STEVENS & LEE
LAWYERS & CONSULTANTS

17 North Second Street
16th Floor
Harrisburg, PA 17101
(717) 234-1090 Fax (717) 234-1099
www.stevenslee.com

Direct Dial: (717) 255-7365
Email: mag@stevenslee.com
Direct Fax: (610) 988-0852

July 19, 2010

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

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.

Choice One Communications of Pennsylvania, Inc., CTC Communications Corp., and FiberNet Telecommunications of Pennsylvania, LLC

Docket Nos. C-20077672, C-20077674 and C-20077676

Dear Secretary Chiavetta:

Enclosed for filing please find the Exceptions of Choice One Communications of Pennsylvania, Inc., CTC Communications Corp., and FiberNet Telecommunications of Pennsylvania, LLC to the Recommended Decision issued in the above-captioned matter.

Because the Exceptions contains Proprietary information, the Public version of the Exceptions is being submitted for e-filing. The Proprietary version of the Exceptions will be submitted in hard copy via overnight delivery, along with the hard copy of the Public version and the e-filing confirmation.

Copies of these Exceptions have been served in accordance with the Certificate of Service. Thank you and please contact me if you have any questions.

Very truly yours,

STEVENS & LEE

Michael A. Gruin

Enclosures
cc: Cheryl Walker-Davis, Esq., Office of Special Assistants
Certificate of Service

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	:	

EXCEPTIONS OF THE ONE COMMUNICATIONS COMPANIES

PUBLIC VERSION

Michael A. Gruin Esq.
PA ID No. 78625
Stevens & Lee
17 N. 2nd St., 16th Floor
Harrisburg, PA 17101
(717) 255-7365

John C. Dodge, Esq.
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20006
(202) 973-4200

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

PUC and FCC Regulatory Decisions

.Statutes

Regulations

INTRODUCTION

Although the evidentiary record already had closed and regular briefing completed, this case essentially began on August 13, 2008 when the Commission issued six first-time "Applicable Legal Standards" by which CLEC cost justifications are to be measured under Section 3017(c) of the Public Utility Code.[1] The One Communications Companies[2] readily embraced the new standards adopted in *Verizon Penn., Inc., et al v. CTSI, LLC*[3] and *Verizon Penn., Inc., et al v. Penn Telecom, Inc.,*[4] because the Companies believed then—and continue to believe—that the three respective cost justifications for Choice One, CTC and FiberNet meet the Commission's expectations with respect to methodology, data inputs and allocation of joint and common costs. One Communications precisely and methodically described how its three cost justifications meet each of the *CTSI* and *PTI* standards in its Supplemental Brief, which the Companies incorporate by reference herein. The three sets of results showed that each of the Companies' tariffed access charge levels are cost justified.

The Recommended Decision in this matter issued June 21, 2010 by Administrative Law Judge ("ALJ") Louis Cocheres largely ignores the substance of the *CTSI* and *PTI* standards, in favor of criticizing a handful of data inputs and cost allocation procedures One Communications used in its studies. Focusing only on these few components (out of hundreds), the Recommended Decision over-expansively finds the studies "fundamentally flawed and unreliable."[5] In reality, it is the Recommended Decision that is fundamentally flawed, as it

---

[1] 66 Pa. C.S. § 3017(c).

[2] Choice One Communications of Pennsylvania Inc. d/b/a One Communications ("Choice One"), CTC Communications Corp. d/b/a One Communications ("CTC") and FiberNet Telecommunications of Pennsylvania, LLC ("FiberNet") (collectively, "One Communications" or "the One Communications Companies" or "the Companies").

[3] Docket No. C-20077332, rel. Aug. 7, 2008 (hereinafter *CTSI*).

[4] Docket No. C-20066987, rel. Aug. 7, 2008 (hereinafter *PTI*).

[5] R.D. at 17.

plucks a tiny minority of inputs out of hundreds to reach its erroneous conclusions, ignoring not just Commission guidance, but ALJ Cocheres's own rulings and musings earlier in this matter.

As just one example of the errors in the Recommended Decision, ALJ Cocheres criticized a single data input regarding a relative use allocator that appeared only in the Choice One cost study, and proceeded to misapply that criticism to the cost studies of CTC and FiberNet, *despite the fact that the relative use allocator was not used in those other studies.* Moreover, ALJ Cocheres ignored testimony by One Communications' expert witness that "correcting" the allocator *would result in higher intrastate costs for Choice One and no material change in the justified access rate.* This is but one of the clear mistakes of fact the Commission must overturn or remand for further proceedings.

The Recommended Decision also raises very serious questions as to whether any Pennsylvania CLEC can ever cost justify its access rates under Section 3017(c). One Communications' three cost justifications adhered precisely to the guidelines announced in *PTI* and *CTSI*, as demonstrated in the Companies' Supplemental Brief. But because ALJ Cocheres was "uncomfortable" with a handful of data inputs or allocations (some of which are particular to only one study) he rejected the Companies' three separate cost justification results entirely. As a result, CLECs operating in Pennsylvania face significant regulatory uncertainties. First, in contrast to historical practice regarding utility cost studies filed with the regulator, does a CLEC in Pennsylvania receive only one shot under Section 3017(c) to run its cost model to justify tariffed rates? Second, if a fraction of the CLEC's cost inputs are challenged as not the best data available, must the Commission reject the entirety of the study results under Section 3017(c)? Third, if only a fraction of the CLEC's cost inputs are deemed unreliable, and adjusting them results in a rate still higher than the ILEC's rate, must the CLEC nonetheless lower its composite

rate to the ILEC rate? One Communications poses these questions because their answers will dictate whether any Pennsylvania CLEC has a realistic and reasonable opportunity to cost justify its access rates under Section 3017(c).

One Communications respectfully submits these Exceptions and requests that the Commission reject the Recommended Decision in its entirety, or in the alternative, remand this case to the Office of Administrative Law Judge for further proceedings consistent with the arguments advanced herein.

EXCEPTIONS

As implied above, certain of the findings in the Recommended Decision do not flow from or fit under the six Applicable Legal Standards from *PTI* and *CTSI*. One Communications will address these findings first, in the order in which they appear in the Recommended Decision.

A. GENERAL EXCEPTIONS

Exception No. 1: The ALJ Erred In Finding One Communications' Expert Witness Admitted That His Studies Were Inaccurate. (RD at 16-18; Findings of Fact 42; Conclusions of Law 16-18, 21-22, 31-33, 36-39, 41-44)

One Communications retained expert witness Donald Parrish to design and execute three cost studies—for Choice One, CTC and FiberNet—to support each carrier's tariffed access rates. Each cost study had hundreds of individual data inputs, cost allocations and other sub-methodologies.[6] At hearing, Verizon[7] did not challenge Mr. Parrish's designation as an expert witness. Verizon did cross-examine Mr. Parrish about an allocation factor he developed for Choice One using a discovery response from the Companies containing different "minutes of

[6] The Choice One study has 149 separate data inputs. The total number of data inputs for all three studies is 366.

[7] 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.

use" ("MOU") data than Mr. Parrish used in his original Choice One cost study.[8] Mr. Parrish agreed with Verizon counsel that the discovery response MOU data was different than what he had used in the Choice One study, and would change the allocation factor he originally developed.

The Recommended Decision finds that the Companies' discovery responses to Verizon "contradicted the data" in Mr. Parrish's studies and then goes on to say, "his inability to explain the Companies' discovery responses . . . was an admission that the studies were inaccurate."[9] This finding pointedly ignores the chronology of the hearing and mischaracterizes Mr. Parrish's testimony. Verizon counsel *never* asked Mr. Parrish to explain the purported contradiction between the MOU data he used originally and that supplied later by One Communications' personnel in discovery. Rather, Verizon's cross-examination was merely a mechanical exercise to demonstrate certain mathematical differences between the data.[10] Similarly, ALJ Cocheres *never* questioned Mr. Parrish about the purported data contradiction. Instead, ALJ Cocheres simply asked Mr. Parrish whether he could substitute data in his computerized model to re-run the program for the Commission.[11]

When Mr. Parrish was given the opportunity to address the purported data contradiction on redirect examination, he testified that the Verizon-proffered data would actually *increase* One Communications' intrastate access costs, and leave the cost justification level the same:

> Q. Lets assume for a moment that all of the information provided to you by Mr. Pachulski, the numbers in particular, are accurate. What effect would that have on the results in your study?
>
> A. I think the way the study is designed, changing the minutes would allocate a fair amount of *additional cost to intrastate access*. It would also increase

[8] Tr. at 272-274.
[9] R.D. at 17.
[10] Tr. at 272-274.
[11] Tr. at 201-292.

