

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF SMALL BUSINESS ADVOCATE
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, Pennsylvania 17101

William R. Lloyd, Jr.
Small Business Advocate

June 3, 2010

(717) 783-2525
(717) 783-2831 (FAX)

HAND DELIVERED

Rosemary Chiavetta, Secretary
Pa. Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

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

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

Dear Secretary Chiavetta:

Enclosed for filing are the original and nine (9) copies of the Reply Brief, on behalf of the Office of Small Business Advocate, in the above-docketed proceedings. As evidenced by the enclosed certificate of service, two copies have been served on all active parties in this case.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in black ink that reads "Steven C. Gray".

Steven C. Gray
Assistant Small Business Advocate
Attorney ID #77538

Enclosures

cc: Parties of Record

John W. Wilson

RECEIVED
2010 JUN -3 PM 3:19
SECRETARY'S BUREAU

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**REPLY BRIEF
ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE**

RECEIVED
PA PUC
SECRETARY'S BUREAU
2010 JUN -3 PM 3: 19

Steven C. Gray
Assistant Small Business Advocate
Attorney ID No. 94800

For: William R. Lloyd, Jr.
Small Business Advocate
Attorney ID No. 16452

Office of Small Business Advocate
300 North Second Street - #1102
Harrisburg, PA 17101

Dated: June 3, 2010

TABLE OF CONTENTS

I. SUMMARY OF REPLY BRIEF 1

 A. Summary of the OSBA’s Positions..... 1

 B. Summary of the Issues Addressed in the OSBA’s Reply Brief..... 2

II. FACTUAL AND LEGAL BACKGROUND 4

III. BURDEN OF PROOF10

IV. SHOULD THE RLECs’ INTRASTATE SWITCHED ACCESS RATES BE REDUCED?14

 A. The Legislature.....14

 B. Subsidies.....14

V. IF THE RLECs’ INTRASTATE SWITCHED ACCESS RATES SHOULD BE REDUCED, TO WHAT LEVEL SHOULD THEY BE REDUCED, AND WHEN?.....17

 A. Rate Levels.....17

 B. Timing.....19

VI. IF THE RLECs’ INTRASTATE SWITCHED ACCESS RATES SHOULD BE REDUCED, HOW SHOULD ANY REVENUE REDUCTIONS BE RECOVERED IN COMPLIANCE WITH 66 PA. C.S.A. 3017?.....20

 A. The Meaning of Revenue Neutrality under Section 301720

 B. Rate Increases21

 1. Rate Caps21

 2. Business Rate Caps and Verizon22

 C. Pennsylvania USF24

VII. GENERAL LEGAL ISSUES24

 A. Retroactivity of any Access Rate Reductions24

 B. Compliance24

VIII. CONCLUSION.....25

TABLE OF AUTHORITIES

Cases

<i>Unified Intercarrier Compensation</i> , CC Docket No. 01-92.....	5, 7
<i>Joint Petition of Nextlink Pennsylvania, Inc., et al.</i> , 196 PUR 4th 172, 93 Pa. PUC 172 (Order entered September 30, 1999) <i>affirmed</i> ; <i>Bell Atlantic-Pennsylvania v. Pennsylvania Public Utility Commission</i> , 763 A.2d 440 (Pa. Cmwlth. 2000), <i>vacated in part</i> ; <i>MCI v. Pennsylvania Public Utility Commission</i> , 577 Pa. 294, 844 A.2d 1239 (Pa. 2004) (colloquially known as the “ <i>Global Order</i> ”).....	4
<i>Buffalo Valley Telephone Company, et al. v. Pennsylvania</i> <i>Public Utility Commission</i> , 990 A.2d 67, (Pa. Cmwlth.2009).....	4, 21
<i>Milkie v. Pa. PUC</i> , 768 A.2d 1217 (Pa. Cmwlth.2001).....	12
<i>Access Charge Investigation per Global Order of September 30, 1999</i> , Docket No. M-00021596, <i>et al.</i> (Order entered July 15, 2003) (“ <i>Rural Access Settlement Order</i> ”).....	4, 23
<i>AT&T v. Verizon</i> , Docket No. C-20027195 (Order entered January 8, 2007).....	10
<i>AT&T Communications of Pennsylvania, LLC, et al. v. Armstrong Telephone</i> <i>Company - Pennsylvania, et al.</i> , Docket Nos. C-2009-2098380, <i>et al.</i>	<i>passim</i>
<i>Investigation Regarding Intrastate Access Charges and IntraLATA Toll</i> <i>Rates of Rural Carriers, and the Pennsylvania Universal Service Fund</i> (“ <i>Investigation Order</i> ”), Docket No. I-00040105.....	4, 5, 6, 7, 12

Statutes

66 Pa. C.S. § 315(a).....10, 11
66 Pa. C.S. § 332(a).....10, 11
66 Pa. C.S. §1309(b).....24
66 Pa. C.S. §§ 3011-3019 (“*New Chapter 30*”).....7, 11, 12, 14, 21, 23
66 Pa. C.S. § 3012.....11, 20
66 Pa. C.S. § 3015.....7, 11, 12, 23
66 Pa. C.S. § 3017.....1, 3, 7, 12, 19, 20, 21, 25
66 Pa. C.S. § 3019(h).....23

