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December 17, 2009

**VIA ELECTRONIC FILING**

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, PA 17120

**RE: Verizon Pennsylvania Inc., Verizon North Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, Verizon Select Services Inc., Verizon Global Networks, Inc., MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc.**

v.

**CTC Communications Corporation, FiberNet Telecommunications of Pennsylvania, LLC, and Choice One Communications of Pennsylvania, Inc.,  
Docket Nos. C-20077672, C-20077674 and C-20077676**

Dear Secretary McNulty:

Enclosed please find the Supplemental Brief, with appended Proposed Findings of Fact, Conclusions of Law and Ordering Paragraphs of the Verizon Companies in the above referenced matter. Because the Supplemental Brief includes information that is Proprietary, an Expurgated copy for the public record is being submitted for e-Filing, and the Proprietary version is being provided via overnight delivery.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink that reads "Suzan D. Paiva" with a stylized flourish at the end.

Suzan D. Paiva

SDP/slb  
Enclosure

**Via E-Mail and First Class U.S.P.S.**  
cc: The Honorable Louis G. Cocheres  
Attached Service List

**CERTIFICATE OF SERVICE**

I, Suzan D. Paiva, hereby certify that I have this day served a copy of Verizon's Supplemental Brief, upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 17<sup>th</sup> day of December, 2009.


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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Verizon Pennsylvania Inc., Verizon North	:	
Inc., Bell Atlantic Communications, Inc.	:	
d/b/a Verizon Long Distance, Verizon	:	
Select Services Inc., Verizon Global	:	
Networks, Inc., MCImetro Access	:	
Transmission Services, LLC d/b/a Verizon	:	
Access Transmission Services, and MCI	:	
Communications Services Inc.,	:	
	:	
Complainants	:	
	:	Docket No. C-20077672
v.	:	Docket No. C-20077674
	:	Docket No. C-20077676
Choice One Communications of	:	
Pennsylvania, Inc., CTC Communications	:	
Corp., and FiberNet Telecommunications	:	
of Pennsylvania, LLC,	:	
	:	
Respondents	:	

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**VERIZON'S SUPPLEMENTAL BRIEF**

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Date: December 17, 2009

**EXPURGATED VERSION**

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## INTRODUCTION

Over two and one-half years ago, Verizon filed this formal complaint asking the Commission to enforce 66 Pa. C.S. § 3017(c) by requiring One Communications<sup>1</sup> to reduce its intrastate switched access rates to “a level no higher than those of the [incumbent local exchange carrier (“ILEC”)] in the corresponding service territory” and to refund all amounts collected in excess of the lawful rates permitted by this statute. Following the Commission-mediated settlement of Verizon’s complaints against two other competitive local exchange carriers (“CLEC”) under this statute, One Communications is now the *only remaining CLEC* still resisting the statutory mandate to reduce its access rates to the ILEC level. The record shows that numerous other CLECs, including one of One Communications’ own affiliates, have for years been charging access rates at or below the ILEC level. (Verizon Main Br. at 26). By continuing to charge access rates well above those of the ILECs and other CLECs, and in excess of what the statute permits, One Communications is continuing to overcharge Verizon by approximately \$70,000 each month, with a total overcharge exceeding \$4 million since this statute became law, and increasing every day. It is also overcharging every other carrier that must terminate calls to, or carry calls placed by, One Communications’ customers. The case has been fully litigated, briefing was completed in April of 2008 and it now awaits a recommended decision and then a final Commission Order.

At the direction of the presiding officer, Verizon submits this supplemental brief to address the impact on this record of two Commission orders entered on August 29, 2008, after

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<sup>1</sup> Respondents are Choice One Communications of Pennsylvania, Inc. (“Choice One”), FiberNet Telecommunications of Pennsylvania, LLC (“FiberNet”), and CTC Communications Corp. (“CTC”) (collectively “One Communications”).

reply briefs were filed in this case.<sup>2</sup> These orders reviewed the recommended decisions in two similar formal complaint cases Verizon filed against CTSI, LLC (“CTSI”) and Penn Telecom, Inc. (“PTI”) to enforce 66 Pa. C.S. § 3017(c) by requiring those CLECs to reduce their access charges and provide refunds for unlawful collections. Both recommendations had required the carriers to comply with the statute by reducing their rates to the ILEC level. In each case, the Commission’s August 29, 2008 orders provided general guidance on the Commission’s interpretation of the term “cost justified” in the statute and on what a CLEC must demonstrate in order to meet its burden of proving that higher access rates are “cost justified,” and also on the issue of refunds for past amounts charged above the lawful rate level under 66 Pa. C.S. § 1312(a). But the Commission did not reach a final decision on the merits of either case, instead offering the parties “the opportunity to settle their dispute” in light of the guidance provided and referring the cases to mediation. (CTSI 8/29/09 Order at 2; PTI 8/29/08 Order at 2). With the able assistance of the Commission’s mediator, Verizon reached settlements with CTSI and PTI and both cases were closed with no further substantive action by the Commission. Both carriers filed tariff revisions that will reduce their rates to the ILEC rate level.

One Communications and Verizon, at the presiding officer’s request, voluntarily agreed to mediation as well, but that mediation ended without a settlement in late 2008. After the PTI and CTSI cases were settled and closed, the presiding officer again requested that the parties discuss the possibility of settlement, but after several weeks the settlement discussions

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2 By conference call and confirming e-mail on December 3, 2009, the presiding officer directed the parties to file supplemental briefs “on the issue of whether or not One Communications’ cost of service study meets the applicable legal standard set forth in the Commission Orders in *VZPA v. CTSI* at Docket No. C-20077332 (e.g. pp. 6-13) and *VZPA v. Penn Telecom* at Docket No. C-20066987,” as well as proposed findings of fact and conclusions of law. Verizon already included proposed findings of fact and conclusions of law and ordering paragraphs as Appendix A to its main brief filed on March 6, 2008. Verizon attaches as Appendix A to this supplemental brief a slightly revised version of the same findings, with minor changes noted in italics reflecting the above two orders.

terminated with an impasse, which was reported to the presiding officer on December 3, 2009. It is abundantly clear that the only way this case is going to be resolved is with a recommended decision and a Commission order.

