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WITNESSES

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None

FORM 2

EXHIBIT INDEX

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FOR IDENTIFICATION IN EVIDENCE

None

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FORM 2

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P R O C E E D I N G S

ADMINISTRATIVE LAW JUDGE KANDACE F. MELILLO:

1 This is the time and place for an initial prehearing conference
2 in the matters of the Investigation Regarding Intrastate Access
3 Charges and IntraLATA Toll Rates of Rural Carriers and the
4 Pennsylvania Universal Service Fund. The docket number is
5 I-0040105. Also consolidated with the investigation are 96 AT&T
6 complaints. The lead docket number is C-2009-2098380. The other
7 docket numbers are contained in an addendum to the Notice of
8 Prehearing Conference, and also the Commission specifically
9 consolidated these dockets in its previous orders in July and
10 August, 2009, in this matter.
11
12

13 I am Administrative Law Judge Kandace F. Melillo,
14 assigned by the Commission to preside in this matter. I note the
15 appearances this morning of Joel Cheskis, Esquire, on behalf of
16 the Office of Consumer Advocate; Steven C. Gray, Esquire, on
17 behalf of the Office of Small Business Advocate; Susan Paiva,
18 Esquire, on behalf of Verizon; Kevin J. Moody, Esquire, on behalf
19 of Comcast; Matt Totino, Esquire, on behalf of Quest; Christopher
20 Arfa, Esquire, on behalf of Cellco Partnership, doing business as
21 Verizon Wireless; Sue Benedek, Esquire, on behalf of the United
22 Telephone of Pennsylvania, LLC, doing business as Embarq
23 Pennsylvania; Renardo L. Hicks, Esquire, on behalf of Sprint
24 Nextel; Ben Aron, Esquire, on behalf of Sprint Nextel; Norman
25 Kennard, Esquire, and Regina Matz, Esquire, on behalf of

1 Pennsylvania Telephone Association; Garnet Hanly, Esquire, on
 2 behalf of T-Mobile; Bradford M. Stern, Esquire, on behalf of
 3 T-Mobile; Barry Naum, Esquire, on behalf of Broadband Cable
 4 Association of Pennsylvania; Allison Kaster, Esquire, on behalf
 5 of the Office of Trial Staff; and Michelle Painter, Esquire, on
 6 behalf of AT&T.

7 Is there anyone else in the courtroom who would
 8 like a chance to be on the record today?

9 (No response.)

10 JUDGE MELILLO: Hearing nothing, then good
 11 morning, everyone.

12 (Chorus of good mornings, Your Honor.)

13 JUDGE MELILLO: I have received prehearing
 14 memoranda from the following: AT&T, Sprint, Verizon,
 15 Pennsylvania Telephone Association, Embarq Pennsylvania, the
 16 Office of Consumer Advocate, the Office of Trial Staff, the
 17 Office of Small Business Advocate, T-Mobile, Quest, the Broadband
 18 Cable Association, and Verizon Wireless.

19 I did not receive a prehearing memorandum from
 20 Comcast; is that correct?

21 MR. MOODY: Your Honor, we did file one. I did
 22 bring copies with me, but I know we filed one.

23 JUDGE MELILLO: All right. Well, do you have a
 24 copy available? I have to be separately served with documents
 25 that you file.

FORM 2

1 (Document handed to Judge Melillo.)

2 JUDGE MELILLO: Thank you.

3 As a preliminary matter, I wanted to clarify the
4 parties to these consolidated proceedings. All parties which
5 participated in the AT&T complaint proceeding and were granted
6 intervention or otherwise participated they are parties, plus
7 those parties which participated in the 2005 proceeding before
8 Administrative Law Judge Colwell in the limited reopening
9 proceeding before Administrative Law Judge Colwell in 2008 and
10 '09 and appear today have indicated their intent to remain a
11 party are parties.

12 I wanted to clarify something with the
13 Pennsylvania Telephone Association. We had out of an abundance
14 of caution served a copy of the Prehearing Conference Notice on
15 three entities, those being Hancock Telephone Company, Deposit
16 Telephone Company, and West Side Telephone Company. Should they
17 continue to be served, or what is the status of these three?

18 MR. KENNARD: Judge, if you look at the PTA
19 Prehearing Conference Memo at footnote 1, there's a description
20 of the PTA companies. There's also a description of why Hancock,
21 West Side, and Deposit are not in this case. They were not in
22 the case before ALJ Colwell; and, because they are not USF
23 recipients, most of these are companies that have operations in
24 other states that have exchanges that are partially in
25 Pennsylvania, we don't believe they're a part of the scope of

1 this case. And it didn't seem controversial in front of ALJ
2 Colwell and are not affected by the outcome here.

3 JUDGE MELILLO: All right.

4 Does anyone have any disagreement with deleting
5 those three telephone companies from the service list?

6 (No response.)

7 JUDGE MELILLO: All right, they are deleted.

8 I have another question about Thomas W. Snyder,
9 Esquire. Does anyone know who he was representing in a prior
10 on-the-record proceeding in this matter?

11 MS. PAINTER: I think he was in-house for Quest.

12 MR. TOTINO: Actually, Your Honor, I don't know.
13 That name is not ringing a bell; but, to the extent that this is
14 who is listed on behalf of Quest, he can be removed from the
15 service list.

16 JUDGE MELILLO: All right. The parties may
17 remove Thomas W. Snyder, Esquire, from the service list. He was
18 listed as being in Denver, Colorado.

19 MR. STERN: Your Honor, I know Tom Snyder. He
20 used to be an in-house employee with Quest in Colorado. He is no
21 longer with the company. I would say he should be deleted from
22 the list.

23 JUDGE MELILLO: Thank you. Your name, please.

24 MR. STERN: I'm Brad Stern from T-Mobile.

25 JUDGE MELILLO: Thank you.

1 The next matter for discussion considers the
2 scope of the proceedings. Your prehearing memoranda were shuck
3 full of opinions about this. The one thing we can say for sure
4 is that there's no universal agreement among the parties as to
5 scope. There are various factions that have developed. I
6 believe that determining the scope of the proceeding is essential
7 because it provides a framework for the parties for the discovery
8 ongoing and the preparation of testimony. So I'm not in favor of
9 putting this off until a later time or dealing with it on an
10 as-needed basis.

11 First of all, I guess we can talk about what is
12 not within the scope of this proceeding. There was a request by
13 the wireless carriers that we clearly set forth the decision or
14 the ruling made by Administrative Law Judge Colwell back in 2005
15 as being the so-called rule of case. In other words, we would
16 not revisit that.

17 First of all and let me clarify that my
18 interpretation of the Commission's recent orders regarding how we
19 would treat the matters that have previously been litigated in
20 the most recent I-docket proceeding before Administrative Law
21 Judge Colwell. Those issues would not be relitigated absent
22 extraordinary circumstances; however, that particular provision
23 did not apply to whatever was decided in the 2005 context because
24 there was no decision made. There was an interim order of Judge
25 Colwell.

1 That having been said, however, I've read Judge
2 Colwell's ruling on this and I do agree with it. Basically, it
3 appears to me to be an academic question as to whether the
4 wireless carriers should contribute to the Fund. The essential
5 question is, can they be required to contribute to the Fund; and
6 she decided that, to the extent that public utility status was
7 required to be a contributor to the Fund, she agreed with the
8 request that the carriers not be considered contributors.

9 So, to that extent, I agree with her. I think
10 there's no question that, according to the Public Utility Code,
11 the Commission does not retain jurisdiction over wireless
12 carriers. So, if anyone wants to comment on that, but I'm going
13 to basically take that provision out of this proceeding.

14 Yes, Mr. Cheskis.

15 MR. CHESKIS: Your Honor, we do disagree with
16 that determination for a number of reasons. First of all, this
17 issue is clearly articulated as an issue to be addressed in this
18 investigation as per the Commission's December 20th, 2004 Order
19 that started this case. Second of all, Judge Colwell's decision
20 to remove that issue from the case that she was deciding may or
21 may not have been appropriate but really has no bearing in our
22 opinion on issues that are to be decided in this portion of the
23 investigation case for a reason that we can discuss regarding
24 bigger issues here about the scope, but the cases are different.

25 The issues that Judge Colwell decided were

1 clearly delineated in the decision of the Commission on April
2 24th, 2008. The issues that are now pending in this portion of
3 the investigation remain relevant to that order from December
4 20th, 2004, which clearly does include the question of whether or
5 not wireless companies should be contributing to the Universal
6 Service Fund.

7 We respectfully disagree with your determination
8 this morning.

9 JUDGE MELILLO: I understand.

10 Anyone else care to comment?

11 Yes, Mr. Arfa.

12 MR. ARFA: Just a point of clarification. The
13 order -- just so the record is clear, Judge Colwell's
14 determination on the wireless carriers' motion preceded the
15 limitation of that investigation by the Commission in 2008. So
16 it was at a time when all the issues were before Judge Colwell;
17 and she decided in our opinion correctly that, in effect, the
18 Commission's question, should the wireless carriers be included
19 even if the answer is no, we don't have the power.

20 So I wanted to make clear that her decision was
21 in 2005 and preceded the last phase of that proceeding. Thank
22 you.