Regulations

Telecommunications Act of 1996 (TA-96), 47 U.S.C. § 252(d).....10
47 CFR § 36.154.....17
47 CFR § 51.705.....18
47 CFR § 51.707.....18
47 CFR § 51.709.....18
47 CFR § 51.711(b).....18
52 Pa. Code § 54.73.....22
52 Pa. Code § 62.3.....22
52 Pa. Code §§ 63.161 - 63.171.....7

I. Summary of Reply Brief

A. Summary of the OSBA's Positions

In its Main Brief, the Office of Small Business Advocate ("OSBA") set forth arguments to support the following positions:

- The Pennsylvania Public Utility Commission ("Commission") should not order the rural local exchange carriers ("RLECs") to further reduce their intrastate access rates. The RLECs have already reduced their intrastate access rates on two previous occasions. There is no need for further reductions at this time. The Complainant in this consolidated proceeding, *i.e.*, AT&T, has not demonstrated that the RLECs' intrastate access rates are above cost. Therefore, AT&T has not met its burden of proof.
- Rather than reducing access rates, the Commission should allow the RLECs to raise their intrastate access rates in order to help fund broadband deployment and ensure that toll carriers and intermodal competitors who use the RLECs' loops pay their fair share of those deployment costs.
- If the Commission orders the RLECs to further reduce their intrastate access rates, each RLEC should reduce its intrastate access rates to the level needed to recover 25% of that RLEC's total loop costs.
- If the Commission orders the RLECs to further reduce their intrastate access rates, Section 3017(a) of the Public Utility Code, 66 Pa. C.S. § 3017(a), requires that the RLECs be permitted to recover the reduced intrastate access charge revenue from their other noncompetitive services. The Pennsylvania Universal Service Fund ("PaUSF") could also be used to fund the recovery of the RLECs' lost access charge revenue.

- The caps on increases to residential and business local exchange rates resulting from further access charge reductions should be discontinued. The Commission should change its telecommunications policy in regards to customer assistance to be consistent with the Commission's policy in the electric and natural gas industries, *i.e.*, assistance should be provided only to low-income residential customers. In the alternative, if the rate caps are continued, the caps should be raised by the rate of inflation since the caps were originally set. The residential rate cap would be set at \$21.00.

- The PaUSF should be modified so that RLECs must demonstrate a need before they are able to draw on those funds.

B. Summary of the Issues Addressed in the OSBA's Reply Brief

In this Reply Brief, the OSBA sets forth its responses to other parties' Main Briefs regarding the following issues:

- The burden of proof in this consolidated proceeding should remain on AT&T in regards to the issues and proposals contained within AT&T's complaints.

- The legislature has no policy that favors the further reduction of the RLECs' intrastate access charges.

- The interexchange carriers ("IXCs") have not produced credible evidence demonstrating that the RLECs' intrastate access rates either are overpriced or are generating subsidies for the RLECs.

- If the Commission orders further access reductions, each RLEC's intrastate access rate should be set on an individual basis. This should be accomplished by lowering the RLEC's intrastate access rate so that the RLEC recovers intrastate access revenue equal to its total

interstate access revenue. Verizon's proposal to set all RLECs' intrastate access rates to Verizon's intrastate access levels should be rejected.

- Section 3017(a)'s requirement for revenue neutrality can not be accomplished through the use of the RLECs' competitive services, as Sprint proposed.

- The OSBA's proposal to eliminate the caps on increases to residential and business local exchange rates resulting from further access charge reductions is consistent with universal service goals.

- Verizon's proposal to raise business rates without constraint in order to achieve Section 3017(a) revenue neutrality is unjust and unreasonable.

II. Factual and Legal Background

On September 30, 1999, the Commission entered the *Global Order*.¹ The *Global Order* created the PaUSF, reduced the access charges of the RLECs, and established a cap on local exchange rates for the RLECs' residential and business customers.²

On July 15, 2003, the Commission entered the *Rural Access Settlement Order*.³ That Order approved a settlement that further reduced the RLECs' access charges, raised the residential and business local exchange rate caps, and left the PaUSF unmodified.

On December 20, 2004, the Commission entered an Order in the *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund* ("Investigation Order"), Docket No. I-00040105, which provided:

That an investigation to consider whether intrastate access charges and intraLATA toll rates in rural ILECs' territories should be decreased and to consider any and all rate issues and rate changes that should or would result in the event that disbursements from the Pennsylvania Universal Service Fund are reduced and/or eliminated is hereby instituted.

Investigation Order, at 7, Ordering Paragraph 1.

Subsequently, the Commission issued a series of orders staying the investigation.

On March 19, 2009, AT&T Communications of Pennsylvania, LLC, TCG New Jersey, Inc., and TCG Pittsburgh, Inc. (collectively, "AT&T") each filed individual complaints with the Commission against 32 RLECs. The 96 complaints requested that the RLECs be ordered to

¹ *Joint Petition of Nextlink Pennsylvania, Inc., et al.*, 196 PUR 4th 172, 93 Pa. PUC 172 (Order entered September 30, 1999) *affirmed*, *Bell Atlantic-Pennsylvania v. Pennsylvania Public Utility Commission*, 763 A.2d 440 (Pa. Cmwlth. 2000), *vacated in part*; *MCI v. Pennsylvania Public Utility Commission*, 577 Pa. 294, 844 A.2d 1239 (Pa. 2004) (colloquially known as the "*Global Order*").