It is high time that the Commission requires One Communications to comply with 66 Pa. C.S. § 3017(c). The guidance provided in the August 29, 2008 orders only serves to confirm what the record here already showed • that One Communications has failed to meet its statutory burden of demonstrating that its higher access rates are “cost justified,” and accordingly its access rates are unlawful, unjust and unreasonable, in violation of 66 Pa. C.S. § 3017(c), and must be reduced. Additionally, the Commission’s orders establish that if the rates are unlawful – which they are – then “the issue of refunds should be determined in accordance with the applicable statutory mandate at 66 Pa. C.S. § 1312.” (CTSI 8/29/09 Order at 11; PTI 8/29/08 Order at 16). One Communications therefore should be required to refund all amounts collected in excess of the lawful rate, “together with interest at the legal rate.” (CTSI 8/29/09 Order at 13; PTI 8/29/08 Order at 18). It should not be permitted to profit, at the expense of its access customers, from continuing to charge rates prohibited by this statute throughout this protracted litigation.

## **ARGUMENT**

- I. One Communications’ Cost Studies Do Not Show That Higher Access Rates Are “Cost Justified,” Which Is The Only Exception The Statute Permits**
  - A. One Communications’ Cost Studies Are Fundamentally Flawed, Inadmissible And Unreliable**

The guidance provided in the August 2008 Orders does not come into play unless it is first found that One Communications submitted admissible and/or reliable cost studies to support its cost justification claim. If the Commission concludes that the studies are inadmissible as

evidence, or even if it concludes that they are theoretically admissible but so flawed that they cannot be relied upon to establish the truth of the underlying financial assumptions, then the Commission must find that One Communications failed to present evidence sufficient to demonstrate that its higher access rates are cost justified, as required to qualify for the limited exception under the statute.

As Verizon explained in detail in its main and reply briefs, One Communications relied solely on the testimony of an outside consultant, who prepared a study for each company allocating a portion of total company alleged expenses to switched access rates to calculate a switched access “revenue requirement” for each company. But this witness conceded under cross-examination that he had no personal knowledge of any of the companies’ investments, revenues or traffic volumes that he assumed as inputs for his study, and that the “facts” underlying his opinions were provided to him by company employees who did not appear as witnesses, and were not personally verified by him. He could not explain why the companies’ own sworn discovery responses in this case contradict many of the factual assumptions in the study. Not a single employee of any of the One Communications companies submitted testimony verifying the underlying financial assumptions or appeared at the hearings. (Verizon Main Br. at 18-22; Reply Br. at 5-8).

It goes without saying that if the key facts are different from what the expert assumed, then his opinion would be different from the result presented in this case. His testimony cannot serve to support the admission into the record of the underlying revenue, investment and traffic data itself. Because the key factual assumptions underlying the studies were based on unreliable hearsay and were not themselves supported by any evidentiary foundation, none of the studies is reliable or admissible evidence of One Communications’ costs. *Yantos v. Workers*

*Compensation Appeal Board*, 563 A.2d 232, 237 (1989). See also *Foster v. McKeesport Hospital*, 260 Pa. Super. 485, 490, 394 A.2d 1031, 1033 (1978) (“[a] cardinal principle governing the admissibility of an expert opinion is that it be based upon a factual foundation”). The Pennsylvania courts have thus consistently held that, “[a]bsent some basis in fact, opinion testimony is inadmissible and to admit such evidence would be an abuse of the trial court’s discretion.” *Rose v. Hoover*, 231 Pa. Super. 251, 254-55, 331 A.2d 878, 880 (1974). See also *Application of LP Water & Sewer Company*, 1991 Pa. PUC LEXIS 145 at 9 (1991).

But even if the studies are found to be admissible as evidence, One Communications itself conceded that this significant shortcoming in the studies’ methodology “goes to the weight of the evidence,” (One Comm. Reply Br. at 12), and in this case because of this faulty foundation the studies should be given no or little weight. Therefore, One Communications has failed to present a study to sustain its statutory burden of demonstrating that higher access rates are cost justified.

**B. One Communications’ Cost Studies Do Not Meet The Standard Set Forth In The Statute, As Explained By The Commission’s August 2008 Orders**

**1. The Commission’s Interpretation Of The “Cost Justified” Standard**

Even if the Commission considers One Communications’ cost studies on their merits, based on the guidance provided in the August 2008 orders the studies do not establish that higher access rates are “cost justified.” The term “cost justified” in the phrase “unless such carrier can demonstrate that the higher access rates are cost justified” is not defined in the statute. To provide guidance on this issue, the Commission’s August 29, 2008 Orders stated that the “cost justified” standard of 66 Pa. C.S. § 3017(c) equates with a “reasonable measure of costs.” (CTSI 8/29/09 Order at 12; PTI 8/29/08 Order at 12). According to the Commission, a CLEC study

presented to establish this exception could include not only the cost of the actual switching and transport functions required to provide switched access service, but also the CLEC could argue for the recovery of a “reasonable measure” of the costs of its “local loop plant” through access rates. (CTSI 8/29/09 Order at 12; PTI 8/29/08 Order at 17).<sup>3</sup> The Commission reasoned that since the ILEC (in this instance Verizon) “currently recovers a portion of its own loop costs through its intrastate access rates,” and particularly through its common carrier line charge, then to “maintain[] parity between the various types of regulated telecommunication service providers” CLECs should also be able to recover a portion of their loop costs through access rates. (CTSI 8/29/09 Order at 8; PTI 8/29/08 Order at 13).

This guidance is consistent with the result Verizon seeks here because Verizon has not argued that One Communications or any CLEC should be required at this time to reduce their switched access rates to incremental cost (which by definition would require a rate *lower* than the current ILEC rate).<sup>4</sup> To the contrary, consistent with the discussion in the August 2008 orders, Verizon fully acknowledged in the record here that Verizon’s own current access rates “contain some contribution” toward overall operating costs and noted that since the statute only requires CLECs to match the Verizon rates – and not to reduce their rates below that level – a CLEC

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<sup>3</sup> The Commission stated that a CLEC may submit for this purpose a fully distributed, embedded accounting revenue requirement cost study, although “consideration should be given” to forward-looking economic cost studies that treat the CLEC’s loop costs as joint costs. In either case, “there must be a clear and well documented demonstration of how the CLEC recovers joint loop costs from services other than switched access.” (CTSI 8/29/09 Order at 12).

