

COMMONWEALTH OF PENNSYLVANIA



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May 24, 2010

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
Commonwealth Keystone Bldg.  
400 North Street  
Harrisburg, PA 17120

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

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

Dear Secretary Chiavetta:

Enclosed for filing please find the Office of Consumer Advocate's Answer to the Wireless Carriers' Motion to Strike, in the above-captioned proceeding.

Copies have been served upon all parties of record as shown on the attached Certificate of Service.

Sincerely,

A handwritten signature in black ink, appearing to read "Joel H. Cheskis".

Joel H. Cheskis  
Assistant Consumer Advocate  
PA. Attorney ID# 81617

Enclosures

cc: All parties of record  
Hon. Kandace F. Melillo, ALJ

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**ANSWER OF THE  
OFFICE OF CONSUMER ADVOCATE  
TO THE WIRELESS CARRIERS'  
MOTION TO STRIKE**

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The Pennsylvania Office of Consumer Advocate (“OCA”) hereby files this Answer to the Wireless Carriers’ Motion to Strike Impertinent Material From the Office of Consumer Advocate’s Main Brief and Appendices And Request for Expedited Consideration (“Motion”). The Wireless Carriers’ filed their Motion on May 20, 2010 and, pursuant to an electronic communication, presiding officer Administrative Law Judge (“ALJ”) Kandace F. Melillo granted the request for expedited consideration.<sup>1</sup> The ALJ ruled that the Answer to the Motion be filed by May 25, 2010.<sup>2</sup> As discussed further below, the Wireless Carriers’ Motion is without merit

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<sup>1</sup> Section 5.103(c) of the Commission’s regulations provides twenty (20) days to file an Answer to a Motion. 52 Pa. Code § 5.103(c).

<sup>2</sup> The OCA notes its continuing objection to the expedited treatment of this Motion, particularly as the Motion itself is untimely. As the OCA previously stated, the Wireless Carriers were aware of the OCA’s position in this proceeding since filing its testimony on January 20, 2010, exactly five months before the Wireless Carriers filed their Motion. At no time during those five months did the Wireless Carriers file any timely objection or Motion to Strike the OCA’s testimony, issue discovery on the OCA’s position, object to the admission of the OCA’s pre-filed testimony into the record at the time of hearing or conduct any cross examination of the OCA’s witness.

and should be rejected. The OCA's Brief is wholly within the scope of this proceeding, pertinent and relevant to the Pennsylvania Public Utility Commission's ("Commission") investigation and provides the Commission with the necessary means to move forward on these important issues. Moreover, the OCA has not violated any order of the Commission entered in this proceeding. The Wireless Carriers' Motion is based on a fundamental misunderstanding of the OCA's comprehensive proposal and the Motion must, therefore, be denied.

In support of its Answer, the OCA submits as follows:

## **I. INTRODUCTION**

### **A. The Wireless Carriers' Motion Is Based On A Fundamental Misunderstanding Of The OCA's Comprehensive Proposal.**

In the Direct Testimony of Dr. Robert Loube filed on January 20, 2010, the OCA presented a comprehensive proposal that the Commission should adopt to resolve numerous issues raised in the Commission's investigation and the complaints filed by AT&T Communications of Pennsylvania, LLC ("AT&T"). The four integrated steps of the OCA's comprehensive plan are as follow:

1. RLEC intrastate access rates should be set equal to their respective interstate rates, including the elimination of the carrier common line charge;
2. RLEC residential basic local exchange rates that are below 120 percent of the Verizon Pennsylvania weighted average residential basic local exchange service rate should be increased to that level, subject to an affordability constraint, while RLEC rates that are above 120 percent of the Verizon weighted average rate remain at their current levels;

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Furthermore, the Wireless Carriers even waited a full week after receiving the OCA's Main Brief to file their Motion, and request for Expedited Consideration.

3. Any remaining revenue required to offset the revenue decrease associated with access rate reductions should be recovered from the Pennsylvania Universal Service Fund; and

4. The revenue base of the Pennsylvania Universal Service Fund should be enlarged to include any service provider that uses the public switched telecommunications network at any point in providing their service.

The OCA submits that all four of these components must be adopted in order to meet the goals of the OCA's plan. The OCA acknowledged, however, that not all portions of its proposal can be implemented by the ALJ or the Commission in this phase of the Commission proceeding. As detailed below, with respect to the expansion of the Pennsylvania Universal Service Fund ("PA USF"), the OCA Brief states that this part of the OCA comprehensive proposal would need to be considered for implementation in a subsequent proceeding.