² These caps apply only when local exchange rates are being increased in tandem with access charge reductions. See *Buffalo Valley Telephone Company, et al. v. Pennsylvania Public Utility Commission*, 990 A.2d 67 (Pa. Cmwlth. 2009).

³ *Access Charge Investigation per Global Order of September 30, 1999*, Docket No. M-00021596, *et al.* (Order entered July 15, 2003) ("*Rural Access Settlement Order*").

reduce their intrastate access rates to levels which match the rates each RLEC charges for interstate switched access.⁴

On April 24, 2008, the Commission entered an Order (“*April 2008 Order*”) which “further stayed [the investigation] pending the outcome of the FCC’s *Unified Intercarrier Compensation* proceeding at CC Docket No. 01-92 or for one year from the date of entry of this Order, whichever is earlier,” for the majority of issues set forth in the *Investigation Order*. *April 2008 Order*, at 31, Ordering Paragraph 1(b).⁵

Despite continuing to stay the proceeding with regard to access charges, the *April 2008 Order* also provided:

that this investigation is reopened for the express and limited purposes of addressing 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 Pennsylvania Universal Service Fund should be increased, and whether or not a ‘needs based’ test (and applicable criteria) for rural ILEC support funding from the PaUSF 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 PaUSF funding as described in the body of this order.

April 2008 Order, at 30, Ordering Paragraph 1(a).

On April 30, 2009, the RLECs, represented by the Pennsylvania Telephone Association (“PTA”), filed answers to each of the AT&T complaints. PTA also filed preliminary objections.

On June 26, 2009, PTA and The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania (“Embarq PA”) submitted a Petition Requesting Interlocutory Review and

⁴ *AT&T Communications of Pennsylvania, LLC, et al. v. Armstrong Telephone Company – Pennsylvania, et al.*, Docket Nos. C-2009-2098380, *et al.*

⁵ *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers and the Pennsylvania Universal Service Fund*, Docket No. I-00040105 (Order entered April 24, 2008).

Answer to Material Questions in regards to the AT&T complaints. PTA and Embarq PA sought, among other things, to have the AT&T complaints dismissed.

On July 23, 2009, Administrative Law Judge (“ALJ”) Susan D. Colwell issued her Recommended Decision (“RD”) in the limited proceeding directed by the *April 2008 Order*.

On July 29, 2009, the Commission entered an Order in the AT&T complaint proceeding. The Commission ruled that the AT&T complaints would not be dismissed, but would be consolidated with the *Investigation Order*.

On August 5, 2009, the Commission entered an Order lifting the stay in *Investigation Order* at Docket No. I-00040105 (“*August 5th Order*”). The *August 5th Order* also addressed the scope of the newly consolidated *Investigation Order* proceeding. The Commission observed:

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.

August 5th Order, at 3. The Commission summarized the scope of the investigation initiated in 2004 as follows:

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.
- 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?

August 5th Order, at 3-4.

The Commission ultimately concluded that “we are persuaded that the access charge investigation should be resumed at this time.” *Id.*, at 19. Furthermore, the Commission ordered “[t]hat the stay of the intrastate access charges portion of this investigation is hereby lifted.” *Id.*, Ordering Paragraph 2, at 21. The Commission also ordered:

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 Order, Ordering Paragraph 5, at 21-22.

On August 19, 2009, a prehearing conference was held before Administrative Law Judge (“ALJ”) Kandace F. Melillo. During that prehearing conference, ALJ Melillo ordered the parties to submit legal memoranda regarding the scope of the consolidated proceeding.

On September 2, 2009, the OSBA submitted a memorandum of law regarding the scope of the consolidated proceeding.

On September 15, 2009, ALJ Melillo issued her *Order Addressing Scope of Consolidated Proceeding*.

On September 25, 2009, AT&T; Verizon Pennsylvania Inc., Verizon North Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, MCI metro Access Transmission Services, LLC d/b/a Verizon Transmission Services, and MCI Communications Services, Inc. (collectively, “Verizon”); Qwest Communications Company, LLC (“Qwest”); Sprint Communications Company, LP, Sprint Spectrum, LP, Nextel Communications of Mid Atlantic, Inc., and NPCR, Inc. (collectively, “Sprint”); Omnipoint Communications Inc. d/b/a T-Mobile, Omnipoint Communications Enterprises LLC d/b/a T-Mobile, and Voicestream Pittsburgh LP d/b/a T-Mobile (collectively, “T Mobile”) filed a Petition for Review and Answer to Material Question in regards to ALJ Melillo’s *Order Addressing Scope of Consolidated Proceeding*.

On December 10, 2009, the Commission upheld ALJ Melillo’s *Order Addressing Scope of Consolidated Proceeding* with only minor modifications.

On January 20, 2010, the OSBA served the Direct Testimony of John W. Wilson.

On March 10, 2010, the OSBA served the Rebuttal Testimony of John W. Wilson.

On April 1, 2010, the OSBA served the Surrebuttal Testimony of John W. Wilson.

April 14, 15, and 16, 2010, evidentiary hearings were held before ALJ Melillo.

On May 13, 2010, the OSBA submitted its Main Brief.

The OSBA submits this *Reply Brief* in accordance with the procedural schedule in this case.