23 MR. CHESKIS: Can I make two other brief points?

24 JUDGE MELILLO: Certainly.

25 MR. CHESKIS: Number one is, what Judge Colwell

1 decided in that case was not superior or takes precedent over
2 what the Commission has clearly stated in its order. So, with
3 all due respect to Your Honor and to Judge Colwell, we're
4 following the direction of the Commission and not of Judge
5 Colwell.

6 Second of all, to the extent that this issue was
7 raised before the Commission in a petition for reconsideration
8 that was filed by Sprint and decided by the Commission on October
9 9th, 2008, the Commission there specifically said that we do not
10 specifically include this issue -- meaning the wireless issue --
11 to be considered in the limited investigation at this time. I
12 think that clearly can say that, yes, they still think this issue
13 is relevant. They still want it included in the investigation as
14 a whole, but they do not want it included in this portion of it
15 and Judge Colwell's portion of the investigation at that time.

16 Now is the appropriate portion of the
17 investigation to decide that issue, and now is the appropriate
18 time to be deciding this very important issue.

19 JUDGE MELILLO: Is it your position, Mr. Cheskis,
20 that the Public Utility Commission has jurisdiction over wireless
21 carriers?

22 MR. CHESKIS: The Commission is not necessarily
23 exerting jurisdiction over wireless carriers at this point. The
24 Commission is conducting an investigation. They are gathering
25 facts. They are gathering the input from relevant interested

1 parties in determining what their options may be, where they
2 might be able to go with this issue. To the extent that they
3 decide that they did determine that their jurisdiction was one
4 way or the other, they can then make their decision.

5 So there are other states that include wireless
6 companies as part of the Universal Service funding. The
7 Commission is certainly within its rights, and it's reasonable
8 for it to be investigating at this time whether it should be and
9 could be doing so. So this issue is relevant to this proceeding
10 right now.

11 JUDGE MELILLO: Well, the specific question that
12 the Commission did include in its 2004 Order said should it be
13 included; and my take on that is, that's really an academic
14 question. The question that has to be addressed first is, can it
15 be? Can the wireless carriers be included as entities that must
16 contribute? If the Commission doesn't have jurisdiction, how can
17 they require contribution? How can they enforce an order? So it
18 seems to be fundamental.

19 But, in any event, we'll get to this issue later
20 about the schedule. It seems like we're going to have to have
21 some time built in the schedule for parties to understandably
22 take decisions that I've made or decisions and orders to the
23 Commission in a petition for material question to get some of
24 these things resolved because, if we don't have these issues
25 resolved, parties aren't going to be able to effectively conduct

1 discovery. There's going to be discovery fights all the time,
2 and there's going to be difficulty in preparing testimony.

3 There's going to be other issues probably that
4 come up as we continue our discussion that are going to be in
5 controversy and --

6 MR. CHESKIS: With all due respect --

7 JUDGE MELILLO: -- I'll leave it at that.

8 MR. CHESKIS: With all due respect, I think we
9 would be doing an immense disservice to the Commission if we
10 conducted this investigation after all these hearings and failed
11 to address the key issue as part of this matter.

12 MS. BENEDEK: Your Honor?

13 JUDGE MELILLO: Yes, Ms. Benedek.

14 MS. BENEDEK: We fully support OCA's point of
15 view. I have three additional points I'd like to make. Embarq
16 PA does not agree that it's an academic question on the wireless
17 issue, and the issue of whether they have jurisdiction over the
18 carriers is very different from whether they have jurisdiction
19 over the subject matter; and subject matter jurisdiction is a
20 separate component of the jurisdictional analysis. If you
21 preclude this issue from ever developing into the record, that's
22 a separate issue.

23 We don't believe Judge Colwell said they are
24 excluded from the case. She said that they are excluded from a
25 jurisdictional standpoint as contributors into the USF, but she

1 made them indispensable parties and that is at page 6 of her
2 order. So it's their risk to take or not take the record.

3 I think our other indispensable -- should I
4 recollect from my own memory that, during the oral argument that
5 day before Judge Colwell, I believe she had made reference that
6 it was her understanding only should the record include the
7 wireless issue that the Commission was looking to develop a full
8 and complete evidentiary record to perhaps take the record to the
9 legislature if that is indeed where it wanted to go.

10 So, if you look at the question of whether the
11 wireless carriers are subject to the Public Utility Code under
12 the strict view of a definition of public utility, that given the
13 FCC issues there's a number of developmental factors that need to
14 be considered in the record; and we quite frankly fully support
15 OCA's overview that it would be a disservice to develop a record
16 without what should be included in the record.

17 JUDGE MELILLO: Thank you.

18 Anyone else care to speak on that issue?

19 MR. KENNARD: Just to put a little finer point,
20 Your Honor, as to what Ms. Benedek said, Judge Colwell did keep
21 the issue alive by acknowledging that one of the two expressly
22 excluded CMRS providers do not have the ability to collect
23 funding from those carriers. Specifically page 5 and I believe
24 Brad Stern's prehearing memo he attaches that decision.

25 JUDGE MELILLO: Yes, he does.

1 MR. KENNARD: On page 5 of that I think is the
2 nub of her discussion that CMRS providers are not public
3 utilities, but the motion makes it legal logic of the
4 Commission's inability to regulate them under present law which
5 necessarily means the Commission voiced concerns regarding
6 including CMRS providers in the definition of contributors to the
7 Fund are misplaced.

8 One of the things PTA intends to discuss on the
9 record in this case is also whether or not voice over internet
10 protocol providers should contribute as well. Under FCC rules,
11 the State cannot regulate as a utility VOIP service providers;
12 but there is also a petition pending before the FCC based upon a
13 brief that was filed by the FCC in the Eighth Circuit that
14 provides that the states can require contribution from voice
15 providers even though they're not regulated public utilities.

16 So I think we have a very similar issue here. So
17 the discussion is consistent with ALJ Colwell that CMRS are not
18 public utilities, but that doesn't necessarily mean they can't be
19 required to contribute to the fund. Number two, it doesn't mean
20 we should close the record out and not give an opportunity to
21 discuss it at all. So, in PTA's opinion in this case, CMRS
22 providers should be subject to discovery, that they be free to
23 address the issues presented by the PTA.

24 I think the theme that the PTA is trying to sound
25 here is, it's a terrible mistake to limit the issues in this case

1 to those issues which were assigned to ALJ Colwell. This is a
2 generic investigation. If you start saying well, you can't talk
3 about this, you can't talk about that when we're dealing with
4 another USF investigation which is access levels, designing the
5 Fund, and contribution, it just creates more furor and probably
6 does foreshadow the parties from going up to the Commission.

7 JUDGE MELILLO: Thank you. I understand and I
8 think we have some time perhaps built into the schedule for that.
9 There was a mention of indispensable parties. I checked with
10 Administrative Law Judge Colwell this morning. Her order does
11 say they would be named indispensable parties, but she indicated
12 that there was no follow-up on that. There was no subsequent
13 order directing that they be made indispensable parties and
14 required to be in the case. So I don't know where we stand with
15 that. She was unaware that anything definitive had been done.

16 I wanted some discussion about that whole
17 indispensable party issue. I think Mr. Stern is wanting to talk
18 about that.

19 MR. STERN: Yes. Thank you, Your Honor. First
20 thing on --

21 JUDGE MELILLO: Could you possibly keep your
22 voice up?

23 MR. STERN: All right. We appreciate your taking
24 notice of Judge Colwell's 2005 Order and agreeing with its
25 holding.

1 Judge Colwell recognized the fact and she stated
2 that wireless CMRS carriers are not jurisdictional public
3 utilities. Nevertheless, she had a Question E in front of her as
4 she pointed out should wireless carriers -- should they
5 contribute and a series of other technical questions. And her
6 view was, I have marching orders. I have to have something in my
7 Recommended Decision at this time that answers that Question E
8 and I need an answer. From that standpoint I need information
9 from some of the wireless carriers.

10 The question is whether today Your Honor is
11 expected by the Commission to have Question E in your Recommended
12 Decision --

13 JUDGE MELILLO: That's correct.

14 MR. STERN: -- asked and answered. Our view of
15 the most recent order of the Commission as to what the scope is
16 going forward, they could have easily said and, Your Honor, you
17 shall both ask and answer Question E. They did not. What
18 ordering paragraph 2 says is that the stay is lifted. We expect
19 access charge reform.

20 Paragraph 5 lists a number of issues, none of
21 which have Question E in them. If the Commission wanted you to
22 have Question E asked and answered, they would have said -- they
23 could have easily said in the ordering paragraph that you shall
24 include Question E and give us an answer. They did not.

25 Just because it appeared in the history of the

1 proceedings and started out as such and has appeared in every
2 order in this docket since as the history of this proceeding
3 doesn't mean that the Commission intends that going forward it be
4 asked and answered. They would say so if they wanted that and
5 they have not.

6 And I think it's fairly clear and plain based on
7 the most recent order that the Commission is not expecting Your
8 Honor to take evidence on Question E and include a section in the
9 Recommended Decision regarding Question E. I think it's -- it
10 can't be any plainer than that.

