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July 29, 2010

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

RE: Verizon Pennsylvania Inc., Verizon North Retain Co. f/k/a Verizon North Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, Verizon Select Services Inc., Verizon Global Networks, Inc., MCI metro 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 Chiavetta:

Enclosed please find the Reply Exceptions of the Verizon Companies in the above referenced matter. The original hardcopy of the Reply Exceptions is being sent to the Commission via Federal Express.

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

Very truly yours,


Suzan D. Paiva

SDP/slb
Enclosure

VIA E-MAIL and U.S. MAIL
cc: Cheryl Walker Davis, Esquire
Attached Certificate of Service

CERTIFICATE OF SERVICE

I, Suzan D. Paiva, hereby certify that I have this day served a copy of Verizon's Reply Exceptions, 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 29th day of July, 2010.

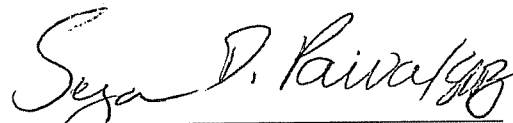
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Verizon Pennsylvania Inc., Verizon North :
Retain Co, f/k/a 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 :

v. :

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

Respondents :

Docket No. C-20077672

Docket No. C-20077674

Docket No. C-20077676

VERIZON'S REPLY EXCEPTIONS

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Pursuant to 52 Pa. Code § 5.535, Verizon¹ replies to the exceptions filed by Choice One Communications of Pennsylvania, Inc. (“Choice One”), FiberNet Telecommunications of Pennsylvania, LLC (“FiberNet”) and CTC Communications Corp. (“CTC”) (collectively “One Communications”) to the Recommended Decision of Administrative Law Judge (“ALJ”) Louis G. Cocheres issued on June 17, 2010 (“RD”).

INTRODUCTION

Over three years ago, Verizon – as a ratepayer being charged unlawfully high rates – filed this formal complaint asking the Commission to enforce 66 Pa. C.S. § 3017(c) by requiring One Communications 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. One Communications is the only competitive carrier in Pennsylvania that refuses to comply with the statutory mandate to reduce its access rates to the ILEC level. Choice One and CTC continue to charge from 2.5 to 4.6 cents per minute for switched access service, while the Verizon ILECs and the other competitive local exchange carriers (“CLECs”) operating in the Verizon ILEC territories charge only 1.4 to 1.7 cents for the same service. (RD at 9).²

No legal justification exists to permit any CLEC, much less one that promotes itself as “the largest privately-held competitive local exchange carrier in the U.S.,” exclusively serving business customers, (Verizon Main Br. at 9), to defy the statutory access rate cap that applies to all of its competitors. As the FCC has recognized, failure to cap CLEC switched access rates at the ILEC level allows “some CLECs inappropriately to shift onto the long distance market in general a

¹ The complainants are Verizon Pennsylvania Inc. (“Verizon PA”), Verizon North Retain Co., formerly known as Verizon North Inc. (“Verizon North”), Verizon Select Services Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, Verizon Global Networks, Inc., MCImetro Access Transmission Services LLC, and MCI Communications Services, Inc. (collectively “Verizon”).

² As the RD explained, FiberNet has a tariffed rate of 6 cents per minute, but charges less than its tariffed rate. (RD at 10).

substantial portion of the CLECs' start-up and network build-out costs," which is "inconsistent with the competitive market," "promote[s] economically inefficient entry into the local markets," "distort[s] the long distance market," and provides "opportunities for arbitrage and incentives for inefficient market entry."³

One Communications had ample opportunity throughout this protracted litigation to comply with the statute voluntarily by reducing its access rates and ceasing these overcharges, but it did not do so.⁴ It also had ample opportunity to provide factual evidence to support its claim to exceed the statutory rate cap, by proving that its higher access rates are "cost justified," and it also did not do so. ALJ Cocheres thoroughly examined the evidence and methodically applied the Commission's guidance on this issue from its August 29, 2008 orders in the PTI and CTSI cases, and concluded that the switched access rates of One Communications are "unjust and unreasonable because they are in excess of the level permitted to be charged under 66 Pa. C.S. § 3017(c), and because the One Communications Companies have not demonstrated that their higher access rates are cost justified." (RD at 38). The ALJ found correctly that the cost studies One Communications submitted in an attempt to prove the "cost justified" exception to the statute had "been so badly discredited" after numerous flaws in the underlying data were exposed on cross examination of the sponsoring witness that "they should be given no weight." (RD at 17). The ALJ also found that the studies'

³ *In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report And Order and Further Notice Of Proposed Rulemaking, CC Docket No. 96-262, 16 FCC Rcd 9923, ¶ 33 (2001).

⁴ By separate orders entered on August 29, 2008 in Verizon's similar complaint cases filed against CTSI, LLC ("CTSI") and Penn Telecom, Inc. ("PTI") the Commission offered the parties "the opportunity to settle their dispute" in light of the guidance provided in those orders regarding the requirements of Section 3017(c), and referred the cases to mediation. 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. At ALJ Cocheres' request, Verizon voluntarily agreed to mediation with One Communications as well, but that mediation ended without a settlement in late 2008. (RD at 4). After the PTI and CTSI cases were settled and closed, the ALJ in late 2009 again requested that the parties discuss the possibility of settlement, but after several weeks the settlement discussions terminated with an impasse, which was reported to the ALJ on December 3, 2009. (*Id.*) The ALJ thus concluded in his RD that this case would not be settled voluntarily and "there are few choices left" and "no reason to delay implementation of the remedy." (RD at 32).

methodology was faulty because it was “designed to inflate the intrastate access service costs to the absolute maximum” and did not provide a valid justification to allow One Communications to charge higher access rates than other similarly-situated carriers. (RD at 25). Because One Communications failed to demonstrate that its higher access rates were “cost justified,” the statute requires One Communications to reduce its rates to a level no higher than the ILECs’ rates.

