.

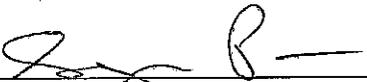
<sup>8</sup> The ALJ did not decide whether or not Section 1309(b) applies to this matter, but proceeded on the assumption that it does apply. Based on her conclusion that there was a chance that the Commission would find Section 1309(b) to apply – and because the RLECs did not agree to be subject to a retroactive order in that instance to a date nine months after complaint filing – the ALJ set an expedited schedule so that she could present a recommendation to the Commission that could be decided within nine months of complaint filing. (6/24/09 ALJ Procedural Order).

concludes regarding the applicability of Section 1309(b), the Commission should resolve the issues raised in AT&T's complaint under the existing schedule or on a similarly expedited basis.

**CONCLUSION**

For the foregoing reasons, the Commission should deny the RLECs' first two material questions. Even if it grants the third material question in order to clarify the applicable law regarding 66 Pa. C.S. § 1309(b), the Commission should direct the ALJ to continue to develop a record and provide a recommendation to the Commission on the issues raised in AT&T's complaint on an expedited basis.

Date: July 6, 2009

  
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