11 With respect to the motion in 2005, you know,
12 here we are relitigating it when the Commission said we shall
13 not. So I don't know why we continue to discuss it. It says
14 what it says as far as the record. No party at the time went to
15 the Commission for reconsideration of it, yet there it sits. And
16 so the real question going forward is whether Your Honor has an
17 obligation to deal with Question E back from 2004 or not and the
18 wireless carriers' position or T-Mobile's position is, the
19 Commission could have said to do that. They did not. Therefore
20 it is not an obligation of Your Honor to include it. Thank you.

21 JUDGE MELILLO: Thank you, Mr. Stern.

22 The Commission did not in its most recent orders
23 preclude looking back at matters that were not included within
24 Judge Colwell's limited reopening proceeding; therefore, at least
25 if we look at it from that context, the ruling that Judge Colwell

1 made with respect to wireless carriers back in 2005 does not
2 necessarily preclude it by that provision from being looked at.
3 However, I agree with her.

4 The threshold question is, first of all the
5 Commission has only asked should not could. So the question is,
6 should they be included? But, in my view at this point, the
7 question is, can they be included? I mean, if we deal with the
8 issue of should, then you get into all kinds of policy questions.
9 But in a sense in my view that's academic because you still have
10 to reach the threshold issue of whether they can be required to
11 contribute. So that's the way I'm looking at it.

12 I hear what Ms. Benedek has said about the
13 difference between personal jurisdiction versus subject matter,
14 and that's an interesting way to look at it. I have to I guess
15 make a decision on this, and then the parties can take that
16 decision to the Commission in a petition for answer to material
17 question if they so desire. But that's going to be an important
18 issue to be decided at this point.

19 Now, the question of indispensable parties, does
20 anybody want to address that?

21 MR. ARFA: Your Honor?

22 JUDGE MELILLO: Yes, Mr. Arfa.

23 MR. ARFA: My recollection upon reviewing the
24 file that matter was litigated, and nobody made a request for
25 that status for any parties to that proceeding to my

1 recollection.

2 JUDGE MELILLO: Thank you, Mr. Arfa.

3 Does anyone wish to address that?

4 MS. BENEDEK: Yes, Your Honor. My understanding
5 of the order is, it was truncated because the matter was stayed.
6 So to say there was no motion or litigation is really a moot
7 point.

8 MR. ARFA: That's not true.

9 MS. BENEDEK: This case was stayed and that's
10 what got us into the last stay.

11 JUDGE MELILLO: Does anyone have any position on
12 it? Does any party wish to speak in favor of the indispensable
13 party nature of the wireless carriers? Does anyone wish to speak
14 against it?

15 MR. KENNARD: I'm not sure what Your Honor means.
16 PTA intends to raise the issue of who should contribute to the
17 Fund, including CMRS and voice over internet protocol carriers.
18 Now, I think the cellular carriers in all fairness are
19 indispensable parties to that issue. So we have them all here,
20 the dominant ones anyway; and I think they're indispensable
21 parties to this case. Judge Colwell ruled that they were, didn't
22 act upon it; but her ruling stands that they are indispensable
23 parties, does it not?

24 JUDGE MELILLO: Yes.

25 MR. STERN: Your Honor, I think Judge Colwell

1 properly explained quite succinctly as to the problem. No, we
2 are not jurisdictional. We can't be made to contribute to the
3 USF, but there's a question going forward. She made us
4 indispensable parties and encouraged us to cooperate. She said
5 what she meant by indispensable parties, encouraged to cooperate.
6 She didn't order us to cooperate. She encouraged us to
7 cooperate. Thank you.

8 JUDGE MELILLO: Yes, Mr. Cheskis, you had your
9 hand up.

10 MR. CHESKIS: Your Honor, this case got started
11 with an investigation. To the extent that the wireless carriers
12 wish to participate on the issues that are being discussed in
13 this investigation, that's up to them. If they don't want to
14 address these issues, they do so at their own risk. But, if they
15 want to bite into these issues, then I guess it's their own
16 decision.

17 MR. ARON: Your Honor, Ben Aron from Sprint
18 Nextel. I think it's clear that there are a few things that are
19 clear. The Commission gave four items that are to be addressed.
20 One of them is the federal USF developments. They're not very
21 complicated. Number two or item B is intrastate access reform
22 for Rural ILECs in view of the rules that govern them. They
23 govern revenue neutral balancing, etc. On its face, they're both
24 simple and complex so we know what we're dealing. We're dealing
25 with Rural LECs' access and everybody agrees with that one.

1 Item C we're going to skip for one second. Item D is
2 the potential effect on rates, revenue neutral rebalancing.
3 We're also following up obviously on ALJ Colwell's just-released
4 decision that references over the course of a hundred pages rate
5 caps and the Pennsylvania Universal Service Fund. What I think
6 she did a extremely good job of is covering the grounds that she
7 was asked to cover.

8 She was exhaustive regarding what it all looked
9 like, what policy questions are regarding it, what it should look
10 like post final decision; and she recommended to the Commission
11 who should take from it. She recommended to the Commission how
12 they should get there, and that was in the form of a rulemaking.
13 In our prehearing memo, we listed all of the many questions that
14 were posed to her, about half of which or more deal with the
15 Pennsylvania Universal Service Fund.

16 If we take the one other factor from this case
17 that is clear which is we are not to relitigate absent
18 extraordinary circumstances, what we're left with is very little.
19 There is no easy way not to relitigate the issues that were
20 before ALJ Colwell without confusion and perhaps without
21 relitigating. So what I propose is that, when the Commission
22 indicated that it wanted us to address the Pennsylvania Universal
23 Service Fund, what their intention was is the following.

24 Today as we speak and going on into the
25 indefinite future there is a Pennsylvania Universal Service Fund.

1 It is a known amount. Its payout is known. The carriers -- Sue
2 and Norm's clients are known to take X amount annually from the
3 Fund. Your task has been deemed to determine what the
4 appropriate rate of Rural LECs' access should be in a revenue
5 neutral manner. It's part of your obligation, therefore, I would
6 contend to consider the exact amount of USF funding that is
7 received.

8 And the extraordinary circumstances exception is
9 to determine if and only if the Commission makes a rule and
10 changes the Fund and does something to take that into account in
11 your existing open docket. If it doesn't happen in time then
12 your docket closes. You make your revenue neutral recommendation
13 regarding the picture today including the Pennsylvania Universal
14 Service Fund. If things change mid course or whenever, then that
15 becomes different.

16 But the complexity of trying not to relitigate
17 yet litigating what the Fund should include, exclude, look like,
18 what rules should apply, etc., it's not only not clean, I would
19 contend it's simply not advisable; and we should not be engaging
20 in that. If the Commission wants to order the inclusion of
21 wireless in the Universal Service Fund, they certainly had every
22 opportunity to do it. The issue has been addressed in this
23 proceeding -- at least has been touched on numerous times.
24 They're not blind to the fact that this is something that might
25 have come up, yet they did not ask that to be included.

1 I would suggest again that we consider the rates,
2 the revenue neutral rebalancing of those rates, the impact on
3 consumer rates, any developments in the federal fund, and the
4 as-currently-constituted Pennsylvania Universal Service Fund. I
5 think if we do that then we fully comply with the items that the
6 Commission asked to be addressed in this proceeding and to allow
7 the Commission its own time to address the Recommended Decision
8 from ALJ Colwell that asks that a very particular set of things
9 be done, including a rulemaking on what the Pennsylvania
10 Universal Service Fund should look like in the future.

11 We touched on it here today. In going forward,
12 we not only litigate it but we -- you know, we now have two
13 different dockets that are going to make the same suggestions on
14 the same topic to the Commission. I don't see how that's not
15 relitigating it, but that's my humble opinion.

16 JUDGE MELILLO: The Commission also requested
17 that the parties consider their rulings on ALJ Colwell's limited
18 reopening with respect to the basic service rates if that's
19 possible. Of course, they're considering that Recommended
20 Decision now; and we're going to be litigating this case at the
21 same time. Thank you.

22 Yes, Mr. Arfa. Are you next?

23 MR. ARFA: Yes, please. Thank you. On the
24 indispensable party issue, Your Honor, I just want to make it
25 quite clear that's a term of art in litigation when a party is

1 necessary to provide full relief on the existing parties to the
2 case.

3 I've never heard of an indispensable party in an
4 investigation; and, before Your Honor makes that assumption on
5 what the parties are arguing as if that's the case, I believe you
6 have to have a motion before you that's fully briefed to
7 adjudicate. I do not believe the concept of indispensable party
8 applies in this instance. If any party believes that is the
9 case, I think they have to make a motion.

10 I believe that Mr. Aron was correct as to the
11 status quo governing. The Commission made it quite clear in its
12 order that its Universal Service regulations should be deemed to
13 apply. Those regulations clearly exclude, consistent with the
14 law, wireless carriers from the contributors.

15 And I also want to make clear that Verizon
16 Wireless, Cellco Partnership, d/b/a Verizon Wireless, is
17 appearing today for the limited purpose of contesting the legal
18 issues; and we have no intent or desire to be a party to the 97,
19 whatever complaint proceedings. And my appearance today should
20 not be interpreted in any way an explicit acknowledgment of that
21 particular issue. We're here for the purpose of this particular
22 question at this moment. Thank you.

