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October 5, 2009

HAND DELIVERY

James McNulty, Secretary
Pennsylvania Public Utility Commission
400 North Street, 2nd Floor
Harrisburg, PA 17120

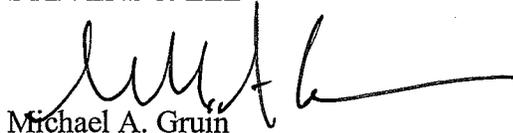
Re: *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund; Docket No. I-00040105*
and
AT&T Communications of Pennsylvania, LLC et al v. Armstrong Telephone Company – Pennsylvania, et al; Docket Nos. C-2009 – 2098380 et al

Dear Secretary McNulty:

Enclosed for filing, please find Sprint's Brief in Support of its Petition for Interlocutory Review and Answer to Material Question in the above-captioned matters, which was filed electronically today. Pursuant to 52 Pa. Code 5.302, copies of the Commission Orders that are relevant to the disposition of the Material Question are attached to the Brief as Appendices A – D. Copies of this Brief and Appendices have been served in accordance with the enclosed certificate of service. Thank you and please contact me if you have any questions.

Best regards,

STEVENS & LEE


Michael A. Gruin

Enclosures

cc: Hon. James H. Cawley, Chairman
Hon. Tyrone J. Christy, Vice-Chairman
Hon. Kim Pizzingrilli, Commissioner
Hon. Wayne E. Gardner, Commissioner
Hon. Robert H. Powelson, Commissioner
Cheryl Walker Davis, Director, Office of Special Assistants
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A PROFESSIONAL CORPORATION

**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	:	

**BRIEF OF SPRINT IN SUPPORT OF PETITION REQUESTING
INTERLOCUTORY REVIEW AND ANSWER TO MATERIAL QUESTION**

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October 5, 2009

I) Introduction.

The Pennsylvania Public Utility Commission (“Commission”), by Order entered July 29, 2009, consolidated multiple complaints filed by AT&T into the Commission’s ongoing *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund*, Docket No. I-00040105 (“RLEC Access Charge Investigation”)¹. Subsequently, by Order entered August 5, 2009 (“*August 5th 2009 Order*”) in the RLEC Access Charge Investigation, the Commission lifted the stay on its investigation of RLEC intrastate switched access charges and assigned the matter to the Office of Administrative Law Judge for the development of an evidentiary record and issuance of a Recommended Decision.² After a prehearing conference and two sets of memoranda addressing the scope of the instant stage of the investigation, Administrative Law Judge Melillo (“ALJ Melillo”) issued the Order Addressing Scope of Consolidated Proceeding (“*ALJ Order Addressing Scope*”)³.

The scope defined in the *ALJ Order Addressing Scope* includes the following *seventeen (17)* issues:⁴

(1) whether intrastate access charges and intraLATA toll rates should be further reduced or rate structures modified in the rural ILECs’ territories; (2) what rates are influenced by contributions to and/or disbursements from the PA USF; (3) if the Fund continues beyond December 31, 2006, should wireless carriers be included in the definition of contributors to the Fund (and related issues); (4) what regulatory changes are necessary to 52 Pa. Code §§ 63.161-63.171 given the complex issues involved as well as recent legislative developments; (5) the appropriateness of continuation of the PA USF to continue to support the access reforms already implemented, and/or the development and implementation of a Toll Line Charge or other universal service fund to recover any revenue deficiencies effectuated by any change in the current PA USF or the current rural access rates; (6) the appropriateness of eliminating current PA USF credits on local service customer bills and increasing access charges on access customer bills to the extent the current PA USF is reduced without replacement funding implemented; (7) the pool of service providers that should be assessed to contribute to universal service support in Pennsylvania; (8)

¹ A copy of the Commission’s July 29, 2009 Order is attached hereto as **Appendix A**.

² A copy of the Commission’s August 5, 2009 Order is attached hereto as **Appendix B**.

³ A copy of the *ALJ Order Addressing Scope* is attached hereto as **Appendix C**.

⁴ As there is a page limitation under the Commission’s rules, the list is provided in single-spaced format. The sheer size of the list should provide some indication that the scope of the instant matter has been defined so broadly as to virtually have neither limits nor bounds.

the impact on rural intrastate access rates and/or rate structures from any further federal action on intercarrier compensation, access, and universal service issues; (9) whether further intrastate access charge reform is necessary in light of the elimination in Act 183 of the mandatory access reductions that were contained in the original Chapter 30 law; (10) the FCC's *Unified Intercarrier Compensation Docket*; (11) 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; (12) PA USF; (13) potential Effects on RLEC Rates; (14) whether the RLECs' intrastate access rates are unjust and unreasonable in violation of 66 Pa. C.S. §1301; (15) whether the RLECs' intrastate access rates violate Section 3011(3) ("ensures that customers pay only reasonable charges for protected services which shall be available on a non-discriminatory basis"); (16) whether the RLECs' intrastate access rates violate Section 3011(5) ("provide diversity in the supply of existing and future telecommunications services and products in telecommunications markets throughout this Commonwealth by ensuring that rates, terms and conditions for protected services are reasonable and do not impede the development of competition"); and (17) whether the RLECs' intrastate access rates violate Section 3011(9) ("encourage the competitive supply of any service in any region where there is market demand").

Essentially, the *ALJ Order Addressing Scope* proposes to include every issue that the Pennsylvania Telephone Association ("PTA") and Embarq have requested to include in this phase of the proceeding, even though many of those issues clearly do not belong in this phase of the proceeding. The overwhelmingly expansive scope announced in the *ALJ Order Addressing Scope* is far broader than the scope of the proceeding identified in the Commission's *August 5th 2009 Order (which specifically identified only four (4) issues)*, is unnecessarily cumulative regarding issues that have been substantially addressed previously within the instant docket, permits parties to promote arguments that are clearly and directly contrary to the Commission's expressly stated policy on access reform, and is certain to result in re-litigation of issues that have already been adjudicated by ALJ Colwell. The scope announced in the *ALJ Order Addressing Scope* will waste Commission and party resources, unnecessarily complicates litigation of the issues that are properly within the scope of the consolidated proceeding, and is inherently counter-intuitive. Ultimately, the approach advocated by the PTA and adopted in the *ALJ Order Addressing Scope* will not only delay the implementation of switched access charge

reform, but will result in an unwieldy investigation that will fail to produce concrete and long overdue reform.

II) Material Question Presented for Review.

A single question has been presented for review:

Does the *ALJ Order Addressing Scope* correctly define the scope of the issues to be addressed in the consolidated proceeding that has been assigned to ALJ Melillo for the development of an evidentiary record and issuance of a Recommended Decision?

Defining the proper scope of the proceeding is clearly a compelling issue that will expedite the conduct of the proceeding, and therefore, Commission review and answer of the Material Question is necessary and appropriate under 52 Pa. Code § 5.302(a). As ALJ Melillo recognized in the *ALJ Order Addressing Scope*, defining the proper scope of this proceeding is of “critical importance . . . for purposes of framing the entire litigation going forward.” *Id.* at 9. Clear guidance from the Commission on the fundamental issue of scope is crucial at this stage of the proceeding. As explained in detail below, the scope defined in the *ALJ Order Addressing Scope* inappropriately includes issues that have no place in the current phase of the Commission’s RLEC Access Charge Investigation. Accordingly, the Commission should carefully examine the history of the RLEC Access Charge Investigation to date and clearly identify the open issues to be resolved in this phase of the proceeding. In doing so, the Commission should adhere to its previously stated directive to avoid re-litigation of issues and exclude the examination of issues that are directly contrary to the Commission’s expressly stated policies on access reform.

III) Discussion.

a) The Proper Scope of The Current Proceeding Before ALJ Melillo

Sprint's contends that the scope of the instant phase of the Commission's investigation, as distilled from the text of the *August 5th 2009 Order* and other relevant Commission Orders, is the following (*sources provided in parenthesis*):

- The FCC's Unified Intercarrier Compensation Docket (*August 5th 2009 Order at 21 - 22*). The parties are to address any new developments in the FCC's *Unified Intercarrier Compensation Docket* that may impact intrastate access reform.
- 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 (*August 5th 2009 Order at 21 - 22*). Insofar as the Commission intends to continue on the course of intrastate access reform, ALJ Melillo's Recommended Decision shall be consistent with the statutory requirement that access reductions be revenue neutral, and shall address changes to RLECs alternative form of regulation plans necessary to effectuate access reductions.
- PA USF (*August 5th 2009 Order at 21 - 22*). As will be made clear in the discussion below, the *August 5th 2009 Order* listed the PA USF only to denote that the current state of the PA USF should be considered. Specifically, in the concluding sentence of the "Resolution" section of the August 5th Order, the Commission stated "*Until there is resolution to access charge reform, the status quo stays in places, and the PaUSF shall continue under the existing regulations at 52 Pa. Code §§63.161-63.171 until such time as new regulations are promulgated eliminating or modifying the Fund.*"⁶ If the Commission intends to revise the PA USF, ALJ Colwell has provided the Commission with a full and complete record and has made substantive recommendations for reform of

⁶ *August 5, 2009 Order*, at 20 (Emphasis Added)

the PA USF, and has recommended that changes to the structure, form and funding level of the PA USF will be determined during some future rulemaking⁷. As re-litigation in the instant docket of issues addressed by ALJ Colwell has been precluded (*see the August 5th Order* at 19), there is nothing of substance that can be addressed relative to the PA USF in the instant docket.

- Potential Effects on RLEC Rates (*August 5th, 2009 Order at 21 – 22*). The Recommended Decision should address with specificity the level of basic local exchange service rate increases that will be permitted by any remedy ordered in this proceeding.
- Retroactivity of Relief (*Sprint has appealed the Commission's dismissal of this issue to the Commonwealth Court, where the appeal is pending*). The Recommended Decision must determine whether RLEC intrastate switched access rates affect more than 5% of the customers and amounts to in excess of 3% of the total gross annual intrastate operating revenues of the individual RLECs.
- Unjust, Unreasonable and Discriminatory Rates (*these issues were raised in the consolidated AT&T Complaint dockets*). While the complaint dockets opened in response to AT&T's 96 complaints may have been consolidated with the Commission's investigation docket, the issues identified in the complaint dockets nevertheless survive post-consolidation. Accordingly, it is necessary for ALJ Melillo to determine whether RLEC rates are unjust and unreasonable, and discriminatory in violation of Sections 1301, 1304 and 3011. 66 Pa. C.S. §§ 1301, 1304 and 3011.

⁷ See the July 22, 2009 Recommended Decision of ALJ Susan Colwell at Docket No. I-00040105, copies of the relevant pages of which are attached hereto as **Appendix D**.

b) The August 5th 2009 Order Intentionally Narrowed the Scope Announced in the Investigation Opening Order.

A review of the Commission's relevant Orders and ALJ Colwell's July 22, 2009 Recommended Decision makes abundantly clear the reasons that the scope announced in the *ALJ Order Addressing Scope* is unworkable and ignores the Commission's clear instructions regarding the scope of the instant phase of the investigation. Specifically, the scope defined in the *ALJ Order Addressing Scope* fails to exclude issues that were previously assigned to and adjudicated by ALJ Colwell, fails to properly frame the scope using guidance available from prior Commission Orders, includes issues that should not be considered under any circumstances (such as RLEC proposed *increases* to switched access rates), and it fails to acknowledge that the *August 5th 2009 Order* identifies a narrower scope than that identified in the Investigation Opening Order. See Order, *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund*, Docket No. I-00040105 (December 20, 2004) ("*Investigation Opening Order*"). The result is that the *ALJ Order Addressing Scope* includes an unworkably large and discordant group of issues that fails to limit the scope based on the Commission's specific instructions and guidance.

The overriding flaw of the *ALJ Order Addressing Scope* is that it fails to recognize that the Commission's *August 5th 2009 Order* considerably narrows the scope of the instant proceeding compared to the scope originally announced in the *Investigation Opening Order*. Had the Commission intended to do no more than reopen the instant proceeding with the same scope that was originally announced in 2004, it would have done so. Rather than direct the parties to address all of the issues identified in the *Investigation Opening Order*, however, the Commission specifically identified only four issues for investigation and announced a proscription against re-litigation as well.

One cannot assume, as the *ALJ Order Addressing Scope* does, that the scope announced in the Commission's *August 5th 2009 Order* is without purpose. That the Commission went so far as to specifically define a unique scope for the instant phase of the proceeding indicates an intention to define a scope distinct from that announced in the *Investigation Opening Order*. Recognizing that various issues have been addressed since the investigation opened in 2004, and that the passage of time has rendered certain other issues moot (or no longer accurate as stated), the Commission acknowledged these factors by narrowing the scope of this phase of the investigation to exclude such matters. To accomplish this task, the Commission took two steps.

First, the Commission offered the following unmistakably clear instructions to the parties:

“... the issues already adjudicated before Administrative Law Judge Susan Colwell during the limited reopening of the investigation shall not be relitigated absent extraordinary circumstances.”

August 5th 2009 Order at 19. From this passage it is clear that the parties are to avoid clouding the current phase of the proceeding with matters addressed by ALJ Colwell in the earlier, limited investigation conducted pursuant to the limited reopening of the Commission's RLEC access investigation. See Order, *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund*, Docket No. I-00040105 (entered April 24, 2009) (“*April 2009 Order*”).

Next, the Commission announced a narrowed scope for the instant phase of the proceeding compared to the scope originally announced in the *Investigation Opening Docket*.

For the instant phase of the proceeding, the Commission announced the following scope:

“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."

August 5th 2009 Order at 21-22. This scope is considerably narrower than the scope announced in the *Investigation Opening Order*, which was as follows:

"(a) Whether intrastate access charges and intraLATA toll rates should be further reduced or rate structures modified in the rural ILECs' territories? (b) What rates are influenced by contributions to and/or disbursements from the Fund? (c) Should disbursements from the Fund be reduced and/or eliminated as a matter of policy and/or law? (d) Assuming the Fund expires on or about December 31, 2006, what action should the Commission take to advance the policies of this Commonwealth? (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? (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?"

Investigation Opening Order at 5 – 6.

Furthermore, the Commission made it clear that the current phase of the proceeding is not to include a full examination of PA USF reform. Specifically, in the concluding sentence of the "Resolution" section of the August 5th Order, the Commission stated "*Until there is resolution to access charge reform, the status quo stays in places, and the PaUSF shall continue under the existing regulations at 52 Pa. Code §§63.161-63.171 until such time as new regulations are promulgated eliminating or modifying the Fund.*"⁸ The Commission has made it clear that changes to the PA USF will only be examined after there is a resolution of access charge reform, and that such changes would be made in the context of a future rulemaking to enact new regulations.

⁸ *August 5, 2009 Order*, at pp.20-21

As set forth in greater detail below, the intention behind, and the net result of, the Commission's proscription against re-litigation and announcement of a narrower scope is to conduct a focused investigation that produces tangible reform recommendations without revisiting the many issues already addressed in this docket since it opened in 2004, or those that are no longer relevant due to the passage of time.

c) Defining the Scope of the Instant Phase of the Proceeding.

The process of carefully defining the scope of the instant phase of the proceeding involves three steps. First, one must consider the four (4) items that were specifically identified for inclusion by the *August 5th 2009 Order* at pages 21-22. Second, those items must be balanced against the issues that are precluded from consideration by the Commission's admonition not to re-litigate issues adjudicated by ALJ Colwell. Finally, it is necessary to cull from the numerous prior Orders and Decisions in this docket those issues that have already been addressed, and which the Commission therefore has excluded by intentionally narrowing the scope of the instant phase of the proceeding compared to the scope of the original investigation.

d) Changes to the PA USF are Excluded from this Phase of the Proceeding

The *August 5th 2009 Order* offers a certain degree of insight into the Commission's posture regarding how it shall proceed, if at all, to revise its PA USF rules.

Although the Joint Motion does not expressly state whether the Joint Movants advocate a continuation of the current PaUSF under the existing regulations codified at 52 Pa.Code §§ 63.161-63.171, it can be inferred that it is the position of the Joint Movants that the *status quo* be maintained until there is a resolution after an investigation and until a future rulemaking determines otherwise consistent with the eventual rulings of this Commission at the limited reopened stage of this Investigation. We are of the opinion that maintaining the *status quo* will also ensure that the current levels of intrastate access charges will not be increased during the stay. It has been, and continues to be the intention of this Commission, since the *Global Order* of 1999, to gradually lower intrastate access charges so as to allow for greater competition in the intrastate and interexchange toll markets ...

August 5th Order at 20. From this passage, clarification of at least two points can be gleaned. First, the scope should *not* include any discussion of increasing access rates, because increasing access rates would be contrary to the Commission's long-standing policy to reduce access charges. Second, if the Commission chooses to change the current PA USF rules (i.e. stray from the *status quo*), it will do so in the context of a future rulemaking, and not in this proceeding.

e) Issues Adjudicated by ALJ Colwell are Excluded from this Phase of the Proceeding

Aside from identifying what issues the Commission identified for inclusion in the scope of the instant docket, or specifically identified for exclusion, one must understand what issues were adjudicated by ALJ Colwell in order to adhere to the Commission's admonition not to re-litigate those issues. To that end, Sprint below reproduces several sections of ALJ Colwell's Recommended Decision to highlight such issues.

The PA USF is a fund which exists because the ratepayers of other telecommunications providers have paid the money, unwittingly, as a hidden tax. It is not "free money" to be plundered at will and without concern for its origins or for whether it is the best use of the money. All parties agree that the concept of universal service is a worthy one. This fund should be reconstructed to provide assistance to those customers who need it, and for those companies who can meet a stringent test for determining that they serve an area whose costs are so high that the company itself deserves extra help for that area alone.

...

The form of the PA USF is a matter of public policy and properly left to the Commission ... Therefore, the Commission is free to design its PA USF in a form which suits the needs of the Commonwealth.

... Reconfiguration of the Fund to provide assistance to low-income customers, as well as assistance to those rural ILECs who can show that their specific circumstances in a particular area merit it, would be an approach which targets the problems.

...

To this end, the Commission should open a rulemaking which proposes changes to its universal service regulations to reflect the Commission's policy regarding universal service in Pennsylvania. Pending the outcome

of the rulemaking, the RLECs should neither be held to an \$18.00 rate cap nor should they be permitted to take funding from the PA USF in order to obtain the revenues which would represent the difference between the \$18.00 and their Chapter 30 plan entitlements. Rather, they should be permitted to raise rates consistent with their Chapter 30 plans, with the Commission performing a just and reasonable analysis where the raise is not consistent.