> obviously the denominator in calculating the unit cost, but *I think the overall impact of that is that it would still be in the same general range in terms of unit cost calculation as it is now.*[12]

Moreover, Mr. Parrish specifically testified that he did *not* assume that the data Verizon counsel presented were correct,[13] and that he would like the opportunity to verify that data with One Communications' personnel to make sure they were accurate.[14] In short, Mr. Parrish did not "admit" that his Choice One (or any other) study was inaccurate, and he was not "unable" to explain the data differential. Instead he testified that, to the extent the Verizon-proffered data were used (and were accurate), they would confirm his study results and the cost justification of the Choice One rate.[15]

Thus, it is plain error for the Recommended Decision to find or even insinuate that Mr. Parrish was unable to explain the Companies' discovery responses used by Verizon: He was not asked to explain by Verizon or ALJ Cocheres, and when he was asked about the discovery responses on redirect, he explained that—far from being contradictory—the Verizon-proffered data would shift additional costs to intrastate access and that re-running the Choice One cost model with the new data (costs and MOU) would leave the rate in the same range. Rather than being "unable" to explain the Companies' data responses, Mr. Parrish testified that using the data in those responses confirmed the findings of his original Choice One study.

---

[12] Tr. at 290 (emphasis added).
[13] Tr. at 293.
[14] *Id.* at 292-293.
[15] The Commission need not take Mr. Parrish's word at hearing regarding the minor impact that the data differential would have on his Choice One study results. A simple, easily verifiable mathematical calculation using record evidence proves his point. Use of the intrastate access MOU provided in the Choice One discovery response and admitted into the record (Verizon Cross-Examination Exhibit No. 2) would produce a mere *2.8%* reduction in Choice One's expenses per minute allocated to intrastate access. This formula does *not* require re-running the Choice One cost model: *Operating Expenses x Adjusted Allocation Factor = Adjusted Intrastate Access Expense Per Minute.* Thus, just as Mr. Parrish predicted on the stand, the variance between the access minutes parameter provided in the discovery response used by Verizon as a cross-examination exhibit and that used originally in the Choice One has only a minor effect on Choice One's operating expenses. Using another simple calculation shown in PROPRIETARY Attachment 1 (and again *not* re-running the cost model), the overall effect of using the access minutes identified in Verizon's Cross-Examination Exhibit 2 on Choice One's rates is a reduction to $0.0446 from the original cost justification level, which new rate is still significantly above Choice One's composite tariffed rate.

The Recommended Decision thus erred in alleging that Mr. Parrish admitted his studies are inaccurate on the purported ground he was unable to explain certain purported data discrepancies. Mr. Parrish made no such admission, and he fully explained the consequence of the data differential on redirect examination. In point of fact, the data "discrepancy" upon which ALJ Cocheres relies for his ruling actually confirms the reasonableness of Mr. Parrish's cost study results for Choice One. The Commission must reject this finding which is clearly based upon a material mistake of fact.

Exception No. 2: The Recommended Decision Errs In Questioning The Reliability Of The CTC And FiberNet Studies Based On Data Pertaining Solely to the Choice One Study. (R.D. at 17; Findings of Fact 42; Conclusions of Law 16-18, 22, 31-22, 36-39, 41-44)

One of the most troubling elements of the Recommended Decision is ALJ Cocheres' "extrapolation" of purported data deficiencies in the Choice One study (fully rebutted above) to the CTC and FiberNet studies. Specifically, ALJ Cocheres referenced Mr. Parrish's "inability to explain the Companies' discovery responses which contradicted the data in his *studies* . . . ."[16] The discovery responses to which ALJ Cocheres specifically refers in the Recommended Decision contain data for only Choice One.[17] However, Mr. Parrish used individualized data for each One Communications carrier and derived individualized cost-justification results for each. It is thus a clear and material mistake of fact to attribute purported deficiencies in the data used in the Choice One study to the studies or results for CTC and FiberNet. ALJ Cocheres should not have questioned the reliability of the CTC or FiberNet studies based on purported concerns applicable only to the Choice One study, and the Commission must reject the flawed Recommended Decision in this regard.

---

[16] R.D. at 17.

[17] Tr. at 272-274. The discovery responses also referenced differences in reported revenues for CTC and FiberNet, which differences do not impact CTC or FiberNet's cost study results.

B. EXCEPTIONS PURSUANT TO *PTI* AND *CTSI*.

In this section One Communications will enter its Exceptions as related to the Recommended Decision's discussion of the six Applicable Legal Standards the Commission adopted in the *PTI* and *CTSI* cases.

1. *PTI/CTSI* STANDARD NO. 1: THE "COST JUSTIFIED" STANDARD OF SECTION 3017(C), 66 PA. CS. §3017(C), EQUATES WITH A "REASONABLE MEASURE OF COSTS" FOR A CLEC'S INTRASTATE SWITCHED ACCESS SERVICES.

Exception No. 3: The ALJ Erred In Finding That One Communications' Expert Witness Needed To "Verify" Certain Accounting Data. (R.D. at 17-18; Findings of Fact 42; Conclusions of Law 16-18, 22, 31-33, 36-39, 41-44)

In his initial discussion regarding reliability, ALJ Cocheres stated that his "confidence in the reliability of the cost studies began to erode when Mr. Parrish testified that he relied on data provided by the Companies' employees and had not attempted to verify it."[18] Pointing to the differential between the original study inputs and the discovery response used by Verizon counsel at hearing, ALJ Cocheres stated:

> [Mr. Parrish] and the Companies knew or should have known that the discovery responses contradicted the data in the studies. At a minimum he should have returned to the Companies and checked the discovery responses and the data in his studies against the actual records before the hearing. Perhaps then he would have been prepared to present a credible explanation in defense of his studies, instead of none at all.[19]

As pointed out in Exception No. 1, Mr. Parrish did in fact address the data differential at hearing and concluded that the Verizon-preferred data would increase intrastate access costs for Choice One and that, in the end, his original cost-justified rate would stand. As illustrated above,

[18] R.D. at 17 (emphasis in original).
[19] R.D. at 17-18.

Mr. Parrish was exactly correct. Thus, the record shows it is factually wrong to assert that Mr. Parrish did not present a credible explanation.

Exception No. 4: The Recommended Decision Erred In Giving No Weight To The Cost Studies. (R.D., *passim*; Findings of Fact 42; Conclusions of Law 16-18, 22, 31-33, 36-39, 41-44)

ALJ Cocheres's decision that the Companies' cost studies as proffered through expert testimony were admissible (which was a correct ruling [20]) is wholly incompatible with further determinations that "the studies were fundamentally flawed and *unreliable*" and "so badly discredited that they should be given *no weight*." [21] This is so because the legal standard for admitting expert opinion incorporates a threshold reliability requirement.[22] Accordingly, ALJ Cocheres—in his role as "gatekeeper" of expert testimony [23]—could not find the studies sufficiently reliable to be admitted on the one hand, and later, as fact finder, deem them "fundamentally ... unreliable." The Recommended Decision's correct holding that the cost studies were admissible establishes, by definition, that they were on some level reliable, so a further conclusion that they were "fundamentally flawed and unreliable" could not logically follow, and this internally inconsistent reasoning is itself grounds for remand (at minimum).

The determination in the Recommended Decision to give all of the cost studies "no weight" because they were viewed as "unreliable" is tantamount to holding they are inadmissible. This error, in turn, rests in substantial part on erroneous rejection of the studies on grounds that "the Companies' discovery responses . . . contradicted data in [the expert's] studies

---

[20] ALJ Cocheres overruled Verizon's objection to the studies' admissibility at Tr. 296-97, and reasons for why this was the proper ruling, at least some of which he must have accepted insofar as the Recommended Decision reaffirms the initial overruling of Verizon's objection (R.D. at 17) appear in One Communications' Reply Brief at 5-13.
[21] R.D. at 17 (emphases added).
[22] *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742, 743-46 (3rd Cir. 1994).
[23] *Id.* at 732.

was an admission . . . the studies were inaccurate." [24] At the outset, there is no question, as a general matter, that expert reports and studies are admissible.[25] Even Verizon conceded, "[i]t is a basic tenet of expert testimony that ... an expert witness may base an opinion on facts of which he has no personal knowledge."[26] Yet the Recommended Decision rejects all three of Mr. Parrish's studies in significant part for failing to go back to the Companies for verification, when it appeared data he used originally in one study differed from that provided in discovery.[27] But Mr. Parrish was under no such obligation given the insignificance of the data points that were inconsistent, and the inconsequential impact they had on his ultimate expert opinion, as described *supra.*

It is well-settled that experts by necessity may rely on materials provided by others, including those not admitted into evidence. [28] This Commission's decision in *LP Water & Sewage Company* embraces the general proposition that an expert may base opinions on facts of which he lacks personal knowledge if they are supported by evidence.[29] As made clear in, for example, *Hamilton Contracting*, lack of certainty or mistake on minor points that do not materially affect an expert's ultimate conclusion do not undermine the acceptability of his testimony. [30]

---

[24] R.D. at 17. As noted above, no such "admission" was made.

[25] *See, e.g., Gartland v. Rosenthal*, 850 A.2d 671 (Pa. Sup. 2004).

[26] Verizon Main Brief at 18 (quoting *Yantos v. Workers Comp. Appeal Bd.*, 563 A.2d 232, 237 (1989)) (internal quotation omitted).

