

ROTHFELDER STERN, L.L.C.

LAW OFFICES

MARTIN C. ROTHFELDER* °#
mcrothfelder@rothfelderstern.com

BRADFORD M. STERN#
bmstern@rothfelderstern.com

*ALSO ADMITTED IN NH
°ALSO ADMITTED IN MO
#ALSO ADMITTED IN PA
°ALSO ADMITTED IN NY

625 CENTRAL AVENUE
WESTFIELD, NJ 07090
TELEPHONE (908) 301-1211
FAX (908) 301-1212

19 DOVE STREET
SUITE 202
ALBANY, NY 12210
TELEPHONE (518) 253-8750

September 2, 2009

VIA E-FILE & FIRST CLASS MAIL

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
400 North Street
Commonwealth, Keystone Building
Harrisburg, PA 17105-3265

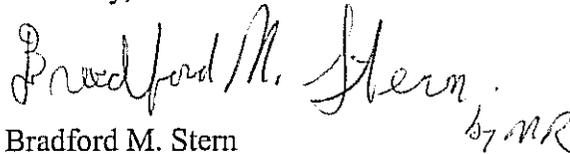
Re: Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund - Docket No. I-00040105

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

Dear Mr. McNulty:

This office represents Omnipoint Communications Inc. d/b/a T-Mobile, Omnipoint Communications Enterprises LLC d/b/a T-Mobile and VoiceStream Pittsburgh LP d/b/a T-Mobile (“T-Mobile”). We are filing a Memorandum of Law on the scope of the proceeding pursuant to ALJ Mellilo’s Prehearing Order dated August 20, 2009. The original hard copy with three (3) copies are being sent via first class mail. Copy has been served in accordance with the attached Certificate of Service.

Sincerely,

by MR

Bradford M. Stern
Attorney ID 57298

BMS/rma

cc: Service List (via E-Mail & First Class Mail)
Honorable Kandace F. Melillo, ALJ (via E-mail & First Class Mail)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation Regarding Intrastate Access)
Charges and IntraLATA Toll Rates of) Docket No. I-00040105
Rural Carriers and The Pennsylvania)
Universal Service Fund)

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

MEMORANDUM OF LAW OF T-MOBILE

Omnipoint Communications Inc.d/b/a T-Mobile, Omnipoint Communications Enterprises LLC d/b/a T-Mobile and VoiceStream Pittsburgh LP d/b/a T-Mobile (collectively “T-Mobile”), by and through the undersigned counsel, hereby files this Memorandum of Law regarding the scope of these proceedings to be adjudicated before Administrative Law Judge (“ALJ”) Melillo, and is pursuant to the Procedural Order issued August 20, 2009 in the above captioned dockets.

I. Introduction

When the Pennsylvania Public Utility Commission (“Commission”) entered its Order on August 5, 2009 consolidating the 96 AT&T Complaints in Docket C-2009-2098380 et al. with Docket No. I-00040105 into one consolidated proceeding (“Investigation Order”), it limited the scope of issues to be investigated and/or adjudicated before ALJ Melillo. The Commission

expressly ordered that the “stay of the intrastate access charges portion of this investigation is hereby lifted.”¹ Further, the Commission ordered those issues already adjudicated before ALJ Colwell during the limited reopening of the *Intrastate Charge Investigation* in Docket No. I-00040105 shall not be relitigated absent extraordinary circumstances.² The Commission expressly identified the issues in the consolidated proceeding:

That the participating parties shall address and provide record evidence on the legal, ratemaking and regulatory accounting linkages between: a) any Federal Communications Commission’s ruling in its *Unified Intercarrier Compensation* proceeding; b) the intrastate access charge reform for rural ILECs in view of the new Chapter 30 law and its relevant provisions at 66 Pa. C.S. §§ 3015 and 3017; c) the Pennsylvania Universal Service Fund; and d) the potential effects on rates for the basic local exchange services of the rural ILECs to the extent this is consistent with the Commission’s determinations in the limited investigation.³

The Commission also ordered that the Pennsylvania Universal Service Fund (“PaUSF”) shall continue under the existing regulations codified at 52 Pa. Code §§ 63.161- 63.171 until such time as new regulations are promulgated eliminating or modifying the Fund.”⁴

T-Mobile asserts that the Commission’s above-stated ordering paragraphs expressly and narrowly limit the scope of issues before ALJ Melillo. Consistent therewith, T-Mobile asserts that Question (e) in the Commission’s December 24, 2004 Order in Docket No. I-00040105 (“December 2004 Order”), which addresses whether wireless carriers “should” contributor to the

¹ *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers and The Pennsylvania Universal Service Fund*, Docket No. I-00040105, dated August 5, 2009 (“Investigation Order”), at page 21, Ordering Paragraph 2).