III. Burden of Proof

In its Main Brief, AT&T stated:

The issue of who has the burden of proof has already been decided by this Commission – that burden plainly lies with the RLECs. A very similar procedural history occurred in the Verizon intrastate access case at Docket No. C-20027195. In that case, AT&T filed a formal complaint against Verizon’s access rates. Despite requests to dismiss AT&T’s complaint, the Commission permitted the complaint to move forward, and consolidated it with a generic investigation into Verizon’s access rates – just as the Commission did here. When determining who had the burden of proof in that case, Verizon argued that AT&T, as the complainant, must share the burden of proving that access rates should be modified. The Commission rejected that argument.

AT&T Main Brief, at 16 (footnotes omitted).

The Commission’s logic in the Verizon access rate case is as follows:

Notwithstanding that the instant docket bears a ‘C’ designation, signaling a formal complaint by a participant, Verizon’s rates, while existing rates, have not been endorsed by this Commission as the final stage in the access charge reform process that began years ago. Substantially similar to this Commission’s development of unbundled network element (UNE) rates, pursuant to the federal Telecommunications Act of 1996 (TA-96), 47 U.S.C. § 252(d), we have not closed the Commission-initiated investigation that began the inquiry.

AT&T v. Verizon, Docket No. C-20027195 (Order entered January 8, 2007), at 21.

Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), states:

Except as may be otherwise provided in section 315 (relating to burden of proof) or other provisions of this part or other relevant statute, the proponent of a rule or order has the burden of proof.

66 Pa. C.S. § 332(a).

Section 315(a) states:

In any proceeding upon the motion of the commission, involving any proposed or existing rate of any public utility, or in any proceedings upon complaint involving any proposed increase in

rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility.

66 Pa. C.S. § 315(a).

Significantly, New Chapter 30 added Section 3012 of the Public Utility Code, 66 Pa. C.S. § 3012. Section 3012 provides that switched access service is a “protected service,” and, therefore, is a noncompetitive service. Section 3015(a)(1) of the Public Utility Code, 66 Pa. C.S. § 3015(a)(1), authorizes the RLECs to employ a price stability mechanism (“PSM”) to increase annually their noncompetitive service revenue. Access charges are part of the noncompetitive service revenue total used by those PSMs. Section 3015(g) states:

The annual rate change limitations set forth in a local exchange telecommunications company's effective commission-approved alternative form of regulation plan or any other commission-approved annual rate change limitation shall remain applicable and shall be deemed just and reasonable under section 1301.

66 Pa. C.S. § 3015(g).

Because of Section 3015(g), the legislature has already determined that the RLECs' access charge rates in effect when New Chapter 30 was signed into law on November 30, 2004, are just and reasonable.

Therefore, at least with regards to the AT&T complaints and the specific relief sought in those complaints, the OSBA submits that it is only reasonable for AT&T to bear the burden of proof. Because AT&T filed complaints against 32 RLECs, Section 332(a) placed the burden of proof in those complaint proceedings on AT&T. Therefore, it would be improper to elevate those complaints to a position where the burden of proof would shift to the RLECs merely because the Commission consolidated the complaint dockets with an investigation docket.

The Commission's own Order in this consolidated proceeding belies AT&T's argument that the burden of proof should be on the RLECs. In the *Investigation Order*, the Commission stated as follows:

The investigation will address the estimated rate impacts of any further changes to access charges and toll rates and will form the basis for any proposed regulatory changes.

Investigation Order, at 6.

In addition, the Commission ordered:

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 Order, Ordering Paragraph 5, at 21-22.

The *Investigation Order* does not appear to contemplate ordering specific RLECs to reduce their access charges by specific amounts. Instead, the *Investigation Order* speaks in generalities, such as ordering the parties to "address" and "provide record evidence" on the issues listed. Therefore, the *Investigation Order* appears to contemplate the creation of a record from which the Commission will update its access reform policy, possibly resulting in new regulations or further proceedings to address specific reductions by specific RLECs.

Consequently, in regards to the AT&T complaints (which seek specific access charge reductions), the burden of proof should remain on AT&T, as AT&T is the party seeking affirmative relief from the Commission. *Milkie v. Pennsylvania Public Utility Commission*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

In the alternative, if the Commission rules that the RLECs have the burden of proof on all matters in this consolidated proceeding, then the burden of going forward rests with any party (e.g., AT&T) that proposes to change the status quo.

IV. Should the RLECs' Intrastate Switched Access Rates be Reduced?

A. The Legislature

In its Main Brief, AT&T stated:

The Commission and the Legislature have long since rejected these claims that access reform is bad public policy, and the overwhelming evidence shows that the Commission should reject such claims here as well.

AT&T Main Brief, at 16 (footnotes omitted).

Contrary to AT&T's contention, the legislature has no "policy" that favors the further reduction of the RLECs' intrastate access charges. Original Chapter 30 contained Section 3007, which required reductions in access charges and limited future increases in access charges. However, New Chapter 30 repealed Section 3007.⁶ If anything, it can be inferred (from this repeal) that the legislature has a policy against further reduction of the RLECs' intrastate access charges unless the Commission determines that there are compelling reasons for such reductions.

Furthermore, as set forth above, the legislature includes intrastate access charge revenue in the RLECs' PSM calculation in order to help fund the RLECs' broadband deployment. That implies the legislature's desire to maintain or increase access charges in order that broadband deployment across the Commonwealth is not hindered.

Consequently, the Commission may still cling to its outdated policy favoring further reductions in access charges, but no party can claim that the legislature supports that policy.