In their Motion, however, the Wireless Carriers argue that the OCA has made arguments that "are clearly barred by the [Commission's] December 2009 Order and therefore must be stricken." Motion at 2. Specifically, the Wireless Carriers seek to strike the OCA's Main Brief at:

- page 3, number paragraph 4 in its entirety,
- page 6, numbered question 3 in its entirety,
- page 17, numbered paragraph 4 in its entirety,
- page 20-21, the carryover paragraph (including footnote 34) in its entirety,
- page 23, the second and third sentences of the first paragraph (including footnote 35),
- page 23, the second sentence of the paragraph,
- page 32, words in the second sentence of the second full paragraph,

- page 49, words in the last sentence of the indented paragraph at the top of the page,
- pages 51 and 52, first paragraph on page 51 through the first full paragraph on page 52,
- page 52, words in the last sentence of the last paragraph,
- page 57, numbered paragraph 4 in its entirety,
- Appendix A, Section A, numbered paragraph 8 in its entirety,
- Appendix C, paragraph 2 in its entirety, and
- Appendix C, words in paragraph 3.

The Wireless Carriers claim that these portions of the OCA brief request that the Commission expand the base of contributors to the PA USF as part of this proceeding.

The Wireless Carriers' Motion, however, misstates the OCA's position in this proceeding. As discussed further below, the OCA generally agrees with the Wireless Carriers' recitation of the multiple Commission Orders entered in this proceeding and the procedural history for this proceeding. The Wireless Carriers, however, have failed to understand the OCA's proposal in this proceeding. The OCA's Brief falls squarely within the scope of this proceeding and is directly relevant to the issues before the Commission in this investigation. As such, the Wireless Carriers' Motion must be denied.

The gravamen of the Wireless Carriers' Motion is that they interpret the OCA comprehensive proposal presented in the OCA's Brief to ask ALJ Melillo to direct that the base of contributors to the PA USF be expanded as part of her Recommended Decision *in this proceeding*. This is not the OCA's position. Rather, it is the OCA's position that, if the ALJ wishes to adopt the OCA's comprehensive proposal set forth in this proceeding to resolve the outstanding issues raised in the AT&T complaints and the Commission's investigation, she

should recommend that the Commission conduct *another proceeding* that will address the scope of the base of contributors to the PA USF. The OCA has agreed in this proceeding that RLEC intrastate access rates should be reduced to their interstate levels, but *only if* it is done in a way that does not produce unaffordable rates for RLEC basic service customers. The OCA has proposed that a substantial portion of the funding for these access reductions should come from the PA USF. The OCA recognizes, however, that, unlike in many other states, the only contributors to the current PA USF are traditional wireline telephone companies. As an element of its comprehensive proposal, the OCA therefore recommends that the Commission open another proceeding to consider the expansion of PA USF funding.

A review of the record and the OCA's Main Brief demonstrates that the OCA has not advocated that the base of contributors to the PA USF must be expanded as part of this proceeding, as the Wireless Carriers argue. The OCA has maintained that its comprehensive proposal is contingent on adopting all four of its parts, but the OCA has acknowledged the limitations on the scope of this proceeding. The Commission needs to look no further than those specific portions of the OCA brief that the Wireless Carriers seek to strike as evidence that the OCA has not argued that the base of PA USF contributors would be expanded in this proceeding but that this issue would be taken up in a separate proceeding. OCA witness Dr. Robert Loube expressly testified, for example, and the OCA reiterated in its Main Brief, that:

The OCA realizes that a finding regarding the recommendation to enlarge the PA USF contribution base may not be within the purview of the assigned issues in this portion of the proceeding. However, the OCA's recommended comprehensive plan is contingent on the Commission addressing this issue *in another proceeding of its choice* and finding in that proceeding that it is necessary to increase the size of the contribution base.

OCA Main Brief at 21 (emphasis added); *quoting*, OCA St. 1 at 16-17. Furthermore, the OCA's Proposed Ordering Paragraph number 2 provides:

That the Commission *institute a further proceeding* for the purpose of expanding the base of contributors to the Pennsylvania Universal Service Fund to include all service providers that use the Public Switched Telephone Network in Pennsylvania to provide service.

OCA Main Brief at Appendix C (emphasis added).

The OCA has acknowledged that, if the Commission decides to adopt the OCA's comprehensive proposal, doing so would require the Commission to address this issue in a separate proceeding. The Wireless Carriers have even recognized this fact in their Motion when quoting the OCA's Main Brief that the OCA's plan "is contingent on the Commission's addressing this issue in another proceeding of its choice and finding in that proceeding that it is necessary to increase the size of the contribution base." Motion at 8, *quoting*, OCA Main Brief at 21. The OCA has maintained in this proceeding that, if the Commission decides to adopt the OCA's comprehensive proposal, they should consider expanding the PA USF *in a separate proceeding*.

