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June 22, 2020

Via Electronic Filing

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

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

The United Telephone Company of Pennsylvania LLC d/b/a CenturyLink 2018 Annual Price Stability Index/Service Price Index Report Filing – R-2019-3012238, et al.

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Pennsylvania Telephone Association's ("PTA") Exceptions to the Recommended Decision dated June 1, 2020 with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

A handwritten signature in blue ink that reads "Deanne M. O'Dell".

Deanne M. O'Dell, Esq.

DMO/lww

Enclosure

cc: Hon. Joel Cheskis, w/enc. (via email only)
Hon. Benjamin Myers w/enc. (via email only)
Cert of Service w/enc. (via email only)
Ra-OSA@pa.gov w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of PA Telephone Association's Exceptions upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Dated: June 22, 2020

Deanne M. O'Dell, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The United Telephone Company of	:	
Pennsylvania LLC d/b/a CenturyLink	:	R-2018-3004019
2018 Annual Price Stability Index/Service	:	
Price Index Report Filing	:	
Office of Consumer Advocate	:	
v.	:	
The United Telephone Company of	:	C-2018-3005400
Pennsylvania LLC d/b/a CenturyLink	:	
The United Telephone Company of	:	
Pennsylvania LLC d/b/a CenturyLink	:	R-2019-3012238
Annual Price Stability Index/Service	:	
Price Index Report Filing	:	
Office of Consumer Advocate	:	
v.	:	C-2019-3012876
The United Telephone Company	:	
of Pennsylvania LLC d/b/a CenturyLink	:	

**Exceptions of the
Pennsylvania Telephone Association**

Deanne M. O'Dell (Atty No. 81604)
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DATED: June 22, 2020

Table of Contents

I. Summary of Exceptions 1

II. Statement of the Case 6

III. PTA Members’ Interest 9

IV. History of Price Cap Regulation 10

 A. Generally 10

 B. Gross Domestic Product and the Price Index 12

 C. Exogenous Events 14

V. The TCJA 15

VI. Exceptions 15

 A. Exception 1 -- The Recommended Decision Incorrectly Rules That the TCJA Is an Exogenous Event and Must Be Reversed. 15

VII. The Commission Should Resolve This Issue and Not Defer to the OCA Complaints for Resolution 27

VIII. CONCLUSION 29

I. SUMMARY OF EXCEPTIONS

This proceeding focuses on the question of whether the price cap plans of various Pennsylvania Telephone Association (“PTA”) member companies, as approved by the Pennsylvania Public Utility Commission (“Commission”), require that they reduce rates in order to flow through the reduced corporate income taxes prompted by the federal Tax Cuts and Jobs Act (“TCJA”). Ten PTA member rural “incumbent”¹ local exchange companies (“RLECs”) operate under price caps.

The Commission suspended its own investigation to allow the Office of Consumer Advocate’s (“OCA”) litigation to develop the issue rather than pursue its own docket. There are now as many as three complaint cases per company (one per price cap filing) brought by the Office of Consumer Advocate on this issue. These proceedings are dormant and simply stacking up, except that the cases involving CenturyLink, LLC (“CenturyLink”) did move forward and an “all parties-all issues” settlement was filed jointly by CenturyLink, the OCA and the Office of Small Business Advocate (“OSBA”).

However, the Administrative Law Judges (“ALJ”) presiding in the CenturyLink case have advised the Commission to reject the settlement because it “fails to determine whether the passage of the TCJA is a qualifying exogenous event under CenturyLink’s Chapter 30 plan.” This rejection of the settlement is clearly bad policy (and law) and, hopefully, will not be accepted by the Commission.

¹ Quotes are placed around the term “incumbent” because the traditional companies have not been the incumbent for at least 20 years. Nor is the implication that incumbency provides an advantage a fair inference. The telecommunications revolution of the last twenty years has removed whatever advantage there was twenty-five years ago in 1996 from the prior 100 years of providing voice service.

Secondarily, the ALJs also ruled that the TCJA is an “exogenous event” such that the flow through of the TCJA tax saving is required. It is from this ruling that the PTA and its member companies seek to intervene and file these Exceptions.

Simply stated, the unsupported assumption made by the Recommended Decision in reaching this conclusion is just plain wrong. In actuality, income taxes imposed on all companies in the US economy are reflected in the Gross Domestic Product (“GDP”) of the country.

The GDP measure includes taxes on income. Taxes represent an element of the cost of goods and services sold in the United States. Any nationwide change in federal income tax rates will have an effect on the cost of all goods and services as measured by the GDP. Moreover, tax expense will be imbedded in the prices paid for durable investments by private businesses and households.

Tax expense is not an exogenous event. No hearing on the OCA’s complaint is needed to reach this conclusion. Three compelling sources: (1) a Federal Communications Commission (“FCC”) decision made when developing price caps; (2) a directly on point ruling of this Commission in the first approved price cap plan; and (3) the publicly available material from the federal agency that calculates GDP; all unequivocally confirm that taxes are reflected in the GDP and changes in the income tax calculation should not be treated as an event outside of the basic GDP-based price cap formula. The FCC, in 1990, found “that tax law changes are presumptively endogenous....” This Commission shortly thereafter, in 1994, ruled that “revenue adjustments for events such as ... increases in corporate or other tax rates ... is unreasonable because very few conditions are not reflected in the [GDP-PI-based] price cap formula ... which we adopt...”

The central idea behind a price cap methodology is to control the price a company charges by defining allowable revenue based upon a national measure of overall corporate productivity, rather setting revenues based upon the firm's incurred costs, plus a return-on-investment. Rather, the price cap formula establishes next year's allowable revenues based upon the most recent annual change in GDP multiplied by the company's revenues last year. The Gross Domestic Product – Price Index (“GDP-PI is that measure of year-over-year changes in the GDP. GDP remains an effective measure of a firm's productivity potential, so long as the industry to which it belongs is accurately reflected in the national average results (less the offset).