B. Subsidies

AT&T claimed that IXCs "pay subsidy-laded switched access charges." AT&T Main Brief, at 21.

Similarly, Sprint stated as follows:

⁶ See the Act of November 30, 2004 (P.L. 1398, No. 183), 66 Pa. C.S. §§ 3011 – 3019 ("New Chapter 30").

Regardless of the means of comparison used, it is beyond dispute that the ILECs' [sic] are receiving an enormous, anti-competitive subsidy from their competitors through their unchecked, inflated access charges.

Sprint Main Brief, at 45.

However, neither AT&T nor Sprint has provided proof of the existence of these access charge "subsidies" or the "grossly" inflated rates. OSBA witness John W. Wilson stated that "while the parties aligned with AT&T assert repeatedly that access charges are 'inflated' and above cost, they have presented no cost evidence to support their exaggerated claims." OSBA Statement No. 1, at 9.

Similarly, Office of Trial Staff ("OTS") witness Mr. Joseph Kubas observed:

Since AT&T and the other IXCs have failed to provide a current cost of service study to support these claims, they have not shown that the current RLEC intrastate access rates are excessive or subsidy laden. While the Commission may have indicated that intrastate access charges provided some unspecified subsidy to BLES [basic local exchange service] rates in the past; however, since that time, intrastate access charges have been reduced, BLES rates have increased, and costs have changed over the past 15 years.

OTS Statement No. 1, at 9.

Significantly, AT&T admitted that "[n]o party presented a cost model in this case as to what the cost of intrastate access actually is." AT&T Main Brief, at 23. Sprint observed that "[t]he record is also clear that neither the RLECs, nor the Commission, are aware of the cost of either basic local service or access service." Sprint Main Brief, at 64.

Therefore, without cost studies, the Commission should not credit the hyperbole of the IXCs. Even if the Commission does rule that the RLECs have the burden of proof in this proceeding, AT&T and Sprint retain the burden of going forward with evidence to demonstrate their claims. Merely repeating the words "subsidy" or "overpriced" does not amount to evidence

that access charges recover more than the IXCs' fair share of the RLECs' loop costs. Although cost studies might not be the end of the analysis, they would provide sorely needed insight into the RLECs' access charges relative to costs, and would materially help clarify whether further access charge reductions are, in fact, needed.

V. **If the RLECs' Intrastate Switched Access Rates Should Be Reduced, to What Level Should They Be Reduced, and When?**

A. **Rate Levels**

If the Commission decides that the RLECs' access charges should be reduced even further, the OSBA then agrees conceptually with AT&T, which stated as follows:

The Commission should immediately reduce the RLECs' intrastate access rates to mirror each RLECs' corresponding interstate access rates in rate level and structure.

AT&T Main Brief, at 40.

However, the OSBA's procedure by which an RLECs' intrastate access rates would be equalized with its interstate access rates is more inclusive than the procedure that AT&T appears to recommend.

In general, the OSBA recommends that the intrastate access charges should be set at the level needed to recover 25% of each individual RLEC's total loop costs. OSBA witness Dr.

Wilson summarized the rationale for the OSBA's proposal as follows:

Federal law requires the interstate jurisdiction to assume some recovery of access costs that are attributable to both interstate and intrastate usage. The FCC has ordered a 25% assignment of total loop costs to interstate toll use. That leaves 75% to be recovered from the intrastate jurisdiction, and the Commission has jurisdiction to allocate that 75% in any way that it decides is reasonable. Based on the principle of equal availability of local access facilities for toll and local service, and the fact that 25% of the total is attributed to interstate usage, it would be entirely reasonable to allocate another 25% to intrastate access. That would leave 50% of these joint and common costs to be covered by charges for local exchange services.

OSBA Statement No. 1, at 15. *See also* 47 CFR § 36.154.

The OSBA proposal would set each RLEC's intrastate access rate on an individual basis by simply lowering the RLEC's intrastate access rate so that it recovers intrastate access revenue

equal to its *total* interstate access revenue. In other words, the Commission would set the RLEC's intrastate access charge by first totaling the revenue that RLEC is currently collecting in interstate access charges.

It is critical to note that an RLEC may be using a subscriber line charge, usage charges, or both, for purposes of recovering interstate access charges. *See* 47 CFR §§ 51.705, 51.707, 51.709, and 51.711(b). Therefore, the interstate access total would include *all* of these revenues, regardless of recovery mechanism. The RLEC should develop its new intrastate access rate to produce the same amount of total revenue which is being recovered for interstate access. This appears to be a significant difference between the AT&T and OSBA proposals. Specifically, it appears that AT&T would simply reduce an RLEC's intrastate access rate to that RLEC's interstate access usage charge. The problem is that an RLEC may not be recovering much (or any) of its interstate access revenue in its usage charges. Instead, the RLEC may be recovering much (or all) of its interstate access revenue through a subscriber line charge.

The OSBA's methodology is a more accurate and fair methodology because it would fully equate the amount of revenue that an RLEC would collect for interstate and intrastate access. Once the total amount of interstate access revenue is calculated, creating intrastate access rates would be a simple mathematical exercise.