The RD also recommends that One Communications be directed pursuant to 66 Pa. C.S. § 1312(a) to refund all overcharges to its access customers, together with interest, so that it does not profit at the expense of its customers from charging rates in violation of this statute for several years while it persisted in litigating this issue.

The Commission should reject the unsupported exceptions of One Communications to ALJ Cocheres’s well-reasoned RD and should adopt the RD as its resolution of this case.

REPLIES TO EXCEPTIONS

Reply to One Communications Exceptions 1, 2, 3 and 4: The RD Correctly Found That The Cost Studies Submitted By One Communications Were Unreliable

A. Introduction

No one disputes that the access rates of the One Communications companies are higher than the ILEC rates; thus, this proceeding was the opportunity for One Communications to submit evidence to satisfy the one and only one exemption from this statutory rate cap, by “demonstrat[ing] that the higher access rates are cost justified.” 66 Pa. C.S. § 3017(c). One Communications failed to make that demonstration. Instead, it relied entirely on the testimony of one outside consultant, Donald E. Parrish, who proffered three revenue requirement studies ostensibly intended to demonstrate that the “costs” of each of the One Communications companies exceed the ILECs’ rates. The ALJ admitted the studies into evidence over Verizon’s objection, but “by the time cross-examination was concluded,” he determined that “the cost studies had been so badly discredited that they should be given no weight.” (RD at 17). Accordingly, the ALJ found that One

Communications did not satisfy the statutory exemption and thus must charge intrastate access rates at ILEC levels. The various exceptions raised by One Communications to the ALJ's ruling are baseless.

B. Reply To Exception 1: The ALJ Found Correctly That The "Studies" Submitted by One Communications Were Unreliable

The ALJ examined closely the "cost studies" submitted by One Communications and found "that the studies were fundamentally flawed and unreliable." (RD at 17). This finding was based largely on the lack of support for the studies offered by the only witness presented by One Communications (Mr. Parrish). As the ALJ explained,

- "[m]y 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," (RD at 17), and
- "his inability to explain the Companies' discovery responses which contradicted the data in his studies." (RD at 17).

In taking exception to these findings, One Communications argues that Mr. Parrish explained on redirect that, as a matter of mathematics, replacing a specific study data input with the contradictory information from one of the companies' discovery responses would increase the purported cost calculation, and so there was no basis to conclude that he was unable to explain the contradictions or that the studies themselves were unreliable. (Exceptions at 5). This argument, in addition to being an improper attempt to introduce new evidence, misses the point. As the ALJ found, the real problem is that Mr. Parrish effectively admitted that he did not know if *any* of the data inputs he assumed in the study were correct as a matter of fact, and this flaw cast doubt upon the reliability of all of the data he relied upon in his cost studies.

As to all of the data inputs that he assumed as the basis for his study, Mr. Parrish testified that he "didn't personally access the companies' accounting systems to obtain the actual cost data," that he "didn't personally access the companies' systems to obtain the operating parameters," that

he “didn’t do anything to personally validate against either the systems or books or accounts or records of the companies any of the information that was given to [him] by the One Communications Company personnel,” and “that the persons who supplied the information” did not “submit[] testimony in this proceeding” and were not “present in the hearing room today.” (Tr. at 268-69). Mr. Parrish also admitted that several of the companies’ discovery responses contained information that was different from what he had used in the studies. (Tr. at 270-286). When discrepancies were brought to his attention between the inputs in his studies and several of the companies’ sworn discovery responses in this proceeding, he testified that he did not know whether or not the numbers in his study were correct. (Tr. at 286). In short, it was clear that Mr. Parrish had no idea whether the data in the studies or the data in the discovery responses was correct, or even if they were both wrong. (*See also* Verizon Main Br. at 18-22; Reply Br. at 5-8).⁵ Thus, One Communications’s quarrel with the ALJ’s finding on the unreliability of the “cost studies” is wrong; the overwhelming record evidence supports the RD’s conclusion that Mr. Parrish effectively admitted that the studies were unreliable.

C. Reply To Exception 2: All Three Of The Studies Were Inconsistent With Discovery Responses

One Communications next contends that the RD “extrapolate[ed]” a single contradiction between the data produced in discovery and the data assumed in the Choice One study to find that all three studies (Choice One, FiberNet and CTC) were unreliable. (Exceptions at 6). That is factually inaccurate. The RD did not specifically reference just one contradiction; it referenced several contradictions admitted by Mr. Parrish during cross examination. Verizon introduced three

⁵ The attempt by One Communications in footnote 15 to demonstrate the impact of changing one input to the Choice One study is irrelevant to the ultimate point. To the extent One Communications implies that simply changing those discrete study inputs that failed to match the information contained in discovery responses cures the fundamental unreliability and lack of foundation of the studies, it is mistaken. Mr. Parrish made it quite clear on cross-examination that he did not personally verify or have any independent knowledge of *any* of the inputs to the studies. Given the significant discrepancies in those inputs that Verizon was able to unearth through discovery, the Commission cannot have confidence in any of the studies’ inputs.

cross examination exhibits that contained discovery responses supplied to Verizon by One Communications in this case, and Mr. Parrish admitted that the information in those exhibits contradicted all three studies. (See Tr. at 277-78 (admitting discrepancy in CTC study) and Tr. at 276 (admitting discrepancy in FiberNet study)). Further, as discussed above, it was amply apparent from the general cross examination responses that Mr. Parrish did not know if any single input to any of the studies was in fact correct. Moreover, no witness appeared to validate the correctness of those inputs, which had been called into serious question by the discovery discrepancies. The RD correctly relied on these contradictions to conclude that all three of the cost studies were inaccurate.

D. Reply To Exceptions 3 and 4: The RD Correctly Concluded That The Failure To Verify The Underlying Factual Assumptions Rendered The Cost Studies Unreliable

One Communications contends that the ALJ concluded incorrectly that Mr. Parrish should have verified the factual correctness of the underlying data assumptions in his studies. (Exception 3 at 7 and Exception 4 at 9). According to One Communications, Mr. Parrish was permitted to rely on “materials provided by others” because “an expert may base opinions on facts of which he lacks personal knowledge if they are supported by evidence.” (Exceptions at 9). But in this instance the “facts” that Mr. Parrish assumed clearly were not supported by any evidence.⁶ His opinion was therefore only as good as the flawed and faulty assumptions upon which it was based, and the ALJ was thus correct to give the opinion no weight.