To recognize those instances where regulators might shift revenues or require the incurrence of additional costs, the Commission created three limited “exogenous” exceptions to the basic GDP-PI formula. These “exogenous events” were narrowly drawn by the Commission to capture unique revenue changes that might be created by the RLECs' regulation and, therefore, differ from an overall competitive economy and not be reflected in the GDP. Indeed, they are specifically caveated by the phrase to the “extent not captured in GDP-PI” or “not reflected in the overall inflation factor as measured by GDP-PI.”²

In doing so, the Commission agreed overwhelmingly with the OCA position that “strongly favors severe limitations on the potential passthrough of exogenous costs to small LEC ratepayers.” The language, according to its intent, is narrow and is intended to be read as such. Subsequent Chapter 30 Plan approvals were consistent with this background and cautiously drawn. There was no attempt to reargue the Commission's prior ruling that changes in overall tax rates are not a cognizable exogenous event.

² Except for the category of FCC revenue shifts, which clearly would never be reflected in the GDP calculations.

In practice, exogenous events have proven to be black swans. Despite all of the changes occurring over the last two decades, there has not been one single exogenous event for which recovery has been approved. This underscores the limited and narrow application of this aspect of price cap regulation as was intended by the OCA and the Commission. In the 1999 “Global Order” the Commission stated that contribution to the Universal Service Fund would not be considered an exogenous event. When WorldCom and Global Crossing declared bankruptcy, costing the RLECs millions in lost access revenues, no special, make-up recovery of the loss was allowed. More recently, when intrastate access charges were reduced by the FCC’s Transformation Order, the Commission stated that it would allow filings to recover lost revenues as an exogenous event, no company ever did.

The reality is that local service prices are set by a highly competitive marketplace. There has been no room to increase rates as evidenced by the fact that most RLECs have consistently maintained “banks” (i.e., accumulated, unused allowable rate increases, previously approved by the Commission, but not taken) they are precluded by the competitive marketplace to collect the higher prices.

No different, except perhaps in magnitude, than the current tax cuts under the TCJA, the “Bush tax cuts” of 2001 and 2003, which continued under President Obama, also reduced corporate taxes. There was no Commission inquiry or OCA complaint, however, of the price cap companies raising the issue of a reduction in rates.

For all of the foregoing reasons, the Recommended Decision’s pronouncement that the TCJA is an exogenous event cannot be plausibly maintained. Were the Commission to ignore the clear language of the Plans, the result would be a double counting of the financial impact on carriers—once through the lower GDP-PI and second through the change based on

each company's specific tax circumstances. This is the outcome that the FCC warned of in its original orders creating the price cap regime subsequently adopted by this Commission.

Finally, the PTA urges the Commission to weigh in now on the exogenous event issue. As noted previously, the Commission may rule as a matter of law by relying upon its own compelling precedent and a plain meaning review of the terms of the plans that it has previously approved. Once this essential question is decided, the parties can decide whether to proceed to hearings, but without that guidance they are floundering.

As the RLECs and the PTA described in their Petition for Recission, the Commission's decision to temporarily stay its own examination of any potential TCJA exogenous effect would unduly burden and delay resolution. Unfortunately, this is precisely what has happened.

Now, two years later, we find ourselves collectively, no closer to resolution as the unprosecuted complaints are gathering dust. A settlement has been unfairly rejected, because the ALJs believe that a settlement will not be acceptable to the Commission. But the Commission cannot, nor should it, force parties to litigate, if they have no desire to do so.

To the extent the Commission feels it does not yet have enough sufficient input to address the exogenous event question, it has several options at its disposal for gathering the information necessary to render an informed, final decision; none of which requires staying its own inquiry at this docket while deferring to the complaint proceedings and subjecting the RLECs (and the OCA and OALJ for that matter) to needless, piecemeal litigation.

Ultimately, a thorough and complete record from all stakeholders - and not a limited record developed through the adjudication of a handful of complaints - will best inform the Commission in reaching a final determination.

II. STATEMENT OF THE CASE

By Secretarial Letter issued March 2, 2018 ("March 2 Secretarial Letter"), the Commission initiated an investigation to determine the effects of the federal TCJA on Pennsylvania telecommunications carriers for 2018 and future years. The Secretarial Letter directed data requests to Pennsylvania's RLECs concerning the effects of the TCJA, including, *inter alia*, whether the TCJA qualified as a potential "exogenous event" under the RLECs' Commission-approved Chapter 30 plans.

Subsequently, the OCA filed complaints against various RLECs' annual Chapter 30 Price Stability Index/Service Price Index ("PSI/SPI") reports alleging that the filings improperly failed to recognize the effect of the TCJA upon them. The complaints began with the RLECs' 2018 PSI/SPI Reports and have continued as an annual event since that time as the OCA seeks to preserve its annually renewed claim to a rate reduction under the plans.³ The OCA has yet to state the basis of its legal position on the question of whether the RLECs are obligated to reflect the tax change in rates.

On August 9, 2018, the Commission *sua sponte* issued another Secretarial Letter which suspended its own investigation, as follows:

Since the issue of whether any TCJA tax savings should be accounted for under these ILECs' Chapter 30 forms of alternative regulation is presently in litigation before OALJ, the Commission will temporarily stay its own inquiry undertaken in [its] March 2018 Secretarial Letter pending the parties' full litigation and the Commission's final adjudication of these ten complaints. In this fashion, the Commission will avoid any prejudgment of any issues that remain pending before it and will have the benefit of a fully developed

³ The Commission has accepted the RLECs' annual PSI/SPI filings as being procedurally consistent with the RLECs' corresponding Chapter 30 plans and permitted them to go into effect subject to the adjudication of the OCA's Formal Complaints.

evidentiary record, the parties' briefs and the presiding ALJ's recommended decision before any final decision is rendered.