In contrast, while the OSBA is in conceptual agreement with AT&T's proposal to set intrastate access charge rates (if further reductions are ordered), the OSBA does not find any rational basis for adopting Verizon's proposal. Specifically, Verizon stated that "the Commission should benchmark all RLECs' interstate switched access rates to the lower of Verizon PA's intrastate switched access rate." Verizon Main Brief, at 21. The OSBA does not find Verizon's reasoning that this will "quickly" allow the Commission to reset the RLECs'

intrastate access charges at all persuasive. It is much more just and reasonable to set the RLECs' access charges on an individual company basis, rather than to use Verizon PA as some sort of generic standard. In short, Verizon's loop costs are unlikely to be the same as even one individual RLEC's, and are virtually certain not to be the same as the loop costs of *each* RLEC. *See* OSBA Statement No. 1, 13-15.

Furthermore, Verizon is reading too much into Section 3017(c), which states:

No telecommunications carrier providing competitive local exchange telecommunications service may charge access rates higher than those charged by the incumbent local exchange telecommunications company in the same service territory unless such carrier can demonstrate that the higher access rates are cost justified.

66 Pa. C.S. § 3017(c).

Section 3017(c) does not demonstrate any "legislative policy" in favor of "moving all access rates to a uniform industry benchmark." Verizon Main Brief, at 21. Section 3017(c) merely keeps access rates consistent within an ILEC's service territory so that the competitive local exchange carrier ("CLEC") will not inflate its access charges in order to set its rates for other services artificially low, thereby placing the ILEC at a competitive disadvantage. That is a far cry from setting an industry-wide access charge benchmark rather than basing access charges on each ILEC's own loop costs.

The OSBA's proposal is a much more fair, rational, and reasonable approach that addresses each RLEC on an individual basis, rather than arbitrarily assigning each RLEC the intrastate access rates of Verizon, or setting each RLEC's intrastate rate at a level which does not include all interstate access revenue.

B. Timing

The OSBA has no further response on this issue.

VI. If the RLECs' Intrastate Switched Access Rates Should Be Reduced, How Should Any Revenue Reductions be Recovered in Compliance with 66 Pa.C.S.A. 3017?

A. The Meaning of Revenue Neutrality under Section 3017

Section 3017(a) of the Public Utility Code states:

The commission may not require a local exchange telecommunications company to reduce access rates except on a revenue-neutral basis.

66 Pa. C.S. § 3017(a).

In its Main Brief, Sprint argued that “the appropriate means of determining revenue neutrality for the purposes of offsetting RLECs [sic] switched access rate reductions is to look to the RLECs’ wide range of competitive services offered over the local loop.” Sprint Main Brief, at 74.

Sprint is wrong.

First, intrastate switched access is a protected service under Section 3012, which the Commission has not declared to be competitive. Therefore, the revenue from switched access service is included in the RLECs’ noncompetitive service revenue total, which is the base to which the annual inflationary adjustment is applied through the PSM process. Sprint’s proposal to achieve Section 3017(a)’s revenue neutrality from an RLEC’s competitive services may, on an absolute basis, make an RLEC whole in regards to the lost access charge revenue. However, the RLEC would not be made whole for purposes of its annual PSM filing, since competitive service revenue cannot be included in an RLEC’s PSM noncompetitive service revenue total.

Consequently, with the intrastate access revenue missing, the base to which the annual PSM increase would be applied would be reduced and the RLEC would receive a reduced annual increase to its authorized noncompetitive service revenue. The impact of Sprint’s proposal would not, ultimately, be revenue neutral to the RLEC, and would not only violate Section

3017(a), but would thwart the purpose of New Chapter 30, *i.e.*, to use annual increases in noncompetitive service revenue to fund accelerated broadband deployment.

Second, the Commonwealth Court recently stated as follows:

Under 66 Pa.C.S. § 3017 the Commission has specific authority to rebalance revenue among *noncompetitive* services by reducing access rates and making revenue neutral increases to other *noncompetitive* rates.

Buffalo Valley Tel. Co. v. Pennsylvania Public Utility Commission, 990 A.2d 67, 80 (Pa. Cmwlth. 2009) (emphasis added).

Individual RLECs would, of course, be entitled to forgo revenue neutrality voluntarily or to recover some or all of the lost access revenue by voluntarily increasing rates for competitive services. However, the Commission has no authority to *order* RLECs to proceed with Sprint’s proposal to use competitive services to achieve revenue neutrality.

B. Rate Increases

1. Rate Caps

In its testimony and Main Brief, the OSBA recommended that the Commission abandon the rate caps on noncompetitive local exchange service to residential and business customers. *See, e.g.*, OSBA Statement No. 3, at 2-3; Main Brief at 25-26. The OSBA is unaware of any response to this proposal by any of the parties, either in testimony or in their Main Briefs. Therefore, to the extent that parties challenge the OSBA’s recommendation for the first time in their Reply Briefs, they will have deprived the OSBA of the opportunity to respond to those challenges with specific arguments.

In anticipation of challenges in the Reply Briefs of other parties, the OSBA asserts again that it is simply not rational to treat all RLEC customers as “low income” customers, in need of monthly assistance to pay their telephone bills. The Commission does not employ this

“everyone is a low income customer” approach in either the electric or natural gas industries.

See 52 Pa. Code §§ 54.73 and 62.3.

The OCA provided a useful summary in regards to the “universal provision of basic local exchange telecommunications service.” *See* OCA Main Brief, at 7-10. Specifically, the OCA summarized this issue by stating:

The Commission cannot, however, simply increase basic local service rates for rural customers to extreme levels without considering the impact such actions have on the Commission’s obligation to maintain universal telephone service at affordable rates.