Recommended Decision, *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund*, Docket No. I-00040105, at 87 – 90 (July 22, 2009) (“Recommended Decision”). To summarize, ALJ Colwell adjudicated and concluded the following: (1) the PA USF should be reconstructed to provide targeted assistance to customers who truly need it, and for those companies meeting a stringent needs-based test; (2) The form of the PA USF is a matter of public policy and should be determined by the Commission itself; (3) Any changes to the structure, form and funding level of the PA USF will be determined during some future rulemaking; and (4) RLECs should not be prevented by any rate cap from increasing their rates to effectuate Chapter 30 plan derived rate increases, and if rate increases are inconsistent with those derived from a Chapter 30 plan the proposed increase should be subject to a just and reasonable analysis. Accordingly, the aforesaid issues should not be re-litigated in the instant phase of the proceeding.

f) Imposition of PA USF Obligations on Wireless Carriers and VOIP Providers Should Be Addressed Elsewhere.

As is made clear by the above discussion, changes to the form, structure and funding level of the PA USF are excluded from the instant phase of the Commission RLEC Access Charge Investigation, because such issues were addressed by ALJ Melillo or were assigned to her for consideration. It therefore follows that the issue of whether wireless carriers or other carriers should contribute to the PA USF is logically excluded from the instant phase of this proceeding. Whether one reaches this conclusion based on the Commission’s past Orders in this

docket, the exclusion of issues adjudicated by ALJ Colwell, jurisdictional analysis, or otherwise, it is inescapable that any discussion of the PA USF would necessarily involve a discussion of the future structure of the fund - an issue that has been already been adjudicated by ALJ Colwell, and regarding which the Commission indicated would occur – if at all – via a future rulemaking.

Additionally, in reviewing the Commission’s narrowing of the scope between the broad Investigation Opening Order and the narrower scope delineated in the *August 5th 2009 Order*, one is forced to conclude that to the extent the Commission intends the parties to address the PA USF, it intends for the parties to address only the *current* PA USF. Thus, the parties must take into account payments that are made under the *current* PA USF, and to the extent the Commission announces changes to the PA USF during the course of the current phase of the investigation, the parties would necessarily be free to comment on those changes to the PA USF and the impact those changes have on reduction of switched access rates. Any other interpretation leads inexorably to conflict with the proscription against re-litigating because ALJ Colwell addressed the future size and structure of the PA USF at length, and the Commission indicated that changes to the PA USF would occur via a future rulemaking – if at all. The admonition against re-litigation essentially complicates the task of analyzing the numerous issues attendant to wireless carriers’ contribution to the PA USF to the point where there is no room for meaningful analysis.

It also bears noting that under 66 Pa. C.S. § 501(b), the Commission is endowed with “power and authority to supervise and regulate all public utilities doing business within this Commonwealth.” The definition of “public utility” contains the following reservation, however: “[t]he term does not include: [a]ny person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service” 66 Pa. C.S. § 102. Accordingly, the Commission is without jurisdiction to impose PA USF contribution obligations

on wireless carriers. The Commission recognized as much in promulgating its PA USF regulations. The Commission defined carriers obligated to contribute to the PA USF as follows:

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)

52 Pa. Code § 63.152 (emphasis added). Considering the jurisdictional disconnect between the suggestion that parties to the instant docket address whether wireless carriers should contribute to the PA USF and the reality that the Commission lacks jurisdiction over wireless carriers, there is no reason to address such issue. If such an issue is to be addressed at all, it is an issue to be addressed by the legislature, not by the parties to the instant docket.

Additionally, the issue is not new to this docket. On March 25, 2005, wireless carriers Verizon Wireless, Omnipoint Communications, and Nextel Communications filed a Motion for a Declaratory Ruling acknowledging that the Commission lacks the statutory jurisdiction to require wireless providers to contribute to the PA USF. The Motion was decided on June 8, 2005 by ALJ Colwell. ALJ Colwell granted the wireless carriers' Motion "insofar as it depends on the determination that wireless carriers are not public utilities within the meaning of the Public Utility Code." No party, including the PTA carriers and Embarq, sought reconsideration, rehearing, or review of ALJ Colwell's determination.

Furthermore, the issue of wireless carrier contribution to the PA USF was not identified for discussion in the narrower scope identified in the *August 5th 2009 Order*. The obvious conclusion is that the scope delineated by Commission in the *August 5th 2009 Order* does not include wireless contribution as an issue in this phase of the proceeding. Accordingly, the issue

of wireless carriers' inclusion in the PA USF is not part of the scope of the instant phase of the investigation.

g) Working in Piecemeal to be Avoided.

The most evident and clear path to defining the scope of this phase of the proceeding is to deal with issues squarely and wholly within the scope of the instant phase of the investigation. The complication inherent in addressing only narrow portions of broad issues is not to be underestimated. It should also be noted that it wastes the Commission's and the parties' resources to address like issues in multiple sub-dockets within the broader RLEC Cccess Charge Investigation. Rather than assist in development of a full and complete record and recommendation, there is an equal or greater likelihood that the result will be a distorted record and potentially incompatible recommendations. The Commission has already received a recommendation – and indicated its agreement thereto – to institute a rulemaking on the future form and structure of the PA USF, so that topic, in its entirety, should not be addressed in the instant investigation.

Finally, an observation by the Commission in the consolidated AT&T Complaint docket is apt and applicable here:

While the substance of the two matters is not identical, it is undeniable that there is considerable overlap in the issues being considered in both cases. Permitting both matters to proceed simultaneously would certainly create a duplication of effort by the Parties and would waste resources of this Commission. This point is important because unlike court proceedings, where private parties typically bear the costs of litigation, the costs of Commission proceedings are ultimately recovered in assessments and rates paid by ratepayers ...

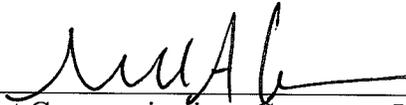
Opinion and Order, *AT&T Communications of Pennsylvania, LLC v. Armstrong Telephone Company – Pennsylvania*, Docket C-2009-2098380 (entered July 29, 2009). The point is no less applicable to the issue of defining the scope of the instant phase of the proceeding. To avoid

duplication of effort that is “ultimately recovered in assessments and rates paid by ratepayers” the scope should be defined narrowly and in a manner designed to avoid overlap and duplication of effort. The most certain way to accomplish this is to focus on those issues identified by Sprint in Section III(a) herein rather than the convoluted and over-broad set of issues identified by the PTA.

IV) Conclusion.

The scope announced in the *ALJ Order Addressing Scope* is inappropriately broad, fails to account for the Commission’s narrowing of the scope in the *August 5th 2009 Order*, and fails to adhere to the Commission’s announced proscription against re-litigating matters adjudicated by ALJ Colwell. Accordingly, the Commission should announce the properly defined scope, as described herein by Sprint, for the current stage of the investigation.

Respectfully Submitted,



FOR: Sprint Communications Company, L.P.,
Sprint Spectrum, L.P., Nextel Communications
of the Mid-Atlantic, Inc., and NPCR, Inc.
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Dated: October 5, 2009

APPENDIX A

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held July 23, 2009

Commissioners Present:

James H. Cawley, Chairman
Tyrone J. Christy, Vice Chairman
Robert F. Powelson
Kim Pizzingrilli
Wayne E. Gardner

AT&T Communications of
Pennsylvania, LLC, *et al.*

C-2009-2098380, *et al.*

v.

Armstrong Telephone Company – Pennsylvania, *et al.*

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition Requesting Interlocutory Review and Answer to Material Questions (Petition) filed by the Pennsylvania Telephone Association (PTA) on behalf of its member companies,¹ and The United Telephone Company of

¹ PTA represents the following companies in this proceeding: Armstrong Telephone Company – Pennsylvania; Armstrong Telephone Company – North, Bentleyville Telephone Company; Buffalo Valley Telephone Company; Citizens Telecommunications Company – New York; Citizens Telephone Company of Kecksburg; Commonwealth Telephone Company LLC d/b/a Frontier Communications Commonwealth Telephone Company; Frontier Communications of Breezewood, LLC; Frontier Communications of Canton, LLC; Frontier Communications of Lakewood, LLC;

Pennsylvania LLC d/b/a Embarq Pennsylvania (Embarq PA) (collectively, Petitioners) on June 26, 2009.

The Material Questions and the suggested answers presented in the Petition are:

Question 1: Did the ALJ err in denying the Preliminary Objections (“POs”) filed by Petitioners seeking to dismiss the complaint on the following bases: (1) The subject of AT&T’s complaint is already the subject of a pending PUC investigation into the Petitioners’ intrastate access rates at Docket No. I-00040105²; and (2) The complaint failed to state a cause of action by failing to allege facts applicable to or aver violations of law by Petitioners, which at all times have adhered to their PUC-approved Chapter 30 Plans and the rates set by the PUC thereunder?

Suggested Answer: Yes.

Question 2: Should the Commission grant the Motion for Stay or Consolidation filed by Petitioners seeking to stay or consolidate AT&T’s complaint with the pending PUC

Frontier Communications of Oswayo River, LLC; Frontier Communications of Pennsylvania, LLC; Conestoga Telephone and Telegraph Company; Denver and Ephrata Telephone and Telegraph Company; Hickory Telephone Company; Ironton Telephone Company; Lackawaxen Telecommunications Services; Laurel Highland Telephone Company; TDS Telcom/Mahanoy & Mahantango Telephone Company; Marianna and Scenery Hill Telephone Company; The North-Eastern Pennsylvania Telephone Company; North Penn Telephone Company; Consolidated Communications of Pennsylvania Company; Palmerton Telephone Company; Pennsylvania Telephone Company; Pymatuning Independent Telephone Company; South Canaan Telephone Company; TDS Telcom/Sugar Valley Telephone Company; The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania; Venus Telephone Corporation; Windstream Pennsylvania LLC; and Yukon-Waltz Telephone Company. Answer to Formal Complaint at 1, note 1.

² *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers and The Pennsylvania Universal Service Fund, Docket No. I-00040105 et al. (RLEC Access Charge Investigation).*

investigation on the following bases: (1) The subject of AT&T's complaint[] is already the subject of a pending PUC investigation into the Petitioners' intrastate access rates at Docket No. I-00040105; and (2) The PUC has previously consolidated an identical complaint by AT&T against Verizon at Docket No. C-20027195³ . . . which remains consolidated, pending, and stayed?

Suggested Answer: Yes.

Question 3: Does the provision of Section 1309(b), 66 Pa. C.S. § 1309(b), mandating a decision within nine months of filing of the complaint or retroactive relief under certain circumstances, apply to AT&T's complaints against Petitioners' intrastate access rates?

Suggested Answer: No.

Petition at 1-2.

Procedural History

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, Complainants) each filed individual complaints (Complaints) with the Commission against thirty-two Pennsylvania rural local exchange carriers (RLECs) for a total of ninety-six Complaints. The Complaints alleged that each RLEC's intrastate access charges violate Sections 1301 and 3011 of the Public Utility Code (Code), 66 Pa. C.S. §§ 1301 and 3011. The Complainants requested that the RLECs be required to reduce intrastate access rates to levels which correspond to the rates each company assesses for interstate switched access.

³ *AT&T Communications of Pennsylvania, Inc. v. Verizon North Incorporated*, Docket No. C-20027195 (Order entered December 24, 2002).

On April 16, 2009, Chief Administrative Law Judge (CALJ) Veronica A. Smith issued an Order which consolidated the thirty-two Complaints filed by each of the three individual Complainants into three lead Complaint dockets. These three lead cases were subsequently consolidated into one case for purposes of hearing and decision.

Procedural Order dated June 24, 2009.

On April 24, 2009, the Office of Consumer Advocate (OCA) filed a Notice of Intervention and Public Statement. On May 12, 2009, the Office of Trial Staff (OTS) filed a Notice of Appearance.

On April 30, 2009, PTA filed identical Answers to each of the ninety-six Complaints. PTA denied the material allegations in the Complaints and contended that the Complainants were attempting to end run the pending *RLEC Access Charge Investigation*, which was partially stayed at the time.⁴ They further argued that said pending investigation was the appropriate forum for deciding access charge issues.

Also on April 30, 2009, PTA filed a document styled "Preliminary Objections and Motion for Stay or Consolidation." This document argued that the Complaints should be (1) dismissed, (2) stayed due to the pending *RLEC Access Charge Investigation* or (3) consolidated with those proceedings. A Notice to Plead was not attached to this document. PTA rectified this deficiency on May 1, 2009.

On May 5, 2009, Sprint Communications Company, L.P.; Sprint Spectrum, L.P.; Nextel Communications of the Mid-Atlantic, Inc.; and NPCR, Inc. (collectively,

⁴ Pursuant to our Order entered April 24, 2008, certain aspects of the proceedings at Docket No. I-00040105 *et al.*, were stayed until the earlier of: April 24, 2009 or the outcome of the Federal Communications Commission's proceeding at CC Docket No. 01-92.

Sprint) filed a Petition for Intervention. On June 19, 2009, Administrative Law Judge (ALJ) Kandace F. Melillo granted this Petition.

On May 13, 2009, the Complainants filed their joint Answer to PTA's Preliminary Objections and Motion for Stay or Consolidation. The Complainants argued that the case should not be dismissed, stayed or consolidated with the *RLEC Access Charge Investigation*. On May 20, 2009, Sprint filed a pleading entitled "Opposition to PTA Preliminary Objections and Motion for Stay or Consolidation."

ALJ Melillo's Order Denying Preliminary Objections and Motion for Consolidation or Stay (*Order Denying Preliminary Objections*) was dated June 22, 2009. Judge Melillo found that the Complaints should not be dismissed based on the Preliminary Objections. Although she tended to agree that the Complaints should be addressed as part of the *RLEC Access Charge Investigation*, she concluded that she could not order the consolidation of these cases because the *RLEC Access Charge Investigation* was not assigned to the Office of Administrative Law Judge (OALJ) at the time.⁵ Finally, she noted that Sprint had argued that Section 1309(b) of the Code, 66 Pa. C.S. § 1309(b), requires the Commission to either issue a decision on the Complaints within nine months of their filing or make any reductions in access rates that may be granted retroactive to that date. Section 1309(b) states that it applies

[O]nly 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, provided that, if the public utility furnishes two or more types of service, the foregoing percentages shall be determined only on the basis of the customers receiving, and the revenues derived from the type of service to which the requested reduction pertains.

⁵ When the ALJ issued her *Order Denying Preliminary Objections*, the *RLEC Access Charge Investigation* was before the Commission.

Sprint's filing did not address these conditions. Judge Melillo concluded that a ruling on this point was required before she ruled on PTA's request for a stay of these proceedings. *Order Denying Preliminary Objections* at 13.

A telephone conference call was held on June 23, 2009, to discuss the applicability of Section 1309 to the instant Complaints. According to the ALJ:

While the parties discussed this issue at length during the Telephone Conference, no consensus was reached and it was decided that PTA would seek a Commission ruling on this matter through the expeditious filing of a petition for review and answer to a material question, pursuant to 52 Pa. Code § 5.302.

Procedural Order at 2. Consequently, ALJ Melillo did not issue a ruling on the applicability of Section 1309 or on PTA's request for a stay. A procedural schedule was established to allow for a Commission resolution of these proceedings within the nine-month period. *Id.*, at 2.

On June 25, 2009, 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 Transmission Services; and MCI Communications Services, Inc. (collectively, Verizon) filed a Petition to Intervene in this proceeding. This Petition was granted by an Order dated June 26, 2009. On June 30, 2009, the Broadband Cable Association of Pennsylvania (BCAP) filed a Petition for Intervention. This Petition was granted by an Order dated July 1, 2009.

As stated previously, the Petitioners filed the Petition Requesting Interlocutory Review and Answer to Material Questions on June 25, 2009. Briefs were

filed on July 6, 2009, by the Complainants, Embarq, OCA, OTS, PTA,⁶ Sprint and Verizon. Also on July 6, 2009, BCAP filed correspondence indicating that it would not submit a brief supporting or opposing the Petition.

Discussion

We note that any issue we do not specifically address herein has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corporation 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).

Legal Standards for Interlocutory Review of a Material Question

The standards for interlocutory review of a material question are set forth in the Commission's Regulation at 52 Pa. Code § 5.302. That Regulation requires that the petitioner state "the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding." The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice – that is, that the alleged error, and any prejudice flowing therefrom, could not be satisfactorily cured during the normal Commission review process. *Joint Application of Bell Atlantic Corporation and GTE Corporation*, Docket Nos. A-310200F0002, *et al.* (Order entered June 10, 1999); *Pa. PUC v. Frontier Communications of Pennsylvania Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *Pa. PUC v. C.S. Water and Sewer Associates*, 74 Pa. P.U.C. 716 (1991); *Re Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

⁶ PTA filed a corrected brief on July 7, 2009.

Positions of the Parties

Petitioners contend that there are numerous compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding. First, they argue that the Complaints raise complex policy issues that are being considered in the *RLEC Access Charge Investigation*. Petitioners submit that they would be substantially prejudiced by the ALJ's ruling because they would be forced to participate in multiple cases simultaneously, each case dealing with the same subject matter. Petition at 2.

Second, the Petitioners note that the ALJ did not consolidate this case with the *RLEC Access Charge Investigation* because the latter case was not assigned to OALJ. "Under the ALJ's ruling only the PUC has the power to do that which the ALJ determined was appropriate, but lacked the power to do" Petition at 2-3.

Third, the Petitioners point out that the ALJ did not resolve the question of the applicability of Section 1309(b) to this proceeding.

[A] PUC ruling is the only means by which the parties can obtain resolution. Without a ruling, the PTA companies and Embarq potentially will be faced with large retroactive refunds to access customers and equally large retroactive recoupments from local service customers and/or the Pennsylvania Universal Service Fund, which customers will also be prejudiced. The outcome will be a chaotic series of cross billings if the PUC does not answer the question now. Alternatively, the AT&T complaint is now on a fast track as the ALJ and parties attempt to meet the nine month deadline (close of record by August 14, 2009).

Petition at 3.

The OCA also argued that the Commission should grant consideration of the material questions. According to the OCA, the matters raised in the Petition for Interlocutory Review “are of vital public importance.” OCA’s Brief at 3. The OCA further argued that it is unreasonable to litigate the complex and important issues presented in this case according to the expedited schedule developed due to the potential applicability of Section 1309(b). *Id.* at 4.

None of the other Parties addressed the question of whether or not the Commission should consider the proffered Material Questions.