<sup>4</sup> The Commission in the PTI and CTSI orders mistakenly presumed that Verizon was arguing that these CLECs’ access rates should be priced at “incremental cost,” and that “CLECs should be prevented from recovering any portion of their local loop costs in intrastate access charges.” (CTSI 8/29/08 Order at 8). This characterization was incorrect, as Verizon pointed out in petitions for reconsideration (“PFRs”) filed in both cases. Those PFRs were never decided due to the settlements and so the Commission never had the opportunity to clarify this misstatement.

charging rates capped at Verizon's access rates would not be pricing at incremental cost and would likewise receive contribution toward its own loop costs. (VZ St. 1.1 at 17-18).<sup>5</sup>

While the Commission did not precisely define what would be considered a "reasonable" CLEC access rate, it stated that it will look to certain objective "proxy benchmarks" in assessing what is a "reasonable" measure of costs for a CLEC's switched access services. The Commission would compare the CLEC's rate to the interstate and intrastate rates charged by other carriers for the same service and to the CLEC's own interstate access rates. (CTSI 8/29/09 Order at 13; PTI 8/29/08 Order at 17). Looking at the rates charged by other carriers for the same service is consistent with the Commission's expressed goal to "maintain[] parity between the various types of regulated telecommunications service providers." (CTSI 8/29/08 Order at 8; PTI 8/29/08 Order at 13). It is consistent with the premise of Section 3017(c) that all carriers operating in the same territory should be charging the same rates for switched access service. It is consistent with the FCC's policy to promote competition and to prevent CLECs from "shift[ing] an inappropriate share of the carriers' costs onto the IXCs and, through them, the long distance

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<sup>5</sup> While Verizon argued (and continues to maintain) that the true "cost" of providing switched access service is limited to the cost of the switching and transport functions used to provide that service, Verizon did not argue that One Communications should price access at this cost in order to comply with the statute. The Commission does not use the term "cost" in the same manner Verizon uses it. Rather, relying on its own previous ratemaking policy, which has traditionally allowed carriers to recover a portion of their loop costs through access rates, (8/29/08 Order at 9), to keep rates for basic service lower than they otherwise would be, the Commission confuses the "cost" of the service with the "price" that is permitted to be charged for the service. But the "cost" of providing access service in an economic sense is not the same as the regulated rate charged for the service. The Commission has priced access rates above the actual incremental cost of providing access service, a concept that the Commonwealth Court has recognized in approving the Commission's policy to reduce access rates closer to cost. *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Commission*, 763 A.2d 440, 480 (Pa. Commw. 2000), *vacated in part on other grounds*, *MCI WorldCom Inc. v. PUC*, 577 Pa. 294, 844 A.2d 1239 (2004) (observing that "[o]ne of the lessons of this proceeding is that the cost of excessively priced elements," such as intrastate switched access rates "must be reduced to a point nearer to *actual incremental cost*." (emphasis added).

market in general.”<sup>6</sup> (Verizon Main Br. at 29-30). It is also consistent with Commonwealth Court precedent looking to a comparison with rates being charged by other carriers for the same service to conclude that the rates are not unreasonable or below cost. *Mobilfone of Northeastern Pennsylvania, Inc. v. PUC*, 78 Pa. Commw. 336, 467 A.2d 902 (1983).

As demonstrated below, One Communications is not seeking a “reasonable measure” of contribution. Rather, by every standard articulated in the Commission’s August 2008 orders, One Communications is seeking with its excessive access rates and inflated cost studies an unreasonable level of contribution. Because the record shows that One Communications would still recover a “reasonable measure” of its loop costs even if it reduced its rates to charge the same rates charged by the ILECs and other CLECs, the Commission must find that One Communications has not shown that its higher access rates are “cost justified.”

## **2. One Communications’ Access Rates Far Exceed The Proxy Benchmarks Of Reasonableness Discussed In The Commission’s Orders**

With the cost studies it submitted in this case, One Communications contends that the “cost justified” access rates for its three companies are: **[BEGIN PROPRIETARY]**

**[END PROPRIETARY].**<sup>7</sup> By contrast, the record shows that Verizon PA charges about 1.7 cents and Verizon North charges about 1.4 cents for the same intrastate switched

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<sup>6</sup> *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, ¶ 22 (2001).

<sup>7</sup> See One Communications Companies St. 1.0 (Parrish Direct) at 4. Verizon cites the cost study results from the record in this proceeding. One Communications attempted to re-run its cost studies and submit the results as extra-record evidence in its main brief, but Verizon has moved to strike this material. The results of those re-run studies further demonstrate the unreliability of the original cost studies. The re-runs reduced Choice One’s claimed revenue requirements by nearly 30 percent – **[BEGIN PROPRIETARY]**

**[END PROPRIETARY]**, but increased the results for the other two companies due to an increase in the “interstate cost residual,” discussed below. (One Communications Main Br. at 37).

access service.<sup>8</sup> Similarly, the record shows that numerous CLECs are providing the same intrastate switched access service in the same areas served by the One Communications Companies at around 1.7 cents per minute. (Verizon Main Br. at 26). In fact, the record does not show *any* carrier other than the One Communications companies operating in Verizon territory that is charging intrastate access rates anywhere close to the magnitude that One Communications claims it should be allowed to charge.<sup>9</sup> Such extremely high access rates are charged only by certain rural ILECs, but One Communications does not provide service in those rural ILEC territories and those rural ILEC rates are not a relevant proxy benchmark for One Communications.<sup>10</sup> Similarly, as One Communications concedes, it and all CLECs are required to set their rates for interstate switched access service no higher than the rates of the ILEC, which rates are even lower than the ILECs' intrastate access rates. (One Comm. Main Br. at 25).

The results of One Communications' cost studies far exceed any of the proxy benchmarks cited by the Commission as its definition of a reasonable range of access rates for CLECs. (CTSI 8/29/08 Order at 13; PTI 8/29/08 Order at 17). They are much higher than the inter- or intra-state rates of the ILECs or of the other CLECs operating in the same territory. They are much higher than One Communications' own interstate rates. And they are much higher than the rate that FiberNet itself is actually charging for switched access (notwithstanding its higher tariffed access rate). The undisputed fact that the rates One

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<sup>8</sup> Verizon St. 1.0 (Price Direct) at 16-17, 23-24, 28, 31, 33-34.

<sup>9</sup> The exceptions are CTSI and PTI, but since the close of the record they have settled their disputes with Verizon and filed tariffs lowering their access rates.

<sup>10</sup> The Commission noted that "[r]ural ILEC intrastate and interstate access rates may play a role in establishing such a range [of reasonability] if a particular CLEC operates in rural exchanges of a ILEC and/or in the service area of a rural ILEC," but One Communications has not shown that this discussion would apply to its operations. See Verizon St. 1.0 at 4 (noting that the One Communications companies operate only in the Verizon ILEC service territory).

Communications claims are “cost justified” are so far out of line with all of the “proxy benchmarks for establishing an appropriate range of just and reasonable intrastate access rates for a particular CLEC” as discussed in the Commission’s August 2008 orders alone proves that One Communications is seeking an unreasonable level of contribution rather than recovery of a “reasonable measure” of its loop costs and that One Communications’ excessive access rates are not “cost justified” under the limited exception to the statutory rate cap.