² *Id.* (Ordering Paragraph 4). ALJ Colwell’s adjudication of the issues is contained in her Recommended Decision dated July 22, 2009 (“July 2009 RD”).

³ *Id.* at pages 21-22 (Ordering Paragraph 5).

⁴ *Id.* at page 2. (Ordering Paragraph 7).

PaUSF, is not to be included in the scope of this proceeding.⁵ T-Mobile therefore requests that ALJ Melillo rule expressly that Question (e) is not within the scope of, and not before her for, investigation and record development in this proceeding.

II. Discussion

During the Prehearing Conference on August 19, 2009, it was clear that the parties do not agree on the scope of this consolidated proceeding. The Pennsylvania Telephone Association (“PTA”) on behalf of its members, is advocating for an expansive scope of issues to be investigated going forward.⁶ For example, the PTA suggests in its Prehearing Memorandum and stated at the prehearing conference that it will raise the issue of whether wireless carriers and other types of service providers, such as Voice over Internet Protocol (“VoIP”) providers should contribute to PaUSF. In substance, the PTA wants to include in the scope of this proceeding for record development all of the questions contained in the Commission’s December 2004 Order, all of the issues identified in Ordering Paragraph 5 of the Investigation Order, all of the issues the PTA has identified in its Prehearing Memorandum it claims are “derivative” thereto, and any other issues the PTA sees fit to raise.

⁵ The December 2004 Order directed ALJ Colwell to “conduct the appropriate proceedings including, but not limited to, a fully developed analysis and recommendation on the following questions:

- a) Whether intrastate access rates charges and intraLATA toll rates should be further reduced or rate structures modified in the rural ILECs’ territories.
- b) What rates are influenced by contributors to and/or disbursements from the PA USF?
- c) Should disbursements from the PAUSF be reduced and/or eliminated as a matter of policy and/or law?
- d) Assuming the PAUSF expires on or about December 31, 2006, what action should the Commission take to advance the policies of this Commonwealth?
- e) If the PAUSF 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 upon? Do wireless companies split their revenue bases by intrastate, and if not will this be a problem?
- f) What regulatory changes are necessary to 52 Pa Code §§63.161-63.171 given the complex issues involved as well as recent legislative developments?”

⁶ PTA, Prehearing Memorandum dated August 17, 2009, at pp. 4-6.

Nothing stated in the Commission's Investigative Order supports such an expansive view of the issues before ALJ Mellilo. To the contrary, Ordering Paragraphs 2, 4, 5 and 7 clearly limit the scope of the issues before ALJ Mellilo to what is expressly contained therein.

- A. The Commission did not intend for ALJ Melillo to address Question(e) contained in the December 2004 Order; otherwise, it would have included that issue in the Ordering Paragraphs of the Investigation Order.

Within the Procedural History section of the Investigation Order, the Commission sets forth a set of questions that ALJ Colwell was to address within the scope of the proceeding on December 24, 2004, but that same set of questions were not included in the ordering paragraphs of the Investigation Order over four years later, either expressly or by reference. Rather, the Commission has made it clear in Ordering Paragraph 5 as to what issues "the participating parties shall address and provide record evidence. . . ." If the Commission intended for ALJ Melillo to address any other issues, such as Question (e) contained in the December 2004 Order, then the Commission would have, at a minimum, made reference to that issue in its ordering paragraphs in the Investigation Order. Moreover, the Commission was clear in its intent of lifting the stay for ". . . the intrastate access charges *portion* of this investigation"⁷ (emphasis added). If the Commission wanted to lift the stay for all questions before ALJ Colwell set forth in the December 2004 Order, it could have done so --- clearly, it did not.

PTA and Embarq assert that the Investigation Order gives ALJ Mellilo the right to address anything related to the PaUSF, and that she is not precluded from addressing PaUSF matters, including expansion of the fund.⁸ To the contrary, the Commission has set forth

⁷ Investigation Order at page 21 (Ordering Paragraph 2).

⁸ See Prehearing Conference Memorandum of the Pennsylvania Telephone Association dated August 17, 2009, at pages 5,6; see also Prehearing Memorandum of the United Telephone of Pennsylvania LLC d/b/a Embarq Pennsylvania dated August 17, 2009, at pages 5-7.