Disposition

Pursuant to 52 Pa. Code § 5.303(a), the Commission shall do one of the following with regard to a petition seeking interlocutory review and answer to a material question that has arisen during the course of a proceeding:

- (1) Continue, revoke or grant a stay of proceedings if necessary to protect the substantial rights of the parties.
- (2) Determine that the petition was improper and return the matter to the presiding officer.
- (3) Decline to answer the question.
- (4) Answer the question.

On consideration of the positions of the Parties, we find that the Petitioners have demonstrated that interlocutory review is necessary in order to prevent substantial prejudice. The Parties would be substantially prejudiced if they were unnecessarily required to litigate multiple cases simultaneously, each case dealing with the same subject matter. Consequently, we will grant interlocutory review.

Material Question 1

The question presented is:

Did the ALJ err in denying the Preliminary Objections (“POs”) filed by Petitioners seeking to dismiss the complaint on the following bases: (1) The subject of AT&T’s complaint is already the subject of a pending PUC investigation into the Petitioners’ intrastate access rates at Docket No. I-00040105; and (2) The complaint failed to state a cause of action by failing to allege facts applicable to or aver violations of law by Petitioners, which at all times have adhered to their PUC-approved Chapter 30 Plans and the rates set by the PUC thereunder?

We will address the first subpart of this question. Based on our answer to this question, there is no need to address the remaining subpart of this question.

ALJ’s Position

PTA’s Preliminary Objections contended that the Complaints should be dismissed, pursuant to 52 Pa. Code § 5.101(a)(6), due to the pendency of a prior proceeding (i.e., the *RLEC Access Charge Investigation*). The ALJ denied this preliminary objection, concluding that PTA failed to provide sufficient information to determine that the doctrine of *lis pendens* applies to this case. *Order Denying Preliminary Objections* at 11.

Positions of the Parties

PTA contends that its Preliminary Objections should be granted and the Complaints dismissed. PTA argues that the Complaints should be dismissed because:

AT&T has repeated its mantra both in opposing a further stay of the [*RLEC Access Charge Investigation*] now pending before the Commission, as well as in the PAUSF/Rate Benchmark Investigation [the part of the *RLEC Access Charge Investigation* that was not stayed by our April 24, 2008 Order] Now using the procedural gambit of a “complaint,” AT&T seeks a third forum to argue that intrastate rates should be reduced to interstate levels.

PTA’s Brief at 4-5 (notes omitted). PTA argues that the Complaints represent an “end-run” around these proceedings, in which AT&T has participated. A complaint is not the appropriate mechanism for challenging or appealing a prior Commission order. *Id.*, at 9. Consequently, PTA contends that the Complaints should be dismissed.

Embarq also argues that the Preliminary Objections should be granted, adopting the reasoning set forth in PTA’s Brief. Embarq’s Brief at 3.

In contrast, the Complainants and Verizon argue that the Complainants have a statutory right to file a complaint against a utility’s rates. AT&T’s Brief at 1; Verizon’s Brief at 3. The Complainants allege that “fundamental due process dictates that AT&T’s complaint be heard.” *Id.* at 3.

Sprint notes that a final decision has not yet been issued in the *RLEC Access Charge Investigation*. Consequently, Sprint argues that issue preclusion, collateral estoppel, and *res judicata* do not bar the Complaints.

In addition, Sprint disputes PTA’s claim that the issues in the *RLEC Access Charge Investigation* are identical to the issues raised by the Complaints. Sprint contends that the issues in the *RLEC Access Charge Investigation* are considerably broader than those to be addressed in the instant proceedings. Sprint’s Brief at 3.

Sprint also notes that the *RLEC Access Charge Investigation* has been stayed for much of the period since its inception. Sprint contends:

Until and unless the Commission reinitiates its investigation in Docket No. I-00040105, the PTA's allegation that AT&T's exercise of its statutory rights to contest unjust, unreasonable and discriminatory rates via formal complaint is a 'collateral attack' on the Commission's investigation docket is baseless.

Sprint's Brief at 4. Similarly, the Complainants contend "the mere existence of a several-times-stayed proceeding is no basis for delaying Commission action on AT&T's complaint." AT&T's Brief at 9. To the contrary, they argue there are many reasons for moving forward, not the least of which is the nine-month deadline established by 66 Pa. C.S. § 1309(b).

The Complainants argue:

In filing its POs, the PTA relied on 52 Pa. Code §5.101(a)(6), which states that one ground for dismissing a case is the pendency of a prior proceeding. The purpose of this regulation is to preclude the simultaneous litigation of two cases dealing with the same issue. That is most definitely not the situation here. There is not currently an **open** case reviewing any of the PTA companies' intrastate access rates. There is no open case where evidence has been introduced, nor is there a case where any sort of schedule has been set. There is no **active** case where the Commission is investigating the issues raised in AT&T's complaint, and therefore the parties are not at risk of wasting time or resources litigating the same issues in two different proceedings.

AT&T's Brief at 9 (emphasis in original). They therefore argue that the Complaints should proceed according to the litigation schedule set forth in the *Procedural Order*.

Disposition

Our Rules of Practice and Procedure, 52 Pa. Code § 5.101(a)(6), permit a party to file a preliminary objection based on the pendency of a prior proceeding. In construing our Rules of Practice and Procedure, we are not bound by the Rules of Civil Procedure, but we can and have found reference to them helpful for guidance. *Pa. PUC v. Metropolitan Edison Company*, 54 Pa. P.U.C. 57 (1980); *Pa. PUC v. Harold Williams*, 53 Pa. P.U.C. 552 (1979).

Rule of Civil Procedure 1028(a)(6) provides that a party may file a preliminary objection based on the pendency of a prior proceeding. In construing this provision, the Pennsylvania Superior Court has said:

[A] party may raise preliminary objections based on the pendency of a prior action. Pa.R.C.P. 1028(a)(6). In order to plead successfully the defense of *lis pendens*, *i.e.*, the pendency of a prior action, it must be shown that the prior case is the same, the parties are the same, and the relief requested is the same. *Penox Technologies, Inc. v. Foster Medical Corp.*, 376 Pa. Super. 450, 546 A.2d 114, 115 (Pa. Super. 1988). The purpose of the *lis pendens* defense is to protect a defendant from harassment by having to defend several suits on the same cause of action at the same time. *Id.* The doctrine of *lis pendens* requires that the prior action be pending. *Norristown Auto Co. v. Hand*, 386 Pa. Super. 269, 562 A.2d 902, 904 (Pa. Super. 1989). Under Pennsylvania law, the question of a pending prior action "is purely a question of law determinable from an inspection of the pleadings." *Davis Cookie Co. v. Wasley*, 389 Pa. Super. 112, 566 A.2d 870, 874 (Pa. Super. 1989).

Once the defense is raised, a court may dismiss or stay the subsequent proceedings. *Penox*, 546 A.2d at 115. It has long been held that a party asserting the defense of *lis pendens* must show that the case is the same, the parties are the same,

and the rights asserted and relief prayed for the same. *Norristown*, 562 A.2d at 904. The three-pronged identity test must be applied strictly when a party is seeking dismissal under the doctrine of prior pending action. *Id.* Alternatively, if the identity test is not strictly met but the action involves a set of circumstances where the litigation of two suits would create a duplication of effort on the part of the parties, waste judicial resources and "create the unseemly spectacle of a race to judgment," the trial court may stay the later-filed action. 562 A.2d at 905.

Crutchfield v. Eaton, 806 A.2d 1259, 1262 (Pa. Super. 2002).

We have reviewed the pleadings in this proceeding and the lengthy history of the *RLEC Access Charge Investigation* and we conclude that there is not the strict identity necessary to dismiss the instant Complaints. The cases are not the same; we agree with Sprint that the *RLEC Access Charge Investigation* is much broader than the Complaints. In addition, the rights asserted and the relief requested in the two cases are not precisely the same. As a result, we will not dismiss the Complaints.

That does not end our analysis, however. As the Superior Court stated, if the three elements of the *lis pendens* doctrine are not strictly met, a tribunal nevertheless may stay a proceeding if the litigation of two suits would create a duplication of effort by the parties, waste judicial resources, and create a race to judgment. Considering all of the facts and circumstances surrounding the instant Complaints and the *RLEC Access Charge Investigation*, we find that these two proceedings should not be permitted to proceed separately and simultaneously.

While the substance of the two matters is not identical, it is undeniable that there is considerable overlap in the issues being considered in both cases. Permitting both matters to proceed simultaneously would certainly create a duplication of effort by the Parties and would waste the resources of this Commission. This point is important

because unlike court proceedings, where private parties typically bear the costs of litigation, the costs of Commission proceedings are ultimately recovered in assessments and rates paid by ratepayers. In addition, we agree with PTA that permitting these two matters to proceed separately could result in inconsistent judgments.

The Complainants have been clear that they are unsatisfied with our decisions to stay the *RLEC Access Charge Investigation*.⁷ Also, we note that the Complainants insist that we must resolve their Complaints within nine months (or, if we fail to meet that deadline but ultimately order a reduction in the RLECs' access charges, the order must be retroactive to the date that is nine months after the Complaints were filed). In our view, this is the kind of "race to judgment" that warrants our intervention.

Consistent with *Crutchfield, supra*, we could stay the instant Complaints pending a resolution of the *RLEC Access Charge Investigation*. We believe, however, that the public interest is best served by consolidating the instant Complaints with the ongoing *RLEC Access Charge Investigation*. The Complainants suggested such consolidation as one form of relief. Specifically, the Complaints requested that the Commission enter an order that:

- (2) Directs either that this proceeding be consolidated with Docket No. I-00040105, or that the scope of that Docket or this case be expanded to determine, for each RLEC, what measures are appropriate and necessary, if any, to enable the RLEC to respond to the reduction in its intrastate switched access revenues

⁷ We reject the Complainants' argument that the Preliminary Objections should be denied because the *RLEC Access Charge Investigation* has not been an active pending case. The Complainants' argument overlooks the fact that the *RLEC Access Charge Investigation* has been inactive because this Commission has, on several occasions, following notice and opportunity to be heard, made a deliberate and considered decision that the public interest requires that the proceedings be stayed.

Complaint at ¶ 25. Similarly, such consolidation was one of the forms of relief requested in PTA's Preliminary Objections and Motion for Stay or Consolidation. *See*, page 18.

Consolidation is consistent with our decision in *AT&T Communications of Pennsylvania, LLC v. Verizon North Inc. and Verizon Pennsylvania Inc.*, C-20027195 (Order entered December 24, 2002). In that case, AT&T filed a formal complaint seeking an investigation of Verizon North's access charges, a determination that those charges were unjust and unreasonable, and an order reducing them to a level no greater than the access rates charged by Verizon Pennsylvania. The Commission consolidated the complaint with the investigation and ordered the matter be resolved in an on-the-record proceeding.

Consequently, we will consolidate the instant Complaints with the *RLEC Access Charge Investigation*.⁸ Upon consolidation, the Complaints will be subject to the decision which we also adopt today at Docket No. I-00040105.

Considering our decision on subpart (1) of Material Question 1, there is no need for us to address the remaining Material Questions.

Conclusion

For the foregoing reasons, we will grant interlocutory review and consider the Material Questions. Further, we will consolidate the Complaints with the *RLEC Access Charge Investigation*, consistent with this Opinion and Order. **THEREFORE,**

IT IS ORDERED:

⁸ Considering that the Complaints are being consolidated with a proceeding that was instituted several years ago, the nine-month deadline in Section 1309(b) will not apply to the consolidated proceeding.

1. That the Petition for Interlocutory Review and Answer to Material Question is granted, consistent with 52 Pa. Code § 5.303(a)(3).

2. We hereby consolidate the following cases:

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, Docket No. C-2009-2098380;

AT&T Communications of Pennsylvania, LLC v. Armstrong Telephone Company – North, Docket No. C-2009-2098386;

AT&T Communications of Pennsylvania, LLC v. Buffalo Valley Telephone Company, Docket No. C-2009-2098425;

AT&T Communications of Pennsylvania, LLC v. Commonwealth Telephone Company, LLC, Docket No. C-2009-2098428;

AT&T Communications of Pennsylvania, LLC v. Frontier Communications of Breezewood, LLC, Docket No. C-2009-2098474;

AT&T Communications of Pennsylvania, LLC v. Bentleyville Telephone Company, Docket No. C-2009-2098519;

AT&T Communications of Pennsylvania, LLC v. Citizens Telephone Company of New York, Docket No. C-2009-2098526;

AT&T Communications of Pennsylvania, LLC v. Frontier Communications of Canton, LLC, Docket No. C-2009-2098528;

AT&T Communications of Pennsylvania, LLC v. Frontier Communications of Lakewood, LLC, Docket No. C-2009-2098679;

AT&T Communications of Pennsylvania, LLC v. Frontier Communications of Oswayo River, LLC, Docket No. C-2009-2098769;

AT&T Communications of Pennsylvania, LLC v. Citizens Telephone Co. of Kecksburg, Docket No. C-2009-2098891;

AT&T Communications of Pennsylvania, LLC v. Frontier Communications of Pennsylvania, LLC, Docket No. C-2009-2099211;

AT&T Communications of Pennsylvania, LLC v. Conestoga Telephone and Telegraph Company, Docket No. C-2009-2099280;

AT&T Communications of Pennsylvania, LLC v. Denver & Ephrata Telephone & Telegraph Company, Docket No. C-2009-2099297;

AT&T Communications of Pennsylvania, LLC v. Hickory Telephone Company, Docket No. C-2009-2099318;

AT&T Communications of Pennsylvania, LLC v. Ironton Telephone Company, Docket No. C-2009-2099700;

AT&T Communications of Pennsylvania, LLC v. The North-Eastern Pennsylvania Telephone Company, Docket No. C-2009-2099701;

AT&T Communications of Pennsylvania, LLC v. Lackawaxen Telecommunications Services, Docket No. C-2009-2099703;

AT&T Communications of Pennsylvania, LLC v. Laurel Highland Telephone Company, Docket No. C-2009-2099704;

AT&T Communications of Pennsylvania, LLC v. TDS Telecom/Mahanoy & Mahantango Telephone Company, Docket No. C-2009-2099706;

AT&T Communications of Pennsylvania, LLC v. Marianna and Scenery Hill Telephone Company, Docket No. C-2009-2099708;

AT&T Communications of Pennsylvania, LLC v. North Penn Telephone Company, Docket No. C-2009-2099732;

AT&T Communications of Pennsylvania, LLC v. Consolidated Communications of Pennsylvania Co., Docket No. C-2009-2099741;

AT&T Communications of Pennsylvania, LLC v. Palmerton Telephone Company, Docket No. C-2009-2099762;

AT&T Communications of Pennsylvania, LLC v. Pennsylvania Telephone Company, Docket No. C-2009-2099763;

AT&T Communications of Pennsylvania, LLC v. Pymatuning Independent Telephone Co., Docket No. C-2009-2099764;

AT&T Communications of Pennsylvania, LLC v. South Canaan Telephone Company, Docket No. C-2009-2099766;

AT&T Communications of Pennsylvania, LLC v. TDS Telecom/Sugar Valley Telephone Company, Docket No. C-2009-2099767;

AT&T Communications of Pennsylvania, LLC v. Venus Telephone Corporation, Docket No. C-2009-2099768;

AT&T Communications of Pennsylvania, LLC v. Windstream Pennsylvania LLC, Docket No. C-2009-2099780;

AT&T Communications of Pennsylvania, LLC v. Yukon-Waltz Telephone Company, Docket No. C-2009-2099783;

AT&T Communications of Pennsylvania, LLC v. Embarq Pennsylvania, Docket No. C-2009-2099797;

TCG New Jersey, Inc. v. Armstrong Telephone Company – Pennsylvania, Docket No. C-2009-2099805;

TCG New Jersey, Inc. v. Armstrong Telephone Company – North, Docket No. C-2009-2099833;

TCG New Jersey, Inc. v. Bentleyville Telephone Co., Docket No. C-2009-2099838;

TCG New Jersey, Inc. v. Buffalo Valley Telephone Company, Docket No. C-2009-2099935;

TCG New Jersey, Inc. v. Citizens Telephone Company of Kecksburg, Docket No. C-2009-2099961;

TCG New Jersey, Inc. v. Frontier Communications of Breezewood, Inc., Docket No. C-2009-2099977;

TCG New Jersey, Inc. v. Commonwealth Telephone Company, Docket No. C-2009-2100002;

TCG New Jersey, Inc. v. Citizens Telephone Company – New York, Docket No. C-2009-2100107;

TCG New Jersey, Inc. v. Frontier Communications of Oswayo River, LLC, Docket No. C-2009-2100200;

TCG New Jersey, Inc. v. Frontier Communications of Canton, Inc., Docket No. C-2009-2100207;

TCG New Jersey, Inc. v. Frontier Communications of Lakewood, Inc., Docket No. C-2009-2100208;

TCG New Jersey, Inc. v. Frontier Communications of Pennsylvania, Inc., Docket No. C-2009-2100209;

TCG New Jersey, Inc. v. Conestoga Telephone & Telegraph Co., Docket No. C-2009-2100210;

TCG New Jersey, Inc. v. Denver & Ephrata Telephone & Telegraph Co., Docket No. C-2009-2100211;

TCG New Jersey, Inc. v. Hickory Telephone Company, Docket No. C-2009-2100213;

TCG New Jersey, Inc. v. Ironton Telephone Company, Docket No. C-2009-2100238;

TCG New Jersey, Inc. v. Marianna and Scenery Hill Telephone Company, Docket No. C-2009-2100253;

TCG New Jersey, Inc. v. Lackawaxen Telecommunications Services, Docket No. C-2009-2100634;

TCG New Jersey, Inc. v. Embarq, Docket No. C-2009-2100657;

TCG New Jersey, Inc. v. Laurel Highland Telephone Company, Docket No. C-2009-2100658;

TCG New Jersey, Inc. v. TDS Telecom/Mahanoy & Mahantango Telephone Company, Docket No. C-2009-2100661;

TCG New Jersey, Inc. v. North Penn Telephone Company, Docket No. C-2009-2100679;

TCG New Jersey, Inc. v. The North-Eastern Telephone Company, Docket No. C-2009-2100680;

TCG New Jersey, Inc. v. Palmerton Telephone Company, Docket No. C-2009-2100725;

TCG New Jersey, Inc. v. Consolidated Communications of Pennsylvania Company, Docket No. C-2009-2100738;

TCG New Jersey, Inc. v. Pennsylvania Telephone Company, Docket No. C-2009-2100860;