OCA Main Brief, at 10.

The OSBA agrees with the OCA’s summary, but finds no conflict between the desires of the OCA to maintain universal service and the OSBA’s view that not every RLEC customer should be treated as a low income customer. It would be much more fair and reasonable to target assistance to only those residential customers who can demonstrate a need for help, rather than to assure that affluent residential customers do not have to pay more than \$18 per month for basic local exchange service. The OSBA is well aware that its recommendation would also remove the caps from business customers, and that there would be no “business” customer assistance program under this proposal. However, the absence of a business assistance program would mirror the Commission practice in other industries.

2. Business Rate Caps and Verizon

In its Main Brief, Verizon stated:

[A]lthough Verizon pointed out several times the lack of evidentiary foundation to limit RLEC business rate increases, no one ever produced any actual evidence in support of the proposition, nor did anyone attempt to rebut Verizon’s evidence that showed that the RLECs’ business rates are relatively low and

could be increased without any constraint. The record simply does not contain the evidence to support imposing a business cap at all.

Verizon Main Brief, at 36.

The OSBA has submitted testimony regarding the establishment and continuation of caps on business local exchange rates. Verizon apparently overlooked that testimony. See OSBA Statement No. 2, at 13-16 and OSBA Statement No. 3, at 2-3.

Verizon is also apparently unfamiliar with the *Rural Access Settlement Order*, which specifically provided for business caps as follows:

Increases to weighted average business rates on a dollar basis will be less than or equal to the increases to weighted average residential rates on a dollar basis.

Rural Access Settlement Order, Attachment A, Conditions of Proposal, Paragraph 5, at 20.

The OSBA is fully aware that Section 3015(a)(3) of the Public Utility Code, 66 Pa. C.S. § 3015(a)(3), imposes a cap only on residential rates. However, Section 3015(a)(3) applies only to *nonrural* ILECs. Thus, it is irrelevant to this proceeding that “Verizon’s business rates routinely receive a higher per-line increase than its residential rates.” Verizon Main Brief, at 36. As demonstrated by Section 3015(a)(3), the legislature was well aware of how to limit a rate cap to residential customers. However, the legislature created no such cap limitation for RLECs.

Furthermore, Verizon’s proposal to increase the RLECs’ business rates “without any constraint” would violate Section 1304 of the Public Utility Code, 66 Pa. C.S. § 1304, in that it would permit RLECs to discriminate against business customers and in favor of residential customers.⁷ Regardless of how the Commission ultimately rules on the issue of residential and business rate caps, Verizon’s solution is discriminatory and unlawful.

⁷ Section 1304 is specifically incorporated into New Chapter 30 by Section 3019(h) of the Public Utility Code, 66 Pa. C.S. § 3019(h).

C. Pennsylvania USF

The OSBA has no further response on this issue.

VII. General Legal Issues

A. Retroactivity of any Access Rate Reductions

In its Main Brief, Sprint stated as follows:

Under Section 1309(b) of the Public Utility Code, when the Commission receives a Complaint seeking a reduction in rates based on allegations that existing rates are unjust, unreasonable or otherwise in violation of law, the PA PUC is required either to issue a ruling on such Complaint within nine (9) months of receipt of the Complaint, or to make such relief that is eventually awarded retroactive to a date nine (9) months after the Complaint is filed.

* * *

The statutory test for retroactive relief is met in this case.

Sprint Main Brief, at 83-84.

Sprint's argument turns upon the effect of consolidating the AT&T complaints with the ongoing Commission investigation. If the consolidation relieved AT&T of the burden of proof regarding its complaints, then adjudication of those complaints is not governed by Section 1309(b). Therefore, there would be no basis for Sprint's proposal to make the access charge reductions retroactive to the end of the nine-month period.

B. Compliance

The OSBA has no further response on this issue.

VIII. Conclusion

AT&T should retain the burden of proof in regards to the issues and proposals raised in its complaints.

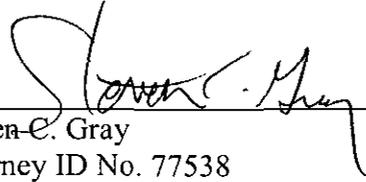
There is not a need for further RLEC intrastate access charge reductions at this time. The legislature has no policy that promotes the further reduction of the RLECs' intrastate access charges. In addition, the IXCs have not produced credible, factual evidence that demonstrates that the RLECs are overcharging for access.

If the Commission decides to order further reductions in the RLECs' intrastate access charges, intrastate access charges should be set separately for each RLEC so that each RLEC recovers 25% of the total cost of its loops through its intrastate access charge.

If the Commission decides to order further reductions in the RLECs' intrastate access charges, Section 3017(a) requires that revenue neutrality be achieved by providing the RLECs with the opportunity to increase various noncompetitive service rates.

Universal service goals will be better achieved if the Commission discontinues the "everyone is a low income customer" local exchange rate caps for the RLECs' residential and business customers. However, if rate caps are to be continued, caps must be maintained on local exchange rates for both the RLECs' residential and business customers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven E. Gray", is written over a horizontal line.