The OCA appreciates that the Commission has determined to address the many interrelated issues regarding universal service and competition in a bifurcated investigation proceeding. Nonetheless, there are areas of overlap that must be brought to the Commission's attention. Indeed, this is an investigation where the record should be fully developed and the positions of the parties fully presented so that the Commission understands the ramifications of any decision. In the OCA's view, the Commission cannot address intrastate access rates without also addressing universal service. It would do the Commission a disservice if the Wireless Carriers' Motion were granted since doing so would prevent the Commission from receiving a

comprehensive proposal to address numerous issues now pending before it, namely, universal service and competition. The information the Wireless Carriers' seek to strike is already admitted into the record in this proceeding, Tr. 477, and the Commission should be aware of how the OCA intends to use such evidence as part of this investigation.

As the OCA articulated in its Main Brief, universal service and competition are both essential goals and objectives of federal and state telecommunications laws. As a result, the OCA has presented a comprehensive proposal, within the confines of the Commission's multiple Orders, that addresses both universal service and competition. While the OCA proposal has some overlapping and interlocking aspects that cover multiple areas, such a comprehensive proposal is precisely what is needed to address these many issues.<sup>3</sup> The OCA did not contravene any Commission Order, as the Wireless Carriers contend, by setting forth a comprehensive proposal.

As such, the Wireless Carriers' Motion must be denied because it is based on a fundamental misunderstanding of the OCA's comprehensive proposal presented in this proceeding.

B. The Wireless Carriers' Motion Must Be Denied Because It Is Untimely And Legally Unsound.

The Wireless Carriers' Motion must be rejected because it is an untimely Motion to Strike OCA testimony. The OCA testimony upon which the OCA relied in its Main Brief, and which the Wireless Carriers now seek to strike, has already been admitted into the record of this proceeding at hearing. Tr. 477. The Wireless Carriers cannot now object to the use of properly admitted record evidence when they did not provide a formal objection to the admission of such

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<sup>3</sup> The Commission need look no further than its historic "Global Order" for the value of resolving many interlocking proceedings at one time.

evidence at the time the evidence was admitted into the record. Doing so would violate fundamental rules of evidence. As the Supreme Court of Pennsylvania has stated: “[a] rule of evidence is waived if it is not invoked when the evidence is offered, and the rule, having been waived, cannot subsequently be invoked on appeal.” Commonwealth v. Kuterbach, 458 Pa. 318, 319, 326 A.2d 283, 283 (1974). *See also*, Takes v. Metropolitan Edison Company, 548 Pa. 92, 98, 695 A.2d 397, 400 (1997) (“It is axiomatic that in order to preserve a trial objection for review, trial counsel is required to make a timely, specific objection during trial.”). Therefore, the Wireless Carriers’ Motion should be rejected because it is untimely.<sup>4</sup>

The Wireless Carriers’ also argue that denying their Motion would “deprive the Wireless Carriers of their due process right to present evidence and otherwise be heard on a question that clearly affects their interest.” Motion at 2; *see also*, Motion at 9. The Wireless Carriers were aware of the OCA’s position in this proceeding as early as January 20, 2010 when the OCA filed the Direct Testimony of its witness, Dr. Robert Loube. The Wireless Carriers could have filed a Motion to Strike any portion of the OCA testimony as of that time, yet chose not to do so. The Wireless Carriers could have issued discovery on the OCA testimony at any point since January 20, 2010, yet chose not to do so. The Wireless Carriers could have filed Rebuttal Testimony in response to the OCA testimony pursuant to the procedural schedule set for this case, yet chose not to do so. The Wireless Carriers could have moved to strike the OCA testimony at the time it was admitted into the record, or cross-examined Dr. Loube regarding his testimony, at the hearing on April 15, 2010, yet chose not to do so.

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<sup>4</sup> Counsel for Sprint’s statement “But I caution in advance, we will take every effort and take every step to ensure that precluded issues do not cloud the waters in the briefing process” is not a proper objection. Tr. 525. In fact, when ALJ Melillo asked for any objections to the admission of OCA Statements 1 and 1-S, no party responded. Tr. 477. Such statements were then admitted in to the record.

The Wireless Carriers had numerous opportunities to “present evidence and otherwise be heard on a question that clearly affects their interests” at any point during the past five months, yet chose not to do so. The Wireless Carriers’ claim that their due process rights have somehow been violated is without merit and should be rejected. The Wireless Carriers could have presented evidence and testimony on the issue of whether the base of contributors to the PA USF should be addressed in a separate proceeding as recommended in the OCA’s testimony. The Wireless Carriers should not be allowed to ignore the relevant issue until a week after the OCA filed its Main Brief and then move to strike portions of the OCA’s Main Brief claiming their due process rights are violated when they were well aware of the OCA’s position in this case for five months and chose not to respond.