When an expert relies on facts or data of which he lacks personal knowledge, there must be some independent indicia of reliability for the underlying facts. For example, it is unreasonable for an expert to rely on data that he did not verify personally, particularly when the data appears to be

⁶ See *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”).

untrustworthy.⁷ And the mere fact that the expert has formulated an opinion based on his assumption of the facts is not a basis to admit the facts underlying the expert's opinion as substantive evidence.⁸

If the key facts are different from what the expert assumed, then his opinion would be different from the result presented in the case. At most, by admitting the cost studies into evidence the ALJ permitted Mr. Parrish to testify as to his opinion of what the One Communications companies' revenue requirements would be *if* the One Communications companies had the specific expenses, investments, revenues, traffic volumes and operating parameters that he assumed as inputs to his studies.⁹ But because it was amply apparent that Mr. Parrish lacked any basis whatsoever to testify that the companies did in fact have the expenses, investments, revenues, traffic volumes and operating parameters that he assumed as inputs to his studies, the ALJ correctly determined that the studies were entitled to no weight.

One Communications also argues that it was an error for the ALJ to admit the studies into evidence and then conclude that they were so flawed and unreliable that they should be given "no weight." (Exception 4 at 8). In other words, One Communications argues that simply by finding the studies to be admissible in evidence the ALJ was required to give them some weight. This argument is directly contrary to arguments made by One Communications when it was attempting

⁷ See *Emigh v. Consolidated Rail Corp.*, 710 F. Supp. 608, 612 (W.D. Pa. 1989) (an expert must "ground his opinion on reliable data rather than speculation.")

⁸ See *Boone v. Moore*, 980 F.2d 539, 542 (8th Cir. 1992) ("the evidence is not offered, nor admissible, for the fact of the matter therein asserted, but simply to indicate the information and material relied upon by the expert. Unless the particular evidence is otherwise admissible under the Rules of Evidence, it may not come in as substantive evidence."); *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728-729 (6th Cir. 1994); *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254 (9th Cir. 1984) ("Rule 703 merely permits such hearsay, or other inadmissible evidence, upon which an expert properly relies, to be admitted to explain the basis of the expert's opinion. . . . It does not allow the admission of the reports to establish the truth of what they assert.") See also *Hospital Association of Pennsylvania v. General Telephone Company of Pennsylvania*, 56 Pa. PUC 680 (RD of ALJ Hoffman, 1982) (where expert had relied upon "rank hearsay without the existence of a scintilla of assurance as to its accuracy or veracity," then "it does not become evidence because an expert witness 'relies' on it. The rule that (in some cases) an expert can base his opinion on hearsay evidence does not mean that he can pull himself up by his own bootstraps.")

⁹ Even then, the underlying methodology of the studies was also flawed in allocating an unreasonable measure of costs to switched access service, as discussed later in these Reply Exceptions.

to rebut Verizon's argument that the studies should not have been admitted as evidence, where One Communications contended that these significant shortcomings in the studies "go[]s to the weight of the evidence," not its admissibility. (One Comm. Reply Br. at 12). It should not now be heard to except to the RD's conclusion that these flawed and unreliable studies should be given no weight. As the United States Supreme Court explained, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 596 (U.S. 1993). Under this standard, the fact finder "is free to give [an admissible expert] opinion little or *no weight*." *Skydive Ariz., Inc. v. Quattrocchi*, 2009 U.S. Dist. LEXIS 75351 (D. Ariz. Aug. 12, 2009) (emphasis added). Under the facts of this case, the cost studies sponsored by Mr. Parrish were "shaky" evidence that the ALJ correctly found merited "no weight."

Reply to One Communications Exception 5, 6, 7, 8, 9 and 10: The RD Correctly Found Several Methodological Errors in The Cost Studies

A. Introduction

In addition to the evidentiary problems that rendered the cost studies proffered by One Communications unreliable, the RD also correctly found several methodological errors that invalidated the results of these studies. In Exceptions 5, 6, 7, 8, 9 and 10, One Communications disputes the findings on these methodological errors. Again, these assertions are misplaced. The studies were intended to "demonstrate that the higher access rates are cost justified," and the Commission has 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). As the RD concluded, rather than allocating a "reasonable measure of costs" to intrastate switched access service, the studies "were designed to inflate the intrastate access service costs to the absolute maximum," thereby improperly overstating the One Communications companies' claimed cost of providing intrastate switched access service. (RD at 25).

B. Reply to Exception 6: The RD Correctly Found That One Communications Erroneously Inflated Its Claimed Intrastate Costs By Including Interstate Costs

One Communications significantly overstated 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 switched access, but also portions of the revenue requirement that the study allocates to the *interstate* jurisdiction.¹⁰ ALJ Cocheres found correctly that “the attempt by the One Communications Companies to recover *interstate* rate shortfalls to be contra-definitional to the statute” because “the direction of the Legislature to this Commission to identify intrastate costs cannot include *interstate* rate shortfalls no matter what kind of cost study the CLEC uses.” (RD at 21) (emphasis in original).¹¹ One Communications takes exception to this finding, but its arguments are without merit.

There is simply no basis for One Communications’s assertion that the FCC requires the recovery of any *interstate* costs through *intrastate* charges. First, contrary to the claim by One Communications that the FCC somehow allows it to recover these interstate costs from other carriers through their intrastate access rates, (Exceptions at 13), 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.”¹² The FCC specifically allows CLECs to recover these costs through *interstate* end user charges.¹³

¹⁰ These are portions 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’s rates.

¹¹ The RD notes that “the inclusion of the revenues attributed to the interstate shortfalls made up a substantial part of the difference between the respondents’ intrastate access rates and Verizon’s rates for the same service.” (RD at 21).

