



COMMONWEALTH OF PENNSYLVANIA

June 22, 2020

E-FILED

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

Re: The United Telephone Company of Pennsylvania LLC d/b/a CenturyLink 2019 Annual Price Stability Index / Service Price Index Report & The United Telephone Company of Pennsylvania LLC d/b/a CenturyLink 2018 Annual Price Stability Index / Service Price Index Report / Docket Nos. R-2019-3012238 & R-2018-3004019

Dear Secretary Chiavetta:

Enclosed please find the Exceptions to the Recommended Decision issued June 1, 2020, on behalf of the Office of Small Business Advocate (“OSBA”), in the above-captioned proceedings.

Copies will be served on all known parties in these proceedings, as indicated on the attached Certificate of Service.

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

Sincerely,

/s/ Steven C. Gray

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

Enclosures

cc: Joseph Gillan
Commission’s Office of Special Assistants
Parties of Record

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The United Telephone Company of Pennsylvania LLC :
d/b/a CenturyLink 2018 Annual Price Stability : R-2018-3004019
Index/Service Price Index Report Filing :

The United Telephone Company of Pennsylvania LLC :
d/b/a CenturyLink 2019 Annual Price Stability : R-2019-3012238
Index/Service Price Index Report Filing :

**EXCEPTIONS TO THE RECOMMENDED DECISION
ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE**

**Steven C. Gray
Senior Supervising
Assistant Small Business Advocate
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**For: John R. Evans
Small Business Advocate**

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Date: June 22, 2020

I. Introduction

The Small Business Advocate is authorized and directed to represent the interests of the small business consumers of utility services in the Commonwealth of Pennsylvania under the provisions of the Small Business Advocate Act, Act 181 of 1988, 73 P.S. §§ 399.41 - 399.50. Pursuant to that statutory authority, on October 12, 2018, the Office of Small Business Advocate (“OSBA”) filed a notice of intervention in the 2018 annual Price Stability Plan (“PSP”) filing submitted by The United Telephone Company of Pennsylvania d/b/a CenturyLink (“CenturyLink” or the “Company”) to the Pennsylvania Public Utility Commission (“Commission”) on August 29, 2018.

On October 2, 2019, the OSBA also filed a notice of intervention in the 2019 annual PSP filing of CenturyLink, which the Company submitted to the Commission on August 30, 2019.

On November 20, 2019, ALJ Joel H. Cheskis and ALJ Benjamin J. Myers issued an Order consolidating CenturyLink’s 2018 PSI/SPI filing and CenturyLink’s 2019 PSI/SPI filing, along with the associated formal complaints filed by the Office of Consumer Advocate (“OCA”).

On January 23, 2020, CenturyLink, the OCA and the OSBA (collectively, the “Parties”) submitted a Joint Petition for Approval of Settlement Agreement (“*Settlement*”).

On January 29, 2020, the OSBA filed a Statement in Support of the *Settlement*.

On February 10, 2020, the ALJ’s notified the parties that they had identified problems with the *Settlement* and requested that a further prehearing conference be established.

On March 10, 2020, a further prehearing conference was held before ALJ Cheskis and ALJ Myers.

On April 14, 2020, the OSBA submitted the written statement of Joseph Gillan in response to the issues raised by the ALJ’s in the March 10th prehearing conference.

On June 2, 2020, the ALJ Cheskis and ALJ Myers issued their Recommended Decision (“RD”).

The OSBA submits the following Exceptions in response to the RD.

II. Exceptions

Exception No. 1: The ALJs erred by claiming that the *Settlement* was not responsive to Commission directives. (RD, at 16)

The ALJs cite to *Tax Cuts and Jobs Act of 2017 Petition to Rescind Secretarial Letter and Discontinue Temporary Stay*, Docket No. M-2018-2641242 (Order entered October 25, 2018) (“*October 2018 Order*”) to conclude that the *Settlement* is not responsive to Commission directives. RD, at 16-17.