23 I bring that up, Your Honor, at the beginning of
24 the day so that parties who are present today are granted full
25 party status. I wanted our intention to be clear. Thank you.

1 JUDGE MELILLO: Thank you. You're aware, of
2 course, Mr. Arfa, that this investigation has been consolidated
3 with 96 formal complaints so that you also have that as a
4 consideration when you're making your indispensable party
5 assertions?

6 MR. ARFA: Thank you, Your Honor, yes. All we
7 need that the formal requirements for party status or
8 indispensable party motions, whatever -- now that I'm standing up
9 again, I apologize. My understanding of Your Honor's inclination
10 is that Judge Colwell's order was not a decision that was in a
11 technical sense an adjudication of an issue.

12 However, we have independently considered the
13 issue based on her order and perhaps other materials in the case
14 and the recent conclusion of your own. If that's the case, we're
15 -- we would hope that that would be made clear on the record so
16 the parties can either proceed to the Commission if they want to
17 or not and we have some clarity. Thank you very much.

18 JUDGE MELILLO: Yes, it was an independent
19 analysis. I did not believe myself to be constrained by the
20 Commission's more recent orders in July and August on the AT&T
21 complaints and the investigation going forward.

22 Anyone else?

23 MS. BENEDEK: Well, I think when the Commission
24 said the stay is lifted, that's what they meant. They meant this
25 is the new investigation. I also want to comment to Mr. Aron's

1 statement regarding the state USF proceeding before Judge
2 Colwell.

3 Regardless of what the Recommended Decision there
4 states, the actual order starting that investigation talked about
5 a -- requested an evidentiary record to determine whether a
6 company -- in the context of a company breaking the cap, the
7 Commission -- cap in quotes -- the benchmark or the cap, whether
8 the Fund should be addressed and how it should look in that
9 context.

10 It was not a revamping or a reforming of the
11 state USF. In addition, paragraph 5 of this order, the August
12 5th Order, that started this consolidated proceeding does mention
13 USF. I'm confident that the professional bar -- that means
14 everybody who's here -- can handle the issue of where that line
15 is or isn't. I'm a little concerned that Sprint has such a
16 overwhelming view of what Judge Colwell -- what the proceeding
17 should have included before Judge Colwell, but I guess we'll
18 address it as we go along.

19 My recollection is that there is a petition for
20 reconsideration filed by Mr. Arfa's client I believe in the Judge
21 Colwell back in '04, '05 where they stated that they took the
22 matter to the Commission to clear the air. To the extent that
23 they have a view of indispensable at this point, it certainly
24 wasn't supported by what they sought relief from the Commission.

25 MR. ARFA: Your Honor, I don't know that

1 counsel's right. Considering that our recollection is four or
2 five years ago, let's stick with the facts and do motions because
3 this is going to get confusing.

4 MS. BENEDEK: I just -- no further comment.

5 JUDGE MELILLO: All right.

6 Yes, Mr. Hicks.

7 MR. HICKS: Just one final comment on this
8 indispensable party issue. I believe that Mr. Stern accurately
9 read from Judge Colwell's motion. I believe that Mr. Aron
10 accurately articulated what the Commission's most recent order
11 indicates the scope of this proceeding would be. I just want to
12 reiterate as you've indicated, this is not just an investigation
13 proceeding. This is a combined complaint proceeding with an
14 investigation proceeding where the parties proposing particular
15 issue as a practical matter bear the burden of proof on those
16 particular issues they're propounding.

17 With respect to indispensable parties, those
18 wireless carriers who really care about this proceeding are here
19 in the room. So I would suggest that there is no reason for Your
20 Honor to do anything more to direct anyone else who doesn't
21 choose to be a part of this and Mr. Stern indicated Judge Colwell
22 encouraged them to be. Who doesn't choose to be a party
23 shouldn't be. I think Your Honor can certainly predict there's
24 no need to direct any other parties to participate in this
25 already protracted proceeding.

1 JUDGE MELILLO: Of course, this certainly depends
2 on what the scope of this proceeding is. It all goes back to
3 that. If, in fact, the Commission as some parties have argued
4 wants to see the issue of wireless carrier contribution
5 considered in the context of this case, then, of course, they
6 could question where the price would likely move because they're
7 going to have a clear interest. They're going to want to be a
8 part of this proceeding and be very active.

9 MR. HICKS: I don't disagree at all about that.
10 I believe your first conclusion is correct that Judge Colwell
11 properly decided the issue of jurisdiction and, therefore, didn't
12 go any further than that.

13 JUDGE MELILLO: That's correct.

14 MR. HICKS: I believe the second point to be
15 connected is that, without jurisdiction over wireless carriers,
16 it's not appropriate to order any wireless carriers to be a part
17 of this. Those who wish to be a part of this proceeding have
18 already intervened.

19 JUDGE MELILLO: Well, the Commission has taken
20 the position that certain parties that are not public utilities
21 and whom they would not normally have jurisdiction over could be
22 indispensable parties, for example, tenants in landlord-tenant
23 disputes about foreign wiring, etc. So I don't know about what
24 you're saying there with respect to the Commission and its
25 rulings.

1 But, in any event, it's my reading that Judge
2 Colwell did decide that, to the extent required public utility
3 status to be a contributor to the Universal Service Fund, in
4 fact, the wireless carriers would not be required to contribute
5 and they would not be included within the definition of
6 contributors under the regulations. That's about as far as we
7 can say it's going.

8 The Commission said should they be contributors,
9 not can they be.

10 MR. HICKS: Understood. Thank you.

11 JUDGE MELILLO: Interesting questions. I don't
12 have a motion in front of me to make any entity an indispensable
13 party at this point. I'm telling you that it's my understanding
14 that the question of indispensable party -- and these would be
15 wireless carriers -- has not been definitively decided. Judge
16 Colwell said they will be made indispensable parties but did not
17 make them so yet. She has indicated that.

18 If any party wishes to file a motion, they can do
19 so. I don't think I need to go any further except I may have to
20 decide on the scope needs to be wireless carriers and then we can
21 go from there. The parties can take care of their petitions to
22 the Commission. They are agreed by decision.

23 Yes, Mr. Cheskis.

24 MR. CHESKIS: So where do we go from here on the
25 first issue? Are we expecting an order from you or something

1 that would formalize your position regarding Question E from the
2 2004 Order?

3 JUDGE MELILLO: There have been arguments made of
4 record today. I don't think that they've been stated in writing.
5 The parties will be provided the opportunity to submit further
6 memoranda on this issue. I'm not going to address it right away.
7 I would have to have the transcript returned. It's a three-day
8 transcript turnaround by the way. I'm going to be on vacation
9 starting this Friday. I won't be back until August 31st. So it
10 won't be addressed prior to then.

11 The parties will have an opportunity to further
12 address this issue. Right before we close this prehearing
13 conference, we'll set some type of schedule for that, and the
14 parties will have an opportunity to respond.

15 MS. BENEDEK: Your Honor, I didn't understand
16 what you just said.

17 JUDGE MELILLO: Certainly. I think I have to
18 make a formal ruling on this so that the parties' rights can be
19 protected, and they can take that ruling up to the Commission if
20 they so desire through a petition for review and answer to
21 material question.

22 We touched upon the questions about to what
23 extent we're going to be looking at the Universal Service Fund.
24 We know that certainly it came up in Judge Colwell's most recent
25 proceeding. I think I have to give some credit here to Sprint.

1 They scored some points in clearly delineating the quandary we
2 have in that we're not supposed to be relitigating issues before
3 Judge Colwell unless there are extraordinary reasons to do so.

4 On the other hand, the Commission has linked the
5 Universal Service Fund and the federal action of the State
6 Chapter 30 revisions and any basic service rulings that they make
7 as a result of Judge Colwell's decision together in paragraph 5
8 of their order. I don't know exactly how we sort this all out.
9 The parties have provided some argument in their prehearing
10 memoranda. I'm looking out at the body of telecommunications
11 experts here, and I'm not seeing anybody looking like they have a
12 bright idea but maybe I'm wrong. Convince me otherwise.

13 There's a whole listing of Universal Service
14 Fund-related issues in the PTA prehearing memorandum. I'm
15 getting the sense that some parties disagree that they can be
16 relitigated. Obviously, if the parties can show extraordinary
17 circumstances, that's another issue that's going to come up in
18 this case.

19 MR. KENNARD: Might I, Your Honor?

20 JUDGE MELILLO: You may.

21 MR. KENNARD: I'm not sure whether it's a bright
22 idea, but I'll offer it up anyway.

23 The Commission has lifted the stay that was
24 inserted in 2005. Prior to setting the stay, they listed the
25 issues that were to be litigated. Now with the stay lifted,

1 isn't it obvious that those issues unless they were assigned to
2 Judge Colwell are still the issues to be litigated in this case?
3 They're certainly not refuted as Your Honor previously said.
4 There's nothing in this order of August that precludes those
5 issues. There's no direct statement that they are included, but
6 paragraph 5 doesn't say they are not either.

7 We're going to something we identified earlier,
8 the prejudice occurs not because there's too many issues but
9 because issues are limited. So what the PTA prehearing memo does
10 is takes the original definition of issues and then adds to those
11 in paragraph 5 and says those are the issues in this case. That
12 seems fair enough and straightforward enough.