**3. One Communications Cost Studies Do Not Demonstrate That Higher Access Rates Are Required For One Communications To Recover A “Reasonable Measure” Of Loop Costs**

Even if the Commission considered the substance of One Communications’ cost studies and overlooked the fact that the results fail in comparison to the Commission’s own proxy benchmarks for reasonableness, the cost studies submitted by One Communications still do not satisfy the Commission’s standard because, taken on their face, they do not establish that One Communications must charge higher access rates than the ILEC in order to recover a “reasonable measure” of its loop costs. To the contrary, it is evident from the studies that One Communications would recover contribution toward operating or loop costs even if it reduced its rates to match what other carriers are charging for the same service, and what it is seeking is unreasonable cost recovery in violation of the statute.

**a. One Communications’ “Interstate Access Cost Residual Component” Is Unreasonable And Should Be Stricken From The Studies**

The premise of One Communications’ revenue requirement study is to allocate its alleged (but unproven) operating costs to various services in order to establish the costs it contends it should be recovering through intrastate access rates. But the intrastate access rates that One Communications claims are “justified” by its study go far beyond the “costs” that the

study actually allocates to intrastate access service. Instead, One Communications significantly bumps up its claimed revenue requirement for intrastate switched access rates by making the unprecedented claim that it must also recover from *intrastate* access rates not only the “revenue requirement” its study actually assigned to intrastate access, but also those portions of the revenue requirement that the study allocates to the *interstate* jurisdiction, but that One Communications claims the FCC will not allow it to recover from *interstate* carrier access rates because the FCC benchmarks those rates at the level of the corresponding ILEC.

As explained in Verizon’s main and reply briefs, this argument is misplaced on two levels. First, contrary to One Communications’ claim that the FCC somehow allows it to recover these interstate costs from other carriers through their intrastate access rates, the FCC actually said that “CLECs remain free to recover *from their end users* any greater costs that they incur in providing either originating or terminating access services.”<sup>11</sup> Second, One Communications actually does recover these costs in interstate rates charged to its end users, and is seeking a double recovery here. Verizon explained in detail that One Communications already imposes interstate end user charges that yield revenues more than sufficient to offset the so-called “interstate access shortfall.” (VZ Reply Br. at 20). One Communications’ attempt to inflate the costs it claims it should recover through intrastate access rates by double counting costs that it should and does recover through interstate end user rates is by definition unreasonable. Further, One Communications’ attempt to include this claimed interstate residual is directly contrary to this Commission’s directive that CLECs must demonstrate that they are “recover[ing] joint loop costs from services other than intrastate switched access,” since these are costs that should be and are recovered in interstate rates. (CTSI 8/29/09 Order at 12; PTI 8/29/08 Order at 17).

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<sup>11</sup> *Access Charge Reform: Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 ¶ 39 (2001) (“*Seventh Report and Order*”).

Moreover, as the Commission explained in its August 2008 orders, to define what is “reasonable” the Commission will look to certain objective “proxy benchmarks” such as the interstate and intrastate rates charged by other carriers for the same service and the CLEC’s own interstate access rates. (CTSI 8/29/09 Order at 13; PTI 8/29/08 Order at 17). Inclusion of the “interstate residual” is a concept never approved by this Commission for other carriers’ access rates, is not a component of the ILECs’ access rates and would result in access rates many multiples higher than any of those proxy benchmarks. As detailed on page 23 of Verizon’s main brief, removing One Communications’ improper interstate residual from the cost study results significantly decreases the claimed revenue requirement for intrastate access. Specifically, even without any other corrections, the removal of this unreasonable component of One Communications’ claimed cost would reduce the cost study results from [BEGIN

**PROPRIETARY]**

**[END PROPRIETARY].**<sup>12</sup>

**b. One Communications’ Studies Include More Than A “Reasonable Measure” Of Loop Costs**

Even without correcting for significant over-allocation and other cost study errors, One Communications study demonstrates that it is seeking more than a “reasonable measure” of contribution toward its operating (loop) costs, which explains why the cost study results fail in comparison to the Commission’s proxy benchmarks of reasonability. As Verizon demonstrated in its own testimony, removing local loop costs from One Communications’ study results – without making any other corrections – would leave Choice One with an intrastate revenue requirement of [BEGIN PROPRIETARY] [END PROPRIETARY] per minute-of-use and FiberNet with an intrastate revenue requirement [BEGIN PROPRIETARY]

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<sup>12</sup> See One Communications Companies St. 1.0 (Parrish Direct) at 4.

[END PROPRIETARY] per minute-of-use, both of which are much lower than the ILEC rate. Therefore, even One Communications' flawed and inflated study effectively admits that anything above [BEGIN PROPRIETARY]

[END PROPRIETARY] is a pure recovery of loop costs. (Verizon Main Br. at 38-39).<sup>13</sup> Since Verizon PA charges about 1.7 cents and Verizon North charges about 1.4 cents for the same service, Choice One and FiberNet under their own assessment would recover loop costs if they reduced rates to match the ILEC rates.

In fact, the portion of the claimed revenue requirement costs that represents a subsidy toward operating costs (loop costs) is likely to be much higher than what One Communications depicted in its study results because, as Verizon explained in its main brief (at 42-43), One Communications used factors based on minutes of use to allocate costs in its revenue requirements studies. This methodology over-allocates alleged investments and expenses to voice services because such factors fail to allocate any of the One Communications companies' investments or expenses to services that are not based on usage. Many services are provided on a basis other than per minute of use, such as basic dial tone service, Centrex, and Custom Calling Features, but One Communications did not allocate any investments or expenses to these services. Therefore, it presumes that all of these investments and expenses will be recovered by usage-based services such as switched access. These non-usage based services unquestionably make use of common network facilities, such as loops. However, because One Communications allocated common network plant on the basis of minutes of use, no loop costs were allocated to these non-usage based services. This error in One Communications' studies violates the

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<sup>13</sup> Removal of loop costs, without any other corrections, reduces CTC's calculated intrastate switched access revenue requirement to [BEGIN PROPRIETARY] [END PROPRIETARY] per minute-of-use. Given the significant flaws in the underlying study methodology and in the reliability of the data input into the study, and the fact that this claimed cost of access minus the loop is far out of proportion to the costs of Choice One and FiberNet for the exact same service, the Commission should not rely on CTC's revenue requirement.

Commission’s directive that “there must be a clear and well documented demonstration of how the CLEC recovers joint loop costs from services other than switched access,” and results in an unreasonable over-allocation of costs to intrastate switched access service. (CTSI 8/29/09 Order at 12; PTI 8/29/08 Order at 17). This blatant over-allocation is another reason why One Communications’ results depart so widely from the Commission’s proxy benchmarks of reasonableness.