TCG New Jersey, Inc. v. Pymatuning Independent Telephone Company, Docket No. C-2009-2100866;

TCG New Jersey, Inc. v. Windstream Pennsylvania, LLC, Docket No. C-2009-2100905;

TCG New Jersey, Inc. v. Yukon-Waltz Telephone Company, Docket No. C-2009-2100908;

TCG New Jersey, Inc. v. Venus Telephone Corporation, Docket No. C-2009-2100915;

TCG New Jersey, Inc. v. South Canaan Telephone Company, Docket No. C-2009-2100917;

TCG New Jersey, Inc. v. TDS Telecom/Sugar Valley Telephone Company, Docket No. C-2009-2100943;

TCG Pittsburgh, Inc. v. Armstrong Telephone Company – Pennsylvania, Docket No. C-2009-2098735;

TCG Pittsburgh, Inc. v. Armstrong Telephone Company – North, Docket No. C-2009-2098760;

TCG Pittsburgh, Inc. v. Bentleyville Telephone Company, Docket No. C-2009-2098936;

TCG Pittsburgh, Inc. v. Buffalo Valley Telephone Company, Docket No. C-2009-2098990;

TCG Pittsburgh, Inc. v. Citizens Telephone of Kecksburg, Docket No. C-2009-2099060;

TCG Pittsburgh, Inc. v. Frontier Communications of Breezewood, LLC, Docket No. C-2009-2099596;

TCG Pittsburgh, Inc. v. Frontier Communications of Canton, LLC, Docket No. C-2009-2099631;

TCG Pittsburgh, Inc. v. Frontier Communications of Lakewood, LLC, Docket No. C-2009-2099834;

TCG Pittsburgh, Inc. v. Frontier Communications of Pennsylvania, LLC, Docket No. C-2009-2099935;

TCG Pittsburgh, Inc. v. Frontier Communications of Oswayo River, LLC, Docket No. C-2009-2099983;

TCG Pittsburgh, Inc. v. North Penn Telephone Company, Docket No. C-2009-2100011;

TCG Pittsburgh, Inc. v. Palmerton Telephone Company, Docket No. C-2009-2100024;

TCG Pittsburgh, Inc. v. Consolidated Communications of Pennsylvania Company, Docket No. C-2009-2100036;

TCG Pittsburgh, Inc. v. Pennsylvania Telephone Company, Docket No. C-2009-2100049;

TCG Pittsburgh, Inc. v. Pymatuning Independent Telephone Company, Docket No. C-2009-2100051;

TCG Pittsburgh, Inc. v. South Canaan Telephone Company, Docket No. C-2009-2100109;

TCG Pittsburgh, Inc. v. TDS Telecom/Sugar Valley Telephone Company, Docket No. C-2009-2100110;

TCG Pittsburgh, Inc. v. Venus Telephone Corporation, Docket No. C-2009-2100112;

TCG Pittsburgh, Inc. v. Windstream Pennsylvania, LLC, Docket No. C-2009-2100114;

TCG Pittsburgh, Inc. v. Yukon-Waltz Telephone Co., Docket No. C-2009-2100116;

TCG Pittsburgh, Inc. v. United Telephone Company of Pa. d/b/a Embarq Pa., Docket No. C-2009-2100117;

TCG Pittsburgh, Inc. v. Conestoga Telephone and Telegraph Company, Docket No. C-2009-2100133;

TCG Pittsburgh, Inc. v. Commonwealth Telephone Company, Docket No. C-2009-2100135;

TCG Pittsburgh, Inc. v. Denver & Ephrata Telephone & Telegraph Co., Docket No. C-2009-2100151;

TCG Pittsburgh, Inc. v. Hickory Telephone Co., Docket No. C-2009-2100152;

TCG Pittsburgh, Inc. v. Ironton Telephone Co., Docket No. C-2009-2100154;

TCG Pittsburgh, Inc. v. Lackawaxen Telecommunications SVCS, Inc., Docket No. C-2009-2100155;

TCG Pittsburgh, Inc. v. Laurel Highland Telephone Co., Docket No. C-2009-2100157;

TCG Pittsburgh, Inc. v. TDS Telecom/Mahanoy & Mahantango Telephone Co., Docket No. C-2009-2100159;

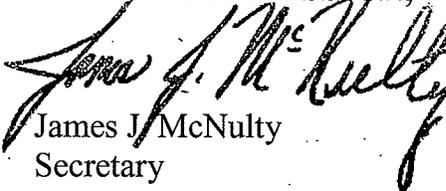
TCG Pittsburgh, Inc. v. Marianna and Scenery Hill Telephone Co., Docket No. C-2009-2100215;

TCG Pittsburgh, Inc. v. The North-Eastern Pennsylvania Telephone Company, Docket No. C-2009-2100236; and

TCG Pittsburgh, Inc. v. Citizens Telephone Company of New York, Docket No. C-2009-2101274.

3. Upon consolidation, the instant Complaints shall be subject to the Order at Docket No. I-00040105, which we also adopt today.

BY THE COMMISSION,


James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: July 23, 2009

ORDER ENTERED: **July 29, 2009**

APPENDIX B

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265**

Public Meeting held July 23, 2009

Commissioners Present:

James H. Cawley, Chairman
Tyrone J. Christy, Vice Chairman
Kim Pizzingrilli
Wayne E. Gardner
Robert F. Powelson

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

ORDER

BY THE COMMISSION:

Presently before this Commission for consideration is the Joint Motion of The Pennsylvania Telephone Association¹ (PTA), Office of Consumer Advocate (OCA), and The United Telephone Company of Pennsylvania d/b/a Embarq Pennsylvania (“Embarq PA”), (collectively “Joint Movants”). The Joint Motion concerns the PTA/OCA/Embarq PA’s request that the Commission grant a further stay of the above-captioned investigation at I-00040105. Several parties support the Joint Motion and other parties object to a further stay of the investigation.

¹ The PTA consists of the following rural incumbent local exchange carriers: Armstrong Telephone Company – Pennsylvania, Armstrong Telephone Company -- North, Bentleyville Telephone Company, Buffalo Valley Telephone Company, Citizens Telephone Company of Kecksburg, Citizens Telecommunications Company of New York, Frontier Communications Commonwealth Telephone Company, LLC (d/b/a Frontier Commonwealth), Frontier Communications of Breezewood, LLC, Frontier Communications of Canton, LLC, Frontier Communications of Canton, LLC, Frontier Communications – Lakewood, LLC, Frontier Communications – Oswayo River, LLC, Frontier Communications of PA, LLC, Conestoga Telephone & Telegraph Company, D&E Telephone Company, Hickory Telephone Company, Ironton Telephone Company, Lackawaxen Telecommunications Services, Laurel Highland Telephone Company, Mahanoy & Mahantango Telephone Company, Marianna & Scenery Hill Telephone Company, The North-Eastern Pennsylvania Telephone Company, North Penn Telephone Company, Consolidated Communications of Pennsylvania Company (f/k/a North Pittsburgh Telephone Company), Palmerton Telephone Company, Pennsylvania Telephone Company, Pymatuning Independent Telephone Company, South Canaan Telephone Company, Sugar Valley Telephone Company, Venus Telephone Corporation, Windstream Pennsylvania, LLC f/k/a ALLTEL Pennsylvania, Inc., , and Yukon-Waltz Telephone Company.

By Order entered April 24, 2008, the stayed investigation was opened for the limited purpose of addressing the \$18.00 cap on R-1 benchmark/caps and any equivalent B-1 benchmark/cap. This limited investigation is intended to determine whether there is a need to increase the rate caps and/or funding for the Pennsylvania Universal Service Fund (“PaUSF”) in order to accommodate the revenue increases authorized for rural ILECs that are now resulting in increased local service rates beyond benchmark rate caps. If it is determined that the \$18.00 cap should be increased, the investigation should also determine whether the size of the fund should be increased, decreased or remain the same. Further, the current investigation is examining whether a needs based test should be used to determine whether rural ILECs qualify for PaUSF funding. On July 23, 2009, Administrative Law Judge Susan D. Colwell issued a Recommended Decision regarding the limited investigation.

Procedural History

Intrastate Access Charge Investigation Procedural History

Our *Global Order*² of September 30, 1999 reduced access charges of all local incumbent exchange carriers operating in Pennsylvania. That order established the PaUSF to enable the rural ILECs and Sprint/United³ to reduce access charges and intraLATA toll rates while, at the same time, ensuring that residential basic local service rates did not exceed the designated price cap of \$16.00 per month. The *Global Order* also called for an investigation to be initiated in January 2001 to further refine a solution to the question of how the carrier charge (CC) pool could be reduced and to consider the appropriateness of a toll line charge to recover any resulting revenue reductions.

² *Re Nextlink Pennsylvania, Inc.*, Docket No. P-00991648; P-00991649, 93 PaPUC 172 (September 30, 1999)(*Global Order*); 196 P.U.R. 4th 172, *aff'd sub nom. Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Commission*, 763 A.2d 440 (Pa.Cmwlth. 2000), *alloc. granted*, 844 A.2d 1239 (Pa. 2004).

³ Sprint/United later divested its landline operations. The United Telephone Company of Pennsylvania d/b/a Embarq Pennsylvania is the local landline telephone company.

On July 15, 2003, at Docket Nos. M-00021596, P-00991648, P-00991649, M-00031694, M-00031694C0001, and P-00930715, this Commission entered an order granting a Joint Procedural Stipulation filed on June 5, 2003, by the RTCC, Sprint/United, OTS, OCA, OSBA, AT&T Communications of Pennsylvania, Inc., Verizon and MCI WorldCom Network Services, Inc. The July 15, 2003 order further reduced intrastate access charges for the rural telephone companies operating within the Commonwealth and increased the cap on basic residential local service rates from \$16.00 to \$18.00 per month. The size of the PaUSF was not changed. No regulations were promulgated to alter the regulations⁴ governing the PaUSF or to terminate the fund. The PaUSF continues until a further rulemaking is completed.

On December 20, 2004, the Commission entered an order in the above-captioned case instituting an investigation into whether there should be further intrastate access charge reductions and intraLATA toll rate reductions in the service territories of rural incumbent local exchange carriers. This investigation was instituted as a result of the Commission's prior order of July 15, 2003, which discussed implementing continuing access charge reform in Pennsylvania. The July 15, 2003 order also provided that a rulemaking proceeding would be initiated no later than December 31, 2004, to address possible modifications to the PaUSF regulations and the simultaneous institution of a proceeding to address all resulting rate issues should disbursements from the PaUSF be reduced in the future.

The December 20, 2004 order directed the Office of Administrative Law Judge (OALJ) to conduct the appropriate proceedings including, but not limited to, a fully developed analysis and recommendation on the following questions:

- a) Whether intrastate access charges and intraLATA toll rates should be further reduced or rate structures modified in the rural ILECs' territories.

⁴ The regulations governing the PaUSF are found at 52 Pa. Code §§ 63.161 – 63.171. There is no sunset provision in the regulations; however, in December, 2004, the Commission was contemplating whether it should begin the legal process of rulemaking to terminate the fund on December 31, 2006.

- b) What rates are influenced by contributors to and/or disbursements from the PaUSF?
- 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?

Following the institution of this investigation, the Federal Communications Commission (FCC), on March 3, 2005, entered a further order addressing its intercarrier compensation proceeding at CC Docket No. 01-92 (FNPRM). The FCC is comprehensively examining the intercarrier compensation regime including interstate and intrastate access, reciprocal compensation and universal service. The FCC stated that one of the main reasons reform is needed is because the current intercarrier compensation system is based on jurisdictional and regulatory distinctions that are no longer linked to technological or economic differences. FNPRM at par. 15. The FCC also established goals for intercarrier compensation reform including the preservation of universal service and the promotion of economic efficiency (FNPRM at par. 33).

By order entered August 30, 2005, this Commission stayed the instant investigation for a period not to exceed 12 months unless extended by Commission order, or until the FCC issued its ruling in its *Unified Intercarrier Compensation* proceeding. We further ordered that upon the expiration of the 12-month stay of the investigation or

the issuance of a FCC ruling in the *Unified Intercarrier Compensation* proceeding, whichever occurred earlier, the parties to the proceeding should submit status reports to the Commission pertaining to common or related matters in the instant investigation and the FCC's *Unified Intercarrier Compensation* proceeding and the need for any coordination of those matters or any new matters that may arise once the instant investigation is reinstated. We also stated that we would entertain future requests for further stays of this investigation for good cause shown and for the purpose of coordinating this Commission's action with the FCC's ruling in its *Unified Intercarrier Compensation* proceeding. Our order stated that upon receipt of the status reports, Commission Staff should prepare a recommendation regarding the reinstatement of this investigation and taking of any other appropriate action.

In July, 2006, the so-called Missoula Plan⁵ was submitted to the FCC. Generally, the Missoula Plan sought to unify intercarrier charges for all traffic over a 4-year time period, reduce intercarrier compensation rates, provide an ability to recover those reduced rates through explicit means, move rates for all traffic closer together, and establish uniform default interconnection rules. By notice issued July 25, 2006, the FCC requested parties submit comments on the Missoula Plan by September 25, 2006, and reply comments by November 9, 2006.

On August 17, 2006, this Commission adopted a motion of Vice Chairman James H. Cawley convening a workshop and facilitated discussion of interested participants, to facilitate the development of comments to the FCC. The workshop was conducted and Commission comments were submitted to the FCC on October 25, 2006. The Missoula Plan and other intercarrier compensation reform proposals are currently pending before the FCC for consideration. This FCC proceeding continues to have significant potential to directly impact the issues in the instant proceeding.

⁵ The Missoula Plan was filed on July 24, 2006 by the National Association of Regulatory Utility Commissioners (NARUC) in recognition of one meeting site where the proposal was considered. It was not endorsed by NARUC, but the filing is one in a series of intercarrier compensation proposals in the FCC's CC Docket No. CC 01-92.

On or about August 30, 2006, status reports were submitted to the Commission by the RTCC, OTS, OCA, Embarq⁶, Verizon, Sprint/Nextel Corp.⁷, the Wireless Carriers, and Qwest Communications. Additionally, the RTCC, OTS, OCA and Embarq filed a Joint Motion for further stay of investigation to which the other parties filed status reports in objection. That Joint Motion was granted by order dated November 15, 2006, which again stayed the investigation pending the outcome of the FCC's Unified Intercarrier Compensation proceeding at CC Docket No. 01-92, or until November 15, 2007, whichever was earlier. The order further directed that upon expiration of the 12-month stay, the parties should again submit status reports to the Commission pertaining to common or related matters in the investigation and the FCC's proceeding and the need for any coordination of those matters or any new matters that may arise once the Investigation is reinstated. Ordering Paragraph No. 4. Status reports were due 30 days prior to the expiration of the 12-month stay or 30 days following the FCC decision, whichever occurred earlier. The Commission granted the stay but allowed for a limited investigation into the rate caps on residential and business rates, as well as the PaUSF. A recommended decision regarding the limited investigation is expected on July 27, 2009, by ALJ Susan Colwell.

The FCC has not made a decision to date regarding its intercarrier compensation proceeding. On March 25, 2009, PTA, OCA, and Embarq PA filed a Joint Motion for further stay of our investigation. Verizon, Sprint, Qwest, and AT&T filed Answers to the Motion. Said motion for a fourth stay is ripe for a decision.

Background of the PaUSF from the *Global Order*

We established the PaUSF through our *Global Order* wherein we stated:

The USF is a means to reduce access and toll rates for the ultimate benefit of the end-user and to encourage greater toll competition, while enabling carriers to continue to preserve the affordability of local service rates.

⁶ The RTCC, OTS, OCA and Embarq filed a joint status report.

⁷ Sprint Nextel Corp. filed on behalf of Sprint Communications Company L.P., its interexchange and competitive local exchange carrier entity, and its wireless entities operating in the Commonwealth: Sprint Spectrum, L.P. d/b/a Sprint PCS and Nextel Communications, Inc., and NPCR, Inc. d/b/a Nextel Partners.

Although it is referred to as a fund, it is actually a pass-through mechanism to facilitate the transition from a monopoly environment to a competitive environment – an exchange of revenue between telephone companies which attempts to equalize the revenue deficits occasioned by mandated decreases in their toll and access charges.

Global Order, page 142.

The establishment of the PaUSF was carried out on a revenue-neutral basis and included the rebalancing of intrastate access charges, toll rates, and local rates by the rural local exchange carriers. The PaUSF was a modified version of a settlement plan submitted by the RTCC and Bell Atlantic-Pennsylvania, Inc. (Bell is now Verizon-PA).

The components of the PaUSF, from the standpoint of the RTCC members, are briefly summarized below:

1. All small incumbent local exchange carriers, which included all ILECs other than Bell and GTE North (GTE North is now Verizon-North), were directed to be recipients of the PaUSF. The PaUSF was established for the purpose of the rate rebalancing needs of the rural local exchange carriers including reductions in their intrastate access and toll rates. All Pennsylvania telecommunications service providers (excluding wireless carriers) were directed to contribute to the PaUSF based upon their intrastate end-user revenues.
2. The RTCC members were permitted to restructure, modify and reduce their access, toll and local rates, as follows:
 - a) Intrastate traffic sensitive switched access rates and structure (including local transport restructure) were converted to mirror interstate switched access rates and structure in effect on July 1, 1998.
 - b) The Common Carrier Line Charge (“CCLC”) was restructured as a flat-rate Carrier Charge (“CC”) and reduced to an intrastate rate not exceeding \$7.00 per line and allocated to intrastate toll providers based on their relative minutes of use.
 - c) The RTCC members were given the opportunity to reduce their intrastate toll rates to an average rate not lower than \$.09 per minute.

d) The RTCC members with low local exchange rates were permitted to increase their residential one-party basic, local rates to an average monthly charge of at least \$10.83, to the extent necessary to offset the reduced toll rates.

e) Those RTCC members with an average monthly R-1 rate above \$16.00 (inclusive of touch-tone) were directed to provide their customers with a Universal Service credit to effectively reduce the rate to \$16.00 with the difference coming out of the PaUSF.

See Global Order at pp. 151-152. Sprint/United (now known as Embarq PA) was not an original participant in the RTCC plan in the *Global* proceeding, but after pleading its inclusion in the PaUSF at the *Global Order* hearings, the Commission ordered that Sprint/United be included as a recipient carrier and in exchange for access charge reductions, it be allowed to draw \$9,000,000 from the PaUSF annually.