Seeking to reverse this ruling, the RLECs and the PTA filed a Petition on August 24, 2018 asking the Commission to resolve the underlying issues in a non-litigation setting on the grounds that the stay unduly burdens the ten RLECs that now must individually litigate a single issue which has an industry-wide impact in ten different cases.⁴ The affected RLECs “will be bound by the record developed in those proceedings and the actions taken by the Commission.” Instead, the Joint Petitioners supported the reinstatement of the Commission’s investigation to obtain a unified ruling that would apply to all of the RLECs, while the complaint cases were stayed pending a final determination by the Commission.⁵

By Order entered October 25, 2018, the Commission denied the Petition to Rescind and determined that the OCA’s pending PSI/SPI complaint cases were the proper forum for resolution of the exogenous event question. The Commission affirmed the stay of its own investigation and deferred to the OCA litigation. “The Commission disagrees with the Joint Petitioners’ averment that allowing other RLECs to intervene in the Formal Complaint proceedings would be insufficient to cure due process concerns raised in the Petition.”⁶

⁴ Petition to Rescind Secretarial Letter and Discontinue Temporary Stay filed August 24, 2018 (“Petition to Rescind”) at ¶ 13.

⁵ This outcome had already been stipulated by all parties to the OCA’s Complaint cases prior to the issuance of the August 9, 2018 Secretarial Letter. (“On June 22, 2018, the parties to the complaint proceedings filed a Joint Procedural Stipulation which stayed the proceedings pending the completion of discovery and adopted certain modifications to the procedural schedule. In entering the stipulation, the parties specifically retained all substantive and procedural rights, including the ability to seek a further stay of the proceedings pending the outcome of the Commission’s investigation at Docket No. M-2018-2641242.” Petition ¶ 17).

⁶ Order at 7-8. The Commission acknowledged that it was inviting multiple interventions and the associated expense: “While we note the Joint Petitioners’ contention that multiple interventions may substantially expand the record in those proceedings and complicate the resolution, the Commission finds that these proceedings 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.” *Id.* at 8

Since that ruling, the OCA complaint cases remained pending, basically dormant except for discovery one year and one half ago, and not been active,⁷ except that each annual price cap filing starting in 2018 has drawn another OCA complaint so that affirmative relief to the OCA could stretch back several years.

However, the cases involving CenturyLink did move forward. On January 23, 2020, CenturyLink, OCA and OSBA submitted a Joint Petition for Approval of Settlement Agreement to the presiding ALJs. Under the settlement, CenturyLink has agreed to forego \$912,511 of potential rate increase captured in its cumulative banked increases and over \$400 million of estimated future increases, also derived from its price cap plan.

Despite the Commission's policy favoring settlements, the ALJs presiding in that case have now recommended that the Commission reject the settlement. The Recommended Decision dated June 1, 2020 finds that the settlement "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, in the October 2018 Order, specifically directed that this issue be 'decided.'"⁸ No evidentiary record was developed and the parties did not argue over whether the TCJA constituted an exogenous event. Simply stated, the settlement is rejected by the Recommended Decision because the parties were not supposed to settle.

This rejection of the settlement is clearly bad policy (and law) and, hopefully, will not be accepted by the Commission. Indeed, it is the Commission's policy to encourage settlement where possible. Here, there was an "all parties – all issues" settlement. By their

⁷ For 2018 complaints, see Office of Consumer Advocate v. Consolidated Communications of Pennsylvania Company et al., Docket Nos. C-2018-3001863 (CCPA), C-2018-3001865 (WBV), C-2018-3001864 (WC), C-2018-3001870 (WDE), C-20183001871 (WPA), C-2018-3001916 (BCC), C-2018-3001917 (HTC), C-2018-3001913 (LTS), C-2018-3001912 (M&SH), and C-2018-3001915 (NEP).

⁸ Recommended Decision at 17.

nature, settlements do not address issues rather they stipulate the outcome without drawing out the debate or seeking resolution of substantive legal questions, as the ALJs believe the Commission's October 2018 Order required.

Compounding issues, the Recommended Decision then rules on the substance, finding that the TCJA is an exogenous event.

Although the parties never articulated their respective disagreements as to why the TCJA does or does not qualify as an exogenous event under CenturyLink's Chapter 30 plan, we believe it is clear that the TCJA is a subsequent federal legislative change that affects CenturyLink's revenues or expenses that is not captured in GDP-PI and, therefore, fits squarely within the definition of an exogenous event.

There are citations to CenturyLink's settlement witness that are used by the ALJs to argue that CenturyLink did not meet its burden of proof. As a settling party, however, CenturyLink's "burden" was to support the settlement, but this is ignored by the ALJs, who conclude that:

As a result, no determination can be made that the impact of the TCJA is not an exogenous event. We find that the passage of the TCJA is an exogenous event under the terms of CenturyLink's Commission-approved Chapter 30 plan.⁹

It is from this ruling that the PTA and its member companies except.

III. PTA MEMBERS' INTEREST

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

⁹ Recommended Decision at 19. Notably, it is the OCA, as the complainant, that has the burden of proof and they did not litigate their position either.

Telephone Company, and The North-Eastern Pennsylvania Telephone Company, are each a rural incumbent local exchange carrier regulated under a Commission-approved price cap form of regulation. They are all members of the PTA.¹⁰ They have all been served the same complaint by the OCA, in some cases repeated times, since issuance of the Commission's Secretarial Letter dated August 9, 2018.

The Recommended Decision recognizes that the issue of whether the TCJA qualifies as an exogenous event for CenturyLink "may also be relevant to other Pennsylvania local exchange carriers as well."¹¹ In this, there is no question. The PTA member companies' interests will be tangibly and directly impacted by any decision regarding exogenous event determination and rate reduction recommendations.

Simultaneously with the submission of these Exceptions, the PTA has filed a Petition to Intervene or, in the Alternative, Motion for Leave to Accept Exceptions in this proceeding involving CenturyLink, as was recognized to be their right in the Commission's October 25, 2018 Order. The PTA and its member companies have a clear vested interest in the substantive outcome of the CenturyLink proceeding and are prejudiced by the ALJ's ruling on the merits.