Verizon also pointed out in its main brief (at 43) that, even if it were appropriate to allocate costs based on relative minutes of use – which it is not – One Communications has not done so correctly. In each of its revenue requirement studies, One Communications has excluded a substantial number of local minutes that were associated with completing local calls from other carriers, such as Verizon PA. Excluding these local minutes distorted the factors in the study and over-allocated costs to intrastate switched access services, directly violating this Commission’s guidance that loop costs must also be allocated to services other than switched access. If loop costs are to be allocated to various services based on the relative number of minutes that each service is carried over the loops, then all minutes for all services carried over the loops should be included as part of that allocation process.

Had One Communications not made these serious allocation errors, it might have come out with a result closer to the Commission’s proxy benchmarks of reasonableness. Accordingly, One Communications’ cost studies fail to demonstrate that One Communications must charge higher access rates than the ILEC in order to recover a “reasonable measure” of its loop costs.

## **II. The Commission Rejected One Communications’ Arguments Against A Refund Order**

As discussed in Verizon’s main and reply briefs, Verizon is also seeking a refund order under 66 Pa. C.S. § 1312(a), which gives the Commission “the power and authority to make an

order requiring the public utility to refund the amount of any excess paid by any patron” where the Commission “shall determine that any rate received by a public utility was unjust or unreasonable.” 66 Pa. C.S. § 1312(a). Such refund shall include “interest at the legal rate from the date of each such excessive payment.” *Id.*<sup>14</sup>

In this case, One Communications submitted no testimony or other evidence in the record to rebut Verizon’s calculations of the amount of the overcharges, as described in Verizon’s direct testimony, and did not discuss the issue in its main brief, even though it had ample notice that the refund claim is an issue in this proceeding. (Verizon Reply Br. at 27-28). One Communications raised certain legal/policy arguments against a refund order for the first time in its reply brief and Verizon moved to strike or in the alternative for leave to file a responsive brief (which was attached to its motion).<sup>15</sup>

Each one of the arguments belatedly raised in One Communications’ reply brief was before the Commission in the PTI and CTSI cases. In PTI, ALJ Weisman had recommended a full refund, and PTI filed an exception on that issue. In CTSI, ALJ Colwell had recommended against a refund on the grounds that Verizon had not demonstrated that CTSI acted in bad faith and that, even if the Commission adopts the Verizon’s “well-done and persuasive” interpretation of the statute to require rate reductions going forward – “it should do so prospectively and not retroactively apply an interpretation that has not been articulated until now.” (CTSI RD at 25). Verizon filed exceptions to this portion of ALJ Colwell’s RD.

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<sup>14</sup> The “legal rate” of interest is 6 percent per annum. 41 P.S. § 202. See *Duquesne Light Co. v. Pa. Public Util. Com.*, 117 Pa. Commw. 28, 36 (Pa. Commw. Ct. 1988).

<sup>15</sup> Notably, One Communications raised only legal and policy arguments against a refund generally, and never submitted evidence to refute or disagree with Verizon’s evidence regarding how the refund should be calculated.

The Commission's August 2008 orders explicitly rejected the reasoning upon which ALJ Colwell had denied the refund in the CTSI case and made clear that, as ALJ Weismandel had done for PTI, the issue of refunds "shall be adjudicated under 66 Pa. C.S. § 1312 regarding the determination of unjust and unreasonable rates and the issuance of refunds." (CTSI 8/29/08 Order at 13; PTI 8/29/08 Order at 18). It also made clear that if a refund is ordered, it will be "together with interest at the legal rate." (*Id.*) The Commission explained that "the fact that the Commission may not have put forth effective guidance regarding the substantive issues in these proceedings does not affect the parameters governing the finding that a particular rate or rates can be unlawful and subject to refund." (CTSI 8/29/09 Order at 11-12; PTI 8/29/08 Order at 16). This decision is consistent with Commonwealth Court precedent on the issue, which overwhelmingly supports the issuance of a refund order in this case.<sup>16</sup> By its plain terms, Section 1312(a) does not require a finding of "bad faith" or other culpable or malicious conduct. To the contrary, the statute states that "[i]n making a determination under this section, the commission need not find that the rate complained of was extortionate or oppressive." 66 Pa. C. S. § 1312(a). To issue a refund order, the Commission need only find that the *rate* itself – not One Communications' conduct – was "unjust or unreasonable." *Id.* If it finds that One Communications' rates violate the statute, the Commission by definition will have found those

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<sup>16</sup> See *Equitable Gas Co. v. Penn. Pub. Util. Comm'n*, 106 Pa. Commw. 240, 258, 526 A.2d 823, 832 (1987) (explaining that tariffed rates are not always "commission-made" rates and that a carrier cannot "validly expect" that its rates "were insulated from retroactive modification" where they "were not stamped with antecedent PUC approval" because there had been no evidentiary proceeding making a "final determination as to reasonableness."); *Emporium Water Co. v. PUC*, 859 A.2d 20, 24 (Pa. Commw. 2004) (holding that a utility that continues to charge rates when it is aware that the rates are subject to challenge, and may ultimately be found to be unjust and unreasonable, assumes the risk that it may be required to refund the revenue collected through those rates); *Pa. Gas & Water Co. v. Pa. Public Util. Com.*, 470 A.2d 1066, 1073, 79 Pa. Commw. 416, 430 (Pa. Commw. Ct. 1984) (noting that while PGW was taking its case to the nation's highest court, it continued to charge rates that it knew were at risk of ultimate disapproval. Accordingly "PG&W must now bear the consequences of implementing those higher rates, in the form of refunds to its customers. Although this is a difficult, and perhaps unfortunate, result for PG&W, we hold that it is mandated by statute and by the facts of the case.")

access rates to be unjust and unreasonable. The purpose of the statute is to protect customers from paying money that they should not have been required to pay. While the decision to issue a refund under Section 1312(a) is “discretionary,” it is not a “punishment” to be dispensed only if the Commission finds that the company acted in bad faith.<sup>17</sup>

Failing to require a refund in a case like this would set a dangerous and counter-productive precedent because it will only encourage companies to take extreme interpretations of statutes and Commission regulations that constrain their rates and to wait for their customers to bring a complaint. Allowing One Communications to keep the money it has unlawfully collected would discourage reasonable compromise and settlement in rate complaint cases. It would make it profitable for companies like One Communications to prolong litigation, because they will keep their unlawful proceeds even if they are ultimately required to reduce their rates. As the Commonwealth Court has observed, where a regulated utility makes the choice to continue billing rates that are at risk of being declared unlawful and to litigate the issue, then the utility must “bear the consequences” of billing those higher rates by refunding the over-collections to its ratepayers.<sup>18</sup> Similarly, here, One Communications continues to overcharge Verizon by about \$70,000 each month that this case continues. If the Commission finds that One Communications’ access rates are in violation of the statute, then it should be required to refund the monies it has collected by charging those unlawful rates.<sup>19</sup>

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<sup>17</sup> *Emporium Water*, 859 A.2d at 24 (affirming a Commission refund order). Although this Commission has discretion under Section 1312(a) with respect to ordering a refund, it would be an abuse of that discretion to deny the refund without a sound legal and factual basis to do so, thereby requiring One Communications’ access customers to bear the cost of the company’s stubborn refusal to comply with the statutory access rate cap and/or its desire to test out its novel legal theories through protracted litigation.