13 The other thing that gets confusing in this is if
14 there's a merger or a confusion over what's an issue and what's
15 an outcome. The Commission's August 24th, 2008 Order says this
16 is going to be in front of Judge Colwell issue, not the outcome,
17 the issue. This investigation is reopened for the express and
18 limited purposes of addressing whether the cap of \$18 should be
19 raised and whether funding for the Pennsylvania Universal Service
20 Fund should be increased on the basis of the price cap increases.

21 Two issues, should residential and business cap
22 be increased? Should the LECs be left to impart the rate
23 increases? That was it. Those were the issues the Commission
24 defined would occur.

25 Now, what the parties -- what Judge Colwell went

1 further. She recommended an outcome of Universal Service, a
2 restructuring of Universal Service. That was based upon the
3 limited issues that she had before her. This is not a
4 particularly efficient way for the Commission to proceed.

5 I don't think anybody supported this bifurcation
6 and now bickering over what issues are in this case versus what
7 was in the other case. And, to be fair, I think we need to
8 include issues that fairly emanate from access charge reductions
9 from restructuring of the USF to accommodate those changes that
10 are going to occur. I just think it would be grossly horrible
11 for Your Honor to say that PTA, Embarq, or the OCA can't address
12 the issues because Colwell has already decided the outcome.

13 MR. ARON: Your Honor?

14 JUDGE MELILLO: Just as a point of clarification,
15 Mr. Kennard, you mention I believe an August, 2008 Order. Was it
16 an April, 2008 Order?

17 MR. KENNARD: April 24th, 2008 Order.

18 JUDGE MELILLO: All right. So then you meant to
19 say April?

20 MR. KENNARD: I did. Here's the order and the
21 ordering paragraphs.

22 JUDGE MELILLO: I guess the concern here is that
23 there may be issues that had to be resolved that were what the
24 Commission specifically assigned to her in the limited reopening,
25 and the Commission now has said that these issues aren't to be

1 relitigated. So, if they have been litigated, in fact they're
2 basically out of the case except for a showing of extraordinary
3 circumstances which perhaps the parties may want to show.

4 MR. ARON: Yes.

5 JUDGE MELILLO: Anybody care to address this
6 matter further? I see a lot of hands.

7 Mr. Aron.

8 MR. ARON: I'm sorry. I'll try to be brief. I
9 would first say that there were a laundry list of issues that
10 were assigned to Judge Colwell. It was a long list. Whether
11 some of the issues were limited and some were greater, broader
12 issues, that might be the case one could argue. But, looking
13 down at the list, whether PA USF funding should be increased,
14 whether PA USF funding is appropriate, whether --

15 JUDGE MELILLO: Are you reading from your
16 prehearing memoranda? I'm sorry.

17 MR. ARON: I'm reading off of page 3 of Sprint's
18 prehearing memoranda.

19 JUDGE MELILLO: Thank you.

20 MR. ARON: I believe this is an accurate
21 recitation of them. Just to save space in the actual document, I
22 didn't necessarily write them verbatim. Do you need a copy?

23 JUDGE MELILLO: I have it here. Go ahead.

24 MR. ARON: Okay. On page 3 we list -- I believe
25 there are three instances -- on page 3 we list the items by

1 number. Item 2 is whether PA USF funding should be increased.
2 Number 3 is whether a needs-based test for PA USF is appropriate.
3 Number 6 is whether the PA USF support is available to offset
4 RLEC rates that near the rate cap via regular annual Chapter 30
5 increases and whether PA USF regs should be revised to
6 accommodate such. Seven, whether the PA USF support for RLECs
7 appears the rate cap has to be competitive or other adverse
8 effects.

9 And there are six other factors to be considered
10 regarding a needs-based test, and I don't know that I need to
11 read them. But there are again a virtual laundry list of items
12 and issues that are PA USF related, quite specifically PA USF
13 related. I simply don't see how all of those issues could have
14 been litigated before Judge Colwell, yet it's easy not to
15 relitigate those issues here. It's not. It's harder not to
16 relitigate those issue here.

17 I think the better course is, without further
18 guidance from the Commission, to take the certain and obvious
19 course which is to relitigate the issues that are clearly not
20 precluded and that is the current state of the PA USF, current
21 amounts of money that are received by the RLECs, the impact of
22 those amounts being received, and in terms of revenue neutrality
23 for rate rebalancing.

24 I think that extraordinary circumstances, should
25 they occur, would obviously include a Commission action adopting,

1 for instance, a recommended decision, a Commission action
2 introducing a rulemaking as was suggested by Judge Colwell to
3 address what the new PA USF rules ought to be. These are
4 extraordinary circumstances. These are reasons that we depart
5 from the obvious course of addressing what things are today and
6 veer off into the dangerous area of perhaps relitigating. I
7 mean, otherwise, what's the point of saying absent extraordinary
8 circumstances?

9 There's nothing extraordinary about looking at
10 another docket that dealt extensively with the PA USF and dealing
11 with the PA USF again today here. There's nothing extraordinary
12 about that. It's complicated and it ignores the admonition not
13 to relitigate.

14 JUDGE MELILLO: So your bottom line is what, Mr.
15 Aron? Are you calling for a certain relitigation as being
16 absolutely necessary?

17 MR. ARON: No, the opposite.

18 JUDGE MELILLO: The opposite, all right. I'm
19 trying to follow where you're going with this.

20 MR. ARON: I believe that, other than possibly
21 returning to address the current contributions of the PA USF to
22 the extent that it does make a payout today, it has not been
23 recommended to be changed immediately. It will continue for the
24 indefinite future. To address those amounts that are paid out to
25 the extent that the impact of revenue neutral rebalancing, that's

1 what we should be addressing in this proceeding so they're not
2 relitigated.

3 JUDGE MELILLO: Your argument for not
4 relitigating but you're saying it's difficult to discern whether
5 or not you might be relitigating. Mr. Aron, were you concluded
6 with your statement?

7 MR. ARON: If the Commission does something
8 further, that's extraordinary circumstances. Then we move on.

9 JUDGE MELILLO: That's consistent with your
10 prehearing memorandum.

11 Yes.

12 MR. HICKS: Your Honor, I wanted to make a
13 suggestion that the parties in this room are not going to ever
14 agree on what the scope of this proceeding is.

15 JUDGE MELILLO: I agree with you. That's right.

16 MR. HICKS: I think we can all agree on that.

17 JUDGE MELILLO: Agreed that you do not have
18 unanimity.

19 MR. HICKS: At the risk of oversimplification, I
20 would suggest that the way Your Honor would be able to determine
21 the scope of this proceeding is to do in part what Sprint has
22 done in its prehearing memo, to identify those issues
23 specifically addressed by Judge Colwell and the previous order.
24 You may or may not agree with our specific recitation, but I
25 think that has to be part of it.

1 The second part of it has to be to take the
2 specific questions that the Commission has posed to Your Honor in
3 this proceeding, and the third part of it is to take the
4 allegations raised by AT&T in its complaint. And I would
5 suggest, Your Honor, that that is how you define the scope of
6 this proceeding because the parties will not agree, ever.

7 MR. GRAY: Well, Your Honor, I've heard enough of
8 Sprint's characterization of Judge Colwell's issues. I don't
9 agree whatsoever. What was in front of Judge Colwell is very
10 limited. When he read his laundry list of what was discussed, he
11 forgot to mention that this was all in the context of what Mr.
12 Kennard said. These were annual price change opportunity
13 filings.

14 The question before Judge Colwell was whether or
15 not when the Rural ILECs have their annual PCO filings they are
16 allowed, of course, to raise their noncompetitive service
17 revenue. Many of the RLECs are up against the \$18 cap. The
18 question came before the Commission because the OCA raised the
19 question of, well, the D and E Companies are going to breach
20 their cap.

21 So what Judge Colwell was looking at was in the
22 context of PCO filings does the cap get breached. That laundry
23 list he just read is correct in that context. Does the USF need
24 to be increased to basically reimburse the ILECs for that breach
25 of the cap? Should the PA USF be expanded? Should the

1 contributions be expanded? That is again in that limited
2 context.

3 So, from my office's perspective, yes, it's
4 actually quite easy to separate the issue of breaching the PCO
5 increase caps whether or not they exist; and the purpose of
6 access charge reform and toll charge reform are two separate
7 issues. And so the OSBA flat out disagrees with Sprint. That is
8 not a direct reading of the Judge Colwell decision. That is not
9 a correct reading of what that case stood for. And it seems
10 quite straightforward like Ms. Benedek said, quite
11 straightforward to be able to separate the two.

12 The point of this investigation is access charge
13 reform, and the PA USF should be addressed in the context of
14 access charge reform and none of us should come anywhere near the
15 issue of annual price change opportunity noncompetitive service
16 revenue increases. That's not in front of us. Judge Colwell
17 addressed that. So the laundry list that Sprint gave you is only
18 accurate in the context of PCO changes, and there should be no
19 problem addressing the PA USF for the purpose of accessing toll
20 for everyone.