[27] R.D. at 17-18.

[28] *See, e.g., Al Hamilton Contracting Co. v. Department of Env. Res.*, 659 A.2d 31, 36 (Com. Ct. Pa. 1995).

[29] 1991 Pa. PUC Lexis 145 at *9 (citing *Vernon v. Stash*, 532 A.2d 484 (1987)). The Commission has further noted "an expert [ ] may assume facts" and, not only that, "such assumed facts *need not be conclusively proven as long as the record tends to establish them.*" *Id.* (emphases added).

[30] 659 A.2d at 36 (expert's "testimony establishe[d] that he knew a low or high wall existed ... prior to submission of the ... report [on which he relied] and he used the report to confirm his conclusions and to specifically locate the high wall," but his "opinion would have been the same even if the report had not been [used]"); *id.* at 37 ("Although [the expert] expressed that he was uncertain whether it was a high wall or a low wall ... , he was not unsure about its existence or [effect].").

To the extent expert reliance on material provided by others has the potential to raise hearsay concerns that are addressed by the validating nature of the expert's reliance on them, *see, e.g., Boucher v. Pennsylvania Hosp.*,

Thus, "the judge should not exclude evidence simply because he ... thinks that there is a flaw in the expert's investigative process which renders the expert's conclusion incorrect [but rather] only exclude the evidence if the flaw is large enough that the expert lacks 'good grounds' for his ... conclusion."[31] "The grounds for the expert's opinion merely have to be good, they do not have to be perfect," and expert testimony can serve its purpose "even if the judge thinks . . . an expert's . . . methodology" has some flaws such that if they had been corrected, "the [expert] would have reached a different conclusion." [32] Thus, "[a] judge frequently should find an expert's methodology helpful even when the judge thinks the expert's technique has flaws[.]" [33] Accordingly, ALJ Cocheres's assignment here of literally "no weight" to Mr. Parrish's testimony—which is the functional equivalent of ruling it inadmissible (while purporting to rule to the contrary)—constitutes reversible error and should be rejected by the Commission.

Exception No. 5: The Recommended Decision Errs In Implying 2004 Cost Data Was Required Or Preferred To Cost Justify One Communications' Rates. (R.D. at 17; Conclusions of Law 16-18, 22, 31-33, 36-39, 41-44)

While conceding no statute or regulation required One Communications to use cost data for the same year their challenged tariffs were filed with the Commission (and further conceding Verizon did not raise the issue in its Complaint), ALJ Cocheres nonetheless indicated he would have been "more comfortable" had One Communications used 2004 cost data in its studies, on

---

831 A.2d 623, 628 (Sup. Ct. Pa. 2003); *Maravich v. Aetna Life & Cas. Co.*, 504 A.2d 896, 900 (Sup. Ct. Pa. 1986), it bears noting that isolated examples of alleged inconsistency do not supplant the "burden on the party [opposing acceptance of an expert opinion] to show that ... a business record is untrustworthy." *Wachovia Bank, N.A. v. Gemini Equip. Co.*, 2006 WL 5242974, 1 Pa. D.&C.5th 235 (Pa. Ct. Com. Pl. 2006). Here, admissibility of the cost studies and the Companies' records on which they are based is supported by both the expert reliance exception to the hearsay rule cited above, and the business records exception. *See Duquesne Light Co. v. Woodland Hills Sch. Dist.*, 700 A.2d 1038, 1048-49 (Com. Ct. Pa. 1997) (even material not fitting within the expert reliance exception may fit within the business records exception); *see also* One Communications' Reply Br. at 11-12 (citing cases).

[31] *Paoli R.R. Yard*, 35 F.3d at 746. While this holding arises in the context of the admissibility of expert testimony under, *inter alia*, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), it also notes this admissibility question "is very close" to that confronting the factfinder as to "the expert's ultimate conclusion." *Id.*

[32] *Id.* at 744.

[33] *Id.* at 744-45.

the theory that such older data "would have answered the question of, 'What were the Companies thinking at the time they made the decisions to set the rates?'"[34] The insinuation that One Communications ought to have used 2004 data constitutes an error of law, because no Pennsylvania law, rule or other authority requires a CLEC to "match" the vintage of its cost justification data to the timing of a tariff filing. Indeed, as the Recommended Decision states, the Commission has not addressed this question.[35] It was therefore inappropriate for ALJ Cocheres to include prejudicial dicta that, as demonstrated herein, is neither factually accurate nor legally sound.

Further, ALJ Cocheres ignored Mr. Parrish's Direct Testimony regarding the vintage of data he used, in which he explained that 2004 data was available only for Choice One.[36] Thus, Mr. Parrish reasonably determined to use the most recent data that was available for all the operating companies, *i.e.*, calendar year 2006. Mr. Parrish also testified that he compared Choice One's 2006 cost data to its 2004 cost data and discovered Choice One's costs were trending *downward*, and he had no reason not to believe the same was true for CTC and FiberNet:

> **Q Did you compare the Companies' 2006 costs to other periods to determine if they were anomalously high?**
>
> **A.** Yes, for Choice One. Only Choice One's historical data was available for this study and I compared its 2006 network costs, market costs and corporate support costs in the PA market to those of 2004 and 2005 and found that, on a per line basis, Choice One's costs are trending downward resulting in relatively lower costs per line in 2006. This is demonstrated by the figures below.
>
> **BEGIN PROPRIETARY**

[34] R.D. at 18.
[35] The Recommended Decision to which ALJ Cocheres cites was vacated by the Commission. *CTSI* at 14.
[36] Parrish Direct at 8.

END PROPRIETARY

> This downward trend in per-line costs reflects Choice One's ongoing improvements in the efficiency with which it provides its services, certainly reflecting economies of scale and probably other cost reducing effects as well. Also, the Company has experienced significant growth in originating minutes per voice line in service between 2005 and 2006, from a monthly average of **BEGIN PROPRIETARY**
> **END PROPRIETARY,** a trend that produces a lower unit cost per minute as usage per line increases. These observations show that the Company's 2006 costs are reasonable in light of its historical operating costs. Although similar data were not available for CTC and FiberNet, *I have no reason to think that a similar pattern would not exist for those entities' costs as well.*[37]

Thus, the Recommended Decision erred as a matter of law in implying Mr. Parrish should have used 2004 data in his three cost studies; there is simply no legal requirement for him to have done so. Moreover, the Recommended Decision relies on a mistake of fact with its implied and unsupported conclusion that 2006 data produced higher cost results than 2004 data when the record shows that One Communications' access costs per line have been trending *downward.*

2. *PTI/CTSI* STANDARD NO. 2: A REASONABLE MEASURE OF THE CLEC'S LOCAL LOOP PLANT CAN BE INCLUDED IN THE CLEC COST STUDY PERFORMED FOR ESTABLISHING THE REASONABLE MEASURE OF COSTS FOR ITS INTRASTATE ACCESS SERVICES.

Exception No. 6: The Recommended Decision Errs In Ruling That One Communications Cannot Include Interstate Costs In Intrastate Rates. (R.D. at 21-22; Findings of Fact 38-41; Conclusions of Law 16-18, 21, 23-24, 31-33, 36-39)

Curiously, the Recommended Decision addresses the influence of interstate access charges on Pennsylvania access charges under the second legal standard from *PTI* and *CTSI,* despite the fact that fifth Applicable Legal Standard seems directly on point. The fifth legal standard *expressly directs* CLECs (and presumably ALJs) to consider the impact of interstate access charges on CLECs' intrastate access charges. However, because ALJ Cocheres addressed

[37] *Id.* at 8-9 (emphasis added).

this issue under the second *PTI/CTSI* standard, we will do the same. In essence, ALJ Cocheres found that it was "contra-definitional" to Section 3017(c) for One Communications to include unrecovered access costs foreclosed from inclusion in interstate rates by the Federal Communications Commission ("FCC").[38] ALJ Cocheres did not question the Companies' calculation of such residual interstate costs.

We start with ALJ Cocheres's example regarding gum balls and chocolate bars. To continue briefly ALJ Cocheres's comestible parlance, One Communications sells but one kind of candy—switched access. Thus, the two-candy example is not relevant to the policy and legal issues at hand, which concern whether Section 3017(c) or other authority permits the recovery of interstate costs in intrastate rates. The plain fact of the matter is that federal policy *already* dictates that certain "interstate" costs are recovered from the intrastate jurisdiction. For example, as One Communications noted in its Supplemental Brief, the FCC arbitrarily assigns 25% of local loop costs to the interstate jurisdiction, leaving 75% to be recovered through intrastate revenues.[39] FCC policy capping CLECs' interstate access rates at corresponding ILEC levels extends this federal policy to CLECs' access costs.[40] Clearly, therefore, One Communications is on solid historical footing in presuming its intrastate charges can be used to recover "interstate" costs, as this is precisely what FCC actions contemplate.