¹² *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*”) (emphasis added).

¹³ *Id.* at 54.

Second, One Communications actually recovers these costs in interstate rates charged to its end users, and thus seeks double recovery here. The record contains unrefuted evidence that “[e]ach of the One Communications Companies has end user charges in their interstate access tariffs” that are generally billed on a per-month, per-line basis.¹⁴ These interstate end user charges yield revenues more than sufficient to offset the so-called “interstate access shortfall.” (VZ Reply Br. at 20). This attempt by One Communications to inflate the costs it claims it should recover through intrastate switched access rates by double counting costs that it should and does recover through interstate end user rates is, by definition, unreasonable and 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, either from carriers or from end users as permitted by the FCC. (CTSI 8/29/09 Order at 12; PTI 8/29/08 Order at 17). Moreover, to determine 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, (CTSI 8/29/09 Order at 13; PTI 8/29/08 Order at 17), but the “interstate residual” concept was 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.¹⁵

¹⁴ VZ St. 1.1 at 31.

¹⁵ One Communications also argues that “intrastate and interstate access services are functionally identical, and costs are not innately jurisdictional in any event.” (Exceptions at 13). This argument actually undercuts One Communications’ own cost study methodology. If interstate and intrastate access services are functionally identical, their costs would likewise be functionally identical. But One Communications assignment of interstate switched access costs to intrastate switched access services effectively increases the costs of intrastate switched access relative to the costs of interstate switched access services. This mis-assignment of interstate costs to intrastate services is completely contrary to One Communications’ premise that the services are functionally identical. ALJ Cocheres correctly found that “[j]ust because the F.C.C. capped the *interstate* access rates and encouraged the CLECs to recover any revenue shortfall from other sources, does not mean that the Companies can reasonably believe that Section 3017(c) authorized the collection of those shortfalls as part of a study to identify the costs of rendering intrastate access services.” (RD at 21-22) (emphasis in original).

C. Reply to Exception 7: The RD Correctly Found That By Excluding Non-Usage Based Services, One Communications Erroneously Over-Allocated Loop Costs to Interstate Switched Access Services

The RD also found that One Communications had erroneously over allocated loop costs to intrastate switched access services by failing to allocate any loop costs to non-usage based services. As ALJ Cocheres explained, “[t]he One Communications Companies provide many non-usage based services that make use of the local loop plant . . . Caller ID, Distinctive Ring, Call Waiting, and Call Trace, among others” and “[a]llocating costs based on minutes of use fails to allocate any [loop] costs to services that are not based on usage.” (RD at 22).

One Communications takes exception to this finding as factually inaccurate. (Exceptions at 16). But One Communications merely repeats the same argument it made below that non-usage based services “are provided principally through the functionalities of the *end office* switch” and that switching costs for these services were included in its studies. (Exceptions at 16-17) (emphasis in original). ALJ Cocheres already explained that “[t]his argument misses the point.” (RD at 23). The issue is not the allocation of the cost of the switch, but rather the failure to properly account for the use of the loop by these services in a study that is intended to allocate costs to all services that use the loop. The cost studies submitted by One Communications did not allocate any loop costs to non-usage based services, which results in recovery of all costs from usage-based services and an overstatement of the costs allocated to switched access.¹⁶

Moreover, had One Communications actually assigned any loop costs to these non-usage based services, it should have been able to point to the place in the studies where such assignments

¹⁶ The commission held in the PTI and CTSI orders that CLECs may include “a reasonable measure” of its “local loop plant” in a cost study intended to establish cost justification under Section 3017(c). (CTSI Order at 12; PTI Order at 17). As Verizon pointed out in its petitions for reconsideration (never decided, due to the settlements), this is a matter of pricing policy and does not mean that loop costs are actually part of the cost of providing switched access service from a costing perspective. As long as the ILECs’ rates provide recovery of loop costs, a CLEC mirroring the ILEC rate will also recover loop costs. Here, however, the Commission need not address whether this is a costing or pricing issue because One Communications has not presented reliable evidence of its costs and has used a methodology calculated to assign an unreasonable measure of loop costs to intrastate access rates.

were performed and state the amount of such assignments. Tellingly, One Communications asks the Commission to “[a]ssume that 5% of Choice One’s total loop-related operating expenses . . . are directly assigned to vertical service costs.” (Exceptions at 17-18, n.51) (emphasis supplied). Such an assumption is not supported by the record and would not have been necessary if the cost studies had actually assigned any loop costs to non-usage based services.

D. Reply To Exception 8: The RD Correctly Found That By Excluding Certain Local Minutes of Use, One Communications Erroneously Over-Allocated Loop Costs To Intrastate Switched Access Services

ALJ Cocheres also found that One Communications erroneously over allocated loop costs to intrastate switched access services by failing to allocate any loop costs to terminating local minutes. As ALJ Cocheres explained, “[b]y excluding local termination minutes the Companies’ cost studies again over allocated loop costs to intrastate switched access services.” (RD at 23).

One Communications takes exception to this finding by reiterating the very same claims it made in its briefs. According to One Communications, loop costs should not be allocated to local terminating minutes “because the FCC has ruled that carriers may *not* agree to include the loop costs of local terminating minutes in any reciprocal compensation arrangement.” (Exceptions at 19) (emphasis in original). As the RD explained, “[t]he Companies’ argument is off the mark.”

Reciprocal compensation is a rate. The issue in this case concerns cost studies. The One Communications Companies have submitted *cost* studies to determine the *cost* of providing intrastate switched access services. They have not demonstrated that the requirement to charge reciprocal compensation rates for local termination traffic somehow affects, or indeed increases the *cost* of providing switched access services. The costs of a service are the same regardless of the price charged for that service.¹⁷

One Communications also takes exception to ALJ Cocheres’s statement that reciprocal compensation is a rate, claiming instead that “reciprocal compensation is an arrangement by which carriers pay each other to transport and terminate traffic.” (Exceptions at 19). But this is a

¹⁷ RD at 24 (emphasis in original).

distinction without a difference. The premise of the studies proffered by One Communications is to allocate costs based on the services that use the loop and local termination services unquestionably use the loop. The payment for a service does not affect the costs of providing a service. In fact, in the very FCC order cited by One Communications, the FCC itself refers to the “*rates* for reciprocal compensation [that] make possible efficient competitive entry.”¹⁸ The RD therefore correctly found that by excluding local terminating minutes, One Communications’ cost studies over allocated loop costs to intrastate switched access services.