IV. HISTORY OF PRICE CAP REGULATION

A. Generally

The genesis of price cap regulation within the telecommunications industry lies with the Federal Telecommunications Commission ("FCC") in the early 1990's. Prior to that

¹⁰ CenturyLink is also a member of the PTA.

¹¹ Recommended Decision at 26.

time, wireline interstate telephone providers were regulated under rate base/rate-of-return in both the state and federal jurisdictions.

On October 4, 1990, the FCC issued the Price Cap Order that adopted an incentive-based system of regulation that was designed to “advance the public interest goals of just, reasonable, and nondiscriminatory rates, as well as a communications system that offers innovative, high quality services.”¹² Prior to that time, as the FCC noted, rate-of-return regulated firms “can pass any cost along to” their customers, rate of return carriers have little incentive to pursue innovative cost-reductions.”¹³

Besides improving the regulated firms’ incentives, price-cap regulation eliminates the need for the costly, cumbersome accounting rules inherent in the rate-of-return method. It also shields consumers from the adverse effects of competition in a rate base/rate of return world where lowered sales often mean increased prices on the remaining sales customers. Finally, rate-of-return creates incentives where firms can gain competitive advantage by shifting costs away from unregulated, competitive activities and onto regulated services where price elasticity of demand is less pronounced. The FCC’s regulatory shift, at first, was mandatory only for the Bell companies and GTE, with other local exchange carriers entitled to remain under rate-of-return regulation at their option.¹⁴

The addition of Chapter 30 to the Public Utility Code, passed by the Pennsylvania General Assembly in 1994,¹⁵ specifically encouraged companies to file a price cap form of

¹² *Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order*, 5 FCC Rcd 6786 (1990) (FCC Price Cap Order); See also, *National Rural Telecom Ass’n v. FCC*, 988 F.2d 174, 1993 U.S. App. LEXIS 6037, 300 U.S. App. D.C. 226, 72 Rad. Reg. 2d (P & F) 452

¹³ *Policy & Rules Concerning Rates for Dominant Carriers*, 3 F.C.C. Rcd. 3195 (1988)

¹⁴ *Policy & Rules Concerning Rates for Dominant Carriers*, 6 F.C.C. Rcd. 2637 ¶ 10 (1991)

¹⁵ In July 1993, Chapter 30 of the Public Utility Code was signed into law. 66 Pa. C.S. §§ 3001-3009. Among other things, Chapter 30 authorized local exchange carriers (LECs) to petition the Commission for approval of

regulation. The price cap form of regulation is not based upon cost recovery but rather changes allowable revenues based upon a formula based upon the gross domestic product price index (GDP-PI).¹⁶ The GDP-PI measures changes in the prices of goods and services produced in the United States. Under price cap theory, telecommunications company productivity can be expected to exceed the national average and many plans have a productivity offset included.

The central idea behind a price cap methodology is to control the price a company charges, rather than its earnings. The idea of an offset is to capture industry-specific price deflation (e.g., the cost of an internet protocol-based switch is less than the older switches being replaced) or as a spur to the company to wring greater efficiencies from its operations.

There are many advantages to this form of regulation over traditional rate base/rate of return. Revenue regulation connects the end user's tariffed price change to the rate of general economic inflation. Companies are not allowed to attempt to flow through competitive losses. Consumer prices are predictable in a competitive market. Difficult allocation and separation issues are avoided. In the mid-1990's telecommunication market, this was a reasonable transition from the incumbent monopoly to a competitive market.

B. Gross Domestic Product and the Price Index

Price cap plans have universally employed the gross domestic product price index as the appropriate benchmark to measure productivity. The GDP-PI is a measure defined and maintained by the Federal Bureau of Economic Analysis, U.S. Department of Commerce

an alternative form of regulation (Chapter 30 Plans) that, if approved, would replace traditional rate base/rate-of-return regulation. Chapter 30 was reenacted in 2004 after sunset in 2003.

¹⁶ *A Guide to Utility Ratemaking* by Cawley and Kennard at 161-163.
http://www.puc.pa.gov/General/publications_reports/pdf/Ratemaking_Guide2018.pdf

(“BEA”).¹⁷ The GDP is a market value measure of the total goods, services, and structures produced by labor and property located within the United States in a particular period.

GDP is one of the most comprehensive and closely watched economic statistics: It is used by the White House and Congress to prepare the Federal budget, by the Federal Reserve to formulate monetary policy, by Wall Street as an indicator of economic activity, and by the business community to prepare forecasts of economic performance that provide the basis for production, investment, and employment planning.¹⁸

In turn, the GDP-Price Index is used as an indicator for the gross change (i.e., inflation) in prices within the U.S. economy between one time frame and another.¹⁹

The GDP calculation already includes taxes on income.²⁰ Taxes represent an element of the cost of goods and services sold in the U.S. economy for almost all goods and services purchased. Over the last 70 years, corporate income taxes as a percentage of GDP has ranged from 6% to its current level of approximately 1.5%.²¹

As previously found by both the FCC and this Commission, any nationwide change in federal income tax rates will have an effect on the cost of goods and services, whether purchased by individuals, by businesses or by federal, state and local governments, as measured by GDP-PI. Moreover, tax expense will be imbedded in the prices paid for durable investments by private businesses and households.

¹⁷ <https://www.bea.gov/>.

¹⁸ Measuring the Economy - A Primer on GDP and the National Income and Product Accounts, BEA (2015). <https://www.bea.gov/resources/methodologies/measuring-the-economy>; See also, <file:///C:/Users/Norm/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/4NQYYCAT/GDP-Education-by-BEA.pdf>.

¹⁹ “The gross domestic product price index measures changes in prices paid for goods and services produced in the United States, including those exported to other countries.” <https://www.bea.gov/resources/learning-center/what-to-know-prices-inflation>.