Moreover, as the record in this case shows, intrastate and interstate access services are functionally identical,[41] and costs are not innately jurisdictional in any event. As Verizon's Mr. Mazziotti so eloquently testified, "Costs are what they are. . . . They're independent of all this

---

[38] R.D. at 21.
[39] 47 C.F.R. § 36.2(b)(3)(iv).
[40] *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 (2001) (hereinafter *Seventh R&O*); *see also* 47 C.F.R. § 61.26.
[41] Tr. at 120-121.

jurisdictional and political stuff."[42] All CLECs' interstate access services are subject to a price cap and a federal policy directive to recover any shortfall from the intrastate jurisdiction. The Recommended Decision is essentially a "not in my backyard" response to the FCC, which is unfair at minimum and unlawful at maximum. In 1930, for example, the United States Supreme Court ruled that a federal district court erred when, on appeal from a state commission rate case decision, it adjusted an ILEC's intrastate ratebase downward (shifting costs to interstate accounts) on the theory that Illinois Bell's affiliates' profitable interstate rates could cover what theretofore had been intrastate costs.[43] By blocking One Communications' attempt to allocate interstate costs to the intrastate jurisdiction as the FCC allows, the Recommended Decision appears to have engaged in the same sort of overreaching into the federal domain that *Smith* proscribes.

Given its understanding of FCC policy regarding interstate access cost recovery (and, correspondingly, a state agency's limited ability to reject FCC policy), One Communications was encouraged by the fifth legal standard from the *PTI* and *CTSI* cases. That standard *expressly obligates* a CLEC (and presumably an ALJ) to give "appropriate consideration" to whether a CLEC's interstate access charges influence or interact *in any fashion* with its intrastate access charges. The Commission is and has been fully aware of the FCC's efforts with respect to capping interstate CLEC access charges (which precede Act 183), and the FCC's long-standing policies that shift certain costs to the intrastate jurisdiction. The Recommended Decision begs the question: If not to provide CLECs the opportunity to recover "interstate" costs from the identical intrastate service, why else would the Commission have issued the fifth legal standard in *PTI* and *CTSI*?

---

[42] Tr. at 117. Verizon's witnesses also testified that there is no functional difference, and that there should be very little, if any, cost difference, between interstate and intrastate access service. *Id.* at 120-121.
[43] *Smith v. Ill. Bell Tel. Co.*, 282 U.S. 133, 148 (1930) (hereinafter *Smith*).

Finally, One Communications notes the statute itself belies ALJ Cocheres's conclusion that the Companies' position on recovery of their interstate residual (costs whose calculation or scale is not questioned) is "contra-definitional" to Section 3017(c). Section 3017(c) says nothing about the jurisdiction of the *costs* that make up a carrier's intrastate *rates*:

> 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.

Especially given that FCC policy *predated* the passage of Act 183 by three years, and that the Legislature is presumed to have known of that policy when it passed Act 183, ALJ Cocheres simply read into Section 3017(c) a constraint that does not exist.

For all these reasons, the Commission should reject the Recommended Decision's ruling that One Communications cannot include a portion of its interstate switched access costs in its intrastate switched access rates for cost justification purposes, as contemplated by the fifth legal standard from *PTI* and *CTSI*.

Exception No. 7: The Recommended Decision Errs In Ruling That One Communications' Cost Studies Did Not Allocate Loop Costs to Non-Usage Based Services. (R.D. at 22-24; Findings of Fact 37, 41; Conclusions of Law 16-18, 20, 25, 31-33, 36-39, 41-44)

The Recommended Decision determined (incorrectly) that, since One Communications' costs studies allocate costs among categories based on relative use of network facilities, "[a]llocating costs based on minutes of use fails to allocate any costs to services that are not based on usage."[44] The Recommended Decision goes on to note the Companies provide "non-usage based services that make use of the local loop. These include Caller ID, Distinctive Ring,

[44] R.D. at 22.

Call Waiting and Call Trace, among others."[45] The Recommended Decision concludes that "[n]one of the One Communications Companies' costs were allocated to these non-usage based services."[46] This finding is factually incorrect. Mr. Parrish allocated the appropriate level of costs to the Companies' vertical services, as discussed further below. Unfortunately, in reaching the flawed conclusions about vertical services the Recommended Decision clings to a red herring argument presented by Verizon which equates cost causality to industry pricing conventions.

In its prefiled Rebuttal Testimony, Verizon cited to the Companies' tariffs as evidence that the Companies provide "non-usage-based services."[47] This characterization is designed to mask actual cost characteristics of such services, and the monthly recurring rate structures used by the Companies to price vertical services provide absolutely no basis for the conclusion that vertical services *costs* are "non-usage-based" or that vertical service costs are not captured by the methodology Mr. Parrish used in his cost studies. Mr. Parrish's methodology—which allocates loop costs according to relative usage of the loop—provides for an equitable and policy-tested manner by which to assign loop costs to *all* services that utilize the local loop, including so-called "non-usage based services." Mr. Parrish specifically addressed Verizon's diversionary tactic in his prefiled rebuttal testimony, where he cited to the FCC's determination that vertical services are provided principally through functionalities of the *end office* switch:

> Vertical switching features, such as call waiting, are provided through operation of hardware and software comprising the "facility" that is the switch, and thus are "features" and "functions" of the switch. . . we find that *vertical switching features are part of the unbundled local switching* element.[48]

---

[45] *Id.*
[46] R.D. at 22.
[47] Verizon Panel Rebuttal at 41.
[48] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd. 15499, 15856 (1996) at ¶ 413.

The FCC further recognized that vertical service costs are traffic-sensitive—usage-based—in nature and are most appropriately recovered on a minute-of-use basis.[49] Vertical services use a call message path established by call setup functions of the switch over the local loop to send signaling data, a function activated only by voice call initiation, or network usage. These services thus "piggyback" on a call path established by switch functionality to facilitate a voice call over the loop that is measured appropriately through the minutes-of-use basis, as recognized by the FCC. The end office switch functionality that facilitates vertical services is measured on a usage basis *and is included in the minutes-of-use factors used in each of the One Communications Companies' cost studies.*

The true cost causality of vertical services is inextricably linked to the minute-based customer calls that activate their use and through which the services are provided. The services cited by the Recommended Decision are used only in conjunction of *calls in progress* (*e.g.*, Caller ID, Distinctive Ring, and Call Waiting) or in conjunction with calls initiated for the sole purpose of activating the service (Call Trace). The costs of the calls in progress, and those of the related vertical services, are generated on a usage basis and are appropriately captured on that basis. Verizon confused the Companies' vertical service *pricing* (flat) with vertical service *costs* (usage-related).[50] Unfortunately the Recommended Decision accepted this faulty conflation. Mr. Parrish's methodology fully and properly accounted for the Companies' vertical service costs on a traffic-sensitive basis, just as FCC policy dictates.[51]

---

[49] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Order on Reconsideration*, 14 FCC Rcd. 18049, ¶ 6 (1999) (rates "per minute of use should apply only to traffic sensitive components of the local switching element, including the switching matrix, the functionalities use to provide vertical services, and the trunk ports.").

[50] Verizon's position is wholly inconsistent with its witnesses' insistence that how a service is *priced* has nothing to do with that service's underlying *costs*. *See, e.g.*, Tr. at 100 ("How Verizon recovers that [trunk cost] is not germane to what it costs us to provide it.")

[51] It is important to put the issue of allocation of traffic sensitive vertical services costs into proper perspective as well. Vertical service costs are relatively small compared to the overall cost of network usage. Implementation of

For all these reasons, the Commission should reject or remand the Recommended Decision on this issue.

Exception No. 8: The Recommended Decision Errs In Ruling That One Communications' Cost Studies Overallocated Loop Costs By Excluding Local MOU. (R.D. at 23-24; Findings of Fact 37; Conclusions of Law 16-18, 20-21, 25, 31-33, 36-39, 41-44)

The Recommended Decision incorrectly deems the Companies' cost studies flawed with respect to allocation of the costs of network transportation and switching functions, because Mr. Parrish excluded terminating local MOU.[52] By excluding local termination minutes, the Recommended Decision contends, the cost studies "over-allocate" loop costs to intrastate switched access services.[53] The Recommended Decision recognizes that "the majority of the excluded local minutes of use are terminated to customers whose technical arrangements include facilities collocated with the One Communications Companies' central offices and thus are terminated without utilization of the local loop."[54] The Recommended Decision further correctly concludes it would be inappropriate to allocate any loop costs to this "collocated" traffic and that the exclusion of such minutes from the calculation of loop cost allocation factors, as One Communications did in its studies, is appropriate.

---

the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd. 15499, 15856 (1996) at ¶ 414; Parrish Surrebuttal at 35. Even if changes were made to the allocation basis for such costs—as erroneously advocated by the Recommended Decision—such changes would have an extremely small impact on One Communications' cost study results. Another simple mathematical exercise demonstrates the point.