E. Reply to Exception 5: The RD Did Not Make Any Finding of Fact or Conclusion of Law That One Communications Should Have Provided Cost Studies Based on 2004 Data

ALJ Cocheres noted that he “would have been more comfortable with 2004 data,” rather than the 2006 data used in the cost studies submitted by One Communications. (RD at 18). One Communications purports to take exception to ALJ Cocheres’s remark on the lack of 2004 data, but this is not a matter upon which exception may be taken. Under the Commission’s rules, “[e]ach exception must . . . identify the finding of fact or conclusion of law to which exception is taken.” 66 Pa. Code §5.533(b). There is no finding of fact or conclusion of law regarding the absence of 2004 data in One Communications’ cost studies. In fact, ALJ Cocheres noted that “[t]he issue of the appropriate time period for data used for cost justification was raised in the CTSI case . . . [u]nfortunately, the Commission did not answer the question.” (RD at 18). ALJ Cocheres then concluded that “[u]nder these circumstances I am reluctant to rule that using 2006 data was unacceptable per se.” (*Id.*) Because the RD did not reject cost studies submitted by One Communications based on their use of 2006 data, there is no finding of fact or conclusion of law on this point to which One Communications can take exception.

¹⁸ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 ¶ 1058 (1996).

F. Reply To Exceptions 9 and 10: It Is Undisputed That The Access Rates Of One Communications Exceed All Relevant Proxy Benchmarks of Reasonability

One Communications takes issue with the portion of the RD discussing the fact that the results of the cost studies presented by One Communications far exceed any of the proxy benchmarks cited by the Commission as its definition of a reasonable range of access rates for CLECs in the CTSI and PTI orders. (RD at 26-27; CTSI 8/29/08 Order at 13; PTI 8/29/08 Order at 17). One Communications contends that the RD somehow barred it from arguing that its costs were higher than the ILEC's based on "comparative unit costs," *i.e.*, the fact that One Communications serves fewer lines than the ILEC.¹⁹ (Exceptions at 22). But the RD did not reject the cost studies on this basis. The RD simply found that the access rates of One Communications are far above the proxy benchmarks of reasonability cited by this Commission because they exceed the rates of the ILECs and the rates of numerous other CLECs for the same service. (RD at 27). This Commission has instructed that "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." (CTSI 8/29/08 Order at 13). Thus, the RD's findings regarding the comparison of the rates of the One Communications companies to those of other CLECs and the ILECs are pertinent and further show the inaccuracy of One Communications's cost justification argument.

One Communications also takes issue with the statement in the RD that "the cost studies at issue provide classic examples of the cross-subsidies which must be avoided" under the Chapter 30 statute because the "One Communications Companies are attempting to shift costs which would otherwise fall on their customers to the intrastate carriers." (RD at 27). One Communications

¹⁹ The other side of this argument, of course, is that One Communications serves only business customers, does not have the same regulatory obligations as the ILEC and likely is able to operate a more efficiently designed network. It is likely, therefore, that a valid "comparative unit cost analysis," if it had been presented, would show that the costs of One Communications are lower than the ILECs'.

contends that Section 3017(c) is silent as to cross-subsidization, stating that “there is no language, plain or otherwise, regarding cross-subsidization.” (Exceptions at 23). Again, One Communications is wrong. One of the legislative goals of Chapter 30 is to “ensure that rates for protected services do not subsidize the competitive ventures of telecommunications carriers.” 66 Pa. C.S. § 3011(4); *see also id* at 3016(f)(1). It was not error for the RD to characterize the allocation of an unreasonable measure of its overall operating costs to the protected service of switched access to be a form of cross-subsidization.

Reply to One Communications Exceptions 11, 12 and 13: The RD Correctly Recommended That One Communications Refund Overbillings, With Interest, Pursuant To 66 Pa. C.S. § 1312(a)

A. Introduction

The ALJ found properly that One Communications must return the money unlawfully collected from its access customers in violation of Section 3017(c) by refunding “the difference between the existing tariffed rates and the rates Verizon charges for the same services” from “the effective date of section 3017” until it reduces those rate, together with “interest at the legal rate from the date each payment was made.” (RD at 30-31). One Communications argues that, even if its access rates violated Section 3017(c), the Commission should only reduce them going forward and either cannot or should not require a refund.²⁰ (Exceptions at 27). But each of its arguments was raised in exceptions or reply exceptions in the PTI and CTSI cases, and the Commission explicitly or implicitly rejected each of them when it concluded in its August 29, 2008 orders that if a carrier’s rates are found to violate Section 3017(c), then “[t]he issue of rate refunds, if any, *shall* be adjudicated under 66 Pa. C.S. § 1312 regarding the determination of unjust and unreasonable

²⁰ One Communications submitted no testimony or other evidence in the record to rebut Verizon’s calculations of the amount of the overcharges or the method of calculating the refund, as described in Verizon’s direct testimony and accepted by the RD, and did not except to the RD’s calculation of the refund. Accordingly, the Commission should adopt Ordering Paragraphs 5 and 15 of the RD with regard to the calculation of the refund.

rates and the issuance of refunds together with interest at the legal rate.” (CTSI 8/29/08 Order at 13; PTI 8/29/08 Order at 18).