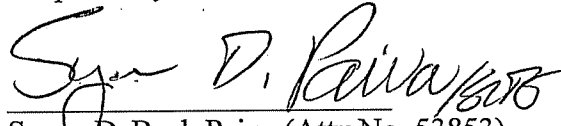
<sup>18</sup> *Pa. Gas & Water Co. v. Pa. Public Util. Com.*, 470 A.2d 1066, 1073, 79 Pa. Commw. 416, 430 (Pa. Commw. Ct. 1984). *See also See Duquesne Light Co. v. Pa. Public Util. Com.*, 117 Pa. Commw. 28, 34-35, 543 A.2d 196, 200 (Pa. Commw. Ct. 1988).

<sup>19</sup> Because this litigation has lasted so long, the provisions of 66 Pa. C.S. § 1309(b) also come into play. Section 1309 sets a nine-month deadline for a final Commission order in rate complaints, and if the

## CONCLUSION

For the foregoing reasons, the Commission should require Choice One and CTC immediately to reduce their intrastate switched access rates to a level no higher than that charged by the incumbent local exchange telecommunications company in the same service territory, and should require FiberNet to reduce its tariffed rate to reflect what it is actually charging for intrastate switched access service. The Commission should also issue a refund order pursuant to 66 Pa. C.S. § 1312(a) requiring Choice One and CTC to refund to Verizon all amounts paid in excess of the rate level permitted by 66 Pa. C.S. § 3017(c) from the effective date of the statute forward, together with interest at the legal rate, and should prohibit FiberNet from attempting to back-bill at rates above the statutory level.

Respectfully submitted,



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Date: December 17, 2009

Attorneys for Verizon

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Commission fails to meet the deadline any rate reductions ultimately required "shall be retroactive to the expiration of such nine-month period," in other words, retroactive to the date nine months after the filing of the complaint. 66 Pa. C.S. § 1309(b). Here, the Complaint was filed on April 25, 2007, and the date nine months after that filing was January 27, 2008. Of course if, as it should, the Commission requires a discretionary refund under Section 1312(a), allowing a refund order going back as much as four years before the filing of the complaint, then the potential applicability of Section 1309 is moot. But if the Commission were to deny a section 1312 refund, then it would have to consider whether Section 1309 requires a mandatory refund at least back to January 27, 2008.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Verizon Pennsylvania Inc., Verizon North	:	
Inc., Bell Atlantic Communications, Inc.	:	
d/b/a Verizon Long Distance, Verizon	:	
Select Services Inc., Verizon Global	:	
Networks, Inc., MCImetro Access	:	
Transmission Services, LLC d/b/a Verizon	:	
Access Transmission Services, and MCI	:	
Communications Services Inc.,	:	
	:	
Complainants	:	
	:	Docket No. C-20077672
v.	:	Docket No. C-20077674
	:	Docket No. C-20077676
Choice One Communications of	:	
Pennsylvania, Inc., CTC Communications	:	
Corp., and FiberNet Telecommunications	:	
of Pennsylvania, LLC,	:	
	:	
Respondents	:	

**VERIZON’S PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDERING PARAGRAPHS**

*Revised on December 17, 2009<sup>1</sup>*

Verizon Pennsylvania Inc., Verizon North Inc., Verizon Select Services Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, Verizon Global Networks, Inc., MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc. (collectively “Verizon”) propose the following findings of fact, conclusions of law and ordering paragraphs in the above-captioned proceeding.

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<sup>1</sup> *Verizon originally submitted these proposed findings as Appendix A to its main brief on March 6, 2008. Verizon submits this revised version with its supplemental brief, and all changed paragraphs from the original are noted in bold and italics.*

## **Findings of Fact**

1. Verizon Pennsylvania Inc. (“Verizon PA”) is an “incumbent local exchange telecommunications company” as defined by 66 Pa. C.S. §§ 3012 and 3017. Verizon PA is authorized by the Commission to provide, and does provide, telecommunications service in the Commonwealth of Pennsylvania. Verizon Complaint ¶ 1.

2. Verizon North Inc. (“Verizon North”) is an “incumbent local exchange telecommunications company” as defined by 66 Pa. C.S. §§ 3012 and 3017. Verizon North is authorized by the Commission to provide, and does provide, telecommunications service in the Commonwealth of Pennsylvania. Verizon Complaint ¶ 2.

3. Verizon Select Services Inc. (“VSSI”) is an interexchange telecommunications carrier that is authorized by the Commission to provide, and that does provide, interexchange telecommunications services in the Commonwealth of Pennsylvania. Verizon Complaint ¶ 3.

4. Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance (“VZLD”) is an interexchange telecommunications carrier that is authorized by the Commission to provide, and that does provide, interexchange telecommunications services in the Commonwealth of Pennsylvania. Verizon Complaint ¶ 4.

5. Verizon Global Networks, Inc. (“VZGNI”) operates and manages network facilities and services for certificated Verizon interexchange affiliates, including but not limited to VSSI and VZLD. Verizon Complaint ¶ 5.

6. MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services (“Verizon Access”) is a competitive local exchange carrier that is authorized by the Commission to provide, and that does provide, telecommunications service in the Commonwealth of Pennsylvania. Verizon Complaint ¶ 6.

7. MCI Communications Services Inc. (“MCI”) is an interexchange telecommunications carrier that is authorized by the Commission to provide, and that does provide, interexchange telecommunications service in the Commonwealth of Pennsylvania. Verizon Complaint ¶ 7.

8. Choice One Communications of Pennsylvania, Inc. (“Choice One”) is a “telecommunications carrier providing competitive local exchange telecommunications service” in the Commonwealth of Pennsylvania as set forth in 66 Pa. C.S. § 3017(c). Verizon Complaint ¶ 10 and Answer ¶ 10.