21 MS. PAINTER: Your Honor, if I may?

22 JUDGE MELILLO: Yes, Ms. Painter.

23 MS. PAINTER: I'm quite surprised by OSBA's
24 position. What the Commission's decision says, it does not say
25 the issue is assigned to ALJ Colwell. It's to be adjudicated

1 before ALJ Colwell.

2 JUDGE MELILLO: That's correct.

3 MS. PAINTER: If you look at what -- OSBA
4 specifically testified in that case that the Universal Service
5 Fund should be completely eliminated and went well beyond -- and
6 nobody objected to that testimony. Nobody tried to exclude that
7 testimony. So the issues that were adjudicated before ALJ
8 Colwell, it's clear from her Recommended Decision, go beyond
9 simply the Chapter 30 increases. It went to the structure of the
10 Universal Service Fund, whether it should continue to exist.

11 Specifically, if you look at item C that's in the
12 December 20th, 2004 issues, it says should disbursements from the
13 Pennsylvania Universal Service Fund be reduced and/or eliminated
14 as a matter of policy and/or law? That issue was extensively
15 discussed, including by OSBA. If you look at page 62 of the
16 Recommended Decision, she summarizes OSBA's position.

17 JUDGE MELILLO: I don't have that in front of me.

18 MS. PAINTER: Okay. She summarizes their
19 position where it says the PA USF has not been shown to be
20 necessary and should be phased out. They said generalized
21 support programs in today's market should end. So they have
22 already testified to this issue. I don't understand what they
23 would say in addition in this case without relitigating it.

24 And the problem with it -- my understanding of
25 why the Commission would say not relitigate it is because they

1 don't want two different ALJ recommended decisions on the same
2 issues that potentially are conflicting. That is the problem.
3 And I agree with Mr. Aron that, if you end up relitigating or
4 litigating those issues delineated in the December, 2004 Order,
5 you will cross over into the ALJ's Recommended Decision.

6 She talked about the general structure of the
7 Fund, whether it should continue to exist; and, in fact, there's
8 another issue from the December, 2004 issues. If the Universal
9 Service Fund expires, what action should the Commission take to
10 advance the policies of the Commission? She addressed that
11 issue. So I understand that the issues that were sent to her may
12 have looked differently, but what was adjudicated before her --
13 is what it did not want to hear again -- involved broader issues.

14 MR. GRAY: The first thing Judge Colwell did is
15 she took access charge reform off the table and off the issues
16 list in that case. Access charge reform and its impact upon the
17 PA USF was not part of that case. That's the first thing she
18 did.

19 MS. PAINTER: That's a totally different issue,
20 Your Honor. In the context of AT&T's complaint, I anticipated
21 that PTA and Embarq would raise Universal Service and how the
22 Universal Service Fund would be impacted by access reductions.
23 That's a completely different issue. I don't think it was ever
24 precluded from this case. It's not part of AT&T's direct case.
25 That's what the Commission meant when they were talking about the

1 Universal Service Fund and the impact of the revenue neutral
2 requirement, and the parties have different positions on how that
3 can be met.

4 MR. KENNARD: Your Honor, if you look through --

5 JUDGE MELILLO: I believe Mr. Cheskis is next.

6 Yes, Mr. Cheskis.

7 MR. CHESKIS: Thank you, Your Honor.

8 I think we need to take a big picture look at
9 what's been going on here for the last five years and also take a
10 close look at what Judge Colwell did versus what she was
11 authorized to do. And, with all due respect to Judge Colwell,
12 her Recommended Decision does not provide recommendations on each
13 of the issues that the Commission specifically directed her to be
14 addressing in her recommendation. She did, however, provide
15 recommendations on issues that she wasn't supposed to be
16 addressing that were beyond the scope regardless of what was
17 litigated or who raised what arguments.

18 We have a right to file exceptions to Judge
19 Colwell's recommendation. Again, with all due respect to Judge
20 Colwell, she's not the decider here. She makes recommendations.
21 I think what we have the right to do is file exceptions to her
22 recommendations on August 28th to say that she should not have
23 decided this issue and should have decided this issue; and, quite
24 frankly, the Commission got this right.

25 On April 24th, 2008, Your Honor, let's take a

1 look at it from their perspective. There was an additional
2 motion for stay of this case pending before then, okay?

3 JUDGE MELILLO: Yes.

4 MR. CHESKIS: At the same time, there was
5 multiple petitions for reconsideration as Mr. Gray mentioned of
6 the D and E appeal.

7 At the same time, we're about to face a change in
8 the presidential election at the FCC. So who knows what's going
9 to happen to the Administration and the FCC proceeding? All
10 these things are boiling up on April 24th, and the Commission
11 really had no opportunity but to bifurcate this issue and to set
12 forth in motion the issue regarding what is the appropriate rural
13 residential benchmark for the Pennsylvania Rural ILECs and that
14 is what Judge Colwell should have addressed in her decision but
15 failed to provide a recommendation on what the appropriate rural
16 residential benchmark is.

17 Now, yes, there are ancillary issues that are
18 related to that. Is drawing from the PA USF to fund the PCO
19 increases is that anticompetitive, etc., etc.? But, if you look
20 -- if you line up these issues that were listed in the order
21 directing her to move forward and the issues that are in the
22 order from December of 2004, there is very, very little, if any,
23 overlap between those issues.

24 We are not looking to relitigate anything. We
25 spent a lot of time and effort during these past 12 months

1 litigating these issues; and, quite frankly, we got our butts
2 handed to us a couple weeks ago.

3 (Laughter.)

4 MR. CHESKIS: So, with all due respect, that is
5 proceeding on different issues and on a different track. We have
6 our right to file exceptions to that.

7 JUDGE MELILLO: Yes, you do.

8 MR. CHESKIS: And, again, I think it's very
9 important to recognize that what Judge Colwell did, number one,
10 is not the final determination of this Commission and, number
11 two, is not always gospel. If not correct, we have a right to
12 file exceptions if we disagree with the determination that she
13 made. Some were within the scope of them and some of them were
14 beyond the scope and within your purview here. And again, if you
15 look at these issues lined up one next to each other -- and I
16 would be more than happy to do that for you --

17 JUDGE MELILLO: That would be wonderful and
18 you'll have that opportunity.

19 MR. CHESKIS: -- you will see there is very
20 little overlap between those issues.

21 JUDGE MELILLO: I agree that Judge Colwell's
22 Recommended Decision is a recommendation. It's not gospel so to
23 speak at this point. However, the Commission also did issue
24 orders in July and August of 2009, the most recent orders which
25 they issued with respect to your question that was given to them

1 in the AT&T complaints and also with respect to the I-docket and
2 said we're not to be relitigating issues that were decided by
3 Judge Colwell.

4 We don't know what the Commission is going to do
5 with her recommendation. We're litigating right now, so we
6 simply don't know. All we have is a Commission pronouncement
7 that we don't relitigate unless there's extraordinary
8 circumstances and I'm bound by that.

9 MR. CHESKIS: We have no intention of
10 relitigating any of the issues we litigated in the proceeding
11 before Judge Colwell.

12 MR. KENNARD: Nor does the PTA, Your Honor.

13 MS. BENEDEK: Agreed.

14 JUDGE MELILLO: Well, I am seeing in the
15 prehearing memoranda there's not unanimity about that as to what
16 was litigated and what still is remaining to litigate. Mr.
17 Cheskis has offered to compare and contrast and say what he
18 thinks is remaining, and everyone else will have that opportunity
19 as well in responding to everybody's position because what we
20 have right now is memoranda. The other parties don't have an
21 opportunity to respond except orally right now, and so we will
22 have some formal pleadings on this matter.

23 Anything further on what was decided by Judge
24 Colwell or what shouldn't have been decided by Judge Colwell,
25 what we have remaining to be decided, what we might possibly have

1 to tread on again, and what we won't tread on again?

2 MR. KENNARD: Your Honor?

3 JUDGE MELILLO: Anything further?

4 MR. KENNARD: Yes, Your Honor.

5 JUDGE MELILLO: Yes, Mr. Kennard.

6 MR. KENNARD: You will not find in that document
7 I gave to you, the April 24th, 2008 decision of the Commission
8 opening that investigation, should the USF be eviscerated, should
9 it be restructured, or should it be revised. Judge Colwell again
10 took the issues before her and reached a conclusion, but she
11 didn't have all the scope of the issues before her. No party
12 here intends to litigate the principal issues that were before
13 Judge Colwell, either the benchmark rate or the rate increases
14 from the Fund, okay?

15 I think you have everybody's understanding here
16 that they believe that there is a full record before the Judge.
17 The question is the ancillary issue, what should be done with the
18 Fund? Judge Colwell went forward and addressed that, but that
19 wasn't an issue before her. She went a little far. I agree with
20 Mr. Cheskis' statement in that regard.

21 The Commission didn't have the opportunity at the
22 same time in writing this order to make the distinction, well,
23 here's what Judge Colwell did on the USF issues and whether the
24 USF should be continued is still to be considered. What they
25 should have done is have a list of issues that they assigned to

1 her more than a year ago to say we're not going to relitigate
2 those.

3 In this order that we now have generated in this
4 second phase, the Commission does have as item C the Pennsylvania
5 Universal Service Fund. That's an issue. That's an issue in
6 this case, the Pennsylvania Universal Service Fund. So why can't
7 we talk about the future of the Fund, how it might be
8 restructured? Consistently in Judge Colwell's case, PTA stayed
9 away from those issues because they weren't clearly within the
10 scope of that case.