Steven E. Gray
Attorney ID No. 77538
Assistant Small Business Advocate

For:

William R. Lloyd, Jr.
Attorney ID No. 16452
Small Business Advocate

Office of Small Business Advocate
Suite 1102
300 North Second Street
Harrisburg, PA 17101

Dated: June 3, 2010

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RECEIVED
2010 JUN -3 PM 3:19
PA. P.U.C. BUREAU
SECRETARY'S OFFICE

Investigation Regarding Intrastate Access :
Charges and IntraLATA Toll Rates of Rural : Docket No. I-00040105
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.* :
Respondent :

CERTIFICATE OF SERVICE

I certify that I am serving two copies of the Reply Brief, on behalf of the Office of Small Business Advocate, by e-mail and first-class mail (unless otherwise noted) upon the persons addressed below:

Hon. Kandace F. Melillo
Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-5452
(717) 787-0481 (fax)
Kmelillo@state.pa.us
(E-mail and Hand Delivery)

Zsuzsanna E. Benedek, Esquire
Embarq Pennsylvania
240 North Third Street, Suite 201
Harrisburg, PA 17101
(717) 245-6346
(717) 236-1389 (fax)
sue.e.benedek@embarq.com

Regina L. Matz, Esquire
Norman J. Kennard, Esquire
Thomas Long Niesen & Kennard
212 Locust Street, Suite 500
P.O. Box 9500
Harrisburg, PA 17108-9500
(RTCC)
(717) 255-7600
(717) 236-8278 (fax)
rmatz@thomaslonglaw.com
Nkennard@thomaslonglaw.com

Joel H. Cheskis, Esquire
Darryl A. Lawrence, Esquire
Office of Consumer Advocate
555 Walnut Street - 5th Floor
Harrisburg, PA 17101-1923
(717) 783-5048
(717) 783-7152 (fax)
jcheskis@paoca.org
dlawrence@paoca.org
(E-mail and Hand Delivery)

Allison Kaster, Esquire
Office of Trial Staff
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105
(717) 787-1976
(717) 772-2677 (fax)
akaster@state.pa.us
(E-mail and Hand Delivery)

Michelle Painter, Esquire
Painter Law Firm, PLLC
13017 Dunhill Drive
Fairfax, VA 22030
(703) 201-8378
(703) 968-5936 (fax)
painterlawfirm@verizon.net

Bradford M. Stern, Esquire
Rothfelder Stern, L.L.C.
620 Central Avenue
Westfield, NJ 07090
(Omnipoint, T-Mobile, Nextel)
(908) 301-1211
(908) 301-1212 (fax)
bmstern@rothfelderstern.com

Christopher M. Arfaa, Esquire
Christopher M. Arfaa, PC
150 N. Radnor Chester Road - Suite F-200
Radnor, PA 19087-5245
(610) 977-2001
(610) 977-0043 (fax)
carfaa@arfaalaw.com

Renardo L. Hicks, Esquire
Stevens & Lee
17 North Second Street - 16th Floor
Harrisburg, PA 17101
(Sprint Nextel)
(717) 234-1090
(717) 234-1099 (fax)
rlh@stevenslee.com

John F. Povilaitis, Esquire
Matthew A. Totino, Esquire
Ryan, Russell, Ogden & Seltzer P.C.
800 North Third Street, Suite 101
Harrisburg, PA 17102-2025
(717) 236-7714
(717) 236-7816 (fax)
jpovilaitis@ryanrussell.com
mtotino@ryanrussell.com

Theresa Z. Cavanaugh, Esquire
John Dodge, Esquire
Davis Wright Tremaine, LLP
1919 Pennsylvania Avenue, N.W. - #200
Washington, DC 20006
(202) 973-4205
(202) 973-4405 (fax)
[johndodge@dwt.com](mailto: johndodge@dwt.com)
terrycavanaugh@dwt.com

Garnet Hanly, Esquire
garnet.hanly@t-mobile.com
(E-Mail Only)

Suzan DeBusk Paiva, Esquire
Leigh A. Hyer, Esquire
Verizon
1717 Arch Street, 10th Floor
Philadelphia, PA 19103
(215) 466-4755
(215) 563-2658 (fax)
suzan.d.paiva@verizon.com
leigh.a.hyer@verizon.com

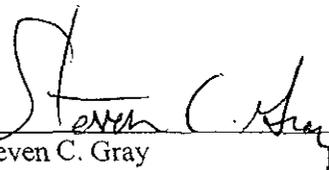
Benjamin J. Aron, Esquire
Sprint Nextel Corporation
2001 Edmund Halley Drive - Room 208
Reston, VA 20919
(703) 592-7618
(730) 592-7404 (fax)
benjamin.aron@sprint.com

Pamela C. Polacek, Esquire
Shelby A. Linton-Keddie, Esquire
McNees Wallace & Nurick, LLC
100 Pine Street
P. O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000
(717) 260-1763 (fax)
ppolacek@mwn.com
skeddie@mwn.com

Allan Kohler, Esquire
Deanne M. O'Dell, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
P.O. Box 1248
Harrisburg, PA 17108-1248
akohler@eckertseamans.com
dodell@eckertseamans.com

Demetrios G. Metropoulos, Esquire
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600
demetro@mayerbrown.com

Philip S. Shapiro, Esquire
Law Department
AT&T Inc.
3033 Chain Bridge Road - Second Floor
Oakton, VA 22185
(703) 272-1478
psshapiro@att.com



Steven C. Gray
Assistant Small Business Advocate
Attorney ID No. 77538

Date: June 3, 2010