Assume that 5% of Choice One's total loop-related operating expenses—a percentage far higher than actual experience—are directly assigned to vertical service costs. The resultant per minute operating expenses allocated back to intrastate access services would be reduced by about .44%, and the adjusted intrastate access cost justification level would be $0.0613 per MOU, a figure far above Choice One's composite tariffed rate. *See* PROPRIETARY Attachment 2. The relatively minor impact demonstrated herein wholly refutes the decision to give no weight to the entirety of One Communications Companies' cost studies, and yet another reason to reject or remand the Recommended Decision.

[52] R.D. at 23.

[53] *Id.*

[54] *Id.* at 23-24.

What remain at issue are local terminating minutes that do traverse the local loop as part of the local call termination function. In its briefs One Communications explained that these remaining local terminating minutes should not bear any loop costs because (1) they are billed via reciprocal compensation arrangements between local carriers, and (2) FCC rules prohibit recovery of loop costs through reciprocal compensation. ALJ Cocheres disagrees, and to justify his determination that the FCC proscription does not affect the cost of providing intrastate access the Recommended Decision he concludes: "Reciprocal compensation is a rate"[55] that does not impact the cost of intrastate access. But this statement is incorrect as a matter of law. The correct definition of reciprocal compensation from the FCC Rules states:

> a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier.[56]

Thus, reciprocal compensation is an arrangement by which carriers pay each other to transport and terminate traffic. It is not a particular rate, as the Recommended Decision claims.

This distinction is important, because the FCC has ruled that carriers may *not* agree to include the loop costs of local terminating minutes in any reciprocal compensation arrangement.[57] The practical effect of the FCC's decision is to characterize such local terminating minute costs—which obviously do not simply disappear notwithstanding the FCC's recovery proscription—as *joint and common* costs related to the local loop. The fairest, most accurate mechanism for recovery of joint and common local loop costs is relative use. Thus, in the cost studies Mr. Parrish used the same relative use factor to assign certain of the local

---

[55] R.D. at 24.
[56] 47 C.F.R. §51.701(e).
[57] *See* the *First Report and Order* in CC Docket Nos. 96-98, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* and 95-185, *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* ¶ 1057.

terminating minute costs that he used for direct local loop costs. Far from "over-allocating" this subset of common costs to intrastate access service, Mr. Parrish's formula assures that intrastate access bears no more than its proportionate share of the common costs, *relative to all services which are able to bear the costs.*

ALJ Cocheres is exactly right when he states that "[t]he costs of a service are the same regardless of the price charged for that service."[58] One might go further and state, "the cost allocators for a service must be the same regardless of the price charged for that service." By excluding non-collocated terminating local minutes from the allocation of loop costs, and by using the same relative use factor for local terminating minute costs, Mr. Parrish reasonably assured that services that are permitted to bear the joint and common costs associated with the local minutes would do so in proportion to the fairest measure available.

The Recommended Decision also errs in concluding that the impact of the exclusion of local terminating minutes is sufficient to "further denigrate the value of the cost studies." Reasonable minds certainly can disagree as to whether One Communications' decision to follow FCC policy as it did was correct, but it is not reasoned decision-making to discredit three complex cost studies based on this single data input. At most ALJ Cocheres should have ordered an adjustment to One Communications' cost studies to include the local terminating minutes. He should not have invalidated the results in their entirety.

For all these reasons, the Commission should reject or remand the Recommended Decision on this issue.

---

[58] R.D. at 24.

3. ***PTI/CTSI* STANDARD NO. 3: ALTHOUGH FDC EMBEDDED ACCOUNTING-REVENUE REQUIREMENT COST STUDIES BY THE CLEC ARE GENERALLY ACCEPTABLE, CONSIDERATION SHOULD BE GIVEN TO FORWARD-LOOKING ECONOMIC COST STUDIES THAT TREAT THE CLEC'S LOOP COSTS AS JOINT COSTS. IN ASCERTAINING THE JOINT LOOP COSTS OF A CLEC, CONSIDERATION SHOULD BE GIVEN TO WHETHER THE CLEC'S LOOP COSTS CAN, IN PART, BE DERIVED FROM THE UNE-LOOP (UNE-L) RATES THAT THE CLEC PAYS FOR LEASING LOOPS TO ITS END-USER CUSTOMERS FROM AN ILEC OR MULTIPLE ILECS. SIMILARLY, IN ANY CLEC COST STUDY, THERE MUST BE A CLEAR AND WELL DOCUMENTED DEMONSTRATION OF HOW THE CLEC RECOVERS JOINT LOOP COSTS FROM SERVICES OTHER THAN INTRASTATE SWITCHED ACCESS.**

ALJ Cocheres correctly determined that One Communications' fully distributed cost studies are permissible under the third legal standard adopted in *PTI* and *CTSI*. One Communications' exceptions to the dicta in the Recommended Decision under this third legal standard are addressed above.

4. ***PTI/CTSI* STANDARD NO. 4: THE COST JUSTIFICATION OF THE ILEC'S INTRASTATE ACCESS RATES IS IMMATERIAL IN ASCERTAINING THE REASONABLE MEASURE OF COSTS FOR THE CLEC'S INTRASTATE SWITCHED CARRIER ACCESS SERVICES. HOWEVER, ILEC AND CLEC INTRASTATE AND INTERSTATE SWITCHED ACCESS RATES MAY BE USED AS PROXY BENCHMARKS FOR ESTABLISHING AN APPROPRIATE RANGE OF JUST AND REASONABLE INTRASTATE ACCESS RATES FOR A PARTICULAR CLEC. RURAL ILEC INTRASTATE AND INTERSTATE ACCESS RATES MAY PLAY A ROLE IN ESTABLISHING SUCH A RANGE IF A PARTICULAR CLEC OPERATES IN RURAL EXCHANGES OF A NON-RURAL ILEC AND/OR IN THE SERVICE AREA OF A RURAL ILEC.**

Exception No. 9: The Recommended Decision Erred In Ruling That Comparative Unit Cost Analyses Are Barred By Section 3017(c). (R.D. at 26-27; Findings of Fact 30; Conclusions of Law 16-18, 30-33, 36-39, 41-44)

The Recommended Decision contends that "[w]hen the Companies made the decision to begin competitive service in Verizon's service territory, their management knew or should have known that they were about to compete with the largest telecommunications carrier in

Pennsylvania"[59] and thus One Communications' management should have known their access rates would have to compare with Verizon's. Belittling One Communications' management—particularly without record support for the unfounded assertion—smacks of arbitrary and capricious decision-making, and the Commission should reject that portion of the Recommended Decision outright. Moreover, the notion that One Communications is statutorily foreclosed from justifying higher costs based, *inter alia*, on "the comparative number of access lines and economies of scale"—is simply wrong as a matter of law.

Returning to the plain language of Section 3017(c), there is nothing in the provision that proscribes a CLEC from justifying its higher rates, at least in part on a relative basis, by examining the comparative number of access lines or other economies of scale. That is a far different issue than comparing the ILEC's absolute costs to the CLEC's absolute costs, which the fourth legal standard bars as immaterial. It is axiomatic that smaller carriers often have higher per unit costs than larger carriers owing to economies of scale.[60] Those higher per unit costs can result in relatively higher per unit prices. In its Supplemental Brief One Communications simply noted it would be inappropriate under the discretionary test embedded in the fourth legal standard (ILEC rates *may* be used as proxy benchmarks) to compare Verizon's rates to the Companies' rates owing to differences in economies of scale. That is one justification out of many supporting the reasonableness of the three cost studies the Companies submitted in this matter. The Recommended Decision's criticism that comparative unit cost analyses are barred by statute is unfounded as a matter of fact and as a conclusion of law, and should be rejected outright.[61]

---

[59] R.D. at 26-27.
[60] *Seventh R&O* at ¶ 69.
[61] One Communications did not attempt to compare access lines or economies of scale with other Pennsylvania LECs for the simple reason that the fourth legal standard from *PTI* and *CTSI* was issued after the close of the record

Exception No. 10: The Recommended Decision Erred in Ruling That Section 3017(c) Was Designed To Reduce Or Eliminate Cross-Subsidization. (R.D. at 27; Findings of Fact 37-41; Conclusions of Law 16-18, 20-21, 31-33, 36-39, 41-44)

The Recommended Decision states that Section 3017(c) "was designed to substantially reduce or eliminate cross-subsidization."[62] Once again ALJ Cocheres has read into the statute language and meaning that does not exist. Section 3017(c) says simply that a CLEC may charge higher than ILEC access rates only if the CLEC access rates are cost justified. There is no language, plain or otherwise, regarding cross-subsidization. One wonders if ALJ Cocheres' criticism would tolerate a circumstance in which a CLEC's access rates were higher than an ILEC's *and* cost justified, but would be higher still were it not for cross-subsidization from other service rates. In that circumstance would the CLEC be required to back out the subsidies and increase its access prices? Fortunately, the statute does not contemplate or admit to this degree of ratemaking micromanagement.