11 So interesting, Judge, in the last case AT&T was
12 arguing that you can't review them both without having them in
13 tandem. Now it's being argued that, well, you can't litigate
14 that issue. AT&T is arguing against us what they argued on their
15 behalf. I don't mean to pick on AT&T but the interexchange
16 carriers.

17 JUDGE MELILLO: We certainly now have two
18 Commission orders that we have to deal with that weren't
19 available to us. The July and August, 2009 Orders weren't
20 available when we were trying to rush through the AT&T complaints
21 under a 1309(b) context.

22 Yes, Ms. Painter, did you want to say anything?

23 MS. PAINTER: I guess in response to Mr. Kennard,
24 they argued quite conclusively and they won that the issues could
25 be litigated separately. The Commission agreed.

1 MS. BENEDEK: Your Honor, may I make just one
2 final point?

3 JUDGE MELILLO: Yes, Ms. Benedek.

4 MS. BENEDEK: I agree with Mr. Hicks' comparison
5 of the issues. I think they're -- what Ms. Painter has spoken of
6 to be adjudicated in paragraph 5 of the August order is incorrect
7 because, as Mr. Kennard has stated and it's actually focused on
8 the issues the Commission in its order sent to Judge Colwell not
9 what Judge Colwell deemed to be the issues in the yet not final
10 RD.

11 So you can't look at the RD and say, oh, these
12 were the issues that were adjudicated. You have to look to the
13 Commission's order that sent the case to Judge Colwell to
14 determine what the Commission believed the issues already were
15 before Judge Colwell. The Commission does not yet have a
16 complete record, and I don't think it's there to pursue.

17 JUDGE MELILLO: I understand and I take it that
18 there are going to be exceptions filed to the Recommended
19 Decision. We have to wait on how the Commission is going to rule
20 on that. I understand your position. Your position is that the
21 April, 2008 Order set forth the parameters of the limited
22 reopening, and there is an argument that there was an
23 adjudication of issues beyond that scope.

24 Anyone else want the speak to this issue?

25 (No response.)

1 JUDGE MELILLO: So it's another one that's open,
2 not decided. We did clarify the service list, though, didn't we?

3 (Laughter.)

4 JUDGE MELILLO: Now, one of the reasons also that
5 I wanted a discussion about the scope of the proceedings now that
6 we have consolidation of the AT&T complaints with the
7 investigation docket or the remaining nonadjudicated issues since
8 the investigation docket was because, as you know, we had some
9 discovery disputes in the AT&T complaint context. I issued a
10 ruling on one of those, and one of those rulings was held in
11 abeyance.

12 I wanted to specifically give the parties the
13 opportunity to file additional pleadings and request that I
14 revisit my prior rulings. I had not seen any request that I
15 revisit prior rulings, so I'm not going to. However, we still
16 have the outstanding motion to compel, which has been responded
17 to; and I believe Mr. Cheskis then requested to hold that matter
18 in further abeyance while the parties continue to discuss that.

19 Is that correct? You understand my quandary? I
20 have an outstanding motion, and I would have to address that in
21 some fashion at some point.

22 MR. CHESKIS: Your Honor, I have not had an
23 opportunity to talk with counsel for Sprint about that yet. I
24 did put it in our prehearing memo; and I would respectfully
25 request, if okay with Sprint, that we be given an opportunity

1 after this hearing to discuss this matter.

2 JUDGE MELILLO: So you wish me not to rule at
3 this point until you've had a further opportunity to discuss the
4 matter. How much more time do you need?

5 MR. CHESKIS: Well, I would like to talk to him
6 today after the prehearing, and we can get back to your office.

7 JUDGE MELILLO: Well, certainly by the date that
8 the OCA has to file its direct testimony if I haven't seen
9 anything withdrawing the motion or saying the motion has been
10 resolved, I'm going to assume that it's not an issue anymore,
11 that it has been resolved just so you know.

12 MR. CHESKIS: Thank you, Your Honor.

13 JUDGE MELILLO: That has to be taken care of. I
14 think, Mr. Cheskis, you also said there may be another discovery
15 dispute. Is that going to be formalized through a motion or
16 what's happening with that?

17 MR. CHESKIS: Not that I'm not aware of.

18 JUDGE MELILLO: I thought you said there was
19 something with Verizon Pennsylvania. No?

20 MR. CHESKIS: I think we received objections and
21 responses to some discovery that we had issued, but we hadn't
22 made a determination prior to the case being suspended or
23 consolidated with this case what we would do with respect to
24 that. So may I ask for your indulgence to touch base with
25 Verizon about that?

1 JUDGE MELILLO: Very well. I don't have a motion
2 to compel before me.

3 Do the parties want to take a short break to do
4 the procedural record? Let's go off the record.

5 (Whereupon, a discussion was held
6 off the record.)

7 (Mr. Gray was excused from the
8 proceeding at 12 o'clock noon.)

9 JUDGE MELILLO: We've had an extended discussion
10 off the record about the procedural schedule and other matters.
11 I would like the parties to provide further memoranda on the
12 issue of the scope of the proceeding.

13 Those memoranda will look at what the issues are
14 as set forth in the Pennsylvania Telephone Association's
15 prehearing memoranda and work from that as to whether you agree
16 with those, you agree with some of them, you agree with none of
17 them and, if you don't agree with them, what do you agree with.
18 And be cognizant that the Commission has said issues adjudicated
19 before Administrative Law Judge Colwell most recently are not to
20 be relitigated except under extraordinary circumstances, and we
21 don't know what the Commission is going to do with respect to
22 that Recommended Decision at this point.

23 Those further memoranda of law are going to be
24 due September 2nd. I will try to get my ruling out on that by
25 September 14th, and then ten days from that point or by September

1 24th the parties will be filing their petitions to the Commission
2 for review on material question based on my September 14th
3 ruling.

4 MR. KENNARD: Your Honor?

5 JUDGE MELILLO: Yes.

6 MR. KENNARD: Would Your Honor certify the issue
7 of the issues up to the Commission?

8 JUDGE MELILLO: No. I'll issue a ruling and the
9 parties can take that up to the Commission under 5.301.

10 MR. KENNARD: Should we be applying to you then
11 for certification or should we take it up as an uncertified
12 question?

13 JUDGE MELILLO: I would just take it up from
14 there because my ruling would essentially be ruling on the scope
15 of the proceeding. If you disagree with that, then you would
16 take up the material question under 5.302.

17 MR. KENNARD: Thank you, Your Honor.

18 MR. HICKS: Your Honor, just a question for
19 clarification?

20 JUDGE MELILLO: Yes.

21 MR. HICKS: I understand you've indicated we use
22 the PTA memo to create the memorandum of law. Is PTA also
23 expected to do a memorandum of law?

24 JUDGE MELILLO: Yes, certainly.

25 MR. HICKS: Understood.

1 JUDGE MELILLO: It would be not in their best
2 interest to avoid that task.

3 MR. HICKS: Understood, Your Honor.

4 JUDGE MELILLO: I'm just thinking here actually I
5 would like responses to those prehearing -- definitely I don't
6 have right now. I don't have responses to the positions, so set
7 forth your positions by September 2nd. Responses will be due
8 September 9th or one week later, and I'll give myself until the
9 15th so that your petitions for material question will be due
10 September 25th which is a Friday and we'll go from there.

11 All right. Then as to the procedural schedule --

12 MS. BENEDEK: You said September 9th, correct?

13 JUDGE MELILLO: Right, September 9th for
14 responses to the memoranda of law on discovery on the proceeding.

15 All right. Then we will have any supplemental
16 direct testimony and testimony of parties aligned with the AT&T
17 position, that's going to be due by November 30th, 2009.

18 I take it that the parties are in agreement that
19 electronic mail service by 4:30 if followed by first-class mail
20 delivery of a hard copy or Express Mail copy the next day is
21 acceptable for in-hand service; is that correct?

22 MR. KENNARD: Yes.

23 JUDGE MELILLO: Hearing no disagreement, that
24 will be set forth in a procedural order. By the way, I will set
25 forth the procedural order. I will try to get that out by

1 Thursday. That's my last working day before my vacation.

2 Location of evidentiary hearings will be
3 Harrisburg, start time each day ten o'clock. We have three days
4 of hearings, April 14th through the 16th, 2010. We already have
5 a protective order in effect. The direct testimony of all
6 parties who are not aligned I guess you could say with the AT&T
7 position or at least not completely aligned would be filed -- I
8 don't know where the advocates stand on this matter -- that's
9 going to be due January 20th, 2010. Then rebuttal to that would
10 be March 10th, 2010; surrebuttal March 31st, 2010; and, of
11 course, evidentiary hearings April 14th through 16th, 2010.

12 MR. CHESKIS: Can you slow down a little bit?

13 JUDGE MELILLO: I'm sorry. I'm just following
14 the PTA memoranda. Main briefs May 13th, 2010; reply briefs June
15 30th, 2010; my recommended decision then would be due August
16 25th.