9. CTC Communications Corp. (“CTC”) is a “telecommunications carrier providing competitive local exchange telecommunications service” in the Commonwealth of Pennsylvania as set forth in 66 Pa. C.S. § 3017(c). Verizon Complaint ¶ 11 and Answer ¶ 11.

10. FiberNet Telecommunications of Pennsylvania, LLC (“FiberNet”) is a “telecommunications carrier providing competitive local exchange telecommunications service” in the Commonwealth of Pennsylvania as set forth in 66 Pa. C.S. § 3017(c). Verizon Complaint ¶ 13 and Answer ¶ 13.

11. Choice One, CTC and FiberNet are referred to collectively in these Findings as the One Communications Companies.

12. The provisions of 66 Pa. C.S. § 3017(c) became effective on November 30, 2004. 66 Pa. C.S. § 3017(c) contains the following mandate applicable to the intrastate switched access rates charged by CLECs:

Limitation - 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).

13. The separate One Communications Companies present themselves for marketing purposes as a single entity operating under the “One Communications” name, and claim on their website to be “the largest privately-held competitive local exchange carrier in the U.S.” They also claim to serve “more than 160,000 businesses, from large to small, in 16 states throughout the Northeast, Mid-Atlantic and Upper Midwest regions.” Verizon St. 1.0 (Price Direct) at 4.

14. The One Communications Companies provide or are authorized to provide competitive local exchange telecommunications service in the service territories of incumbent local exchange telecommunications companies Verizon PA and Verizon North. Verizon Complaint ¶ 17 and Answer ¶ 17; Verizon St. 1.0 (Price Direct) at 4.

15. Choice One’s intrastate switched access rates can be found in its tariff PA P.U.C. Tariff No 2. CTC’s switched access rates are contained in its tariff Pa. P.U.C. No. 5. FiberNet’s switched access rates are contained in its tariff Pa. P.U.C. No. 4, Section 5.4.1.

16. Verizon PA’s intrastate switched access rates can be found in its tariff Pa. PUC No. 302. Verizon North’s intrastate switched access rates can be found in its tariff Pa. PUC No. 9.

17. Each of the Verizon companies is an intrastate switched access customer of the One Communications Companies, and each pays the One Communications Companies’ intrastate switched access rates. Verizon St. 1.0 (Price Direct) at 36, 37 and 40; One Communications St. 2.0 (Parrish Rebuttal) at 2, n.1.

18. The One Communications Companies have admitted that their intrastate switched access rates are higher than the corresponding ILEC rates. One Communications Companies’ Answer ¶¶ 23, 37; Tr. at 28; One Communications St. 2.0 at 2.

19. Choice One’s and CTC’s access rates are higher than the ILEC’s access rates in both the territory of Verizon PA and the territory of Verizon North, and FiberNet’s tariffed access rate is higher than the ILEC’s rates in the same territories.

20. Choice One is charging from 2.5 to 4.6 cents per minute-of-use (depending on the access customers' customer mix and traffic patterns) for intrastate switched access in the territories of Verizon PA and Verizon North.

21. CTC is charging approximately 3.8 cents per minute-of-use for intrastate switched access in the territories of Verizon PA and Verizon North.

22. FiberNet's tariffed rate is 6 cents per minute-of-use for intrastate switched access in the territories of Verizon PA and Verizon North.

23. Notwithstanding its tariffed rates, FiberNet is billing Verizon at rates that are below Verizon PA's and Verizon North's tariffed switched access rates. However, FiberNet maintains a tariff on file with the above rate of 6 cents a minute. Verizon St. 1.0 (Price Direct) at 35. At the prehearing conference in this matter, however, FiberNet would not agree to amend its tariff to reflect the rates it was actually charging and to waive any claim for back-billing at the higher tariffed rate. Tr. at 21-22.

24. Verizon PA charges about 1.7 cents and Verizon North charges about 1.4 cents for the same intrastate switched access service. Verizon St. 1.0 (Price Direct) at 16-17, 23-24, 28, 31, 33-34. ***The intrastate access rates charged by the One Communications Companies are higher than the rates charged by the ILECs for switched access service, higher than the rates charged by numerous other CLECs in the same territory for the same service, and higher than the rates charged by One Communications, the ILECs and other CLECs for switched access in the interstate jurisdiction. (Verizon Supplemental Br. at 9).***

25. Access charges were established during a monopoly regime of telecommunications regulation at the local exchange level.

26. Access charges contain implicit and explicit subsidies for local rates.

27. The local exchange telecommunications market is now competitive.

28. In a competitive market, implicit and explicit subsidies distort the operations of the competitive marketplace.

29. Reducing subsidies received from other telecommunications carriers forces providers, such as the One Communications Companies, to generate income from their own customers.

30. The Commission has a long-standing policy of lowering access charges.

31. The One Communications Companies have not instituted any proceeding to demonstrate that their “higher access rates are cost justified,” and this Commission has not previously determined that such rates are cost justified under 66 Pa. C.S. § 3017(c) in order to allow the One Communications Companies to charge these higher rates.

32. The One Communications Companies presented revenue requirement studies, rather than studies designed to determine the actual cost to these companies of providing intrastate switched access service.

33. The revenue requirement studies prepared by the One Communications Companies’ only witness, Mr. Parrish, use each of the One Communications Companies’ “actual 2006 costs and operating parameters.” Tr. at 268.

34. Mr. Parrish did not personally access the One Communications Companies’ accounting systems or records to obtain those “costs or operating parameters.” Tr. at 268. Rather, Mr. Parrish was provided that information by four employees of the One Communications Companies. Tr. at 269, 289-90. Mr. Parrish admitted that he did not validate any of the information provided by these employees. Tr. at 268. None of those employees appeared as witnesses in this proceeding. Tr. at 269.

35. The cost and operating parameter information on which Mr. Parrish based his revenue requirement studies differed significantly from the same information provided by employees of the One Communications Companies in verified responses to Verizon’s discovery requests. Tr.

at 270-72, 289; Verizon Cross Ex. 2 (One Communications Companies' Response to Verizon Interrogatory No. 1, Set 2).

36. The cost and operating parameter information on which Mr. Parrish based his revenue requirement studies are not "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject" because the record shows them to be unreliable and not trustworthy.

37. The One Communications Companies' revenue requirement studies inappropriately include interstate switched access revenue requirements in their calculation of intrastate switched access revenue requirements.

38. The One Communications Companies have no unrecovered interstate revenue requirements.

**39. *The One Communications Companies' revenue requirement studies improperly include an unreasonable measure of their costs of local loops and/or other operating costs.***

40. The One Communications Companies' revenue requirement studies use an allocation factor that overallocates loop expenses and investments to intrastate switched access services. These factors also excluded local minutes associated with completing local calls from other carriers, thereby overallocating loop costs to intrastate switched access services.