One Communications provides no reasonable basis for this Commission to allow it to keep the millions of dollars that it collected in violation of Section 3017(c), money the Legislature never intended it to collect or its access customers to pay. Rejecting a refund order in this case would set a dangerous and counter-productive precedent. It would encourage companies like One Communications to take extreme interpretations of statutes and regulations and to resist all efforts at settlement because, in the end, it would be more profitable for them to prolong litigation if they are permitted to keep their unlawful proceeds. As the Commonwealth Court observed, where a regulated utility makes the choice to continue billing rates that are at risk of being declared unlawful the utility must “bear the consequences” of billing those higher rates by refunding the over-collections.²¹

B. Reply to Exception 12: Section 1312(a) Applies In This Case

Following the Commission’s guidance in the PTI and CTSI cases and based on a careful examination of the evidence and the law in this case, the ALJ recommended a refund under 66 Pa. C.S. § 1312(a), which provides “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.” 66 Pa. C.S. § 1312.²² One Communications’s arguments against the application of Section 1312(a) to this case are unavailing, and were considered and rejected in the PTI and CTSI cases.

²¹ *Pa. Gas & Water Co. v. PUC*, 470 A.2d 1066, 1073, 79 Pa. Commw. 416, 430 (Pa. Commw. Ct. 1984). *See also See Duquesne Light Co. v. PUC*, 117 Pa. Commw. 28, 34-35, 543 A.2d 196, 200 (Pa. Commw. Ct. 1988).

²² The “legal rate” of interest is 6 percent per annum. 41 P.S. § 202. *See Duquesne Light Co.*, 117 Pa. Commw. at 36, 543 A.2d at 200.

First, One Communications argues that it cannot be required to refund amounts paid under “lawfully-filed, Commission-approved tariffs,” even if the Commission finds that those rates were unlawful. (Exceptions at 27). This same argument was raised by CTSI and PTI and implicitly rejected by the Commission. As ALJ Colwell correctly observed in rejecting this argument, “[w]hile it is true that a utility must charge its tariffed rates, it is also true that a utility must file a tariff with rates which are consistent with applicable law.” (CTSI RD at 14). One Communications relies upon a 58 year old case explaining the doctrine of “commission-made rates,”²³ to argue that its tariffed access rates are automatically insulated from any refund requirement and can only be reduced going forward. (Exceptions at 28). But the law is clear that One Communications’ rates, although tariffed, are not “commission-made rates” and are not insulated from a retroactive refund obligation simply by virtue of their inclusion in a tariff. The Commonwealth Court has explicitly rejected the argument One Communications makes here. The court held that rates such as One Communications’ access rates, which were not subject to a previous Commission rate case and an explicit finding of reasonableness based on an evidentiary record and applicable law, are not “commission made rates” and are not insulated from retroactive modification if found to be unjust and unreasonable. To the contrary, “when given the express authority [pursuant to 66 Pa. C.S. § 1301] to ensure that every rate ‘received by any public utility . . . be just and reasonable,’” this Commission “is under a mandate to fulfill its obligation and *may do so retroactively* when the rates in issue were not subject to a prior review for reasonableness.”²⁴ Like *Equitable* in that case, One

²³ *Cheltenham & Abington Sewerage Co. v. PUC*, 25 A.2d 334, 344 Pa. 366 (1942).

²⁴ *Equitable Gas Co. v. Pennsylvania Public Utility Com.*, 106 Pa. Commw. 240, 259, 526 A.2d 823 (1987) (emphasis added). As the court explained, “[w]hile it is true that ‘Commission-made’ rates cannot be retroactively changed, this doctrine” only applies to “rates which are implemented subsequent to an exhaustive evidentiary presentation of the utility’s expenses and their reasonableness, the fair value of the utility’s property used and useful in the public service, and the return on that value to be received by companies who are subject to similar economic risks. Numerous and lengthy public hearings are conducted, lay and expert witnesses are examined and voluminous documentary evidence is submitted.” *Equitable*, 106 Pa. Commw at 259, 526 A.2d at 831. See also *Duquesne Light Co. v. PUC*, 96 Pa. Commw. 168, 177, 507 A.2d 433, 438 (Pa. Commw. Ct. 1986) (“Monies collected from

Communications here cannot “validly expect” that its intrastate switched access rates “were insulated from retroactive modification” because they “were not stamped with antecedent PUC approval. . . . No final determination as to reasonableness had been made by the PUC.”²⁵ One Communications has pointed to no Commission order specifically reviewing its rates upon an evidentiary record and affirming them as just and reasonable, and specifically such review concluding that they were compliant with Section 3017(c) after it became law. (Verizon St. 1.1 at 8). Accordingly, One Communications’s access rates are not “commission-made rates.” Section 1312(a) states that the Commission may order a refund where the rate collected 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.” 66 Pa. C.S. § 1312(a) (emphasis added). Here, the Commission is authorized to direct a refund if it finds that the rate collected was “unjust or unreasonable,” even if it was included in a tariff, where that rate is “unlawful” because it is in violation of Section 3017(c).²⁶

Second, One Communications argues that ordering a refund under Section 1312(a) would be “highly punitive,” (Exceptions at 27), suggesting that refunds may be required only when there is bad faith. That is wrong. Section 1312(a) does not require a finding of “bad faith” or other culpable or malicious conduct that would warrant the carrier being “penalized.” 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 the conduct of One Communications – was unlawful and therefore “unjust or unreasonable.” *Id.* The purpose of the

customers pursuant to a net energy clause adjustment do not carry the Commission's antecedent imprimatur, and thus the Commission-made rates doctrine does not apply to requests for refunds of these revenues.”)

²⁵ *Equitable*, 106 Pa. Commw at 259, 526 A.2d at 831.