²⁰ *Id.* at 10; See also Concepts and Methods of the U.S. National Income and Product Accounts (2017), <https://www.bea.gov/resources/learning-center/what-to-know-prices-inflation>.

²¹ <https://www.taxpolicycenter.org/statistics/corporate-income-tax-share-gdp-1946-2018>.

C. **Exogenous Events.**

GDP is an effective measure of a firm's productivity so long as the industry to which it applies is accurately reflected in the national average results (plus or minus the productivity offset). To the extent there is a deviation outside of management's control that are not captured in the GDP, specific circumstances can be defined that allow revenues to be adjusted outside of the GDP-PI formula. Under the Plans, exogenous events are "positive or negative changes in [the Company's] revenues or expenses" that are different from the overall economy as reflected in the GDP-PI.

All three exogenous events recognized in Pennsylvania are driven by regulatory uncertainty and designed to capture certain potential events that are specific to the telecommunication industry; principally changes created by governmental regulation of them.

- The **first** maintains revenue neutrality by allowing special recovery **in the event that the FCC shifts revenues** that have traditionally been federally tariffed (such as access charges or subscriber line charges) but only "where interstate revenues actually change."
- The **second** exception to the GDP-PI formula is a hedge **against "regulatory and legislative changes** (state and federal) which affect revenues or expenses, **to the extent not captured in GDP-PI"** by allowing a revenue increase (or decrease depending).
- The **third** and final exogenous event captures "**[u]nique changes in the telephone industry which are not reflected in the overall inflation factor as measured by GDP-PI.**"

Each of these exogenous events is designed to capture events unique to the regulated local exchange carriers.

V. THE TCJA

On December 22, 2017, the “Tax Cuts and Jobs Act of 2017” (Public Law No. 115-97) was signed into law by President Trump. Pursuant to the TCJA, which became effective on January 1, 2018, various provisions of the Tax Reform Act of 1986 were repealed or amended. Particularly notable was a substantial tax reduction that decreased the tax rate applicable for all businesses.

The Commission subsequently required seventeen jurisdictional electric, natural gas, water and wastewater utilities to implement a “negative surcharge” or monthly credit on customer bills totaling more than \$320 million per year as a result of the decrease in federal corporate tax rate and other tax changes under the TCJA. These companies’ tariffed rates are all determined by traditional, “cost plus” regulatory methods (i.e., rate base/rate-of-return) and the tax reductions were properly flowed through to customers.

The circumstances and rules are not the same for price cap carriers, however, and the Recommended Decision errs in remanding and forcing issue resolution for price cap carriers that would achieve “similar benefits.”²²

VI. EXCEPTIONS

A. Exception 1 -- The Recommended Decision Incorrectly Rules That the TCJA Is an Exogenous Event and Must Be Reversed.

Chapter 30 ushered in an entirely different form of regulation which superseded traditional monopoly rate setting. The price cap RLECs are not regulated based on costs or earnings levels. Nor are they guaranteed any rate-of-return. Under Chapter 30, each

²² Recommended Decision at 22.

company is entitled to an alternative form of regulation under the terms of that statute and its Commission-approved alternative regulation plan.

Chapter 30 expressly supersedes most of the provisions of Chapter 13, those sections of the Public Utility Codes that provide the statutory basis for the Commission to regulate public utilities based on cost and earnings.²³ Under alternative regulation, the Commission no longer presides over rate cases, does not review earnings, and does not guarantee a rate-of-return.

The scope of the Commission regulation does not extend to competitive services. Chapter 30 provides that “[t]he commission may not fix or prescribe the rates, tolls, charges, rate structures, rate base, rate of return or earnings of competitive services or otherwise regulate competitive services.”²⁴ As long as the services are not priced below cost, “a local exchange telecommunications company may price competitive services at the company’s discretion.”²⁵

The Commission actually rate regulates only a small portion of an RLEC’s revenue stream. These consist of stand-alone basic, intrastate voice service to residential and small business customers.²⁶ Internet services, wireless, VoIP enabled, and bundled services, among others, are not within this Commission’s jurisdiction.

²³ “The terms of a local exchange telecommunications company’s alternative form of regulation and network modernization plans shall govern the regulation of the local exchange telecommunications company and, consistent with the provisions of this chapter, shall supersede any conflicting provisions of this title or other laws of this commonwealth and shall specifically supersede all provisions of Chapter 13 (relating to rates and rate making) other than sections 1301 (relating to rates to be just and reasonable), 1302 (relating to tariffs; filing and inspection), 1303 (relating to adherence to tariffs), 1304 (relating to discrimination in rates), 1305 (relating to advance payment of rates; interest on deposits), 1309 (relating to rates fixed on complaint; investigation of costs of production) and 1312 (relating to refunds).” 66 Pa. C.S. § 3019 (h)

²⁴ 66 Pa. C.S. § 3019(g).

²⁵ 66 Pa. C.S. § 3016(e).

²⁶ Terminating intrastate switched access services were considered “protected,” but have since been federally jurisdictionalized and the rates are being reduced to zero and eliminated under FCC rules.

The firms providing this service are often multi-jurisdictional and, most certainly, multi-service. One of the reasons that price caps became popular was the avoidance of complex cost allocations. Many of the PTA companies here are part of a larger, diverse corporate entity and pay taxes on a consolidated basis. So that, if one wanted to isolate a portion of the total company tax bill attributable to an individual LEC in a particular state, an allocation would have to be designed on some basis, presumably income, to calculate that company's proportionate tax liability from the consolidated return.²⁷ Most RLECs are providing numerous services within their company structure, so costs would be apportioned among the various services then to determine income. The local service piece would somehow be extracted from this to determine income and tax effect. The difficulty of doing so should be clear.