parameters of how it expects ALJ Mellilo to conduct the proceeding.⁹ First, the Commission specified that “[t]hat the Pennsylvania Universal Service Fund shall continue under the existing regulations codified at 52 Pa. Code §§ 63.161 – 63.171 until such time as new regulations are promulgated eliminating or modifying the Fund.”¹⁰ Second and consistent therewith, the Commission ordered in Ordering Paragraph 4 that the issues adjudicated before ALJ Colwell are not to be relitigated, absent extraordinary circumstances. ALJ Colwell’s July 2009 RD provides an extensive analysis of the form of the PaUSF, funding levels and for whom funding should be available.¹¹ Appreciating the complexities associated with a restructuring of the PaUSF, the July 2009 RD states “[t]hat the Commission shall institute a rulemaking for the purpose of defining the specific form of the Pennsylvania Universal Service Fund and its uses.”¹² Nothing in the Commission’s Investigative Order even remotely suggests that ALJ Mellilo is to address any issues related to what parties “should” contribute to the PaUSF. Indeed, in the interest of judicial efficiency and to minimize the risk of having two contradictory recommended decisions pending before the Commission, the Investigation Order limits the scope of issues before ALJ Mellilo. For these reasons, issues involving PaUSF reform belong in the separate rulemaking recommended by ALJ Colwell.

⁹ T-Mobile agrees with Sprint that the Investigation Order effectively limits the scope of PaUSF issues ALJ Mellilo is to address essentially to recommendations regarding the level of support payments from the PaUSF in order to acknowledge revenue neutral switched access rate reductions. *See* Sprint Prehearing Memorandum dated August 17, 2009, at p. 6.

¹⁰ *Id.* at page 22 (Ordering Paragraph 7).

¹¹ *See generally* July 2009 RD, at pages 66-90.

¹² *Id.* at page 92.

B. Wireless Carriers are not “indispensable parties” for the adjudication of issues in this proceeding.

Ordering Paragraph 7 limits the scope of the proceeding by stating that the PaUSF shall continue under existing regulations until such time as new regulations are promulgated to eliminate or modify the USF, which was thoroughly addressed by ALJ Colwell in her July 2009 RD. The Commission’s “existing regulations” expressly exclude wireless carriers as contributors to the PaUSF.¹³ Indeed, the Public Utility Code defines “public utilities” to exclude “[a]ny person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service.”¹⁴ ALJ Colwell has confirmed that “wireless carriers are not public utilities within the meaning of the Public Utility Code”.¹⁵ As a result, because the Commission in its December 2004 Order charged ALJ Colwell with six specific questions to develop a record, she regarded wireless carrier contributions to the PaUSF to involve wholly academic issues. As such, ALJ Colwell sought the “cooperation” of the wireless carriers with the other parties and in that context deemed them “indispensable parties”¹⁶

Based on the scope set forth in the Investigation Order, T-Mobile as a wireless carrier cannot have its legal rights determined or affected by this proceeding, and therefore is not in a

¹³ See 52 Pa. Code § 161. Therein, the rule defines “contributing telecommunications providers” to the PaUSF as “[T]elecommunications 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)*” (emphasis added).

¹⁴ 66 Pa. C.S. § 102(2)(iv).

¹⁵ See *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund*, Order Disposing of Motions, Docket No. 1-00040105, dated June 8, 2005, at page 10.

¹⁶ *Id.* at page 6.

strictly legal sense an “indispensable party” to this proceeding.¹⁷ The focus on this proceeding is not on PaUSF, but rather intrastate access charges as defined in ordering paragraph 2 in the Investigation Order. Moreover, any need for seeking and obtaining T-Mobile’s cooperation with the other parties in this proceeding relates only to the issues raised in Question(e) of the December 2004 Order, which T-Mobile asserts herein is not before ALJ Mellilo. Thus, T-Mobile’s status under this proceeding is that of a voluntarily participating party.

III. Conclusion

The Commission did not intend for ALJ Melillo to address changes to the fundamental structure of the PaUSF in this next phase of the consolidated proceeding, and in any event has not directed ALJ Melillo to develop a record at hearing and issue a recommended decision on Question (e) set forth in the December 2004 Order. By directing ALJ Melillo not to relitigate issues adjudicated before ALJ Colwell in Docket I-00040105, absent extraordinary circumstances, the Commission limited the scope of the proceeding before ALJ Melillo. ALJ Colwell has already recommended that the Commission convene a rulemaking to address any fundamental changes to the PaUSF, and her “adjudication” is already before the Commission, and should not be relitigated here. By Ordering Paragraph 4, the Commission clearly desires to avoid judicial inefficiency and the potential for having conflicting recommended decisions pending before it. For the foregoing reasons, T-Mobile requests that ALJ Melillo issue an order confirming that Question (e) in the Commission’s December 2004 Order is not before this investigation and clarifying that T-Mobile is not an “indispensable party” to this proceeding.

¹⁷ See *Union Township v. Ethan Michael, Inc.*, --- A.2d ---, 2009 WL 2177225 (Pa.Cmwlt.,2009) (“The general rule is that an indispensable party is one whose rights are so connected with the claims being litigated that he must be a party to the lawsuit to protect his rights and that no decree can be made without impairing those rights” (citing *Columbia Gas Transmission Corporation v. Diamond Fuel Company*, 464 Pa. 377, 346 A.2d 788 (1975))).