The two "examples" of cross-subsidization mentioned by ALJ Cocheres are amply rebutted elsewhere herein. One Communications has followed FCC policy in the recovery of its interstate residual, and has not attempted to over-allocate local loop costs. The Commission should reject the Recommended Decision on this point for the reasons articulated above. ALJ Cocheres's reading of Section 3017(c) goes beyond the plain language of the statute.

---

in the instant matter, and no record evidence exists upon which a comparison can be made. It appears now that One Communications was punished for its lack of clairvoyance. Fortunately, the fourth legal standard's proxy test is discretionary, and need not be used given the overall cost justifications in the record here.

[62] R.D. at 27.

5. *PTI/CTSI* STANDARD NO. 5: THERE MUST BE APPROPRIATE CONSIDERATION GIVEN TO WHETHER THE CLEC'S INTERSTATE CARRIER ACCESS CHARGES INFLUENCE OR INTERACT IN ANY FASHION WITH THE REASONABLE MEASURE OF COST AND THE SETTING OF THE CLEC'S INTRASTATE CARRIER ACCESS CHARGES.

One Communications addressed this issue under Exception No. 6. The Recommended Decision erred in determining that the Companies cannot recover certain interstate access costs in their intrastate access rates. FCC policy permits CLECs to recover costs in that fashion, and the fifth legal standard *obligates* an ALJ to consider what influence a CLEC's interstate rates have on its intrastate rates. The Commission must reject or remand the Recommended Decision on this issue.

6. *PTI/CTSI* STANDARD NO. 6: THE ISSUE OF RATE REFUNDS, IF ANY, SHALL BE ADJUDICATED UNDER 66 PA. C.S. § 1312 REGARDING THE DETERMINATION OF UNJUST AND UNREASONABLE RATES AND THE ISSUANCE OF REFUNDS TOGETHER WITH INTEREST AT THE LEGAL RATE.

In *PTI* and *CTSI* the Commission adopted a sixth Applicable Legal Standard relating to calculation of rate refunds, if any. This section of One Communications' exceptions will focus on legal errors in the Recommended Decision, and some of the implicit policy determinations ALJ Cocheres rendered which have significant ramifications beyond the four corners of this case.

Exception No. 11: The Recommended Decision Erred In Calculating Refunds Based On Verizon's Tariffed Rates. (R.D. at 28-32; Conclusions of Law 32-38)

Throughout these Exceptions One Communications has demonstrated that most of the data inputs or allocations questioned by ALJ Cocheres have a modest impact, at best, on the cost justification results determined by Mr. Parrish for each of the Companies. Nonetheless, because ALJ Cocheres rejected all the studies rather than requiring One Communications to make

adjustments to and re-run the studies, he determined that Choice One and CTC must refund to Verizon—and all other "patrons" that used the Companies' intrastate access services in the Verizon service territory—the difference between One Communications' tariffed rates and the rates Verizon charges for the same service.[63] Assuming, *arguendo*, that the sum of the adjustments actually identified in the Recommended Decision would result in new rates below One Communications' tariffed rates but above Verizon's tariffed rates, One Communications respectfully submits that such new rate levels are the "cost justified" rates it should assess Verizon and other patrons. This perspective is consistent with Section 1309(a) of the Public Utility Code, which generally instructs the Commission as follows:

> Whenever the commission . . . *upon complaint*, finds that the existing rates of any public utility for any service are unjust, unreasonable, or in anywise in violation of any provision of law, *the commission* ***shall*** *determine* the just and reasonable rates, including maximum or minimum rates, to be thereafter observed and in force, and shall fix the same by order to be served upon the public utility, and such rates shall constitute the legal rates of the public utility until changed as provided in this part. (Emphases added.)

This case arose as a result of a Verizon complaint,[64] and ALJ Cocheres ruled that One Communications' intrastate access rates are unjust and unreasonable rates.[65] Section 1309(a), which must be read in *pari materia* with Section 3017(c), thus directs the Commission to "determine" the Companies' just and reasonable rates. However, ALJ Cocheres did not perform this exercise. Instead he ignored the entirety of One Communications three, separate cost justifications and picked Verizon's rates as a proxy for the Companies' just and reasonable rates.

Had ALJ Cocheres calculated, or directed One Communications to calculate, revised rates based on the handful of criticisms identified in the Recommended Decision, One Communications believes that its revised rates would still be *above the tariffed rates of Verizon*

---

[63] R.D. at 30.
[64] R.D. at 2.
[65] R.D. at Conclusion of Law 21.

which would certainly have affected the level of refunds due, if any. Thus, the Recommended Decision errs as a conclusion of law as to the *level* of any refunds that might be due to access customers of One Communications. At most One Communications would owe refunds calculated at the level of the total adjustments expressly identified in the Recommended Decision, not at Verizon's rate levels.

ALJ Cocheres appeared to acknowledge the Commission's duty to determine One Communications' access rates at the hearing, when, in speaking about the need for an additional hearing, he stated:

> Instead, it is perhaps more often the case that the Judge ultimately makes the decision on what, if any, adjustments need to be made to the cost study. The Commission reviews the exceptions which inevitably follow, although most Judges don't understand why, and then the Commission makes a decision, and oftentimes, based on the recommendation of the Judge, will order that the cost study be re-run using the inputs designated by the Commission.[66]

The cost studies One Communications submitted are complex but not complicated. Each study, on average, has more than 120 data inputs.[67] ALJ Cocheres picked out but a handful of such inputs to criticize or repudiate. The cost studies can be re-run easily and in short order to accommodate the criticisms in the Recommended Decision.[68] It would have been a simple matter for ALJ Cocheres to direct One Communications to alter those few inputs he questioned and re-run the cost studies. The Commission can do the same.

The Recommended Decision errs in calculating refunds (which are not due in any event) based on the difference between One Communications' current rates and Verizon's rates. For purposes of this Exception only, the proper measure of any refunds would be the difference between One Communications' *revised* rates and Verizon's rates, as contemplated by Section

---

[66] Tr. at 291-293, 300.
[67] *See* n. 6, *supra.*
[68] Tr. at 292.

1309(a) of the Public Utility Code, and ALJ Cocheres's own remarks in this matter. The Commission should reject or remand the Recommended Decision on this point for these reasons.

Exception No. 12: The Recommended Decision Erred In Ordering Refunds Reaching Back Prior To A Commission Determination Of Unlawfulness. (Conclusions of Law at 42-43)

ALJ Cocheres also concluded that the applicable refund period was from November 30, 2004—2½ years *prior* to Verizon's complaint—through the date that the Companies' tariffs are cancelled.[69] Assuming, *arguendo,* the Commission were to find the Companies' access rates violated Section 3017(c), the Recommended Decision's highly punitive recommendation that refunds should extend back to the passage of Act 183 and be applicable to all purchasers of One Communications' switched access service since that time is not legally or equitably justified, and the recommendation should be rejected outright by the Commission.

First, requiring refunds for periods prior to a Commission determination regarding Section 3017(c) is in direct conflict with several other sections of the Code, which must be read in *pari materia* with Section 3017(c). For example, One Communications' current intrastate switched access rates are included in lawfully-filed, Commission-approved tariffs. Therefore, pursuant to 66 Pa. C.S. § 1303, One Communications was, and is, *obligated* to charge those approved access rates until the Commission determines that such rates are unlawful.[70] Further, 66 Pa. C.S. § 3303 expressly precludes forfeiture or penalties on account of collecting any rate that is contained in a tariff properly filed with the Commission.[71]

ALJ Cocheres's refund recommendation ignores these companion statutes, and would have One Communications issue refunds on the grounds that its access rates are "unjust" or

---

[69] *Id.*

[70] No public utility ...may demand or receive ...a greater or less rate for any service rendered or to be rendered by the public utility than that specified in the tariffs of such public utility applicable thereto. 66 Pa. C.S. § 1303.

[71] 66 Pa. C.S. § 3303.

"unreasonable" despite the facts that those very same rates were approved by the Commission, that One Communications was (and is) statutorily obligated to adhere to those rates until changed with the approval of the Commission, and that the Legislature proscribes the Commission from imposing a forfeiture or penalty on any properly filed tariff. This statutory construction is buttressed by well-settled Pennsylvania jurisprudence that tariffs have the full force and effect of law and are binding upon both the utility and its customers until changed.[72] Similarly in Pennsylvania, rates terms and conditions of tariffed services are presumed to be just and reasonable.[73]

Second, Pennsylvania Supreme Court precedent also forecloses reaching back for refunds prior to the date of a Commission determination that the subject rates are unlawful. In the landmark case of *Cheltenham and Abington Sewerage Co. v. Pennsylvania Public Utility Commission* ("*Cheltenham*"),[74] the Pennsylvania Supreme Court addressed the authority of the Commission to order refunds to customers in connection with the agency's finding that a utility's previously approved tariff was unjust and unreasonable. In *Cheltenham*, the Court held the Commission had no authority to order refunds for any periods prior to the date of its finding that rates were unlawful. The Court held that the Commission's approval of a tariff was quasi-legislative function, and that the utility was "entitled to rely upon the declaration of the commission as to what was a lawful and reasonable rate until a change was made by the commission acting in its quasi-legislative function."[75] The Court concluded it did not "regard it of any significance that the tariffs designed to yield the specified gross annual revenue were

---

[72] *Stiteler v. The Bell Telephone Company of Pennsylvania, Inc.*, 379 A.2d. 339 (Pa. Cmwlth. 1977) ("presently effective tariffs are not mere contracts, but have the full force and effect of law and may be relied upon, and are binding upon, both the utility and its customers").