We also stated in our *Global Order*:

[W]e shall initiate an investigation on or about January 2, 2001, to further refine a solution to the question of how the Carrier Charge (CC) pool can be reduced. At its conclusion, but no later than December 31, 2001, the pool will be reduced. In addition, we shall consider the appropriateness of a Toll Line Charge (TLC)[or an intrastate Subscriber Line Charge] to recover any resulting reductions.

Global Order at 60.

Further Access Charge/Federal USF Reform History

In addition to the Commission's competitive undertakings on the intrastate side, the FCC instituted numerous proceedings aimed at further addressing an orderly transition from monopoly to a more competitive environment.

Pursuant to TA-96, the FCC undertook reform of both interstate access charges and federal universal service support mechanisms. Beginning in 1997, the FCC adopted several measures to move interstate access charges for price cap carriers toward lower,

cost-based levels by revising the recovery of loop and other non-traffic sensitive costs from per-minute charges to flat per line charges thereby aligning rates more closely with the way the costs are incurred.

For example, in order to phase out interstate carrier common line (“CCL”) charges, the per-minute charges assessed on interexchange (“IXC”) carriers through which ILECs recover their residual non-traffic sensitive interstate loop costs that are not recovered through their capped federal subscriber line charges (“SLCs”), the FCC created the presubscribed interexchange carrier charge (“PICC”), a flat, per line monthly charge imposed on IXCs. The FCC also shifted the non-traffic sensitive costs of the line ports from per-minute local switching charges to the common line category and established a mechanism to phase out the per-minute transport interconnection charge (TIC). The FCC held that more rate structure modifications would be required to create a system that accurately reflects the true cost of service in all respects.

In its *Interstate Access Support Order*⁸ the FCC continued the process of access charge and universal service reform for price cap local exchange carriers. That order prescribed a more straightforward, and purportedly economically rational, common line rate structure by increasing the caps on the SLC, a flat monthly charge assessed directly on end-users to recover interstate loop costs, and phasing out the PICC, which the FCC viewed as economically inefficient due to the indirect flow of loop costs to end-users through IXCs. The FCC also revisited the controversial “X-factor,” in the federal price cap mechanism changing its function from a productivity offset to a tool for reducing per-minute access charges to target levels proposed by parties participating before the federal agency.

The FCC also established a new interstate access support mechanism, capped at \$650 million annually, to replace what the FCC deemed implicit support included in the

⁸ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982, May 31, 2000, (*Access Charge Reform Order*) at 15998 Par. 35.

interstate access charges of price cap carriers, finding \$650 million to be a reasonable amount that would provide sufficient, but not excessive, support. In this regard, the FCC observed that a range of funding levels might be deemed “sufficient” for purposes of TA-96, and that “identifying an amount of implicit support in our interstate access charge system to make explicit is an imprecise exercise.”⁹

In recognition of the need for a more comprehensive review of the issues of access charge and universal service reform for the remaining 1,300 or so rural local exchange carriers serving less than 2% of the nation’s access lines, the FCC placed such reforms for the non-price cap carriers on a separate track. As documented in a series of white papers prepared by the Rural Task Force, an *ad hoc* stakeholder group constituted by the FCC to study the differences between the provision of telecommunications services in rural and non-rural areas, rural carriers generally have higher operating and facilities costs due to lower subscriber population density, smaller exchanges and limited economies of scale.¹⁰ Significantly, rural carriers rely more heavily on revenues from access charges and universal service support in order to provide ubiquitous and affordable local service. On May 23, 2001, the FCC released its *Fourteenth Report and Order and Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Report and Order, 16 FCC RCD 11244 (released May 23, 2001) (“*Rural Task Force Order*”).

The *Rural Task Force Order* changed the manner in which rural interstate universal service support is currently calculated and applied. Among other things, the *Rural Task Force Order* endorsed use of a modified embedded cost mechanism for rural carriers, as opposed to a forward-looking cost mechanism required for price cap carriers,

⁹ *Interstate Access Support Order* at 13046 par. 201.

¹⁰ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9164-65 (1977) (*Universal Service First Report and Order*) at 8917 par. 253 (subsequent history omitted); *Rural Task Force Order*.

to determine rural carrier support, and included implementation of a rural growth factor (the sum of annual line growth and a general inflation factor) and a “safety net” additive and “safety valve” to provide support for new investment and growth above stated thresholds. While created as an interim plan, the FCC also made clear its intention to develop “a long-term plan that better targets support to carriers serving high-cost areas, while at the same time recognizing the significant differences among rural carriers, and between rural and non-rural carriers.”¹¹

The FCC also took major steps in beginning to reform interstate high-cost support, interstate access charges and universal service support systems for non-rural carriers through a series of reports and orders in the matter of *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 and the *Interstate Access Support Order*, and the interstate high-cost support for rural carriers through the *Rural Task Force Order*, the FCC began to address the matter of interstate access charge and universal service support reforms for the rural carriers. On November 8, 2001, the FCC issued its *Second Report and Order* at CC Docket Nos. 01-304, 00-256 (MAG Plan), 96-45 (USF), 98-77 (Access Charge Reform) and 98-166 (Authorized ROR), in what is referred to as the *MAG Order*. In the *MAG Order*, the FCC stated its intent to align the interstate access rate structure with a lower, more cost-based level, remove what the FCC deemed to be implicit support for universal service and replace it with explicit, portable and competitively neutral support. Specifically, the *MAG Order* lowered interstate access charges from approximately \$0.046 per minute to possibly as low as \$0.022 per minute, increased the interstate SLC over a period of time, and phased out the CCL by July 1, 2003, replacing it with a portable interstate common line support (“ICLS”) universal service mechanism. In addition, SLC caps were increased effective January 1, 2002, raising monthly per line SLC rates from a range of \$3.50 - \$5.00 for residence and single line business to a range of \$6.00 - \$6.50. These interstate changes have resulted in significant increases to most Pennsylvania consumers, which are in addition to the intrastate increases in local service

¹¹ *Id.* at 11249 par. 8.

rates under Pennsylvania's intrastate access charge reforms and the rate effects of Chapter 30.

On March 12, 2009, the House Subcommittee on Communications, Technology and the Internet held hearings on a bill to reform the federal Universal Service Fund ("USF"). Called the Universal Service Reform Act of 2007, the bill proposed to cap the growth of the federal USF, in part, by limiting the number of eligible carriers and also by compensating them based upon their actual costs. This proposed legislation also sought to allow disbursements to be used for broadband deployment. Chairman Boucher has indicated he is in the process of revising the legislation.

On November 5, 2008, at CC Docket No. 01-92, the FCC issued a pending *Intercarrier Compensation Notice of Proposed Rulemaking* ("ICC NOPR") which considers a radical restructuring of the intercarrier compensation system and federal USF as proposed by former FCC Chairman Martin. The plan includes the concept of subjecting all traffic to a new reciprocal compensation methodology designed to drive down interstate and intrastate access rates and to be implemented by state regulators. The plan further proposes to raise the cap on the national subscriber line charge up to \$8.00 - \$8.50 per month from the current \$6.50 level. Chairman Martin's draft was released at CC Docket No. 01-92 as a Notice of Proposed Rulemaking and appeared in the *Federal Register* on November 10, 2008.

There are also pending state matters before this Commission. In January 2007, this Commission entered an order staying a pending investigation involving the Verizon companies pending the outcome of the FCC's Intercarrier Compensation proceeding or for a period of one year until January 8, 2008, whichever is less. The Commission granted Verizon a further one-year stay by order entered September 11, 2008.

Currently, pending before the Commonwealth Court are two appeals that could affect the PaUSF.¹² Briefs have been filed and the parties are awaiting the scheduling of oral argument.

Finally, there exist 96 complaints requesting further intrastate access charge reductions pending before the Commission *In re: AT&T Communications of Pennsylvania LLC v. Armstrong Telephone Company – Pennsylvania, et al.*; Docket No. C-2009-2098380, *et al.*; *TCG New Jersey, Inc. v. Armstrong Telephone Company – Pennsylvania, et al.*; Docket No. C-2009-2099805, *et al.*; and *TCG Pittsburgh, Inc. v. Armstrong Telephone Company – Pennsylvania, et al.*, Docket No. C-2009-2098735, *et al.* On June 26, 2009, the Pennsylvania Telephone Association (PTA) and Embarq PA submitted a Petition Requesting Interlocutory Review and Answer to Material Questions to this Commission regarding issues arising from these complaints. These material questions for review includes question of whether the ALJ erred in denying the Preliminary Objections filed by the PTA and Embarq PA seeking to dismiss the complaints and whether the Commission should grant the Motion for Stay or Consolidation seeking to stay or consolidate AT&T's complaint with the pending PUC investigation at Docket No. I-00040105. These material questions are being addressed in a separate Commission Order.

Discussion

In the instant proceeding, the Joint Movants request that the Commission issue an order staying the above-captioned investigation for at least one year after the Commission enters an order acting on this Joint Motion, or until the FCC rules on its *Unified Intercarrier Compensation* proceeding at CC Docket No. 01-92, whichever is earlier. This would be the fourth such 12-month stay. The parties in opposition to the Joint Motion request the Commission resume a full investigation of all issues.

¹² *Buffalo Valley Telephone Company, Conestoga Telephone and Telegraph Company, and Denver and Ephrata Telephone and Telegraph Company v. Pennsylvania Public Utility Commission*, No. 847 C.D. 2008 and *Irwin A. Popowsky, Consumer Advocate v. Pennsylvania Public Utility Commission*, No. 940 C.D. 2008.

The Joint Movants claim that because the FCC's *Unified Intercarrier Compensation* proceeding at CC Docket No. 01-92 and pending federal legislation may substantially alter the law governing intrastate universal service programs, these continuing federal administrative and legislative activities present a "moving target" of uncertain result with respect to the parameters and outcomes of any further investigation undertaken in this docket at this time. Joint Movants argue that the federal proposals and the pending state level litigation could have a significant impact on rural access reform. The federal proposals cover both interstate and intrastate access charge reform and affect both the federal and Pennsylvania USFs. Accordingly, Joint Movants claim it would be unreasonable, unproductive and impractical for this Commission to act further on rural access reform in advance of the FCC. Therefore, a further stay of the full-blown access charge investigation regarding the lowering of intrastate access charges is warranted.

Verizon¹³ responded to the Joint Motion on April 17, 2009, opposing continuation of a stay of the investigation. Instead, Verizon requested the Commission act to reduce the gap between the highest rural local exchange carrier's access rates and the rates Verizon and other carriers are permitted to charge for the same services. Verizon requests the Commission require the rural ILECs to make substantial progress towards reducing their access rates and to disclose their intrastate switched access rate elements and average rate per minute of use for the years 2006 and 2007. Verizon claims that it charges on average about \$0.017 per minute for intrastate switched access service in Pennsylvania, a rate below the national average, while most of the rural ILECs' switched access rates average over \$0.04 per minute, and some are as high as \$0.09 or \$0.11 per minute.

Verizon contends that consumers in the RLECs' territories suffer as their choices of competitive providers are limited. Additionally, Verizon claims its customers suffer because Verizon has to pay high intrastate access charges to support the RLECs, and this

¹³ Verizon filed on behalf of the Verizon ILECs, Verizon Pennsylvania Inc. and Verizon North Inc. as well as Verizon's CLEC, MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, (collectively referred to as "Verizon").

money could be used to provide better and less expensive services and products to its own customers.

Verizon contends that the limited investigation has shown that the RLECs are not little “Mom and Pop” companies. In fact, a number of RLECs are affiliated with large, sophisticated national carriers yet they still charge high access rates. Verizon contends Frontier/Commonwealth averages among the highest of the RLECs at over \$0.07 per minute for intrastate switched access, Embarq charges almost \$0.05 per minute, and Windstream, Consolidated/North Pittsburgh and the D&E Companies charge around \$0.04 per minute. Verizon avers that if the rural ILEC rates were lower and the disparity between their rates and those of other carriers were reduced, then the balance might tilt in favor of waiting for the FCC to decide its intercarrier compensation regime. However, Verizon argues the Commission should uphold its duty to investigate the intrastate access rates, regardless of any pending action at the FCC. Verizon admits that it would be good for a state to coordinate its requirements with the federal government’s, but because there is no imminent FCC action in intercarrier compensation, there is no basis to postpone the proceeding and delay further access charge reductions.

Verizon points to Virginia as a state moving forward with access charge reform for Embarq as a result of a Sprint petition. Other access charge reform is being considered in Kentucky, Washington, and Kansas. Therefore, Verizon contends that Pennsylvania ought to be reconsidering its access charge reform.

AT&T Communications of Pennsylvania, LLC (“AT&T”) filed an Answer on April 17, 2009, requesting the Commission resume this proceeding with the objective of removing implicit subsidies by reducing intrastate access rates to appropriate levels and rebalancing reduced ILEC revenues through increases to retail rates and a state universal service funding mechanism that would result in more economically rational prices for all rural incumbent local exchange carriers (“rural ILECs”) services.

Primarily, AT&T argues it has been four years since access charge reform in Pennsylvania, and it is time for Pennsylvania to fulfill its promise to complete the access charge investigation and decide three issues. AT&T requests the Commission decide whether the RLECs' intrastate access charges should be reduced to mirror the interstate access charges.

AT&T claims that the rural carriers in Pennsylvania are not so rural or small in that more than a million of the 1.1 million lines served by the Rural ILECs are provided by just five companies, all large national carriers which, with one exception, are headquartered outside of Pennsylvania. Embarq recently merged with Century Tel to form an even larger national carrier, headquartered in Louisiana. Embarq serves approximately 300,000 lines as does Frontier. Windstream serves nearly 200,000, and the D&E Companies serve more than 100,000. The fifth largest carrier, North Pittsburgh, part of Consolidated Communications based in Mattoon, Illinois, serves some 50,000 lines in Pittsburgh's suburbs.

AT&T asserts these 5 largest national carriers should be the central focus of the Commission's access reform effort. Of the 19 other RLECs, none serve more than 12,000 lines and collectively, they serve fewer than 100,000 lines.

AT&T avers that the Commission should resume the proceeding and remove implicit subsidies by reducing intrastate access charges to appropriate levels and rebalance revenues through increases to retail rates and the PaUSF. AT&T believes the more states that engage in intrastate access reform, the less likely it will be that the FCC would take any action that could be construed as punitive towards those states. AT&T encourages this Commission to join West Virginia, Virginia, and New Jersey who have recently opened full intrastate access charge investigations. AT&T does not believe the FCC or the federal government will act quickly with regard to intercarrier compensation and intrastate access charges "given the laser focus on the nation's economic woes."

AT&T Answer p. 9.

Qwest Communications Corporation (“Qwest”) filed a status report on March 25, 2009, requesting the Commission reinstitute its investigation of rural intrastate access charges because it is unlikely the federal government will issue a ruling soon on intercarrier compensation. Qwest argues that “traffic pumping” of IXC traffic to rural carriers with high access charges is occurring by third parties. The profitable access charge revenues are then being shared by the rural carrier and the third party. Qwest argues this is a nationwide problem.

Sprint Communications Company, L.P., Sprint Spectrum, L.P., Nextel Communications of the Mid-Atlantic, Inc. and NPCR, Inc., (collectively “Sprint”) submitted an Answer to the Joint Motion requesting the Commission resume the investigation because no federal action directly impacting rural local exchange company intrastate access charges is imminent and further delay prevents the Commission from making progress on the important access charge and universal service issues we identified as the focus of this investigation in December, 2004. Sprint asserts that unless the Commission loses or cedes its jurisdiction over intrastate traffic, neither of which Sprint sees as a likely outcome of the *Unified Intercarrier Compensation* proceeding, action by the Commission will be required to effectuate any solution to Pennsylvania’s inflated access rates announced by the FCC. Therefore, Sprint urges this Commission to deny the Joint Motion on the grounds that intrastate access reform, particularly for the rural carriers, is urgently needed.

Resolution

The Commission has repeatedly stayed the examination of the intrastate carrier access charges of rural incumbent local exchange carriers (RLECs) in the context of its *Intrastate Access Charge Investigation* for valid reasons.¹⁴ These reasons were partially based on the parallel initiatives of the FCC on intercarrier compensation reform at the

¹⁴ See generally *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund*, Docket No. I-00040105, Order entered August 30, 2005, Order entered November 16, 2006.

national level, and their potential interaction with intrastate carrier access charges and basic telephone service retail rates under Chapter 30 of the Public Utility Code.¹⁵ With its April 24, 2008 Order in the *Intrastate Access Charge Investigation* the Commission directed the limited reopening of that proceeding and referred the examination of certain issues to the Office of Administrative Law Judge (OALJ).¹⁶

During the intervening time frame, we have not seen any substantial resolution of intercarrier compensation issues by the FCC on the national level. The latest FCC proposals on national intercarrier compensation and federal universal service fund (USF) reform were put forward in November 2008.¹⁷ However, the FCC still must take substantive action, and it is unclear whether the FCC will appropriately prioritize the area of intercarrier compensation and federal USF reform for ultimate resolution any time soon.

This Commission, unlike what has occurred in many other states, has proceeded with numerous intrastate carrier access charge reforms and the institution of a Pennsylvania-specific USF. However, ongoing proceedings both before the Commission and the Pennsylvania Commonwealth Court¹⁸ have provided serious indications that, in the absence of substantive FCC actions in the areas of national intercarrier compensation reform and the federal USF, this Commission may need to again undertake the initiative of reexamining the area of intrastate carrier access charges for the RLECs. The AT&T complaint underlines the need for such action.

¹⁵ *In re Developing a Unified Intercarrier Compensation Regime* (FCC March 3, 2005), CC Docket No. 01-92, *Further Notice of Proposed Rulemaking*, FCC 05-33 (*Unified Intercarrier Compensation*). See also 66 Pa. C.S. §3017(a).

¹⁶ *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund et al.*, Docket No. I-00040105 et al., Order entered April 24, 2008, Order entered September 25, 2008, and Recommended Decision by ALJ Susan Colwell entered July 23, 2009.

¹⁷ *In re High-Cost Universal Service Support et al.*, (FCC November 5, 2008), WC Docket No. 05-337 et al., *Order on Remand and Report and Order and Further Notice of Proposed Rulemaking*, FCC 08-262.

¹⁸ *Buffalo Valley Tel. Co. et al. v. Pa. Pub. Util. Comm'n*, No. 847 C.D. 2008 (*Pa. Cmwlth.*) case pending; *Popowsky v. Pa. Pub. Util. Comm'n*, No. 940 C.D. 2008 (*Pa. Cmwlth.*) case pending.