Respectfully Submitted,

Omnipoint Communications Inc. d/b/a T-Mobile, Omnipoint Communications Enterprises d/b/a T-Mobile, and VoiceStream Pittsburgh LP d/b/a T-Mobile

By: Bradford M. Stern by *MR*
Bradford M. Stern (Atty. ID No. 57298)
Rothfelder Stern, L.L.C.
625 Central Avenue
Westfield, N.J. 07090
(908) 301-1211
(908) 301-1212 fax
bmstern@rothfelderstern.com

Counsel for T-Mobile

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Memorandum of Law for Omnipoint Communications Inc. d/b/a T-Mobile, Omnipoint Communications Enterprises LLC d/b/a T-Mobile and VoiceStream Pittsburgh LP d/b/a T-Mobile ("T-Mobile") upon the participants, listed below, in accordance with the requirements of §1.54.

Benjamin J. Aron, Esq.
SPRINT NEXTEL CORPORATION/GOV'T AFFAIRS
2001 Edmund Halley Drive, Room 208
Reston, VA 20191
benjamin.aron@sprint.com

Zsuzsanna Benedek, Esq.
EMBARQ PENNSYLVANIA
240 North Third Street, Suite 201
Harrisburg, PA 17101
sue.e.benedek@embarq.com

Joel Cheskis, Esq.
OFFICE OF CONSUMER ADVOCATE
555 Walnut Street
5th Floor Forum Place
Harrisburg, PA 17101-1923
jcheskis@paoca.org

Steven C. Gray, Esq.
OFFICE OF SMALL BUSINESS ADVOCATE
Suite 1102 Commerce Building
300 North Second Street
Harrisburg, PA 17101
sgray@state.pa.us

Norman J. Kennard, Esq.
THOMAS, LONG, NIESEN & KENNARD
212 Locust Street, Suite 500
P.O. Box 9500
Harrisburg, PA 17108-9500
nkennard@thomaslonglaw.com

Michelle Painter, Esq.
THE PAINTER LAW FIRM
130 17 Dunhill Drive
Fairfax, VA 22030
painterlawfirm@verizon.net

Suzan D. Paiva, Esq.
VERIZON
1717 Arch Street, 10th Floor
Philadelphia, PA 19103
suzan.d.paiva@verizon.com

Pamela Polacek, Esq.
Barry A. Naum, Esq.
MCNEES WALLACE & NURICK LLC
P.O. Box 1166
100 Pine Street
Harrisburg, PA 17108-1166
ppolacek@mwn.com
bnaum@mwn.com

Christopher M. Arfaa, Esq.
LAW OFFICES OF
CHRISTOPHER M. ARFAA
150 N. Radnor Chester Road
Suite F-200
Radnor, PA 19087
carfaa@arfaalaw.com

Allison C. Kaster, Esq.
Adeolu Bakare, Esq
PA PUC OFFICE OF TRIAL STAFF
PO BOX 3265
Harrisburg, PA 17108-1166
akaster@state.pa.us
abakare@state.pa.us

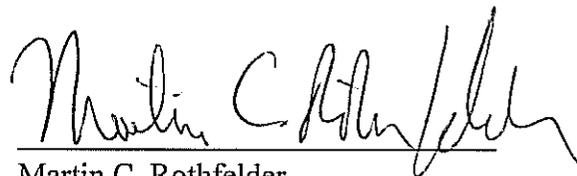
Renardo L. Hicks, Esq.
Regina Matz, Esq.
Michael Gruin, Esq.
STEVENS & LEE
17 North Second Street, 16th floor
Harrisburg, PA 17101
rlh@stevenslee.com
rmatz@thomaslonglaw.com
mag@stevenslee.com

Matthew A. Totino, Esq
John F. Povilaitis, Esq
RYAN, RUSSELL, OGDEN & SELTZER
800 North Third Street, Suite 101
Harrisburg, PA 17102-2025
mtotino@ryanrussell.com
JPovilaitis@RyanRussell.com

September 2, 2009

Alan Kohler, Esq.
Deanne M. O'Dell, Esq.
ECKERT SEAMANS CHERIN & MELLOTT
213 Market Street, 8th floor
Harrisburg, PA 17101
akohler@eckertseamans.com
dodell@eckertseamans.com

Garnet Hanly, Esq.
T-MOBILE
401 9th Street, NW, Suite 550
Washington, DC 20004
garnet.hanly@t-mobile.com



Martin C. Rothfelder
Atty ID 85479
Rothfelder Stern, LLC
625 Central Avenue
Westfield, NJ 07090
(908) 301-1211
(908) 301-1212
mcrothfelder@rothfelderstern.com