**41. *Correcting for all of the above errors in the One Communications Companies' studies, it is evident that the One Communications companies would recover reasonable contribution toward operating or loop costs even if they reduced access rates to match what the ILECs are charging for the same service, and that what One Communications is seeking is unreasonable recovery in violation of the statute.***

42. If Choice One had charged Verizon rates no higher than those of the incumbent local exchange telecommunications company in the corresponding service territory for the period from

November 2004 through July 1, 2007, then Verizon would have paid of \$2,266,288.35 less than it actually paid. Verizon Statement No. 1.0 at 36.

43. For the period after July 1, 2007, Choice One's overcharge percentage was 64.4% for charges to the Verizon long distance companies, 54.3% for charges to the former MCI companies and 32% for charges to the Verizon ILECs, for a total overcharge percentage of 42.4%. Verizon St. 1.0 Table 7. If Choice One had charged Verizon rates no higher than those of the incumbent local exchange telecommunications company in the corresponding service territory, Verizon would have been charged amounts that were reduced by the above percentages.

44. CTC's overcharge percentage to the Verizon companies was 40.6%. Verizon St. 1.0 Table 8. If CTC had charged Verizon rates no higher than those of the incumbent local exchange telecommunications company in the corresponding service territory for the period from November 2004, Verizon would have been charged amounts that were reduced by 40.6% of what it was actually charged and paid.

### **Conclusions of Law**

45. Each of the One Communications Companies is a telecommunications carrier providing competitive local exchange telecommunications service and is subject to the requirements of 66 Pa. C.S. § 3017(c).

46. In the service territories of Verizon PA and Verizon North, Choice One and CTC are charging access rates higher than those charged by the incumbent local exchange telecommunications company in the same service territory in violation of 66 Pa. C.S. § 3017(c).

47. In the service territories of Verizon PA and Verizon North, FiberNet maintains a tariffed access rates higher than the rates charged by the incumbent local exchange telecommunications company in the same service territory in violation of 66 Pa. C.S. § 3017(c).

48. The One Communications Companies' revenue requirement studies are not admissible as evidence.

49. Even if the Mr. Parrish's opinion testimony were admissible as evidence, the underlying facts upon which he based his opinion, including the One Communications Companies' purported expenses, investments, revenues and traffic volumes, are not admissible in evidence to prove the truth of the matters asserted. Accordingly, Mr. Parrish's opinion alone is not sufficient evidence to demonstrate that the rates are cost justified.

***50. Even if the studies are admissible as evidence, they are not sufficient to demonstrate that the access rates are cost justified because the One Communications Companies' access rates exceed all proxy benchmarks of reasonability. (CTSI 8/29/08 Order at 13; PTI 8/29/08 Order at 17).***

51. Even if the revenue requirement studies were admissible and could be relied upon to demonstrate cost justification, the studies are flawed and unreliable because they improperly inflate the result by including revenue requirements assigned to interstate access service.

***52. Even if the revenue requirement studies were admissible and could be relied upon to demonstrate cost justification, the studies are flawed and unreliable because they improperly inflate the result by including more than a reasonable measure of loop and/or other operating costs.***

53. Even if the revenue requirement studies were admissible and could be relied upon to demonstrate cost justification, the studies are flawed and unreliable because they improperly inflate the result by using flawed allocation factors.

54. The One Communications Companies have not met their burden under 66 Pa. C.S § 3017(c) to demonstrate that their higher switched access rates are cost justified.

55. The One Communications Companies' switched access rates are unjust or unreasonable under 66 Pa. C.S. §§ 1301 and 1312.

56. The One Communications Companies are required to file tariff revisions to reduce their switched access rates to those charged by the incumbent local exchange telecommunications company in the same service territory. 66 Pa. C.S. § 3017(c)

57. Choice One and CTC have damaged Verizon by charging rates that are in violation of 66 Pa. C.S. § 3017(c) and unjust or unreasonable under 66 Pa. C.S. §§ 1301 and 1312.

58. Pursuant to 66 Pa. C.S. § 3012(a):

If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. In making a determination under this section, the commission need not find that the rate complained of was extortionate or oppressive. Any order of the commission awarding a refund shall be made for and on behalf of all patrons subject to the same rate of the public utility. The commission shall state in any refund order the exact amount to be paid, the reasonable time within which payment shall be made, and shall make findings upon pertinent questions of fact.

59. The One Communications Companies' intrastate switched access rates are unjust and unreasonable because they are in excess of the level permitted to be charged under 66 Pa. C.S. § 3017(c), and the One Communications Companies have not demonstrated that their higher access rates are cost justified under that statute. Accordingly, pursuant to 66 Pa. C.S. § 3012(a), the Commission hereby issues a refund order requiring Choice One and CTC to refund the amount of any excess paid by Verizon from the effective date of 66 Pa. C.S. § 3017(c), plus interest at the legal rate of 6% per annum. 66 Pa. C.S. § 1312(a); 41 P.S. § 202; *Duquesne Light Co. v. Pa. Public Util. Com.*, 117 Pa. Commw. 28, 36 (Pa. Commw. Ct. 1988). The Commission further prohibits FiberNet from attempting to back-bill at the rate contained in its tariff.

60. Choice One must refund Verizon \$2,266,288.35 for the period from November 30, 2004 to July 1, 2007 and must apply the following overcharge percentages to calculate the refund for the period after July 1, 2007: 64.4% for charges to the Verizon long distance companies, 54.3% for charges to the former MCI companies and 32% for charges to the Verizon ILECs, for a total overcharge percentage of 42.4%.

61. CTC must calculate the refund for the period after November 30, 2004 by applying the overcharge percentage of 40.6%. Verizon St. 1.0 Table 8.

62. Choice One and CTC must pay interest on the refund at the legal rate of 6% per annum.

#### **Ordering Paragraphs**

63. Verizon's complaint is granted.

64. Within ten (10) days of the effective date of the Commission's order, each of the One Communications Companies shall file tariff revisions reducing its tariffed intrastate switch access rates to a level no higher than those of the incumbent local exchange telecommunications company in the same service territory.

65. Within thirty (30) days of the effective date of the Commission's order, Choice One and CTC shall issue refunds in accordance with the Commission's order, plus interest at the legal rate of 6% per annum.

66. FiberNet is enjoined from back-billing Verizon at its tariffed switched access rate.

67. Choice One, CTC and FiberNet are enjoined from charging access rates higher than the corresponding incumbent local exchange telecommunications company's rates in the same service territory rates unless and until the Commission first enters a final order finding that the company has demonstrated that higher access rates are cost justified.