

August 17, 2009

*Via Electronic Filing*

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

Re: Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers and the Pennsylvania Universal Service Fund, **Docket No. I-00040105**

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

Dear Secretary McNulty:

Enclosed for filing please find the Prehearing Memorandum of Cellco Partnership d/b/a Verizon Wireless in the above-referenced consolidated proceeding.

Very truly yours,

  
Christopher M. Arfaa

cc: Hon. Kandace F. Melillo (*via Federal Express – Overnight Delivery*)  
Certificate of Service (*via Federal Express – Overnight Delivery*)

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation Regarding Intrastate Access  
Charges and IntraLATA Toll Rates of  
Rural Carriers and the Pennsylvania  
Universal Service Fund

Docket No. **I-00040105**

AT&T Communications of Pennsylvania,  
LLC,

v.

Armstrong Telephone Company –  
Pennsylvania, *et al.*

Docket No. **C-2009-2098380**, *et al.*

**PREHEARING MEMORANDUM OF  
CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS**

Cellco Partnership d/b/a Verizon Wireless submits this prehearing memorandum pursuant to the Prehearing Conference Order of August 11, 2009 in the above-captioned matters.

**I. HISTORY OF THE PROCEEDING**

The Commission opened the investigation at Docket I-00040105 on December 20, 2004 “to consider whether intrastate access charges and intraLATA toll rates in rural ILEC territories should be decreased and to consider any and all rate issues and rate changes that should or would result in the event that disbursements from the Pennsylvania Universal Service Fund are reduced and/or eliminated.” (12/20/04 Order, Ordering ¶ 1). When the Commission created the Pennsylvania Universal Service Fund (“PaUSF”), it excluded wireless carriers such as Verizon Wireless from the group of telecommunications service providers required to contribute to that

fund.<sup>1</sup> The Commonwealth Court affirmed the exclusion, noting that the Public Utility Code excludes wireless carriers from the Commission's jurisdiction.<sup>2</sup> However, the December 20, 2004 Order directed that the Office of Administrative Law Judge provide an analysis and recommendation of a number of questions, including whether and how wireless carriers should be required to contribute to the Pennsylvania Universal Service Fund (PaUSF):

(e) If the Fund continues beyond December 31, 2006, should wireless carriers be included in the definition of contributors to the Fund? If included, how will the Commission know which wireless carriers to assess? Will the Commission need to require wireless carriers to register with the Commission? What would a wireless carrier's contribution be based on? Do wireless companies split their revenue bases by intrastate, and if not, will this be a problem?

(12/20/04 Order at 5.)

On March 25, 2005, Verizon Wireless and Omnipoint Communications Inc. d/b/a T-Mobile, Omnipoint Communications Enterprises LLC d/b/a T-Mobile, Voicestream Pittsburgh LP d/b/a T-Mobile, and Nextel Communications Inc. (the "Wireless Carriers") filed a motion for a declaratory ruling acknowledging that the Commission lacks statutory jurisdiction to require wireless providers to contribute to the PaUSF. The motion was decided by Administrative Law Judge Susan D. Colwell by order entered June 8, 2005. ALJ Colwell concluded:

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<sup>1</sup> *In re Joint Petition of Nextlink Pennsylvania, Inc.*, Docket Nos. P-00991648, P-001649, slip op. at 140-41 (Sept. 30, 1999), *aff'd sub nom. Bell Atlantic – Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n*, 763 A.2d 440 (Pa. Commw. 2000), *vacated in part on other grounds sub nom. MCI WorldCom, Inc. v. Pennsylvania Pub. Util. Comm'n*, 577 Pa. 294, 844 A.2d 1239 (2004).

<sup>2</sup> *Bell Atlantic – Pennsylvania v. PUC*, 763 A.2d at 499 (citing 66 Pa. C.S. § 102 ("Public utility")(2)(iv)).

The Commission's authority derives from the express measures stated in the Public Utility Code, which authorizes the Commission to supervise and regulate public utilities doing business within the Commonwealth. 66 Pa. C.S. § 501(b). The definition of "public utility" specifically states that the term does not include: ["(iv) Any person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service." 66 Pa. C.S. § 102.

(6/8/2005 Order Disposing of Motions, Docket No. I-00040105, at 4-5.) ALJ Colwell therefore granted the Wireless Carriers' motion "insofar as it depends on the determination that the wireless carriers are not public utilities within the meaning of the Public Utility Code." (Order Disposing of Motions at ordering para. 1.)<sup>3</sup> No party sought reconsideration, rehearing, or review of ALJ Colwell's determination.

The Commission by order entered August 30, 2005 granted a request to stay the investigation at Docket No. I-00040105 to await developments in the Federal Communications Commission's ("FCC") intercarrier compensation investigation. The Commission extended that stay several times.