The avoidance of complex and controversial cost allocation exercises was a primary reason for converting to price cap regulation in the first place:

Another important reason for exploring incentive regulation for LECs concerns cost allocations and pricing. Previous orders in this docket have articulated the pressures that a rate of return system places on cost allocation systems. In response to these pressures, the Commission has over time built up a complex system of cost allocation rules that track costs from their inception in the corporate books of account through their allocation to the various telecommunications services LECs provide. Indeed, given the incentives rate of return creates for companies to misallocate costs, thereby threatening our policy of ensuring that rates are based on their fully distributed costs, we spend a great deal of our regulatory resources policing our cost allocation systems.²⁸

Indeed, devising a system of TCJA income tax cost allocation is completely antithetical to price cap regulation and the intended effect on both the regulator and the

²⁷ Remember the RLECs do not have an income statement for regulated operations, so they cannot readily determine the tax liability of the firm's regulated operations.

²⁸ FCC Price Cap Order at ¶ 34.

regulated. As the ALJs' noted from the parties record testimony in support of the settlement:²⁹

Mr. Gillan [CentryLink] added that 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 and attempting to create a special, single use cost allocation methodology for this one purpose is impractical. Similar to Dr. Loube [OCA], Mr. Gillan then provided extensive detail regarding the history of cost allocation methods and changes in telecommunications technology.³⁰

The Recommended Decision, however, summarily dismisses these witnesses' testimony in a confusing manner: "The facts relied on by the expert witnesses ... do not develop the evidentiary record in support of [the settlement]."³¹ Of course, testified-to-facts **are** the evidentiary record. Perhaps the ALJs intended to simply dismiss the parties' expert claims as unconvincing or irrelevant. That, however, is different from a finding of no evidence. If that's what was meant, it should have been stated.

The FCC's Orders that created price cap regulation in the telecommunications space recognized exogenous events as a variable to the GDP-PI formula:

Exogenous costs are in general those costs that are triggered by administrative, legislative or judicial action beyond the control of the carriers. ... These costs are created by such events as separations changes; USOA amendments; changes in transitional and long term support; the expiration of amortizations; and the reallocation of regulated and nonregulated costs.³²

The FCC expressly excluded tax law changes from its list of permissible exogenous events:

²⁹ CenturyLink was not alone in its belief that a fair and accurate allocation methodology could be devised. "The OCA noted that litigation of the 2018 PSI/SPI and 2019 PSI/SPI would have involved complex issues of fact pertaining to financial and tax records and jurisdictional allocations... Dr. Loube added that quantification and allocation of savings arising from the TCJA is complicated and would consume significant resources..."; "The OSBA also noted that there was an absence of reasonable cost allocation procedures in light of contemporary technologies and market conditions." Recommended Decision at 14-15.

³⁰ Recommended Decision at 15-16.

³¹ Recommended Decision at 21.

³² FCC Price Cap Order at ¶ 166.

We find that tax law changes are **presumptively endogenous**,^[33] despite the arguments of a number of LECs that the GNP-PI will not reflect the costs of tax law changes. As explained in the Second Further Notice, the GNP-PI^[34] is **a very broad-based price index that measures changes in all costs -- including tax costs -- that affect prices in the economy**. To grant LECs exogenous treatment of tax changes that are already accounted for in the GNP-PI **would be to "double-count"** their effect, a result that is inconsistent with the goals of price cap regulation to encourage cost based rates. Indeed, we have tried to avoid the possibility [sic] of such "double-counting" in our treatment of tax law changes for AT&T by presuming such tax changes to be endogenous.³⁵

Shortly thereafter, **this Commission made the same ruling** to exclude generally applicable tax changes from the category of exogenous events in its first price cap filing. Bell Atlantic – Pennsylvania, Inc. (now Verizon), the largest incumbent local exchange company (“ILEC”)³⁶ in Pennsylvania, filed the first Petition³⁶ for Approval of an Alternative Regulation Plan, which the Commission resolved by Order dated June 28, 1994.³⁷

During that proceeding, the Pennsylvania Cable Television Association (“PCTA,” now BCAP) opposed exogenous changes generally and flow throughs of increases or decreases in taxes specifically:

... very few conditions are not reflected in [the] price cap formula (GDP-PI minus 5.29%). **One-time changes in corporate tax rates, payroll tax rates,**

³³ The opposite of exogenous. “Endogenous” is a biology term that basically means included or intrinsic. <https://www.merriam-webster.com/dictionary/endogenous> “**1:** growing or produced by growth from deep tissue // endogenous plant roots **2 a:** caused by factors inside the organism or system // suffered from endogenous depression // endogenous business cycles **b:** produced or synthesized within the organism or system // an endogenous hormone.

³⁴ The FCC’s subsequent change from GNP-PI to GDP-PI did not affect this ruling. *Price Cap Performance Review for Local Exchange Carriers Treatment of Operator Services Under Price Cap Regulation Revisions to Price Cap Rules for AT&T*, Second Further Notice of Proposed Rulemaking, CC Docket No. 94-1 CC Docket No. 93-124 CC Docket No. 93-19, Released September 20, 1995 (“In the LEC Price Cap Order, we used the Gross National Product Price Index (GNP-PI) as the inflation measure. LEC Price Cap Order, 5 FCC Rcd at 6792-93 (para. 50). In the First Report and Order, we replaced our inflation measure with the Gross Domestic Product Price Index (GDPPI). First Report and Order, paras. 347-51.”).

³⁵ *Id.* at ¶ 176 (Emphasis added).

³⁶ Verizon is classified as a “non-rural” local exchange company under Chapter 30.