Therefore, based upon these circumstances and our review of the parties' positions, we are persuaded that the access charge investigation should be resumed at this time. The pending proposals that are before the FCC to impose a \$0.0007 rate to interstate and intrastate access charges alike nationwide and of pending federal legislation do not alone warrant a fourth one-year stay of the investigation as FCC action does not appear to be imminent.¹⁹

The Recommended Decision by ALJ Susan Colwell entered on July 23, 2009, as well as the evidentiary record in that limited investigation will assist us in resolving the full investigation, and the issues already adjudicated before Administrative Law Judge Susan Colwell during the limited reopening of the investigation shall not be relitigated absent extraordinary circumstances.

In the event that the FCC makes a final determination regarding intercarrier compensation regimes during our full investigations, the impact of said determination should be addressed by all interested parties as part of the proceeding. We acknowledge that former Chairman Martin's proposal as well as other proposals before the FCC in the *Unified Intercarrier Compensation* proceeding could have a significant impact on rural access reform as many of these proposals advocate interstate and intrastate access charge reform as well as federal and state universal service funds. Most of the proposals suggest that rural carriers should continue to receive funding of their networks to foster universal service and in many cases create supplemental rural universal service funding or access

¹⁹ *Federal Communication Commission's Public Notice of Proposed Rulemaking on Intercarrier Compensation* (Docket No. 01-92) at FCC 08-262 published in the Federal Register on November 10, 2008 (the *ICC NOPR*). The Intercarrier Compensation proposals establish an interim reciprocal compensation rate of \$0.0007 per Minute of Use (MOU). *Id.* The proposals uniformly require state commissions to conduct a series of cost-study proceedings to arrive at a reciprocal compensation rate that does not exceed the transitional rate. The cost studies are to replace total element long-run incremental cost (TELRIC) rates, which contained cost allocations for non-traffic sensitive and traffic sensitive costs, with a new incremental cost model that allocates only traffic sensitive costs to access termination rates. The states would have a 10-year period to transition from current rates to the uniform rate. The imposition of the uniform rate is essentially constructive preemption of the PaPUC's right and jurisdictional duty to set intrastate access charge rates. The PaPUC has traditionally implemented the TELRIC standard in numerous proceedings for the establishment of cost-based rates in interconnection agreements and related exchange and termination of traffic.

charge replacement funding to compensate rural carriers for additional required access reform.

We submitted comments to the FCC on November 26, 2008, to the *ICC NOPR* declaring Pennsylvania to be one of several states that have undertaken extensive reform of our intercarrier compensation rates and have established a state universal service fund in connection with intrastate access charge reductions. This Commission already has affected in excess of \$1 billion in intercarrier compensation reform in Pennsylvania broken down into \$605.9 million on Verizon's access rate reductions, \$189.4 million on rural carrier access rate reductions, and \$218.3 million from the PaUSF to support access rate reform since 2000.

Although the Joint Motion does not expressly state whether the Joint Movants advocate a continuation of the current PaUSF under the existing regulations codified at 52 Pa.Code §§ 63.161-63.171, it can be inferred that it is the position of the Joint Movants that the *status quo* be maintained until there is a resolution after an investigation and until a future rulemaking determines otherwise consistent with the eventual rulings of this Commission at the limited reopened stage of this Investigation. We are of the opinion that maintaining the *status quo* will also ensure that the current levels of intrastate access charges will not be increased during the stay. It has been, and continues to be the intention of this Commission, since the *Global Order* of 1999, to gradually lower intrastate access charges so as to allow for greater competition in the intrastate and interexchange toll markets. At the same time we recognize the mandates of Chapter 30 require that local service rates be reasonable and affordable in all areas of this Commonwealth.

Accordingly, for these above-stated reasons, the Joint Motion will be denied. Until there is a resolution to access charge reform, the *status quo* stays in place, and the 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; **THEREFORE,**

IT IS ORDERED:

1. That the Joint Motion of The Pennsylvania Telephone Association, Office of Consumer Advocate, and The United Telephone Company of Pennsylvania d/b/a Embarq Pennsylvania is hereby denied.

2. That the stay of the intrastate access charges portion of this investigation is hereby lifted.

3. That this investigation at Docket No. I-00040105 consolidated with the 96 complaints at Docket Nos. C-2009-2098380 *et al.*, *In Re: AT&T Communications of Pennsylvania, LLC et al. v. Armstrong Telephone Company-Pennsylvania, et al.* are hereby assigned to the Office of Administrative Law Judge for the development of the appropriate evidentiary record and the issuance of a Recommended Decision within twelve (12) months from the date of entry of this Order.

4. That the participating parties shall be afforded due process opportunities to supplement the evidentiary record; however, 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.

5. 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.

6. That the Commission Staff from the Office of Special Assistants and the Law Bureau is hereby directed to continue monitoring the Federal Communications Commission's *Unified Intercarrier Compensation* proceeding.

7. That 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.

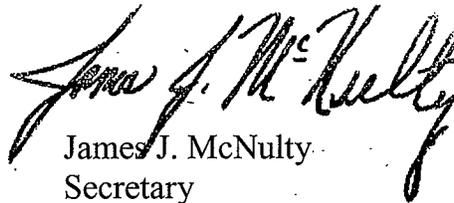
8. That absent extraordinary circumstances, intrastate access charges of the rural incumbent local exchange carriers including Embarq shall not increase during the investigation.

9. That the current average benchmark caps on residential R-1 rates and corresponding business rate caps shall remain in effect unless modified by future Commission Order.

10. That a copy of this order be delivered to all telecommunications carriers operating in Pennsylvania, the Office of Consumer Advocate, Office of Small Business Advocate, and to Solix, Inc., the current Administrator of the Pennsylvania Universal Service Fund.

11. That a copy of this order be delivered for publication to the *Pennsylvania Bulletin*.

BY THE COMMISSION:


James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: July 23, 2009

ORDER ENTERED: August 5, 2009

APPENDIX C

**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	:	

ORDER ADDRESSING SCOPE OF CONSOLIDATED PROCEEDINGS

The purpose of this Order is to provide guidance and avoid future conflicts by addressing the scope of these consolidated proceedings, based upon interpretation of prior Commission rulings and the Recommended Decision of Administrative Law Judge Susan D. Colwell (ALJ Colwell) on the limited reopening of the investigation at Docket No. I-00040105. The parties have been given the opportunity for input, and have provided prehearing memoranda, oral argument, and over 200 pages of additional legal memoranda on this subject. All arguments have been duly considered, even if not separately addressed herein.

Based on the Procedural Order dated August 20, 2009, the parties will have ten (10) days from the date of this Order in which to file a petition for interlocutory Commission review and answer to a material question pursuant to 52 Pa. Code §5.302 if they disagree with all or any part of this Order. A party seeking review should also consider requesting additional time

for this *Investigation* if the Commission determines that it will waive the thirty (30) day period pursuant to 52 Pa. Code §5.303(b) for a decision on the petition for interlocutory review.

I. BACKGROUND

On December 20, 2004, at Docket No. I-00040105,¹ the Commission entered an Order instituting an investigation (*RLEC Access Charge Investigation* or *Investigation*) as to whether there should be further intrastate access charge and intraLATA toll rate reductions in the rural incumbent local exchange carriers' (RLECs) territories and the rate issues/changes that should or would result if Pennsylvania Universal Service Fund (PA USF or Fund) disbursements were reduced. This investigation was instituted as a result of the Commission's prior Order of July 15, 2003, at Docket No. M-00021596, and the *Global Order*,² which discussed implementing continuing access charge reform in Pennsylvania.

The *December 2004 Order* directed the Office of Administrative Law Judge (OALJ) to conduct the appropriate proceedings including, but not limited to, a fully developed analysis and recommendation on the following questions:

- a) Whether intrastate access 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 PA USF be reduced and/or eliminated as a matter of policy and/or law?
- d) Assuming the PA USF expires on or about December 31, 2006, what action should the Commission take to advance the policies of this Commonwealth?

¹ See, *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund*, Docket No. I-00040105, Order entered December 20, 2004 (*December 2004 Order*).

² *Re Nextlink Pennsylvania, Inc.*, Docket No. P-00991648; P-00991649, 93 PaPUC 172 (September 30, 1999)(*Global Order*); 196 P.U.R. 4th 172, *aff'd sub nom. Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Commission*, 763 A.2d 440 (Pa.Cmwlth. 2000), *alloc. granted*, 844 A.2d 1239 (Pa. 2004).

- e) If the PA USF 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?

The *RLEC Access Charge Investigation* was assigned to ALJ Colwell for hearings as necessary and a decision. However, by Order entered August 30, 2005 (*August 2005 Order*), the proceeding was stayed before hearings were held due to a pending Federal Communications Commission (FCC) examination of access charges, reciprocal compensation and universal service in the *Unified Intercarrier Compensation*³ proceeding. Prior to the stay, ALJ Colwell had issued a ruling in Issue (e), above, in response to a motion by the Wireless Carriers requesting a determination that the Commission lacked jurisdiction to require commercial mobile radio service ("CMRS") providers to contribute to the PA USF. ALJ Colwell granted the Wireless Carriers' Motion to the extent it depended on a determination that wireless carriers are not public utilities. ALJ Colwell also indicated a future intent to name the wireless carriers as "indispensable parties," but never specifically ordered wireless carriers to be joined as indispensable parties, and no motion requesting joinder has been filed to date. See, ALJ Colwell's Order Disposing of Motions, dated June 8, 2005.

In July, 2006, the Missoula Plan⁴ was submitted to the FCC. Generally, the Missoula Plan sought to unify intercarrier charges for all traffic over a 4-year time period, reduce intercarrier compensation rates, provide an ability to recover those reduced rates through explicit means, move rates for all traffic closer together, and establish uniform default interconnection rules. The Missoula Plan and other intercarrier compensation reform proposals

³ See, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33, Further Notice of Proposed Rulemaking (released March 3, 2005).

⁴ The Missoula Plan, which was filed on July 24, 2006, is one in a series of intercarrier compensation proposals in the FCC's CC Docket No. 01-92.

are currently pending before the FCC for consideration. The Commission considers this FCC proceeding to have significant potential to directly impact the issues in the instant proceeding.⁵

On or about August 30, 2006, the Rural Telephone Company Coalition (RTCC), the Office of Trial Staff (OTS), the Office of Consumer Advocate (OCA), and Embarq PA filed a Joint Motion for further stay of the *RLEC Access Charge Investigation*. By Order entered November 15, 2006 (*November 2006 Order*), the Commission granted the Joint Motion and stayed the proceeding pending the outcome of the *Unified Intercarrier Compensation* proceeding, or until November 15, 2007, whichever was earlier.

By Order entered April 24, 2008 (*April 2008 Order*), the Commission reopened the *Investigation* for the following listed purposes:

1. To address whether the cap of \$18.00 on residential monthly service rates and any corresponding cap on business monthly service rates should be raised, whether funding for the PA USF should be increased, and whether or not a “needs based” test (and applicable criteria) for rural ILEC support funding from the PA USF in conjunction with the federal USF support payments that the rural ILECs receive should be established in order to determine which rural ILECs qualify for PA USF funding as described in the body of the *April 2008 Order*; and
2. That the proceedings also address the following issues:
 - (a) Whether the Commission has the authority under Chapter 30 and other relevant provisions of the Public Utility Code to perform a just and reasonable rate analysis of the rural incumbent local exchange carriers’ (ILECs’) residential rates for basic local exchange services when such rates exceed the appropriate residential rate benchmark.
 - (b) The appropriate benchmark for the rural ILEC residential rate for basic local exchange service taking into account the statutory requirements for maintaining and enhancing universal telecommunications services at affordable rates. Participating parties are encouraged to submit appropriate studies and testimony, including economic cost studies that can provide the necessary information for the establishment of the appropriate residential benchmark rate for maintaining and enhancing universal telephone service goals in Pennsylvania.

⁵ See, e.g., *RLEC Access Charge Investigation*, Order entered August 9, 2009 (*August 2009 Order*), p. 5.

(c) Whether PA USF funding support should be received by rural ILECs that incrementally pierce the appropriate residential rate cap because of the regular annual Chapter 30 revenue increases, and whether the Commission's PA USF regulations at 52 Pa. Code § 63.161 et seq. should be accordingly revised. The relevant inquiry should include the role of non-expired "banked revenues" that rural ILECs may have accumulated through the operation of their respective Chapter 30 modified alternative regulation plans and corresponding price stability mechanisms.

(d) Whether the potential availability of PA USF support distributions to those rural ILECs that pierce the appropriate residential rate cap because of their respective annual Chapter 30 annual revenue increases has any anti-competitive or other adverse effects, especially with respect to the currently established PA USF support contribution mechanism and its participating telecommunications utility carriers.

(e) The "needs based" test should address the following interlinked areas that involve the operations of the rural ILECs:

(i) The Chapter 30 annual rural ILEC price stability mechanism revenue increases:

(ii) The annual federal USF support that the Pennsylvania rural ILECs receive;

(iii) The fact that most of the Pennsylvania rural ILECs are "average schedule" telephone utility companies that do not jurisdictionalize a number of revenue, expense, and asset parameters for their regulated operations;

(iv) Whether there is any relevance that rural ILEC assets and facilities may be used both for the provision of regulated intrastate telecommunications services, but also for the provision of non-jurisdictional services that potentially include unregulated services;

(v) Whether the overall financial health of the rural ILECs that continue to get both PA USF and federal USF support should play a role for continuing to receive PA USF support distributions; and

(vi) Whether the PA USF level of support distributions to the recipient rural ILECs should be adjusted in relation to the revenue increases in local exchange rates that have been or are implemented through their respective Chapter 30 modified alternative regulation plans and price stability mechanisms.

The limited reopened *Investigation* was assigned to ALJ Colwell for hearing and decision. The remainder of the *Investigation* was stayed for the third time pending the outcome of the FCC's *Unified Intercarrier Compensation* proceeding or until April 24, 2009 (i.e., one year from the entry date of the *April 2008 Order*), whichever came first.

On March 19, 2009, during the pendency of the third *RLEC Access Charge Investigation* stay, AT&T Communications of Pennsylvania, LLC (AT&T PA), TCG New Jersey, Inc. (TCG NJ) and TCG Pittsburgh, Inc. (TCG) (collectively AT&T) each filed individual complaints (AT&T Complaints) with the Commission against thirty two (32) Pennsylvania RLECs⁶ for a total of ninety-six (96) complaints (referred to collectively as AT&T Complaint proceeding). The AT&T Complaints, which were filed pursuant to 52 Pa Code §5.21 and 66 Pa. C.S. §§701 and 1309, involved alleged intrastate access charge violations of 66 Pa. C.S. §§1301 and 3011(3), (4), (5), (8) and (9). As relief, AT&T requested that the RLECs be required to reduce intrastate access rates to levels which correspond, both in rate levels and in rate structure, to the rates each company assesses for interstate switched access.

On April 30, 2009, the RLECs, represented by the Pennsylvania Telephone Association (PTA), filed identical Answers to each of the ninety-six (96) Complaints and also filed Preliminary Objections. In its Answer, PTA denied the material allegations and contended that AT&T was attempting to end run the Commission's pending *Rural Access Charge Investigation* that was stayed at that time. It further argued that the pending investigation was the

⁶ The RLECs are as follows: Armstrong Telephone Company – Pennsylvania; Armstrong Telephone Company – North; Bentleyville Telephone Company; Buffalo Valley Telephone Company; Citizens Telephone Company of Kecksburg; Citizens Telecommunications Company of New York; Frontier Communications Commonwealth Telephone Company, LLC (d/b/a Frontier Commonwealth); Frontier Communications of Breezewood, LLC; Frontier Communications of Canton, LLC; Frontier Communications – Lakewood, LLC; Frontier Communications – Oswayo River, LLC; Frontier Communications of PA, LLC; Conestoga Telephone & Telegraph Company; D&E Telephone Company; Hickory Telephone Company; Ironton Telephone Company; Lackawaxen Telecommunications Services; Laurel Highland Telephone Company; Mahanoy & Mahantango Telephone Company; Marianna & Scenery Hill Telephone Company; The North-Eastern Pennsylvania Telephone Company; North Penn Telephone Company; Consolidated Communications of Pennsylvania Company (f/k/a North Pittsburgh Telephone Company); Palmerton Telephone Company; Pennsylvania Telephone Company; Pymatuning Independent Telephone Company; South Canaan Telephone Company; Sugar Valley Telephone Company; The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania (Embarq PA); Venus Telephone Corporation; Windstream Pennsylvania, LLC (f/k/a ALLTEL Pennsylvania, Inc.); and Yukon-Waltz Telephone Company.

appropriate forum for deciding access charge issues. In its Preliminary Objections, PTA alleged *lis pendens*, due to the pending *RLEC Access Charge Investigation*, and failure of AT&T to state a cause of action.

The AT&T Complaints were consolidated into three lead dockets, and I was assigned to these matters to hold hearings as necessary and render a decision. I consolidated the three lead dockets into one (1) lead docket at C-2009-2098380. I also denied PTA's Preliminary Objections by Order dated June 22, 2009.

The following parties intervened/ filed notice of appearances in the AT&T Complaint proceeding: Sprint Communications Company, L.P., Sprint Spectrum, L.P., Nextel Communications of the Mid-Atlantic, Inc., and NPCR, Inc. (collectively Sprint); OTS; OCA; The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania (Embarq PA); 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 Transmission Services, and MCI Communications Services, Inc. (collectively "Verizon"); and the Broadband Cable Association of Pennsylvania (BCAP). Also, Embarq PA, one of the thirty-two (32) individual Respondents in this matter, was represented by separate counsel who filed a Notice of Appearance.

Sprint raised an issue concerning the applicability of the nine-month period and retroactivity provision in Section 1309(b) of the Public Utility Code (Code), 66 Pa. C.S. §1309(b), to the AT&T Complaints. During a June 23, 2009, Telephonic Conference in this matter, it was decided that PTA would seek a Commission ruling on the Section 1309 question through the filing of a petition for review and answer to a material question. In the interim, an expedited procedural schedule was established due to the uncertainty about how the Section 1309(b) question would be decided by the Commission.

On June 26, 2009, PTA and Embarq PA submitted a Petition Requesting Interlocutory Review and Answer to Material Questions (Material Questions Petition) regarding

issues arising from the AT&T Complaints. The material questions for review included whether the ALJ erred in denying the Preliminary Objections filed by the PTA, whether the Commission should stay or consolidate the AT&T's Complaints with the pending *RLEC Access Charge Investigation*, and whether the retroactivity provision in Section 1309(b) applied to the AT&T Complaints.