[73] *Lehigh Valley Power C'tee v. Pa. Public Utility Commission*, 563 A.2d 557 (Pa. Cmwlth. 1989).

[74] *Cheltenham & Abington Sewerage Co. v. Pa. Pub. Uti. Comm'n*, 25 A.2d. 334, 344 Pa. 366, Sup. 1942, appeal dismissed 63 S.Ct. 38, 317 U.S. 588, rehearing denied 63 S.Ct. 153, 317 U.S. 707, cert. denied. 63 S.Ct. 39, 317 U.S. 588.

[75] *Cheltenham*, at 25 A.2d 336.

prepared by the appellant and approved by the Commission rather than set by the Commission in the first place."[76]

Applying the principles underlying Public Utility Code Sections 1303 and 3303 and *Cheltenham* to the present situation, One Communications was (and is) legally entitled to rely on the Commission's approval of its intrastate switched access rates and was (and is) obligated to collect those rates from its customers until the rates are changed by a new Order of the Commission. It is not disputed that the Commission has the authority to order One Communications to change its rates upon a finding of a violation. But, it is clear that One Communications cannot be ordered to issue refunds to customers for any periods prior to such a new Commission directive to change its rates, and especially not back to November of 2004, when Act 183 was enacted. The Recommended Decision ignores these clear well-established legal principles, and as such must be rejected.

In addition to lacking legal basis, ALJ Cocheres's refund recommendation also lacks an equitable basis. The Commission must use sound discretion in determining whether a refund is an appropriate remedy.[77] If the Commission ultimately decides One Communications' access rates are not cost justified, the circumstances and balance of equities clearly do not justify awarding Verizon and all other purchasers a refund dating back to the effective date of Act 183 (November 2004) as ALJ Cocheres has recommended. In addition to the devastating and severe financial consequences the recommended refunds would have for the One Communications Companies, the Commission must recognize that Verizon sat on its rights for 2½ years after passage of Act 183.

---

[76] *Id.*

[77] *See National Fuel Gas Distribution Corp. v. Pa. Pub. Util. Comm'n*, 464 A.2d 546, 76 P. Cmwlth. 102 (1983).

Further, Verizon's trilogy of Section 3017 complaints (against PTI, CTSI and One Communications) were cases of first impression that took the Commission and the litigants into uncharted waters. The Commission did not issue any regulation or directive to CLECs regarding cost-justifying their access rates after the enactment of Section 3017(c) in 2004.[78] The Commission's preexisting regulations did not require CLECs to file cost supporting data at the time its tariffs are submitted,[79] and instead required only such information if requested by the Commission.[80] Until the Commission's *CTSI* and *PTI* Orders were released in late 2008, CLECs had absolutely no guidance regarding the statute's or the Commission's "cost-justification" requirement. ALJ Colwell recognized these equitable considerations in her Recommended Decision in the *CTSI* case. Even though Judge Colwell determined that CTSI's rates were not cost-justified for reasons not present in the instant case, she recommended prospective rate changes only, and strongly recommended against issuance of refunds.[81] The Commission should recognize here as well the inherent unfairness of the ordering a CLEC to issue a refund under these circumstances.

Moreover, the statute at issue in this case is silent with respect to refunds, and thus should not be read against CLECs such as the One Communications Companies which abided by its plain terms. Similarly, as One Communications discussed in its Reply Brief at pages 4-5, Section 3017(c) does not require a CLEC to take any affirmative action to support its access rate *at the time its tariffs are filed.* The statute merely requires the CLEC be prepared to demonstrate its rates *are* cost justified if challenged by the Commission or by another party (which One Communications did), not that they *were* cost justified when Act 1983 was passed.

---

[78] *CTSI* R.D. at 13.
[79] *See* 52 Pa. Code § 53.59.
[80] *CTSI* at 13. Obviously the Commission has not requested that One Communications submit a cost justification in this matter. One Communications did so voluntarily to meet its burden of proof.
[81] *CTSI* R.D. at 26

For all these legal and equitable reasons, the Commission should reject the Recommended Decision's view that refunds can reach back prior to a Commission determination of unlawfulness.

Exception No. 13: In the Alternative, If Refunds Are To Be Considered, Section 1309 Of The Public Utility Should Control, Not Section 1312.

In the *CTSI* and *PTI* orders, the Commission determined that Section 1312 of the Public Utility Code should control the issue of refunds for violations of Section 3017.[82] ALJ Cocheres determined to use Section 1312 in this case as a result. However, after the Commission issued the *PTI* Order, PTI filed a motion requesting reconsideration of this finding. The *PTI* case was settled and the Complaint in that case withdrawn before the Commission acted on the PTI Motion for Reconsideration. PTI's arguments on this issue remain compelling and correct. Section 1312 is not applicable to Verizon's complaints against CLECs under 3017(c), and One Communications respectfully submits that the Commission should revisit its determination from *PTI* and *CTSI* that the issue of refunds should be decided solely under Section 1312.[83] Section 1309(a) of the Public Utility Code applies where, as here, a complaint is filed alleging that a public utility's rates are in anywise in violation of any *provision of law*. It states, in pertinent part:

> Whenever the commission . . *upon complaint* . . . finds that the existing rates of any public utility for any service are unjust, unreasonable, or *in anywise in violation of any provision of law*, the commission shall determine the just and reasonable rates, including maximum or minimum rates, to be thereafter observed and in force, and shall fix the same by order to be served upon the public utility,

---

[82] *See CTSI* and *PTI* (The issue of rate refunds, if any, shall be adjudicated under 66 Pa. C.S. § 1312 regarding the determination of unjust and unreasonable rates and the issuance of refunds together with interest at the legal rate.)

[83] While it is true One Communications did not oppose utilization of the sixth legal standard from *PTI* and *CTSI* in this matter, One Communications was not aware the ALJ Cocheres would err in using Section 1312 to reach back prior to a Commission determination here. One Communications specifically rejects any insinuation or finding that in agreeing to abide by the sixth legal standard from *PTI* and *CTSI* that the Companies agreed to unlawful reaching back.

> and such rates shall constitute the legal rates of the public utility until changed as provided in this part. (Emphases added.)

The precise complaint situation contemplated in Section 1309(a) and highlighted above is the exact situation presented in the instant case: Verizon brought a Complaint on April 25, 2007 alleging *only* that One Communications' access rates were *in violation of a provision of law*—Section 3017(c). Therefore, if the Commission finds that Verizon has met its burden of proof and upholds the Complaint, the provisions of 1309 must control the issue of refunds.

Of critical importance to this case is the fact that Section 1309(b) contains a clear limitation on the issuance of refunds:

> Before the expiration of a nine-month period beginning on the date of the commission's motion or the filing of a complaint pursuant to subsection (a), a majority of the members of the commission . . . shall make a final decision and order . . . If such an order has not been made at the expiration of such nine-month period and the motion or complaint pursuant to subsection (a) requested a reduction in rates, *a final decision and order of the commission which determines or fixes a rate reduction shall be retroactive to the expiration of such nine-month period* . . . . (Emphasis added.)

ALJ Cocheres's recommendation to order refunds dating back to November 30, 2004 clearly violates Section 1309(b)'s limitation. Under 1309(b), the *earliest* the Commission could order One Communications to issue refunds would be January 25, 2008, which is nine months after the date of filing of Verizon's Complaint.

Section 1312, by contrast, applies to different circumstances than in this case. As PTI pointed out, Section 1312 is meant to address a situation where a utility was receiving a rate that was in excess of its lawfully approved tariffed rates.[84] That is clearly not the case here. Here the rates reviewed were Commission-approved tariffed rates, which are presumed to be just and reasonable. There is nothing in the record to suggest One Communications' access rates were in

[84] *See* Petition for Clarification And/Or Reconsideration of Penn Telecom Inc., Docket No. C-20066987 (filed September 15, 2008).

excess of the applicable rate contained in its existing and effective tariffs, and Verizon's Complaint did not even contain such an allegation.[85] There is nothing in the record to suggest One Communications' access rates were in violation of any order or regulation of the Commission, and again, Verizon's Complaint did not even contain such an allegation. Finally, there is nothing in the record to suggest One Communications' access rates were unjust or unreasonable, and again, Verizon's Complaint did not even allege as much. It is undisputed that the sole basis for Verizon's Complaint was an alleged violation of a *provision of law*, namely, an alleged violation of Section 3017 of the Code.

For the purposes of this Exception, Section 1309 thus controls the matter of any refunds, and limits the reach-back period to January 25, 2008. The Commission must reject or remand the Recommended Decision on this point as well.