By order entered April 24, 2008, the Commission reopened the stayed investigation for the limited purpose of addressing certain retail rate cap and universal service fund issues relating to the operations of Pennsylvania's rural local exchange carriers (the "RLECs") under alternative regulation. Sprint Communications Company, L.P., Sprint Spectrum, L.P., Nextel Communications of the Mid-Atlantic, Inc., and NPCR, Inc. (collectively "Sprint") filed a motion for reconsideration, seeking among other things clarification that the re-opened investigation would not include consideration

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<sup>3</sup> The Wireless Carriers' motion also sought bifurcation or certification of the determination for immediate Commission review. These requests were denied.

of wireless carriers contribution to PaUSF funding obligations. By order entered October 9, 2008, the Commission granted the requested clarification. (10/9/2008 Order, Docket No. I-00040105 et al., ordering para. 1 (“we hereby clarify that the re-opened investigation will not include consideration of CMRS carriers in conjunction with PaUSF funding obligations”)). No further reconsideration, rehearing, or review of this issue was sought by any party.

ALJ Susan Colwell issued a recommended decision in this portion of the investigation on July 23, 2009. Among other things, she recommended that, rather than addressing specific fund changes in the investigation, the Commission should convene a rulemaking “for the purpose of defining the specific form of the Pennsylvania Universal Service Fund and its uses.” (7/23/09 RD at 93).

On March 19, 2009, AT&T Communications of Pennsylvania, LLC (AT&T PA), TCG New Jersey, Inc. (TCG NJ) and TCG Pittsburgh, Inc. (TCG) (collectively “AT&T”) filed complaints against thirty-two Pennsylvania RLECs, contending that the RLECs’ intrastate access rates are unjust and unreasonable in violation of 66 Pa. C.S. §1301, that these high rates charged to other carriers for access to the RLECs’ networks impede competition and violate other aspects of legislative policy set forth in 66 Pa. C.S. § 3011, and requesting that the Commission require the RLECs to reduce those rates. Verizon Wireless was not a party to the AT&T complaint proceedings.

Both cases came before the Commission through a material question petition filed by the RLECs, which sought to have the complaint case consolidated with the investigation and the entire matter stayed to await FCC action. The Commission’s August 5, 2009 Order consolidated the investigation and complaints, but denied the RLECs’ request for a further stay of the

investigation. In lifting the stay, the Commission made clear that “in the interest of judicial efficiency, the issues already adjudicated before Administrative Law Judge Susan Colwell during the limited reopening of the *Intrastate Access Charge Investigation* at Docket No.I-00040105 shall not be relitigated absent extraordinary circumstances.” (8/5/09 Order, ordering para. 4).

## II. SCOPE OF THIS PROCEEDING

The prehearing conference order directs the parties “to include a discussion in their prehearing memoranda concerning the scope of the new proceeding.” (8/11/09 Order at 2). The Commission’s August 5, 2009 order describes the scope of the proceeding as “reexamining the area of intrastate carrier access charges for the RLECs.” (8/5/09 Order at 18). This is consistent with the AT&T complaints, which present the issues of whether the intrastate access rates of each particular RLEC should be reduced, and, if so, how the revenue should be rebalanced to other RLEC rates under 66 Pa. C.S. § 3017(a).

Verizon Wireless understands that the RLECs intend to argue that this phase of the investigation should also consider whether wireless carriers and others that do not contribute to the PaUSF today should be forced to contribute the fund. This issue is not within the scope of this phase of the proceeding. The Commission stated that “the access charge investigation should be resumed at this time,” but emphasized that “the issues already adjudicated before Administrative Law Judge Susan Colwell during the limited reopening of the investigation ***shall not be relitigated*** absent extraordinary circumstances.” (8/5/09 Order at 19 (emphasis added).) As described above, ALJ Colwell has held that the Commission lacks statutory authority to require wireless carriers to contribute to the PaUSF. No “extraordinary circumstances” warrant relitigation of this issue.

Furthermore, the Commission’s order makes clear that “[u]ntil there is a resolution to access charge reform, the status quo stays in place, and the PaUSF shall continue under the

existing regulations . . . until such time as new regulations are promulgated [through a proper rulemaking] eliminating or modifying the Fund.” (8/5/09 Order at 20-21.) The Commission’s “existing regulations,” consistent with the Commission’s statutory authority, expressly exempt wireless carriers as contributors to the PaUSF.<sup>4</sup> Therefore, this phase of the investigation must proceed on the premise that the PaUSF operates unchanged “under the existing regulations” – that is, without contribution by wireless carriers.