The *October 2018 Order*’s Ordering Paragraphs state, as follows:

1. That the Petition to Rescind Secretarial Letter and Discontinue Temporary Stay filed by Consolidated Communications of Pennsylvania Company, Windstream Buffalo Valley, Inc., Windstream Conestoga, Inc., Windstream D&E, Inc., Windstream Pennsylvania, LLC, Bentleyville Communications Corporation, Hickory Telephone Company, Lackawaxen Telecommunications Services, Inc., Marianna & Scenery Hill Telephone Company, and The North Eastern Pennsylvania Telephone Company and the Pennsylvania Telephone Association is denied.
2. That the Office of Administrative Law Judge timely address Incumbent Local Exchange Carriers’ Petitions to Intervene, should the carriers choose, in the Formal Complaint proceedings pursuant to 52 Pa. Code §§ 5.71 5.76 and, as appropriate, consolidation pursuant to 52 Pa. Code § 5.81.
3. That Incumbent Local Exchange Carriers participating in the Formal Complaint proceedings shall continue to file Price Stability Index/Service Price Index filings pursuant to Chapter 30 and to each carrier’s Chapter 30 plan if a final decision has not been reached by the Office of Administrative Law Judge by May 1, 2019.

4. That the Secretary's Bureau shall serve a copy of the instant Order denying the Petition on all Incumbent Local Exchange Carriers, the Pennsylvania Telephone Association, the Office of Consumer Advocate, the Office of Small Business Advocate, the Office of Administrative Law Judge, and the Commission's Bureau of Investigation and Enforcement.

October 2018 Order, at 9-10. Thus, the ALJs can find no support for their assertion in the Ordering Paragraphs.

Instead, the ALJs cited to the following text in the *October 2018 Order*:

Since their initial approval in the years shortly after Chapter 30 became effective, the Commission has had no cause to review the impact of an event such as the TCJA, which, by magnitude and after more thorough review, may or may not be considered within the context of the applicable Chapter 30 price stability mechanisms. Notwithstanding the Joint Petitioners' contentions that they are, in essence, unfairly and unduly burdened, the pending Formal Complaint proceedings are a proper forum for this issue to be investigated and decided.

October 2018 Order, at 5 (footnote omitted). *See also*, RD, at 16-17. The ALJs continued with further citations to the October 2018 Order, as follows:

The Commission further noted that 'more importantly, the Commission's generic investigation will be aided by a fully-developed evidentiary record regarding exogenous events and other provisions in carriers' Chapter 30 plans.' *Id.* at 7 [*October 2018 Order*, at 7].

The Commission added that the proceedings involving the OCA's complaints against the ILECs' individual Chapter 30 filings 'are the appropriate mechanism to resolve whether any TCJA tax savings should be accounted for under ILECs' Chapter 30 plans' provisions regarding qualifying exogenous events' and that 'the decision ultimately rendered by OALJ, along with staff analysis of the non-litigated issues, will serve as guidance for the Commission to determine the overall impact of the TCJA on ILECs.' *Id.* at 8 [*October 2018 Order*, at 8].

RD, at 17.

Specifically, the ALJs stated, as follows:

As an initial matter, the settlement will be rejected because it fails to determine whether the passage of the TCJA is a qualifying exogenous event under CenturyLink's Chapter 30 plan. As noted above, the Commission specifically directed in the October 2018 Order that this issue be 'decided.' Yet, the settlement leaves this fundamental issue unresolved.

RD, at 17 (footnote omitted).

The ALJs are correct – the *Settlement* does avoid resolving this specific legal issue. The precursor issue involved in this (and every other) ILEC TCJA case is whether the TCJA is an exogenous event as defined by that ILEC's Alternative Regulation Plan. In this proceeding, the OSBA is certain that the TCJA is an exogenous event, while CenturyLink is certain that it is not. *See Joint Petition*, Appendix A, Paragraph 31. The OSBA and CenturyLink have agreed to disagree and bring this protracted litigation to a close. *Id.*, at Paragraph 32. While the *Settlement* does not address the question, the evidentiary statement of OSBA's witness assumed that the TCJA was, in fact, an exogenous event (*OSBA Statement of Joseph Gillan*, at 3, footnote 4) and demonstrated that the settlement was in the public interest *as though* this threshold issue was decided in favor of the OSBA. As such, in our view, this issue is no longer relevant to the immediate question as to whether the *Settlement* should be approved.

The OSBA respectfully submits that the Commission needs to clarify what it wants from the litigants in this and in every other ILEC TCJA case. The Parties, in good faith, submitted the *Settlement* in an attempt to settle a contentious legal issue that would involve additional, protracted litigation. If, however, the ALJs are correct, and the Commission wants the issue of whether the TCJA is an exogenous event to be fully litigated, this raises additional procedural and legal questions. Does the Commission intend for the litigated outcome of this CenturyLink proceeding to be precedent for all other ILEC TCJA cases on the issue of whether the TCJA is an exogenous event? Or does the Commission wish each ILEC TCJA case to be separately litigated

to determine whether the TCJA is an exogenous event under each, individual ILEC Amended Network Modernization Plan?