²⁶ The Commonwealth Court has found that rates that are “unlawful” are by definition “unjust or unreasonable” within the meaning of Section 1312(a). *Duquesne Light Co. v. PUC*, 117 Pa. Commw. 28, 543 A.2d 196 (1988).

statute is to protect customers from paying money that they should not have been required to pay, not to punish a company for misconduct. The Commonwealth Court has consistently ruled that when a company chooses to litigate or otherwise interprets its legal obligations in a way that turns out to be wrong – regardless of whether those positions were taken in good faith – it assumes the risk that it will ultimately *not* be entitled to the revenue collected through the questionable rates and will have to provide a refund.²⁷ The outcome must be the same here. One Communications should be required to refund its overcollections.²⁸

Third, One Communications argues that requiring it to refund the amounts it has overcollected from its customers over the years by charging unlawful rates would not be “equitable.” (Exceptions at 29). But the Commonwealth Court has also already rejected this argument, ruling that any equitable considerations weigh in favor of a refund to the overcharged customers, not in favor of the company that knowingly chose to charge the rates that were subject to challenge. In response to a company’s argument that it would be inequitable to require it under Section 1312(a) to refund overcharges collected, the Commonwealth Court noted that “[w]ith regard to equitable considerations, we must observe that Duquesne made the choice to proceed with” the rate increases and that “[e]quity should not intervene where those seeking its aid are at

²⁷ *Pa. Gas & Water Co. v. PUC*, 470 A.2d 1066, 1073, 79 Pa. Commw. 416, 430 (Pa. Commw. Ct. 1984) (Because PG&W continued during appeal to charge rates that it knew were at risk of ultimate disapproval, “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.”) *See also id.*, 470 A.2d at 1071, 79 Pa. Commw. at 426 (“PG&W, of course, relied upon the decisions of this Court in collecting rates which were held ultimately to be in excess of those which the PUC adjudged just and reasonable. This reliance, unfortunately for PG&W, was misplaced and PG&W must now bear the burden of compliance with the PUC refund order.”)

²⁸ For the same reason, the argument that 66 Pa. C.S. § 3303 somehow strips this Commission of the authority to require a refund of a tariffed but unlawful rate is baseless. (Exceptions at 27). Section 3303 provides that “[no] public utility . . . shall be liable for any penalty or forfeiture on account of demanding, collecting, or receiving any rate for any service . . . when such rate, regulation, or practice is contained in a tariff properly filed with the commission.” But a refund order is not a penalty or forfeiture. It is simply returning to the customers what the company had no legal right to take from them. Section 3303 cannot be read to nullify the refund authority provided to the Commission under Section 1312. *See* 1 Pa. C.S. § 1921(a) (“Every statute shall be construed, if possible, to give effect to all its provisions.”)

least in part responsible for the circumstances which they now contend have produced an inequitable result.”²⁹ Here, too, One Communications is “at least in part responsible” for the fact that it has continued to charge Verizon and its other access customers unlawfully high rates and allowed the potential refund to grow to millions of dollars while opposing Verizon’s attempts to enforce the statute. One Communications should not be heard to claim equity as a defense to permit it to evade a refund order and keep the millions of dollars that it knew or should have known were being collected unlawfully and at its own peril. It would be inequitable to allow One Communications to profit from its stubborn refusal to take any action to comply with a statutory requirement of which it admittedly was well-aware.³⁰ One Communications similarly argues that the Commission should exercise its “sound discretion” not to require a refund, (Exceptions at 29), but One Communications has pointed to no legal or factual basis to refrain from ordering a refund here. While the Commission does have discretion with regard to the refund, it may not exercise its discretion arbitrarily or abuse that discretion, and so may not refuse to order a refund without a sound legal or factual basis to do so.³¹

Fourth, One Communications argues that the Commission should not require refunds back to the effective date of Section 3017(c) in November of 2004 because Verizon purportedly “sat on its rights” by refraining from filing a formal complaint against One Communications until April of 2007. (Exceptions at 29). This argument contradicts the plain language of Section 1312(a). The statute does not limit a customer’s entitlement to a refund to overcharges made on or after the date it files a formal complaint with the Commission. To the contrary, the statute contemplates that the refund will go back four years *before* the complaint was filed, stating that the Commission has the

²⁹ *Duquesne Light*, 117 Pa. Commw. at 36, 543 A.2d at 200.

³⁰ One Communications admits that it knew of Verizon’s claim that its rates violated Section 3017(c) since at least August of 2005, when it received a demand letter from Verizon. (See Complaint and Answer ¶ 32).

³¹ *In re Women's Homoeopathic Hospital*, 393 Pa. 313, 316, 142 A.2d 292, 294 (Pa. 1958) (such an abuse occurs when “the law is over-ridden or misapplied, or the judgment exercised is manifestly unreasonable.”)

“power and authority” to require a refund of any “excess paid” by a customer as a consequence of “unlawful” rates “within four years *prior to the date of the filing of the complaint.*” 66 Pa. C.S. § 1312(a) (emphasis added). One Communications has cited no authority to support its proposition that a customer must file a complaint immediately upon learning of its potential claim, or forfeit its right to the refund authorized by 66 Pa. C.S. § 1312(a). In fact, this interpretation would negate the authority provided to the Commission under that statute and discourage any informal efforts to obtain statutory compliance. Further, the record demonstrates that Verizon notified One Communications in writing in August of 2005 that its rates were in violation of Section 3017(c).³² Verizon should not be penalized for trying to avoid litigation and encouraging voluntary compliance with the law. If the Commission were to accept the argument that a customer forfeits its right to a refund under Section 1312(a) unless it immediately files a formal complaint as soon as it becomes aware of a potential claim, and that any attempts to resolve the matter informally are undertaken at the customer’s peril, then it will be encouraging frequent litigation and discouraging attempts to settle, contrary to its own preferred policy, which is “to encourage settlements.” *See* 52 Pa. Code § 5.231(a).

Finally, One Communications contends that it should be allowed to retain the money it collected from its access customers by charging rates that far exceed those of the ILEC because “[t]he 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.” (Exceptions at 30). One Communications relies on ALJ Colwell’s recommended decision in the CTSI case, which recommended against a refund on the ground that the Commission had not provided guidance on the interpretation of Section 3017(c). (*Id.*). But the Commission in its August 29, 2008 order explicitly rejected that portion of ALJ Colwell’s RD, holding that “the fact that the Commission

³² *See* Complaint and Answer, ¶ 32.