On July 23, 2009, ALJ Colwell's Recommended Decision on the limited reopening portion of the *RLEC Access Charge Investigation* was issued. Exceptions were due to be filed by August 28, 2009 and Reply Exceptions are due later this month.

A fourth stay request was filed concerning the remainder of the *RLEC Access Charge Investigation* which had not been assigned to ALJ Colwell. This stay request and the Material Questions Petition were considered by the Commission at Public Meeting on July 23, 2009.

Regarding the Material Questions Petition, the Commission determined, in an Order entered July 29, 2009 at C-2009-2098380 et al. (*July 2009 Order*), that *lis pendens* did not apply and the AT&T Complaints would not be dismissed, but that they would be consolidated with the *RLEC Access Charge Investigation* to avoid duplicative litigation. The Commission also indicated that, considering that the AT&T Complaints were being consolidated with a proceeding that was instituted several years ago, the nine-month deadline and retroactivity provision in Section 1309(b) of the Public Utility Code would not apply. Regarding the *RLEC Access Charge Investigation*, the Commission lifted the stay and assigned the matter to OALJ for development of an appropriate evidentiary record and the issuance of a Recommended Decision within twelve (12) months. The Commission further ordered that, absent extraordinary circumstances, the issues already adjudicated by ALJ Colwell were not to be relitigated. *August 2009 Order*, p. 21.

The *August 2009 Order* also contained the following Ordering Paragraph #5:

5. 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.

The consolidated AT&T Complaints and *RLEC Access Charge Investigation* were assigned to me for such hearings as necessary and a recommended decision.

A Prehearing Conference was held in these consolidated matters on Wednesday, August 19, 2009, at 10:00 a.m. for the purpose of setting a litigation schedule and addressing other procedural issues. The following parties participated and were granted party status: AT&T; PTA; Embarq PA; Verizon; OCA; OSBA; OTS; Comcast; Qwest Communications Company, LLC (Qwest); Cellco Partnership d/b/a Verizon Wireless (VZ Wireless); Sprint; Omnipoint Communications Enterprises LLC 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), and BCAP.

At the Prehearing Conference, the Wireless Carriers requested confirmation that ALJ Colwell's June 8, 2005 Order Disposing of Motions remained in effect and that Issue (e) set forth in the *December 2004 Order* was no longer within the scope of issues to be addressed in these proceedings. This request and subsequent discussion about the scope of the proceeding, which extended over a considerable period of time, revealed a vast disagreement among the parties about scope.

Given the critical importance of this matter for purposes of framing the entire litigation going forward, I ruled that the parties should submit additional memoranda and responsive memoranda and that, after consideration, I would issue an Order which would set forth the scope of the proceeding. The Order would be subject to Commission review pursuant to 52 Pa. Code §§5.302-5.303. To focus the parties' efforts, I indicated that the issues identified

in the PTA Prehearing Conference Memorandum (the most expansive scope of the proceeding being advocated) should be utilized. The parties were given until September 2, 2009 to file initial memoranda of law and until September 9, 2009 to file reply memoranda to the memoranda of other parties.

On September 2, 2009, I received memoranda of law from the following parties: AT&T, PTA, Embarq PA, Sprint, OCA, OSBA, T-Mobile, VZ Wireless, Verizon, Qwest, Comcast, and BCAP. On September 9, 2009, I received reply memoranda from AT&T, PTA, Embarq PA, Sprint, Verizon, VZ Wireless, Qwest and Comcast. This matter is now ready for a ruling.

II. DISCUSSION

Based upon review of the parties' positions, the two principal areas of disagreement, which at times overlap, are: (1) the inclusion of original Issues (a) through (f) from the *December 2004 Order*, especially Issue (e) concerning Wireless Carrier contribution to the PA USF; and (2) issues which were adjudicated by ALJ Colwell based upon the limited reopening and cannot be relitigated absent extraordinary circumstances. I will address these matters below, as well as other issues which have been raised by the parties. There apparently is no disagreement about the issues in the consolidated AT&T Complaints, as set forth in the OCA Memorandum of Law at 18-19, and I will list these as issues at the end of this Discussion.

I understand that PTA, OCA, and Embarq PA have filed Exceptions to ALJ Colwell's Recommended Decision (RD) and have contended, *inter alia*, that the RD addressed matters which were beyond the scope of the limited reopening. It is not my prerogative, in addressing the scope of the remaining investigation, to decide the validity of Exceptions pending before the Commission. Accordingly, while some parties have argued that they should not be precluded from addressing issues in the "proper" proceeding, I will give no weight to these arguments. The Commission has clearly stated that parties are not to relitigate matters previously adjudicated (absent extraordinary circumstances not alleged herein), and therefore, if ALJ

Colwell decided the matter, it is not within the scope of this proceeding unless and until the Commission grants the Exception and refers the matter to OALJ.

A. Inclusion of the Six Issues from the *December 2004 Order* in this Proceeding

I will first address whether these issues as a group have been removed entirely as issues or removed from this proceeding but retained for a future proceeding. If the issues are generally within the scope of this proceeding, then I will consider whether any or all have otherwise been removed due to prior adjudication.

PTA, OCA and Embarq generally agree that the six (6) issues contained in the *December 2004 Order*, and listed individually in the PTA Prehearing Memorandum, are still within the scope of this proceeding, although PTA indicated that some are now moot or outdated. As to the moot or outdated issues, PTA contended that they should be briefly addressed in testimony rather than preliminarily disposed of through restrictions as to scope. PTA Reply Memorandum at 2, footnote 1. The parties favoring inclusion of the issues point out that the Commission never rescinded the *December 2004 Order*, although it has had several opportunities to do so, and, as pointed out by PTA, has always restated these issues in subsequent Orders concerning stay requests (*see, August 2005 Order; November 2006 Order; April 2008 Order; August 2009 Order*).

AT&T contended that none of the six (6) original issues from the *December 2004 Order* are within the scope of this proceeding, and that the issues going forward have been recast based upon the *August 2009 Order*. AT&T Memorandum at 6-7; Reply Memorandum at 6-9. It argued that if the Commission had intended the parties to address the six original issues, it would have so stated in its *August 2009 Order*. Sprint and VZ Wireless tended to focus on Ordering Paragraph #2 of the *August 2009 Order*, wherein the Commission stated that “the stay of the intrastate access charges portion of this investigation is hereby lifted.” Sprint interpreted that provision as evidencing an intent to open only a portion of the overall investigation, as opposed to the entire broad investigation, and that the actual issues are those contained in Ordering

Paragraph #5 of the *August 2009 Order*. Sprint Reply Memorandum at 3-4. VZ Wireless interpreted Ordering Paragraph #2 as exempting the original Issue (e) from the restarted investigation. VZ Wireless Memorandum at 5-6.

I have considered the parties' arguments and conclude that the original six issues set forth in the *December 2004 Order* as a group are still within the scope of the investigation (although they may be individually precluded as explained, below). A critical factor to my conclusion is that there is no Commission Order which has explicitly rescinded the original list, although the Commission has had opportunities to do so. For example, in the *April 2008 Order*, at page 17, the Commission referred to parties' beliefs that there was no value in continuing an active investigation on the questions posed by the Commission in the *December 2004 Order*. Despite these contentions by the parties, the Commission did not rescind the original six (6) issues.

Also, in a Sprint Petition for Reconsideration concerning the *April 2008 Order*, the Commission was requested to clarify that the limited reopened investigation (most recently before ALJ Colwell) would not include consideration of CMRS carriers in conjunction with PA USF funding obligations (Issue (e) from the *December 2004 Order*). At that time, the Commission had the opportunity to state that Issue (e) and all issues from that earlier Order were no longer part of the broader investigation. Instead, the Commission clarified that Issue (e) was not to be included within the limited investigation. *See, RLEC Access Charge Investigation*, Order entered October 9, 2008 (*October 2008 Order*), p. 3. This also evidences, as observed by PTA, that the six issues as a group are to be included in the restarted investigation, unless otherwise precluded.

In addition, while some parties have focused on Ordering Paragraph #5 of the *August 2009 Order* as setting forth the only remaining issues, I note that the Commission did not specifically limit the issues to those included in Ordering Paragraph #5. If the Commission had wanted to do so, it could have inserted the word "only" between the words "shall" and "address."

I have no authority to insert the word “only” in that Ordering Paragraph, and would need further direction from the Commission if that was its intent.

Furthermore, in its *July 2009 Order*, at page 14, concerning the Material Questions Petition, the Commission agreed with Sprint that the *Rural Access Charge Investigation* was much broader than the AT&T Complaint cases. It is difficult to see how the *Rural Access Charge Investigation* could be much broader than the AT&T Complaint proceeding if it is limited to Ordering Paragraph #5 of the *August 2009 Order*, since the issues therein appear to be largely encompassed within the AT&T Complaint proceeding.

I also do not agree with Sprint and VZ Wireless that Ordering Paragraph #2 of the *August 2009 Order* should be interpreted as activating only a portion of the remaining issues and as deferring other remaining issues for yet another proceeding. Instead, I interpret that paragraph as an acknowledgement that intrastate access charges were not included within the limited reopening and that access charges are to be addressed now.

As I have determined that the six (6) issues as a group have not been removed by subsequent Commission Orders and have not been reserved for future litigation, I will now address the issues individually (Issues (a) through (f) in the *December 2004 Order*).

1. Whether intrastate access charges and intraLATA toll rates should be further reduced or rate structures modified in the rural ILECs’ territories.

The parties appear to agree that this issue, at least with respect to access charges, is appropriately included as an issue, and I agree. PTA and others point out that the Commission no longer regulates intraLATA toll rates, but I note some parties may want to consider this matter in the context of access charge reform (e.g., whether there could be public interest benefits from lowering access charges). I agree with PTA that this issue should be retained “as is” and that the parties can briefly explain in testimony why they believe the intraLATA toll rate issue is no longer relevant.

2. What rates are influenced by contributors to and/or disbursements from the PA USF?

The parties disagree as to whether this issue should be included in the proceeding. Some see this question as critical to a complete understanding of requested access reform while others argue that it is related to PA USF issues and will be resolved in ALJ Colwell's recommended rulemaking.

I view this issue as rate-specific and am not convinced that, other than as it relates to annual Chapter 30 increases, it has been adjudicated by ALJ Colwell or will be addressed in the proposed rulemaking. Also, I observe a linkage between this question and Ordering Paragraph #5 of the *August 2009 Order*, and all parties agree that the issues set forth in that paragraph are part of this case. Accordingly, I conclude that this question, other than as limited herein, is appropriately addressed by the parties.

3. Should disbursements from the PA USF be reduced and/or eliminated as a matter of policy and/or law?

I agree with parties such as Verizon that this matter was adjudicated by ALJ Colwell in her recent RD and should not be relitigated absent extraordinary circumstances. ALJ Colwell clearly recommended a new policy direction for the PA USF, to be accomplished through a rulemaking, as she concluded that “[t]his fund should be reconstructed to provide assistance to those customers who need it, and for those companies who can meet a stringent test for determining that they serve an area whose costs are so high that the company itself deserves extra help for that area alone.”

Accordingly, unless the Commission determines otherwise or a party demonstrates extraordinary circumstances, this issue will not be addressed herein. However, this does not preclude the parties from addressing the linkage between access reform proposal(s) presented herein, the PA USF, and revenue neutrality, as noted by Embarq PA (Embarq PA Reply Memorandum at 4-5). See, Ordering Paragraph #5 of the *August 2009 Order*.

4. Assuming the PA USF expires on or about December 31, 2006, what action should the Commission take to advance the policies of this Commonwealth?

Some parties pointed out that this question, as stated, is moot because the PA USF did not expire on December 31, 2006. However, I view the question as having continued relevance but as having been included in ALJ Colwell's policy recommendation, as explained previously (see also, AT&T Reply Memorandum at 6-7).

Accordingly, unless the Commission determines otherwise or a party demonstrates extraordinary circumstances, this issue will not be addressed herein.

5. If the PA USF 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?

This is probably the most contentious of the six (6) issues, as the Wireless Carriers have strenuously opposed its inclusion in this proceeding. However, the OCA, PTA and Embarq PA have argued just as strenuously for inclusion.

I have considered the parties' arguments and while I initially took the position that, due to lack of Commission jurisdiction, questions concerning wireless carrier contribution would be purely academic and therefore beyond the scope of this investigation (see Prehearing Conference transcript), I have reconsidered this position.

First of all, I readily acknowledge that wireless carriers are not public utilities within the meaning of the Public Utility Code, 66 Pa. C.S. §102(2)(iv). However, as recognized by ALJ Colwell in her June 8, 2005 Order Disposing of Motions, the Commission's authority to investigate whether CMRS providers should be contributors to the PA USF, is not dependent upon public utility status. Indeed, it appears that in asking questions about CMRS provider contribution, the Commission was seeking information to decide whether or not to seek a

legislative change, such as inclusion of CMRS providers as public utilities. This is a valid investigative inquiry.

I am also reminded that investigations are more expansive than complaint proceedings, and this view argues for inclusion of issues, even though, to the extent public utility status is necessary, the Commission may not require PA USF contribution from wireless carriers at this time. As stated by the OCA in its Memorandum at page 8:

The Commission uses investigations to address broad issues of policy and fact that often go beyond the scope of a single adjudication between two opposing parties. The fact that the Commission gave one year for this investigation to be conducted supports the point that the investigation is a fact gathering exercise that is intended to present a detailed evidentiary record to the Commission for its review. To limit the scope of this proceeding as some parties have advocated, or to expedite the proceeding, would in general do a disservice to the Commission on this matter of vital public importance.

Some parties (e.g. Verizon, VZ Wireless, and Qwest) have contended that Ordering Paragraph #7 in the *August 2009 Order* precludes consideration of any issues, such as wireless carrier contribution, which would require PA USF regulatory changes. I disagree. Indeed, the very purpose of an investigation is to provide information to the regulatory body which could eventually result in a rulemaking. Ordering Paragraph #7 simply states the obvious; that existing regulations will not change absent a rulemaking proceeding which would provide notice and an opportunity for all interested parties to have input.

Finally, I disagree with those parties (e.g. T-Mobile) which claim that ALJ Colwell adjudicated this issue when she made PA USF policy recommendations. While ALJ Colwell recommended initiation of a rulemaking to address the form and uses of the PA USF, and provided a new policy direction, she did not address or adjudicate any issue concerning who should contribute to the PA USF. The questions set forth by the Commission in its *December 2004 Order* on this matter are properly included as issues herein.

I acknowledge that, as indicated by Sprint, a “piecemeal approach” which includes some PA USF issues while excluding others, is not preferred. Sprint Memorandum at 14-15. However, I find that approach to be unavoidable in order to comply with prior Commission directives (particularly Ordering Paragraphs 4 and 5 in the *August 2009 Order*).

6. What regulatory changes are necessary to 52 Pa. Code §§63.161 – 63.171 given the complex issues involved as well as recent legislative developments?

Based upon the previous resolution, I consider regulatory changes involving the inclusion of wireless carriers as contributors to the PA USF to be within the scope of this proceeding. Also, any regulatory changes necessary to address the issues set forth in Ordering Paragraph #5 in the *August 2009 Order* would also be within the scope, subject to the following limitation. That limitation is that regulatory changes which involve relitigation of ALJ Colwell’s policy recommendation on form and uses of the PA USF would not be within the scope, absent extraordinary circumstances.

B. Inclusion of Other PTA Issues Derived from the *December 2004 Order*

PTA listed three (3) issues in its Prehearing Memorandum, in addition to the six (6) issues from the *December 2004 Order*, which it contended were derived from those six (6) issues. I will address each of these issues separately as to whether, in my view, they are included within the scope of this proceeding.

1. The appropriateness of continuation of the PA USF to continue to support the access reforms already implemented, and/or the development and implementation of a Toll Line Charge or other universal service fund to recover any revenue deficiencies effectuated by any change in the current PA USF or the current rural access rates.

PTA contended that this listed issue was within the scope of this proceeding as it flowed from the third issue or Issue (c) in the *December 2004 Order*. PTA Memorandum at 6-7. Embarq PA and OCA are supportive of PTA’s position.

I previously ruled, *supra*, that the third issue from the *December 2004 Order* was encompassed within ALJ Colwell's recent RD and thus could not be relitigated absent extraordinary circumstances. However, I interpret the instant issue as encompassing treatment of revenue deficiencies resulting from access reductions, rather than simply a relitigation of PA USF policy as in Issue (c). I note for example that AT&T and Qwest view this issue as potentially encompassing matters within the scope of this proceeding pursuant to Ordering Paragraph #5 of the *August 2009 Order* (see AT&T Memorandum at 11, Reply Memorandum at 9-10; Qwest Memorandum at 8-9).

After consideration of the parties' positions, I adopt AT&T's approach and will consider parties' efforts to address the revenue neutrality requirement of Chapter 30 as within the scope of this proceeding under Ordering Paragraph #5 of the *August 2009 Order*. For this same reason, linkages between access charge reductions and the PA USF or retail rate increases to recover access reductions are proper issues for this case. However, attempts by parties to relitigate PA USF policy direction as adjudicated by ALJ Colwell will be precluded absent extraordinary circumstances.

2. The appropriateness of eliminating current PA USF credits on local service customer bills and increasing access charges on access customer bills to the extent the current PA USF is reduced without replacement funding implemented.

PTA asserted in its Memorandum at 6-7 that this issue flowed from Issue (c) in the *December 2004 Order*, and its position was supported by Embarq PA and OCA. AT&T, however, contended that this very issue was recently litigated before ALJ Colwell and no party provided any extraordinary circumstances that would justify addressing this issue again. AT&T Memorandum at 11-12, Reply Memorandum at 10. Qwest observed that the issue as phrased would be contrary to the Commission's current and long-standing policy of reducing access charges, not increasing them. Qwest Memorandum at 9.

I understand AT&T's position that this matter was litigated previously; however, I am not convinced that ALJ Colwell actually decided this specific matter in her RD. I also

acknowledge the Commission's long-standing policy of access charge reduction, and note that access charges are not to increase during this investigation absent extraordinary circumstances. *August 2009 Order*, Ordering Paragraph #8. However, a consideration of this issue in this investigation is not the same as increasing access charges during the pendency of the proceeding. Also, the likelihood of success of an issue is not relevant to determining scope. Therefore, I conclude, based on Commission guidance from the *August 2009 Order*, that this issue is within the scope of the proceeding.