If the issue of expansion of the PaUSF contribution base is to be addressed here (which it should not), then administrative and judicial efficiency requires immediate consideration of the Commission’s statutory authority to require wireless carriers to contribute to the PaUSF. The Public Utility Code authorizes the Commission to supervise and regulate “public utilities,” 66 Pa. C.S. § 501(b). The Code defines “public utilities” expressly to exclude wireless carriers, stating that the term does not include “[a]ny person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service.” *Id.* § 102(“Public utility”)(2)(iv). The Pennsylvania Supreme Court has held that since wireless carriers are “[c]learly . . . excluded from the definition of public utility,” they are “not regulated by the Public Utility Commission.”<sup>5</sup> The Commonwealth and Superior Courts concur.<sup>6</sup> The

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<sup>4</sup> See 52 Pa. Code. § 63.162 (“Contributing telecommunications providers-- Telecommunications carriers that provide intraState telecommunications services. Whether a provider or class of providers is a telecommunications carrier will be determined based upon whether the provider or class of providers is considered a telecommunications carrier under Federal law as interpreted by the Federal Communications Commission except that wireless carriers are exempt from this subchapter under 66 Pa.C.S. § 102(2)(iv) (relating to definitions).”). The wireless exemption cannot be changed absent both an amendment of the Public Utility Code by the General Assembly and an amendment of the Commission’s PaUSF regulations pursuant to a formal rulemaking.

<sup>5</sup> *Crown Communications v. Zoning Hearing Bd.*, 550 Pa. 266, 273, 705 A.2d 427, 431 (1997).

Commission has acknowledged and abided by this jurisdictional limitation in a variety of contexts.<sup>7</sup> Therefore, if the question whether wireless carriers should be required to contribute to the PaUSF is to be addressed at this time, the threshold legal question of the Commission's authority to impose such a requirement must be resolved.

### III. ISSUES

If the question of contribution to the PaUSF is not included in this phase of these proceedings, Verizon Wireless does not at this time anticipate presenting any issues.

However if the question of including wireless carriers as contributors to the PaUSF is included, Verizon Wireless will present the following issues:

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<sup>6</sup> See, e.g., *Bell Atlantic – Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n*, 763 A.2d 440, 499 (Pa. Commw. 2000) (“an entity engaged in wireless communications exclusively, i.e. any person not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service is not within the definition of public utility subject to PUC jurisdiction”), *vacated in part on other grounds sub nom. MCI WorldCom, Inc. v. Pennsylvania Pub. Util. Comm'n*, 577 Pa. 294, 844 A.2d 1239 (2004); *Aronson v. Sprint Spectrum, L.P.*, 767 A.2d 564, 572 (Pa. Super. 2001) (“[T]he Commonwealth does not regulate Sprint Spectrum.”).

<sup>7</sup> See, e.g., *Passarell v. AT&T Wireless Servs., Inc.*, 98 Pa. PUC 389, 2003 WL 23484584 (Aug. 14, 2003) (dismissing complaint concerning rate and billing matters of CMRS provider for lack of jurisdiction); *Aronson v. Sprint Spectrum, L.P.*, 767 A.2d 564, 569 (Pa. Super. 2001) (“[U]nless a provider of cellular service is ‘otherwise a public utility,’ it does not become a regulated public utility under this Commission’s jurisdiction merely because it provides cellular service to the public for compensation. . . . thus, Sprint Spectrum, L.P. is not a ‘public utility’ within the meaning of the Code . . . . [T]he complaint *sub judice* must be dismissed for lack of jurisdiction.”) (citation omitted); *Electronic Transaction Auditing of Telephone Customer Proprietary Information*, Doc. No. L-00970123, 29 Pa.B. 5564 (1999) (“Cellular, PCS, and switched packet systems, including the internet, carry an increasing share of voice communications. While the FCC, with authority based on the federal Communications Act, may have jurisdiction to regulate all these modes of communication, we do not.”); Tentative Order, *In re Implementation of the Omnibus Budget Reconciliation Act of 1993*, Docket Nos. L-00950104, M-00950695, 1998 WL 842357 Pa. PUC Sept. 18 1998) (PUC does not regulate PCS services); Order, *In re Implementation of the Omnibus Budget Reconciliation Act of 1993*, Docket Nos. L-00950104, M-00950695, 1995 WL 944903 (Pa. PUC June 16, 1995) (recognizing deregulation of cellular services).

1. Does the Pennsylvania Public Utility Commission have the legal authority to compel wireless carriers to make payments to or otherwise be involved in a Pennsylvania Universal Service Fund?
2. Does the Pennsylvania Public Utility Commission have the legal authority to establish and administer payments for the Universal Service Fund, including compelling payments from carriers or their customers and distributing funds to selected carriers?
3. Will prompt interlocutory review of the foregoing issues by the Commission prevent prejudice or expedite the conduct of this proceeding?

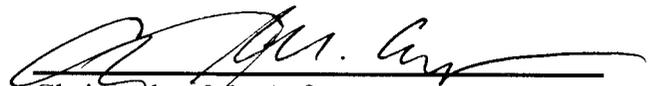
Verizon Wireless reserves the right to identify and address additional issues, as appropriate.

#### IV. WITNESSES

Verizon Wireless does not intend to present witnesses at this time but reserves the right to do so.

Dated: August 17, 2009

Respectfully submitted,



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I, Christopher M. Arfaa, hereby certify that I have this day caused to be served a copy of the foregoing document upon the persons listed below by Federal Express – Overnight Delivery.

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