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; *see also* PTI 8/29/08 Order at 16). The Commission thus concluded that, notwithstanding the lack of prior Commission guidance, 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). Section 3017(c) was self-executing and binding on all CLECs when it became law, imposing specific obligations on CLECs that did not require the Commission or the access customers to take any further steps to implement the clear legislative mandate.

C. Reply to Exception 13: Section 1309 And Section 1312 Are Not Mutually Exclusive With Regard To Retroactive Refunds

One Communications argues that, with respect to refunds, Section 1312(a) “is not applicable” to this case and instead Section 1309(a) applies. But the Commission already concluded in the PTI and CTSI orders that the issue of rate refunds “shall be adjudicated under 66 Pa. C.S. §1312.”³³ In any event, even if the Commission concludes that Section 1309(a) also applies in this case, these provisions are not mutually exclusive with the provisions of Section 1312(a) and this argument provides no basis for the Commission to refrain from adopting the ALJ’s recommendation of a refund going back to the effective date of Section 3017 under Section 1312(a).

Section 1309 provides, in certain types of rate complaints, for a nine-month decision deadline, or alternatively for mandatory retroactivity of any rate reduction back to the date nine months after the complaint was filed. 66 Pa. C.S. § 1309. One Communications suggests that if the Commission found that Section 1309 applies to the case, then the Commission would be limited to

³³ PTI 8/29/08 Order at 18. One Communications’ argument is based on PTI’s petition for reconsideration, challenging the Commission’s conclusion that the issue of rate refunds “shall be adjudicated under 66 Pa. C.S. §1312.” PTI argued that the Commission should apply Section 1309 instead. The Commission never decided that petition for reconsideration because the parties were able to settle the case through the Commission’s mediation process.

requiring a refund from the date nine months after complaint filing, and could not also rely on Section 1312 to require a refund going back up to four years before the filing of the complaint. In other words, the applicability of Section 1309, in One Communications's view, would render Section 1312 inapplicable. One Communications's conclusion does not logically follow from its premise. Regardless of whether a case is subject to the nine month deadline of Section 1309, the Commission still *also* has the discretion under Section 1312 to require a refund with interest dating back up to four years prior to the filing of the complaint if it finds that the rates charges were unjust and unreasonable. Nothing in either section states that they are mutually exclusive.³⁴ The only consequence if this case is found to come under Section 1309 (as One Communications argues), is that the Commission should have decided it within nine months of complaint filing (by January 25, 2008) and any Commission order reducing the switched access rates of One Communications at a minimum "*shall* be retroactive to the expiration of [the] nine-month period." 66 Pa. C.S. § 1309(b) (retroactivity that is mandatory, not discretionary). But this does not mean that the Commission does not *also* have the "power and authority" to issue a discretionary refund under Section 1312 requiring One Communications to refund all overcollections from the effective date of the access rate cap.

D. Reply to Exception 11: The Refund Should Be Calculated Based On The Difference Between The Rates Charged By One Communications And The ILECs' Tariffed Rates

One Communications also argues that, rather than being required to refund the difference between the access rates it charged and the ILEC rates, it should be provided a remand to "re-run" its flawed and unreliable cost studies to calculate a new access rate that is higher than the ILEC's rate and to calculate a refund based on that rate. (Exceptions at 26). But for the reasons discussed

³⁴ See *Emporium Water Co. v. PUC*, 859 A.2d 20,23 (Pa. Commw. 2004) (recognizing that certain Public Utility Code sections, including Section 1309, address the requirement that rates be just and reasonable, while Section 1312 governs the issue of refunds where a rate was found not to be just and reasonable).

in response the other exceptions filed by One Communications, the ALJ correctly concluded that the cost studies were unreliable and fundamentally flawed and that One Communications had failed to demonstrate a cost justification to charge *any* rate higher than the ILEC rate. Accordingly, under the plain language of Section 3017(c) it was unlawful for One Communications to charge any rates “higher than those charged by the incumbent local exchange telecommunications company in the same service territory.” 66 Pa. C.S. § 3017(c). Under Section 1312(a), 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.” 66 Pa. C.S. § 1312(a). In this case, the “amount of any excess paid . . . in consequence of such unlawful collection” is the difference between the rate One Communications actually charged since Section 3017(c) went into effect and the “rates . . . charged by the incumbent local exchange telecommunications company in the same service territory.”

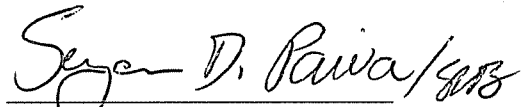
One Communications contends that Section 1309(a) does not permit the Commission to “pick[] Verizon’s rates as a proxy for [One Communications’] just and reasonable rates,” but rather requires the Commission to use its cost studies to calculate a new rate. (Exceptions at 25). But the Legislature already “picked” Verizon’s rates as a “proxy” for a just and reasonable switched access rate for all CLECs operating in Verizon’s territory when it enacted Section 3017(c). Section 1309(a) simply says that if the Commission finds existing rates to be unreasonable or unlawful, it “shall *determine* the just and reasonable rates.” 66 Pa. C.S. § 1309(a) (emphasis added). In this instance, Section 3017(c) already “determine[d]” that in the absence of valid cost justification, the only just and reasonable rate permitted by law is a rate no higher than that charged by the ILEC, and there is nothing more for the Commission to “determine.” In One Communications’ own words, Section 1309(a) must be read “*in pari materia*” with Section 3017(c). (Exceptions at 25). One Communications’s argument that it should be permitted to further prolong this litigation with a

remand to calculate a new rate higher than the ILEC's rate in order to calculate the refund is baseless and should be rejected.

CONCLUSION

The Commission should reject the meritless and unsupported exceptions to ALJ Cocheres's well-reasoned RD and should adopt the RD as its resolution of this case. This matter has been pending before the Commission for over three years, during which time One Communications continued to charge its unlawfully excessive switched access rates. Accordingly, the Commission should act promptly to issue a final order enforcing 66 Pa. C.S. § 3017(c) by requiring One Communications to reduce its access rates and requiring a refund with interest under 66 Pa. C.S. § 1312(a).

Respectfully submitted,



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