³⁷ *Bell Atlantic - Pennsylvania, Inc.'s Petition and Plan for Alternative Form of Regulation Under Chapter 30*, Docket Nos. P-00930715; P-00930715C001 and P-00930715C002, 1994 Pa. PUC LEXIS 142 (Opinion and Order entered June 28, 1994) (“1994 Bell Order”).

local property taxes, or any like cost elements affect firms throughout the economy. Cost impacts arising from exogenous changes, therefore are captured in the GDP-PI inflation index. PCTA St. 1 (Selwyn) at 40. Costs unique to a competitive firm are often not directly recoverable through the prices of its product or service. Given that the PSM is intended, in part, to replicate the 'competitive result,' therefore, the exogenous costs identified by the Bell Plan should not be recoverable through a PSM.³⁸

The OCA also opposed the recognition of any exogenous events. **The Commission adopted BCAP's proposed exogenous events language, explaining** as follows:

Bell's Plan gives it the discretion to advocate for a broad range of exogenous pass-throughs to noncompetitive service ratepayers. This violates the statutory requirement that the Plan ensure just and reasonable rates for noncompetitive services. Also, it violates the requirement that the economic risk of incentive regulation not be borne by noncompetitive service customers. 66 Pa. C.S. § 3004(d)(2) & (14).

Bell's ability to initiate revenue adjustments for events such as government actions, increases in utility rates, or **increases in corporate or other tax rates** applying to it, outside of the price cap mechanism, **is unreasonable because very few conditions are not reflected in the revised price cap formula recommended by PCTA, which we adopt below.**³⁹

As a result of the Commission's ruling, Verizon's exogenous events "are limited to mechanical regulatory events bearing only on local exchange carriers and may include only changes resulting from: (1) jurisdictional shifts where costs are transferred to or from the interstate jurisdiction and where an equal and opposite exogenous adjustment was allowed by the Federal Communications Commission under its price cap system; and (2) limited regulatory accounting changes not initiated by Verizon."

As the Verizon Chapter 30 filing was coming to conclusion, the Commission began to explore ways to generically define the procedures and substance of Chapter 30 Plans in order

³⁸ *Id.* at 69 (Emphasis added).

³⁹ *Id.* at 71 (Emphasis added).

to encourage other ILECs, particularly the smaller carriers, to commit to the delivery of broadband speeds consistent with the legislative intent.⁴⁰ In December 1993, the Commission entered an Order that adopted interim filing procedures for RLECs serving less than 50,000 access lines.

Next, substantive guidelines were adopted for the smaller companies via Tentative Opinion and Order in 1995 after a review of comments filed in reaction to a “Staff White Paper.”⁴¹ In that proceeding, the PTA supported price caps in that proceeding as the best alternative to rate-of-return regulation, as the Commission recognized:

PTA's endorsement of using a price cap mechanism for the streamlined regulation of small LECs in Pennsylvania can be best summarized in the following statement:

Price caps are easily calculated on the basis of publicly available, known information. In the opinion of the Smaller Companies of the PTA, this is the only known method of truly serving the objectives of Streamlined Regulation -- reducing regulatory costs and delays -- while simultaneously maintaining reasonable charges for customers and promoting fair competition. Moreover, since a company's costs are irrelevant under price caps, there is no ability to cross-subsidize competitive ventures by shifting related costs to the "regulated side" of the equation. In fact, cost allocations themselves become irrelevant.⁴²

On the topic of exogenous events, the 1995 Streamlined Order reports that:

The OCA strongly favors severe limitations on the potential passthrough of exogenous costs to small LEC ratepayers... If any cost pass throughs are

⁴⁰ 1995 Streamlined Order, *infra*, at 15 (“The Chapter 30 law has been in effect for approximately 1.7 years, and so far, this Commission has had the opportunity to fully adjudicate only the petition for alternative regulation and network modernization of Bell Atlantic-Pa. We cannot speculate as to the precise reasons that may have motivated other LECs to refrain from filing alternative and/or streamlined regulation and network modernization petitions and plans under the auspices of the Chapter 30 law. We are convinced, however, that further implementation of the Chapter 30 law with regard to the streamlined regulation of the small LECs, requires the enunciation of further guidance by this Commission without additional delay.”)

⁴¹ *Re Implementation of Chapter 30 of the Public Utility Code; Streamlined Form of Regulation*, Docket No. M-00930483, 1995 Pa. PUC LEXIS 58 *, Order entered August 25, 1995 (1995 Streamlined Order).

⁴² *Id.* at 6.

to be allowed, the OCA **recommends an approach which would limit exogenous cost passthroughs** to:

- (a) Jurisdictional shifts in costs that affect (by an equal and opposite amount) rates in the interstate jurisdiction;
- (b) Regulatory changes not initiated by the telecommunications industry; and
- (c) Unique changes that would not be reflected in an overall general index of inflation. *Id.* at 15-16.⁴³

Upon review of the parties' comments, **the Commission declared that:**

We agree with the OCA's position regarding the passthrough of exogenous costs in relation to the streamlined regulation of small LECs under a price cap or PSM formula.⁴⁴

Thus, the Commission prescribed for the RLECs the OCA's exogenous event language as described above word for word.⁴⁵ This is the language largely replicated in the plans that followed, including those adopted for the PTA member companies. The language according to its intent is narrow and is intended to be read narrowly.

Note that the focus is upon governmentally induced cost changes that are unique to the telephone industry, and not applicable to the economy as a whole. There was no attempt to reargue the Commission's ruling in the 1994 Bell Order that changes in overall tax rates are not an acceptable exogenous event. That decision has stood undisturbed since it was entered over twenty-five years ago.

⁴³ *Id.* at 12

⁴⁴ *Id.* at 17. See also, *Id.* at 19-20

⁴⁵ *Id.* 18-19.

Subsequent to disposition of the Verizon case, the five Frontier Companies filed a Joint Petition, which the Commission approved with modifications.⁴⁶ Exogenous events were limited to those contained in the 1995 Streamlined Order.

In our Streamlined Order we discussed the nature and scope of exogenous events. We held that exogenous events include costs imposed by legitimate Federal and Commonwealth government actions as well as jurisdictional accounting structure changes when there are revenue and rate impacts in the interstate operations of the LECs concerned. We also held, however, that exogenous events excluded a simple election to depart from 'average schedule' status when there were no revenue and rate implications in the LEC's interstate operations. Page 37

Next following was Commonwealth Telephone's April 15, 1996 filing.⁴⁷ As the Commission stated:

The ALJ ... determined that **CTC's proposal was the same approach endorsed by the Commission.** The ALJ agreed with CTC that its exogenous events proposal was designed to reflect occurrences over which management had no control and **which were not reflected in the GDI-PI.**⁴⁸

The Commission adopted the ALJ's recommendation.