3. The pool of service providers that should be assessed to contribute to universal service support in Pennsylvania.

This issue is perceived by some parties to be a restatement of Issue (e) from the *December 2004 Order*, and I have already ruled that Issue (e) is within the scope of the proceeding. Other parties such as OCA and Embarq PA, observed that this issue (unlike Issue (e)), could include record development regarding VoIP carriers' contribution to the PA USF arising from any continued access reform undertaken by the Commission. OCA Memorandum at 16; Embarq PA Memorandum at 6. See also, Ordering Paragraph #5 of the *August 2009 Order* requiring parties to address linkages between access reform, the PA USF, and basic local service rates. While the issue of contributors to the PA USF was not adjudicated by ALJ Colwell, I note that the Commission has previously declined to make conclusive jurisdictional or policy determinations or to take action with respect to VoIP traffic until the FCC provides guidance. See, *Investigation into Voice Over Internet Protocol as a Jurisdictional Service (VoIP Order)*, Docket No. M-00031707, Order entered May 24, 2004. Also, the issue of VoIP provider contribution was not specifically included in the *December 2004 Order*, which was entered soon after the Commission's *VoIP Order*. Thus, while I am not precluding issues relating to expansion of the PA USF contributor pool at this point, due to Ordering Paragraph #5, I urge the parties to consider prior Commission action concerning VoIP providers in focusing their litigation efforts.

C. Issues Related to Ordering Paragraph #5 of the August 2009 Order

PTA raised two (2) final issues in its Prehearing Memorandum which it contended were related to Ordering Paragraph #5 of the *August 2009 Order*, plus a “catch-all” issue based on additional issues that are relevant to the *Investigation*. I will address the identified issues below. With respect to the “catch-all” issue, as PTA has not set forth these other issues which it might deem to be relevant, it is not possible to assess at this time whether these unspecified issues might be within the scope of this proceeding.

In its Memorandum at 20-21, Sprint referenced issues which were listed in its Prehearing Conference Memorandum at pages 5-7, and indicated that these issues were in addition to PTA’s issues. Upon review, it appears that most of Sprint’s issues are related to Ordering Paragraph #5 of the *August 2009 Order* and I will address those issues in this section of the Order. Sprint’s other issues relate to either the retroactivity of relief (which has been appealed to Commonwealth Court and therefore is not before me⁷) or specific issues raised in the AT&T Complaints. Issues related to the AT&T Complaint proceeding, which are not in dispute, will be listed in a subsequent section of this Order.

1. The impact on rural intrastate access rates and/or rate structures from any further federal action on intercarrier compensation, access, and universal service issues. (PTA Issue)

PTA contended that this issue is properly considered a sub-issue of Ordering Paragraph #5 of the *August 2009 Order*, which directs the parties to address linkages between any FCC ruling in the *Unified Intercarrier Compensation* proceeding, intrastate access charge reform in view of Chapter 30 and 66 Pa. C.S. §§3015 and 3017, the PA USF and basic local exchange service rates.

⁷ In its *July 2009 Order*, the Commission ruled that the retroactivity provision set forth in Section 1309(b) of the Code was not applicable to these proceedings, and this ruling has now been appealed by Sprint to Commonwealth Court. As the Commission previously addressed this issue and an appeal has now been taken, this matter is outside the scope of this Commission proceeding. Pa. R.A.P. 1701(a).

Many parties (e.g. Embarq PA, OCA, OSBA, Verizon, Comcast, Sprint, and Qwest) generally agree or do not disagree that this listed issue is within the scope of this proceeding. AT&T, however, believes that PTA intends to provide testimony on what the FCC might do and how it might impact Pennsylvania, and that this type of speculative testimony should not be permitted. AT&T Reply Memorandum at 10-11. I agree that the Commission wanted the parties' focus to be on a final FCC determination concerning intercarrier compensation regimes. *August 2009 Order*, p. 19. However, the Commission has also indicated concern about pending matters such as the Missoula Plan. I am not willing, at this juncture, to foreclose testimony about pending FCC matters, to the extent it can be shown to potentially impact intrastate access charge reform in Pennsylvania. Other parties are free to respond that these pending proposals are speculative. In these complex, interrelated federal/state intercarrier compensation matters, it is preferable to err on the side of allowing information, if relevant, rather than precluding it from the outset. See also, Sprint Prehearing Conference Memorandum at 5, indicating that the Commission desires to be kept informed of all *Unified Intercarrier Compensation* Docket developments.

2. Whether further intrastate access charge reform is necessary in light of the elimination in Act 183 of the mandatory access reductions that were contained in the original Chapter 30 law. (PTA Issue)

PTA contended that this issue is properly considered a sub-issue of Ordering Paragraph #5 in the *August 2009 Order*. PTA Memorandum at 7. AT&T and Verizon specifically acknowledged that this issue is within the scope of this proceeding and I agree. Sprint indicated disagreement with the question's underlying premise (Sprint Memorandum at 20), but disagreement with a parties' position does not provide a basis for rejection of the issue as being beyond the scope of the investigation.

3. The FCC's *Unified Intercarrier Compensation* Docket (Sprint issue)

Sprint listed this issue in its Prehearing Conference Memorandum, and asserted that its inclusion as an issue in Ordering Paragraph #5 of the *August 2009 Order* was indicative

of the Commission's continuing desire to be kept informed of all developments at this docket. Sprint indicated that parties should address the extent to which relief suggested in the instant proceeding is consistent with relief suggested by the FCC.

No party objected to this issue as being beyond the scope of this proceeding and, as I find it to be consistent with Ordering Paragraph #5 of the *August 2009 Order*, it is appropriately addressed herein.

4. 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 (Sprint issue)

Sprint listed this issue in its Prehearing Conference Memorandum, and contended that its inclusion as an issue in Ordering Paragraph #5 of the *August 2009 Order* was indicative of the Commission's desire that I conform my decision to the statutory requirements that access reductions be revenue neutral and consistent with Section 3015 of the Code. Accordingly, Sprint, in effect, indicated that the record should include (and the parties therefore must provide) information sufficient for me to recommend an appropriate intrastate switched access rate, a revenue neutral manner in which to achieve that rate, and any necessary changes to Chapter 30 Plans to effectuate the proposal.

No party filed an objection to these listed issues or sub-issues as being beyond the scope and as I find them to be consistent with Ordering Paragraph #5 of the *August 2009 Order*, they are appropriately addressed in this proceeding.

5. PA USF (Sprint issue)

The parties clearly were not all in agreement with Sprint's position, set forth in its Prehearing Memorandum at 6, regarding the limitation on the PA USF linkage issue in Ordering Paragraph #5 of the *August 2009 Order*. However, on the other hand, no party argued against Sprint's right to raise its listed issue as being within the scope of this proceeding. Sprint also indicated that the amount of PA USF payments must be considered and acknowledged in

announcing revenue neutral rate reductions, and I agree that this linkage is within the scope of this proceeding.

6. Potential Effects on RLEC Rates (Sprint issue)

Sprint listed this issue in its Prehearing Conference Memorandum, and asserted that its inclusion as an issue in Ordering Paragraph #5 of the *August 2009 Order* indicated that the Commission wanted to know with specificity the level of basic local exchange service rate increases that would be required by any remedy ordered in this proceeding. Thus, it advocated for the provision by the parties of information on resulting rate increases based upon parties' access reduction proposals.

No party filed an objection to these listed issues or sub-issues as being beyond the scope and as I find them to be consistent with Ordering Paragraph #5 of the *August 2009 Order*, they are appropriately addressed in this proceeding.

D. AT&T Complaint proceeding issues

OCA appropriately noted that the issues raised in the AT&T Complaint proceeding that were consolidated with the *Investigation* remain as issues. These issues are as follows:

- whether the RLECs' intrastate access rates are unjust and unreasonable in violation of 66 Pa. C.S. §1301
- whether the RLECs' intrastate access rates violate Section 3011(3) ("ensures that customers pay only reasonable charges for protected services which shall be available on a non-discriminatory basis")
- whether the RLECs' intrastate access rates violate Section 3011(5) ("provide diversity in the supply of existing and future telecommunications services and products in telecommunications markets throughout this Commonwealth by ensuring that rates, terms and conditions for protected

services are reasonable and do not impede the development of competition”); and

- whether the RLECs’ intrastate access rates violate Section 3011(9) (“encourage the competitive supply of any service in any region where there is market demand”).

No party contested the OCA’s listing of the AT&T Complaint proceeding issues and they are all accepted as within the scope of this proceeding.

III. ORDERING PARAGRAPHS

THEREFORE,

IT IS ORDERED:

1. That the scope of this proceeding shall include, consistent with the discussion herein: (1) the issues set forth in the *December 2004 Order*, except for those matters that have been adjudicated by ALJ Colwell (unless extraordinary circumstances are shown); (2) the issues set forth in Ordering Paragraph #5 of the *August 2009 Order*, except for those matters which have been adjudicated by ALJ Colwell (unless extraordinary circumstances are shown); (3) derivative issues which have been specifically permitted herein; and (4) the AT&T Complaint issues.

2. That the parties will have ten (10) days from the date of this Order in which to file a petition for review and answer to a material question pursuant to 52 Pa. Code §5.302 if they disagree with all or any part of this Order.

Date: September 15, 2009

Kandace F. Melillo
Administrative Law Judge

APPENDIX D

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation Regarding Intrastate Access	:	
Charges and IntraLATA Toll Rates of Rural	:	
Carriers and the Pennsylvania Universal	:	I-00040105
Service Fund	:	

RECOMMENDED DECISION

Before
Susan D. Colwell
Administrative Law Judge

July 22, 2009

from the Pa USF as part of the *Global Order*. These payments are not to offset access or toll rated reductions but to maintain the residential rate cap. OCA Reply Brief at 17; OCA Schd RDC-4. Therefore, it is clear that permitting RLECs to draw upon the USF for increased revenue entitlements would not be a new use for the Fund.

In fact, what OCA has shown is that the *Global Order* anticipated that the rate cap would be carried out in part by the rural ILECs' drawing on the PA USF where their required revenues exceeded the rate cap when the revenue requirement was short-changed by reduced access rates. This provision would be in effect until a Commission Order or another law superseded it. This supersession occurred when Act 183 was enacted and rate caps were replaced by the annual price changes permitted by the Chapter 30 plans.

The PTA/Embarq/OCA position is that the RLECs are entitled to the rate caps with accompanying PA USF withdrawals provided by the *Global Order* as well as the inflation adjustments provided by Chapter 30. OCA believes that this approach will maintain the comparability and affordability standards, even if this requires some adjustment to the PA USF in the future. OCA Main Brief at 58. While this approach certainly would maintain the standards, it would do so at the expense of the contributor carrier ratepayers and competition in general.

The PA USF is a fund which exists because the ratepayers of other telecommunications providers have paid the money, unwittingly, as a hidden tax. It is not "free money" to be plundered at will and without concern for its origins or for whether it is the best use of the money. All parties agree that the concept of universal service is a worthy one. This fund should be reconstructed to provide assistance to those customers who need it, and for those companies who can meet a stringent test for determining that they serve an area whose costs are so high that the company itself deserves extra help for that area alone.

At some point, the market is meant to rely on competition to keep rates affordable. Institutionalizing the PA USF in its present form to provide subsidies to companies

who do not have to prove need will not assist the market in reaching its goals and will, instead, provide barriers to entry for new carriers.

Looking back over the Commission's Orders leading up to this Investigation, it is clear that there was no expectation by the Commission that the PA USF would be institutionalized in its present form, nor that the ultimate PA USF would be used to compensate telecommunications carriers for the difference between their Chapter 30 Plan allowed increases and the \$18.00 rate cap. The PA USF anticipated in the *Global Order* was intended to be an interim measure for easing rural ILECs away from high access charges by compensating them for the difference which competition introduced into the market. That "interim measure" has continued for ten years, and that is considerably longer than the Order anticipated. The parties to that litigation, as well as the parties to the *Access Charge Investigation* were agreeable to settlement because they believed that the Commission would institute *and litigate* an investigation which would address and handle the PA USF and access charge issues in a timely manner. The Commission recognizes that settlements are preferable to litigated results, but if the companies are expected to enter settlements in the future, the Commission needs to institute a rulemaking which institutionalizes the PA USF in a final form.

As AT&T points out,

The evidence shows that the number of "people" without competitive options is consistently decreasing, yet OCA and the RLECs want to continue to subsidize every single one of the RLECs' customers, and . . . even want to subsidize the RLECs for customers the RLECs don't even serve anymore. Again, the RLEC and OCA "solutions" are not about protecting *customers*, but are about protecting the RLECs' revenue streams. That is wholly inappropriate, contrary to the best interests of Pennsylvania consumers, and should be rejected.

AT&T Reply Brief at 2-3.

The form of the PA USF is a matter of public policy and properly left to the Commission. The OCA recommends that it be institutionalized in its present form to keep rates comparable and affordable, consistent with the form of the federal USF. Since the federal USF

exists, there is no real need to mirror it. Therefore, the Commission is free to design its PA USF in a form which suits the needs of the Commonwealth.

Penetration of telecommunications, including wire, wireless, cable and VoIP, has reached 97% in Pennsylvania. This is either a wonderful achievement for which all carriers should be congratulated, or a way of recognizing that 150,000 people still do not have a means of communicating telephonically, depending on the point of view advocated. Reconfiguration of the Fund to provide assistance to low-income customers, as well as assistance to those rural ILECs who can show that their specific circumstances in a particular area merit it, would be an approach which targets the problems. This would be consistent with the CAP programs currently used by other fixed utilities. The funding for this new PA USF should be by a labeled surcharge on the bills of customers to retain the "transparency" that this Commission values.

The AT&T conclusion provides an accurate summary:

The evidence demonstrates that the conundrum the Commission initially thought it was faced with as a result of the issues in this case is one that can be easily resolved while still preserving the goals of universal service and promoting a fully competitive environment. With respect to the basic local service rate cap, there are fewer and fewer customers who are purchasing basic local service anymore, which means there is no longer a need to protect all of the RLEC's customers -- the protection should be much more targeted to those customers who really need it. In addition, the evidence shows that competition is already providing an effective "cap" on rates the RLECs charge their customers, and there is no need for the Commission to continue to maintain an artificial rate cap. . . . With respect to the PA USF, expanding the PA USF in order to fund the RLECs' network modernization commitments would be contrary to purpose of the fund, contrary to the regulations establishing the fund, contrary to the legislation, and would be anti-competitive. If anything, the Commission should abolish the fund in its current form, and should establish a fund that is actually directed at protecting low-income consumers, or those consumers who are truly in rural, high cost areas.
AT&T Main Brief at 30.

To this end, the Commission should open a rulemaking which proposes changes to its universal service regulations to reflect the Commission's policy regarding universal service in Pennsylvania. Pending the outcome of the rulemaking, the RLECs should neither be held to an \$18.00 rate cap nor should they be permitted to take funding from the PA USF in order to obtain the revenues which would represent the difference between the \$18.00 and their Chapter 30 plan entitlements. Rather, they should be permitted to raise rates consistent with their Chapter 30 plans, with the Commission performing a just and reasonable analysis where the raise is not consistent.

F. CONCLUSIONS OF LAW

1. The settlement plan that created the USF relied on a \$16 residential rate level as a point of reference. It required carriers to reduce their access and toll rates and increase their local rates if they were below a certain level, but also allowed three RLECs that had residential rates over \$16 to reduce those rates and receive a contribution from the USF to replace that revenue. *Global Order* slip op. at 192.

2. The interim funding mechanism was created to function until December 31, 2003 or until the subsequent investigation develops a new process. *Global Order*, slip op. at 146.

3. A subsequent settlement increased the monthly cap to \$18.00 for a minimum three year period through December 31, 2006. *Access Charge Investigation per Global Order of September 30, 1999*, PUC Docket No. M-00021596 (Opinion and Order entered May 5, 2003).

4. An RLEC electing alternative regulation must have an alternative regulation plan approved by the Commission. 66 Pa. C.S. Chapter 30.

5. Under alternative regulation, an RLEC's overall revenue from noncompetitive services can be increased each year based on the change in the rate of inflation. 66 Pa. C.S. Chapter 30.

6. The alternative regulation plans contain an inflation-based formula that calculates an allowable increase to annual revenue from noncompetitive services, based on the previous year's noncompetitive revenue and the change in the rate of inflation from the prior year. The carrier typically makes a price change filing each year presenting its calculation of the allowed overall revenue increase and detailing the changes to rates for noncompetitive services from which it proposes to secure the additional revenue. Carriers also have the option to bank the revenue opportunity for future use. 66 Pa. C.S. Chapter 30.

7. Preservation or protection of the ILECs' revenues and profits, however, should not be confused with achievement of universal service goals. Universal service refers to the ability of end-users to obtain reasonably-priced telecommunications services. ILECs can be protected in many ways that will not benefit consumers, and conversely consumers can be helped in many ways that will not benefit carriers. Comcast Stmt.1.0 at 6.

8. Sections 1301 and 3015(g) of the Public Utility Code preserves the Commission's authority to conduct a just and reasonable analysis on ILEC rates. 66 Pa. C.S. §§ 1301, 3015(g).

9. The Commission promulgated regulations regarding the administration of the PA USF. 52 Pa. Code §§ 63.161-171.

10. A regulation promulgated under the agency's statutory authority is to administer a statute or prescribe the practice or procedure before the agency. 1 Pa. Code §1.4(3).

11. The *Access Charge Investigation* called for the continuation of the rate cap until modified by further Commission rulemaking. *Access Charge Investigation per Global Order of September 30, 1999*, PUC Docket Nos. M-00021596, P-00991648, P-00991649.

12. Federal law regarding universal service appears at 47 U.S.C. § 254.
13. Pennsylvania law regarding telecommunications policy is set forth in 66 Pa. C.S. § 3011.
14. Pennsylvania USF regulations appear at 52 pa. Code §§ 63.161-63.171.

G. RECOMMENDED ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the Consolidated Transcript Corrections submitted by the parties are adopted and incorporated into the record.
2. That the Commission shall institute a rulemaking for the purpose of defining the specific form of the Pennsylvania Universal Service Fund and its uses.
3. That the Law Bureau be directed to prepare the advance notice of proposed rulemaking within six months of the effective date of this Order.
4. That the Commission Order be served upon each certificated telecommunications carrier in the Commonwealth.

Dated: July 22, 2009

Susan D. Colwell
Administrative Law Judge

CERTIFICATION OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 and 1.55, via electronic mail.

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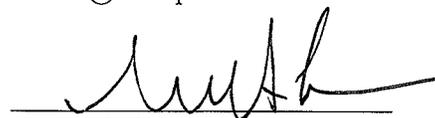
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October 5, 2009


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