CONCLUSION

In this case One Communications submitted detailed studies demonstrating that intrastate switched access rates for Choice One, CTC and FiberNet are cost justified under Section 3017(c), using direct and causally related costs, plus rational and reasonable allocations for joint and common costs. One Communications thoroughly rebutted Verizon's theoretical criticisms of the studies by demonstrating that the service-specific cost studies complied with state law, Commission precedent and One Communications' governing tariffs. In addition, during the regular briefing phase of this case, One Communications rebutted each of the specific fact criticisms lodged by Verizon, relating to the interstate residual; the so-called End User Carrier Line charge or Subscriber Line Charge; vertical calling services; terminating local minutes of

[85] *See also* R.D. at Findings of Fact 15-17, 23-24 (describing One Communications' tariffed rates).

use; local termination costs; "retail" depreciation expense; and retail client manager and consultant expenses.

Since the close of the record and regular briefing in this case, the Commission issued six Applicable Legal Standards by which ALJ Cocheres was to have evaluated One Communications' three cost studies. In supplemental briefing One Communications precisely and methodically described how its three cost justifications meet each of the *CTSI* and *PTI* standards. Rather than apply those standards, ALJ Cocheres relied on only a handful of the hundreds of data inputs—adjustments to which either increase One Communications' intrastate access costs, confirm the reasonableness of Mr. Parrish's studies or result in rates still higher than Verizon's—to reject the cost studies in their entirety. ALJ Cocheres misapplied singular criticism across all three studies, misapplied state law and ignored record evidence and federal and state regulatory policy in reaching his Recommended Decision.

These Exceptions have demonstrated that the Recommended Decision's criticisms of One Communications' three cost studies are baseless. The overwhelming weight of the evidence demonstrates that One Communications' access rates are cost justified under Section 3017(c). Consequently, One Communications has met its burden of proof in this case. For all these reasons the Commission should reject in its entirety the Recommended Decision issued June 17, 2010, hold that One Communications' intrastate switched access rates are cost justified under Section 3017(c), and dismiss Verizon's Complaint in its entirety.

WHEREFORE, for all the reasons enumerated herein and in its prior pleadings, One Communications respectfully requests that the Commission reject in its entirety the Recommended Decision issued June 17, 2010 and dismiss the Complaint of Verizon, or in the

alternative, remand the Recommended Decision to the Office of Administrative Law Judges for further proceedings consistent with the Exceptions raised herein.

Respectfully submitted,

By: _____

Michael A. Gruin, Esquire
PA ID No. 78625
STEVENS & LEE
17 North Second Street, 16th Floor
Harrisburg, PA 17101
Office: (717) 255-7365
Facsimile: (610) 988-0851
mag@stevenslee.com

John C. Dodge, Esquire
DAVIS, WRIGHT TREMAINE, LLC
1919 Pennsylvania Avenue NW, Suite 800
Washington, D.C. 20006
Office: (202) 973-4200
Facsimile: (202) 973-4499
johndodge@dwt.com

Counsel for the One Communications Companies

July 19, 2010

PROPRIETARY

ATTACHMENT 1

Impact of Adjustment to Intrastate Access Minutes of Use from Verizon Cross Exhibit 2

		Adjusted Allocation
A.	**Adjusted Allocation to Intrastate Access 1/**	$
B.	**Adjusted Intrastate Access Minutes 2/**	
C.	**Adjusted Operating Expenses per Minute 3/**	$
D.	**Original Operating Expenses per Minute 4/**	$
E.	**Impact on Operating Expenses per Minute 5/**	
F.	**Estimated Intrastate Access Total Cost per Minute 6/**	$
G.	**Estimated Interstate Access Shortfall per Minute 7/**	$
H.	**Total Recovery Requirement - Intrastate Access 8/**	$

NOTES:

1 Parrish Exh. A, Sch. 2, Sum of Col.1 LL.II.A.1.c, II.A.2.c, II.B.1.c, II.B.3.c, II.B.4.c, II.B.6.c, IV.D.3, and Sch. 3, LL.V.H, Col. 4 x
Vz Cross Exh. 2, 2006 MOUs divided by (Parrish, Exh. A, Sch. 2, LL.I.A, Col. 1 - Sch. 2, LL.I.A, Col. 3 + Vz Cross Exh. 2, 2006 M
+
Parrish Exh. A, Sch. 2, LL.IV.A x
Vz Cross Exh. 2, 2006 MOUs divided by (Parrish, Exh. A, Sch. 2, LL.I.E, Col. 1 - Sch. 2, LL.I.E, Col. 3 + Vz Cross Exh. 2, 2006 M
+
Parrish Exh. A, Sch. 2, Sum of Col. 1LL.II.A.6.c, II.A.7.c, II.A.8c x
Vz Cross Exh. 2, 2006 MOUs divided by (Parrish, Exh. A, Sch. 2, LL.I.I, Col. 1 - Sch. 2, LL.I.I, Col. 3 + Vz Cross Exh. 2, 2006 MO
+
Parrish Exh. A, Sch. 2, Sum of Col. 1 LL.IV.B, IV.C, IV.F x
Sum of LL. 1, 2, & 3 above divided by Parrish Exh. A, Sch. 2, LL.II.C.1, Col. 1

2 Vz Cross Exh.2, 2006 MOUs

3 Line A above divided by Line B above

4 Parrish Exh. A, Sch. 4, Sum of Col. 2 LL.III.A and III.B divided by Parrish Exh. A, Sch. 4, LL.IV, Col. 2

5 (Line C above - Line D above) divided by Line D above

6 Line C divided by Parrish Exh. A, Sch. 4, Sum of Col. 2 LL.III.A and III.B divided by LL.III.E, Col.2

7 ((Line F above x Parrish Exh. A, Sch. 4, LL.IV, Col. 1) minus LL.VI.A, Col. 1) divided by Line B above

8 Line F above + Line G above

PROPRIETARY

ATTACHMENT 2

Impact of Adjustment to Allocated Loop Costs for Alleged Non-Usage Based Services

		Adjusted Allocation
A.	**Adjusted Allocation to Intrastate Access 1/**	$
B.	**Adjusted Intrastate Access Minutes 2/**	
C.	**Adjusted Operating Expenses per Minute 3/**	$
D.	**Original Operating Expenses per Minute 4/**	$
E.	**Impact on Operating Expenses per Minute 5/**	
F.	**Estimated Intrastate Access Total Cost per Minute 6/**	$
G.	**Estimated Interstate Access Shortfall per Minute 7/**	$
H.	**Total Recovery Requirement - Intrastate Access 8/**	$

NOTES:

1 Parrish Exh. A, Sch. 2, Sum of Col. 1 LL.II.A.1.c, II.A.2.c, II.B.1.c, II.B.3.c, II.B.4.c, II.B.6.c, IV.D.3, and Sch.3, LL.V.H, Col. 4 x Sch. 2, LL.I.B, Col. 3
+
Parrish Exh. A, Sch. 2, LL.IV.A, Col. 1 x
Sch. 2, LL.I.F, Col. 3
+
((Parrish Exh. A, Sch. 2, Sum of Col. 1 LL.II.A.6.c, II.A.7.c, II.A.8.c) x .95) x
Sch. 2, LL.I.J, Col. 3
+
Parrish Exh. A, Sch.2, Sum of Col.1 LL.IV.B, IV.C, IV.F x
Sum of LL. 1, 2, & 3 above divided by Parrish Exh. A, Sch.2, LL.II.C.1, Col.1

2 Parrish Exh. A, Sch. 4, LL.IV, Col. 2

3 Line A above divided by Line B above

4 Parrish Exh. A, Sch. 4, Sum of Col. 2 LL.III.A and III.B divided by Parrish Exh. A, Sch. 4, LL.IV, Col. 2)

5 (Line C above - Line D above) divided by Line D above

6 Line C above divided by (Parrish Exh. A, Sch. 4, Sum of Col. 2 LL.III.A and III.B divided by LL.III.E, Col. 2)

7 ((Line F above x Parrish Exh. A, Sch. 4, LL.IV, Col. 1) minus LL.VI.A, Col. 1) divided by Line B above

8 Line F above + Line G above

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.,	:	Docket No. C-20077672
Complainants	:	Docket No. C-20077674
v	:	Docket No. C-20077676
CTC Communications Corp., FiberNet Telecommunications of Pennsylvania, LLC and Choice One Communications of Pennsylvania, Inc.,	:	
Respondents	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Exceptions on behalf of CTC, FiberNet and Choice One in accordance with the requirements of 52 Pa. Code § 1.54 et. seq. (relating to service by a participant):

VIA E-MAIL AND FIRST CLASS MAIL

Susan S. Paiva, Esquire
Assistant General Counsel
Verizon Communications
1717 Arch Street, 10W
Philadelphia, PA 19103

James G. Pachulski
TechNet Law Group, P.C.
6001 Montrose Road, Suite 509
Rockville, MD 20852

Michael A. Gruin

DATED: July 19, 2010