The OCA further submits that the Wireless Carriers’ argument that “the Commission lacks jurisdiction under [sic] to require commercial mobile radio services (CMRS) providers to contribute to the PA USF,” Motion at n. 15, is also without merit and should be rejected. The cases previously relied on by the Wireless Carriers to support such an argument, in fact, do not demonstrate that the Commission lacks authority to include wireless carriers as part of the base of contributors to the PA USF.<sup>5</sup> Nevertheless, the Commission is not even being asked to decide whether the base of contributors to the PA USF can be expanded in this proceeding. The Commission need not even reach any argument from the Wireless Carriers that the Commission lacks jurisdiction to require wireless companies to contribute to the PA USF as the Wireless

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<sup>5</sup> See, e.g., Passarell v. AT&T Wireless Services, Inc., Docket No. C-20028278, Opinion and Order (entered Aug. 14, 2003) (the Commission dismissed a complaint concerning rate and billing matters of wireless providers but noted that “our restraint regarding Formal Complaints concerning customer service or quality of service by wireless providers, which authority exists notwithstanding federal preemption of state regulation of rates or market entry, *does not preclude the Commission from future action concerning wireless carriers.*”); see also, Crown Communications v. Zoning Hearing Bd., 550 Pa. 266, 273, 705 A.2d 427, 431 (1997) (whether a zoning hearing board properly denied an antenna height variance is not dispositive of whether or not the Commission could consider wireless carriers as contributors to the PA USF). Neither of these cases stand for the proposition that the Commission cannot expand the scope of the base of contributors to the PA USF.

Carriers have again argued in their Motion. The OCA welcomes the opportunity to debate the merits of whether the base of contributors to the PA USF should be expanded to include all service providers who use the public switched telephone network in Pennsylvania when the Commission seeks to have that issue addressed.

Finally, as stated above, the OCA submits that the entire purpose of an investigation is to develop an evidentiary record regarding a particular issue that the Commission seeks information on. It would do the Commission a disservice if the Wireless Carriers' Motion would be granted since doing so would prohibit the Commission from receiving a comprehensive proposal to address numerous issues now pending before it, namely, universal service and competition. The information the Wireless Carriers' seek to strike is already admitted into the record in this proceeding. Tr. 477. The Commission should be aware of how the OCA intends to use such evidence as part of a comprehensive resolution of the issues before the Commission.

As such, the Wireless Carriers' Motion is without merit and should be denied. The OCA has not violated any Commission Order governing this matter, as the Wireless Carriers allege in their Motion.

## **II. RESPONSE TO SPECIFIC PARAGRAPHS**

1. Denied. The OCA has at all times complied with the Commission's December 2009 Order in this proceeding.
2. Denied. Such statements are a matter of law to which no response is required.
3. Denied. Such statements are a matter of law to which no response is required.
4. Admitted. The Commission's December 20, 2004 Order speaks for itself.
5. Admitted. The Commission's August 5, 2009 Order speaks for itself.

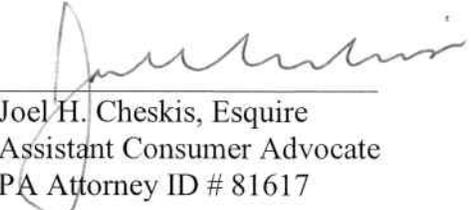
6. Admitted. ALJ Melillo's September 15, 2009 Order speaks for itself.
7. Admitted. ALJ Melillo's September 15, 2009 Order speaks for itself.
8. Admitted.
9. Admitted. The Commission's December 2009 Order speaks for itself.
10. Denied. Such statements are a matter of law to which no response is required.
11. Denied. Such statements are a matter of law to which no response is required.
12. Denied. The OCA's Main Brief speaks for itself.
13. Denied. The OCA's Main Brief and the Commission's December 2009 Order speak for themselves.
14. Denied. Such statements are a matter of law to which no response is required.
15. Denied. Such statements are a matter of law to which no response is required.
16. Denied. No portion of the OCA's Main Brief should be stricken.
17. The OCA opposed the Wireless Carriers request for expedited consideration of their Motion and was denied. No response is therefore necessary.

### **III. CONCLUSION**

WHEREFORE, the Pennsylvania Office of Consumer Advocate respectfully requests that the Honorable Presiding Officer, Administrative Law Judge Kandace F. Melillo, deny the Wireless Carriers Motion to Strike Impertinent Material From the Office of Consumer

Advocate's Main Brief and Appendices filed May 20, 2010. The OCA submits that the Wireless Carriers' Motion is without merit and should be denied in its entirety.

Respectfully submitted,



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Date: May 24, 2010  
127548

CERTIFICATE OF SERVICE

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

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

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Answer to the Wireless Carriers' Motion to Strike, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 24th day of May 2010.

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