The OSBA signed the *Settlement* in an attempt to resolve this proceeding in a manner that was just, reasonable, and would end years-long litigation. In fact, the OSBA hoped that the *Settlement* would provide a template by which the dozens of remaining ILEC TCJA cases could be settled. Unfortunately, the ALJs did not agree with, and recommended rejection of, the *Settlement*. Nevertheless, the OSBA respectfully submits that it was not the intention of this Office to disregard the directions of the Commission in this matter. The OSBA simply could not convince CenturyLink to abandon its legal position, and we concluded that the practical outcome (which is no better than we could have achieved had CenturyLink agreed with our legal position) was more important than fighting over a legal question.

The OSBA respectfully submits that the Parties have done exactly what the Commission directed – to “investigate” and “resolve” how to address the effects of the Tax Cuts and Jobs Act of 2017 (“TCJA”) on the various Pennsylvania ILEC’s respective annual Chapter 30 Price Stability Index/Service Price Index filings. Simply put, the OSBA believes that the *Settlement* provides a workable solution to a difficult, litigious, problem.

Exception No. 2: The ALJs erred by claiming that the *Settlement* was not supported by substantial evidence to demonstrate that it was in the public interest. (RD, at 20)

In their RD, the ALJs state, as follows:

While the parties have submitted *substantial evidence* regarding the history and intricacies of telecommunication ratemaking *indicating how difficult it would be to make an accurate determination of the value of the impact of the passage of the TCJA on CenturyLink’s Chapter 30 plan*, there is no record evidence that supports the core agreement in the settlement – that CenturyLink agreeing to forgo banking its allowed revenue increases for its 2018, 2019 and 2020 PSI/SPI filings in response to the impact of the passage of TCJA is in the public interest.

RD, at 20 (emphasis added).

The instant proceeding presents a stark contrast to what occurred as a result of the Commission's October 25th Order with its *Temporary Rates Order*, Tax Cuts and Jobs Act of 2017, Docket No. M-2018-2641242 (Order entered May 17, 2018). The electric, natural gas, and water utilities addressed in the Temporary Rates Order are all subject to "traditional" ratemaking under Section 1308(d) of the Public Utility Code, 66 Pa. C.S. § 1308(d) (Voluntary changes in rates; General rate increases). Traditional base rates cases provide detailed, documented, and readily available financial information for the public utility in question. Thus, the Commission issued a Secretarial Letter, stating, as follows:

In order to determine any effects of the TCJA on the tax liabilities of Commission-regulated public utilities for 2018 and future years, the Commission requests that the utilities listed in Attachment A to this Secretarial Letter provide verified responses to the data requests in Attachment B in order to calculate, among other things, the net effect on income tax expense and rate base as a result of implementation of the TCJA. The Commission further requests that the utilities listed in Attachment A complete the template (Attachment C) in order to assist the Commission in its calculation of the effects on taxable income and customer rates related to the TCJA.

Secretarial Letter, Docket No. M-2018-2641242 (Issued February 12, 2018), at 2 (footnote omitted). The electric, natural gas, and water utilities, with their extensive financial data readily at hand, were able to quickly supply the detailed responses requested by the Commission. For example, PPL Electric was able to calculate the rate impact of the TCJA, adjust that calculation, and get final Commission approval – all in roughly four months. *See, e.g., Reconsideration Order*, Tax Cuts and Jobs Act – PPL Electric Utilities Corporation, Docket No. R 2018 3000775 (Order entered June 14, 2018).

In contrast to Commonwealth electric, natural gas, and water utilities, ILECs have been

under “alternative regulation” since Chapter 30 was originally enacted on July 8, 1993. As a result (and as ILECs often repeat), alternative regulation is to be a complete replacement for traditional rate base/rate of return regulation. Consequently, the detailed, readily available financial data is simply not as available for Commonwealth ILECs as it is for a “traditional rate base/rate of return” utility.