17 That's direct testimony of parties responding to
18 the AT&T aligned position that would include the parties'
19 response to the November 30th testimony is due January 20th,
20 2010; rebuttal testimony March 10th, 2010; surrebuttal testimony
21 March 31, 2010; evidentiary hearings in Harrisburg starting at
22 10:00 a.m. April 14th, 15th, and 16th, 2010; main briefs May
23 13th, 2010; reply briefs June 30th, 2010; and my Recommended
24 Decision will be due August 25th, 2010.

25 MS. PAINTER: Your Honor?

1 JUDGE MELILLO: Yes.

2 MS. PAINTER: I'm sorry. When we originally set
3 the schedule in the AT&T complaint case, AT&T did have an
4 opportunity for oral rejoinder at that point at the prior
5 hearings. At this point right now, it looks like PTA and Embarq
6 would have less. I'm wondering if there'll be the opportunity to
7 do rejoinders based on the limited rebuttal and surrebuttal.

8 JUDGE MELILLO: You had a proposal in your
9 prehearing memoranda, Ms. Painter, of rejoinder testimony.
10 Actually it looks like you had a proposal to pre-serve or to
11 serve prepared rejoinder.

12 MS. PAINTER: Right. AT&T would have the
13 opportunity to file that last round. What I propose here would
14 possibly be an outline and oral rejoinder which was going to be
15 the case in the original complaint case.

16 JUDGE MELILLO: Now, you didn't have oral
17 rejoinder though in your proposal because you had the November
18 23rd date.

19 MS. PAINTER: Well, that's because the way it was
20 drafted the schedule is a little bit difficult in terms of
21 rounds.

22 MR. KENNARD: Can we do written rejoinder the
23 week before the hearings? And part and parcel of this is AT&T's
24 right for the last say.

25 MS. PAINTER: Because we have burden of proof on

1 the complaint issues.

2 JUDGE MELILLO: When would you propose to do
3 that, when in the schedule would that happen?

4 MS. PAINTER: Well, April 7th would be fine.

5 JUDGE MELILLO: Excuse me.

6 MS. PAINTER: April 7th which is the week before
7 the hearings would be fine.

8 JUDGE MELILLO: All right. Then we'll set forth
9 April 7th, 2010, for rejoinder testimony of parties with the
10 burden of proof in the AT&T complaint proceedings.

11 There was some discussion off the record about
12 shortening the discovery time after a certain point. There was a
13 request to shorten it actually after the November 30th, 2009
14 discovery timeframe. Does anyone have any objection to that?
15 That would be shortening it to ten days for responses to written
16 interrogatories. I believe the parties also wanted a ten-day
17 objection period but a five-day rule for meet and discuss; is
18 that correct?

19 MS. BENEDEK: Correct, except if it's the Friday
20 rule you had mentioned earlier.

21 JUDGE MELILLO: Do you want the Friday rule in
22 effect?

23 MS. BENEDEK: Yes.

24 JUDGE MELILLO: Friday rule would be service of
25 interrogatories after 4:00 p.m. on a Friday or after 12:00 or

1 what time?

2 MS. BENEDEK: After noon.

3 JUDGE MELILLO: After noon, after 12 o'clock.

4 Then you would effectuate the Friday rule, so then you would deem
5 discovery served on the following Monday if it's received after
6 12 o'clock on Friday. And I take it that, if the parties are
7 going to do that, they might as well just wait until Monday.
8 Until November 30th then, until that round of testimony, the
9 regular discovery rules will be in effect.

10 Is there anything further to discuss today?

11 MR. ARON: One quick point?

12 JUDGE MELILLO: Yes, Mr. Aron.

13 MR. ARON: The protective ordering that's been
14 entered covers the majority but not all of parties that are here
15 today, so I guess either it would need to be extended to cover
16 everyone or the parties that are not covered should they be
17 included. Another option would be for Your Honor to simply
18 extend it to all parties to the proceeding. In other words, it
19 was submitted I think for the complaint docket. I don't know
20 that there is any, in fact, is there?

21 JUDGE MELILLO: Yes, there is. In fact, I was
22 given the --

23 MR. ARON: Okay.

24 JUDGE MELILLO: -- I-docket protective order is
25 basically the template for my entering of a protective order in

1 the AT&T complaint case because there was going to be a possible
2 overlap in discovery except that it was going to be coming in
3 from the AT&T complaint case.

4 MR. ARON: I guess everyone has signed that.

5 JUDGE MELILLO: That was actually signed in 2005.
6 There was a protective order in 2005 signed by Judge Colwell at
7 the prior investigation proceeding, but it still is that
8 investigation. Potentially the issues may have gotten scrambled
9 a bit and changed a bit and taken away or added but it's still
10 that case. And then also we have a protective order in the AT&T
11 case.

12 MR. HICKS: Perhaps reiteration by Your Honor in
13 your order that the protective order continues to be in effect
14 would be helpful to us all.

15 JUDGE MELILLO: I can do that.

16 Anything further?

17 MR. STERN: Yes.

18 JUDGE MELILLO: Yes, Your Honor.

19 MR. STERN: Your Honor, I intend to file a motion
20 to admit Ms. Garnet Hanly pro hac vice in this case on behalf of
21 T-Mobile. I don't know if the parties agree or disagree. If
22 anybody has an objection preliminarily on the record on that, I
23 would appreciate hearing it. I will be filing that motion.

24 JUDGE MELILLO: Yes. You understand that
25 Pennsylvania-admitted counsel must remain as counsel of record

1 during the pendency of the proceeding?

2 MR. STERN: We understand the rules of pro hac
3 vice.

4 MS. BENEDEK: I have something, Your Honor.

5 JUDGE MELILLO: Yes.

6 MS. BENEDEK: Our prehearing memo identified the
7 issue of parameters for panel testimony. First of all --

8 JUDGE MELILLO: Can you speak into the
9 microphone, please.

10 MS. BENEDEK: Sure. We had identified in our
11 prehearing memo the possibility of having parameters for any
12 panel testimony that comes in. We identified on page 3 of our
13 prehearing memo. I was wondering if the parties had views on
14 that and is Your Honor agreeable to panel testimony and, if so,
15 what would be the parameters?

16 MS. PAINTER: Your Honor?

17 JUDGE MELILLO: Yes, Ms. Painter.

18 MS. PAINTER: In response to Embarq's raising
19 this issue, I did go back to look and see about the practice of
20 using panel testimony in Pennsylvania. It is quite common. It
21 was used in the UNE pricing case in 2002 by Verizon. Hot cut
22 migration case Verizon filed a panel of six. In the UNE case of
23 2004 OCA filed panel testimony, and both the Verizon original
24 access case and the access remand case both Verizon and AT&T
25 filed panel testimony. So it's fairly common.

1 I don't recall ever having put parameters around
2 it. I don't think it's necessary. I don't think it's ever
3 presented a problem.

4 JUDGE MELILLO: Any responses?

5 MS. BENEDEK: Yes. I think the parameters that
6 we suggested were reasonable to limit to two witnesses in one
7 panel. If there's an extraordinary circumstance that requires
8 otherwise, certainly we would try to work with the parties and
9 discuss a ruling. The second parameter that we suggested a
10 portion of the testimony sponsored by the individual witness be
11 identified. I think that's helpful for cross-examination,
12 helpful for discovery, and helps to ease the administration of
13 the litigation of the case.

14 To the extent that those witnesses offer a piece
15 of testimony, then they should be identified as what the
16 rationale is for supporting it. Again I think it expedites the
17 hearing. What I want to avoid here is any kind of comments
18 doubling up with somebody who is a main witness in the case and
19 does all the talking. Therefore, it's a cross-examination issue
20 and due process issue in that regard and I believe parameters are
21 helpful.

22 MS. PAINTER: The problem, Your Honor, is that
23 much of the testimony is mostly economic and policy combined very
24 difficult to go through it and identify a particular witness.
25 The issues are just too combined to separate them all in this

1 manner. Certainly during the hearings what we found with ALJ
2 Colwell's case and AT&T presented a panel there was that she is
3 very capable of directing a certain witness to answer a
4 particular question.

5 There were times when there were objections made
6 to both and she was able to rule on those, and it didn't create
7 any problems. It's standard. I don't recall any problems with
8 the Verizon case. The Judge was very capable of handling it.

9 JUDGE MELILLO: So far I guess we have a panel of
10 two that's been proposed by AT&T. I know this issue has come up
11 before. I know it can create problems with regard to who's
12 responsible for which questions. I know it can be sorted out,
13 but I'm really not in favor of more than three. I don't see a
14 need to have more than three on a panel. I'd say no more than
15 three, and we'll work the other matters out as it goes along.

16 MS. PAINTER: Okay.

17 JUDGE MELILLO: I just wanted to state briefly
18 for the record some of the matters that were discussed off the
19 record about the schedule. I know there has been some parties
20 that had advocated basically litigating this matter in more like
21 eight months rather than 12 months. I was cognizant of the other
22 parties' positions. I'm cognizant that we don't have a scope of
23 the proceeding generally defined. There could be petitions for
24 review. There could be petitions to the Commission for response
25 to material question.

C E R T I F I C A T E

I hereby certify, as the stenographic reporter,
that the foregoing proceedings were taken stenographically by me
and thereafter reduced to typewriting by me, or under my
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