OSBA witness Joseph Gillan summarized the problem, as follows:

The purpose of my statement is to explain why the proposed settlement between United Telephone Company of Pennsylvania LLC (‘CenturyLink’), the Office of Consumer Advocate (‘OCA’) and the Office of the Small Business Advocate (‘OSBA’) is in the public interest. As I explain below, the regulatory tools needed to attribute a portion of the federal income tax reduction to jurisdictionally intrastate services – most particularly, a cost allocation mechanism to plausibly determine intrastate profits – have been discarded over the past 35+ years. As a result, there is no off-the-shelf methodology to determine what portion (if any) of a reduction in federal income tax liability should be allocated to intrastate Pennsylvania services.

* * *

In other words, the existing cost allocation rules– rules which are unambiguously fallacious in structure and result – cannot determine what portion, if any, of a reduction in federal income tax is jurisdictionally intrastate. Consequently, a threshold requirement to using any portion of a tax-related rate reduction to reduce intrastate rates would be the creation of a new cost allocation scheme.

OSBA Statement of Joseph Gillan, at 2, Paragraph 8 and at 5, Paragraph 20.

As Mr. Gillan fully explains in his Statement, the significant complicating factor in creating “substantial evidence” is the absence of reasonable cost allocation procedures that recognize contemporary technologies and market conditions. It is uniformly accepted that the FCC’s freeze of cost allocations in a world *prior* to the development of the internet and the dominance of broadband network deployment fundamentally distorts rate-of-return calculations

by allocating 75% of the cost of fiber loop facilities to the intrastate jurisdiction and 0% of the revenues from internet access they make possible. Moreover, the FCC froze other allocations in 2001 based on 2000 traffic patterns, and have consistently extended that freeze without reform, most recently extending this “interim freeze” until the end of 2024.

Therefore, it is difficult to construct the “substantial evidence” that would appear to satisfy the ALJs. Furthermore, it is simply impossible to take ILECs, which have been operating under alternative regulation for decades, and perform the type of TCJA impact analysis that was so thoroughly done with the Commonwealth’s traditional, rate-of-return, utilities.

Nevertheless, while Mr. Gillan (alongside each of the other witnesses) explained in detail why the traditional tools to allocate income tax savings among different services no longer exist in telecommunications, he also provided a good faith estimate of a reasonable allocation to determine whether the magnitude of the concession extracted from CenturyLink (the elimination of \$1.4 million in banked revenues that could be used to raise local rates) is relatively close to the value of the reduction in federal taxes (estimated at \$1.2 million). *OSBA Statement of Joseph Gillan*, at Paragraph 23, 24. In our view, Mr. Gillan’s analysis is substantial evidence – indeed, it is uncontroverted evidence – that the *Settlement* is in the public interest.

The RD takes Mr. Gillan’s good faith estimate and uses it as evidence that an analysis is possible. RD, at 23 (“Mr. Gillan’s analysis demonstrates that a quantifiable benefit to CenturyLink’s customers as a result of the passage of the TCJA could be estimated.”). So far so good, in that the ALJs understand that Mr. Gillan’s “analysis” is the best available evidence upon which to base a decision. Yet, the ALJs then ignore the more important point – that Mr. Gillan’s “analysis” demonstrates that the settlement is in the public interest. Specifically, it demonstrates that as proposed by the *Settlement*, CenturyLink agrees to give up more revenue than Mr.

Gillan's analysis indicates is justified.

The OSBA observes that the ALJs should have followed their argument to the logical conclusion. If Mr. Gillan's "analysis" is evidence that a reasonable allocation of tax benefits is possible, then it is rational to find that the conclusion of that analysis -- that the settlement is in the public interest -- is also reasonable.

Therefore, the OSBA respectfully submits that the *Settlement* is in the public interest, as set forth both in the *Settlement* itself, and as detailed in *OSBA Statement of Joseph Gillan*. Furthermore, both the *Settlement* and the *OSBA Statement of Joseph Gillan* provide sufficient and substantial evidentiary basis to approve the Settlement. Moreover, we have discussed the dilemma presented by the RD with Mr. Gillan (*i.e.*, its acceptance of Mr. Gillan's analysis that evidence *can be* produced, while simultaneously claiming that such evidence *has not been* produced) and he affirms that he has produced the best estimate available and that continued litigation is unlikely to produce a different approach.

III. Conclusion

Wherefore, the OSBA respectfully requests that the Commission adopt OSBA Exceptions Nos. 1 and 2, as set forth above, and approve the *Settlement* in its entirety.

Respectfully submitted,

/s/ Steven C. Gray

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Dated: June 22, 2020

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been served via email (*unless otherwise noted below*) upon the following persons, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

The Honorable Joel H. Cheskis
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