In the 2000 ALLTEL (now Windstream) proceeding, the Commission acknowledges the OCA position:

The OCA recognized the propriety of treating outside the price cap formula costs related to exogenous events that are totally beyond ALLTEL's control. The OCA also recognized that exogenous events should include costs that are **unique to the telephone industry and not picked up by the GDP-PI,** precisely as identified in ALLTEL's Plan.⁴⁹

⁴⁶ *Joint Petition of Frontier Companies for A Streamlined for Network Modernization Form of Regulation and Plan for Network Modernization*, Docket No. P-00951005, 1996 Pa. PUC LEXIS 158, Opinion and Order entered December 6, 1996.

⁴⁷ *Petition of Commonwealth Telephone Company for an Alternative Regulation and Network Modernization Plan*, Docket Nos P-00961024 and P-009610, 1997 Pa. PUC LEXIS 4 *, Opinion and Order entered January 17, 1997.

⁴⁸ *Id.* at 33-34 (emphasis added).

⁴⁹ *Petition of ALLTEL Pennsylvania, Inc., for Approval of an Alternate Form of Regulation and Network Modernization Plan*, P-00981423, Opinion and Order entered January 20, 2000 at 29 (emphasis added).

Since approval of the Plans, the Commission has had little opportunity to address exogenous changes. In the 1999 “Global Order” the Commission stated that contribution to the Universal Service Fund would not be considered an exogenous event either.⁵⁰ When WorldCom and Global Crossing then entered bankruptcy, costing the ILECs millions in lost access revenues, no rate recovery was allowed, although these events were unique to the telephone industry and outside the companies control. Settlements denying recovery were approved by the Commission.⁵¹

More recently, when access charges were reduced by the FCC’s Transformation Order, the Commission opined:

With regard to the issue of whether the FCC’s directives constitute an exogenous event under Chapter 30 Plans, we conclude that the *FCC Order* constitutes an exogenous event under a typical RLEC Chapter 30 Plan, such that resulting revenue reductions, which are not otherwise recovered through the FCC’s revenue recovery mechanisms, may be considered for a special revenue adjustment as discussed herein. While there are differences among the Chapter 30 Plans filed by the RLECs, the following language generally is representative of the exogenous event clauses found within these Plans:

... any changes or events within the Company’s control are excluded as exogenous events. Notwithstanding any other limitation specified herein, ... parties in interest may request the Commission to make special revenue adjustments beyond the scope of the PSI [price stability index] to recognize exogenous events (“Z”), including but not limited to the

⁵⁰ *Joint Petition of Nextlink Pennsylvania, Inc.; Senator Vincent J. Fumo; Senator Roger Madigan; Senator Mary Jo White; the city of Philadelphia; The Pennsylvania Cable & Telecommunications Association; RCN Telecommunications Services of Pennsylvania, Inc.; Hyperion telecommunications, Inc.; ATX Telecommunications; CTSI, Inc.; MCI Worldcom; and AT&T Communications of Pennsylvania, Inc. for Adoption of Partial Settlement Resolving Pending Telecommunications Issues*, Docket No. P-00991648 and *Joint Petition of Bell Atlantic Pennsylvania, Inc., Conectiv Communications, Inc.; Network Access Solutions; and the Rural Telephone Company Coalition for Resolution of Global Telecommunications Proceedings*, Docket No. P-00991649, Opinion and Order entered September 30, 199 at 177 (note 180)

⁵¹ *See, Petition of Commonwealth Telephone Company for Recognition of an Exogenous Event Under Its Alternative Regulation Plan*, Docket No. P-00032020; *Commonwealth Telephone Company Price Stability Index/Service Price Index Filing*, Docket No. P-00961024 F0002; *Petition of Commonwealth Telephone Company For An Alternative Form of Regulation and Network Modernization Plan*, Docket No. P-00961024; *Commonwealth Telephone State Tax Adjustment Surcharge*, Docket No. R-00027695; (Tentative Order entered July 21, 2003, which became final per Secretarial Letter dated August 19, 2003).

following: . . . subsequent regulatory and legislative changes (state & federal) which affect revenues and/or costs, to the extent not captured in GDP-PI [gross domestic product price index].⁵²

The Commission indicated that it would not order exogenous event filings, but rather recognized the RLECs' opportunity to do so.⁵³

The rationale given was squarely within the scope of the Plans' language:

Based upon the Updated Joint Petition, the Updated Petition, and the responses thereto that have been filed in this proceeding, we believe that the *FCC Order* comprehensively changed the intercarrier compensation structure for the nation's telecommunications carriers, and that it clearly is a federal "regulatory . . . change[] . . . which affect[s] revenues[]" as contemplated by a typical RLEC Chapter 30 Plan.⁵⁴

Despite this positive signaling by the Commission, no ILEC ever filed. There were several obstacles, the most significant of which was (and continues to be) the fact that local service prices are set in a highly competitive marketplace. After the federalization of all access charges, the only remaining service to increase is local service rates. This transfer of revenue responsibility from access to local was and still is not plausible.

Simply stated, the RLECs are unable to increase local service rates in the current competitive environment. By way of example, most RLECs have consistently maintained "banks" (i.e., unused past allowable rate increases approved by the Commission and flowing from the operation of approved Chapter 30 Plans) because, although permitted under their

⁵² *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers and The Pennsylvania Universal Service Fund*, Docket No. I-00040105, *AT&T Communications of Pennsylvania, et al., v. Armstrong Telephone Company - Pennsylvania, et al.*, Docket No. C-2009-2098380, *et al., Implementation of the Federal Communications Commission's Order of November 18, 2011, as Amended or Revised and Coordination with Certain Intrastate Matters*, Docket No. M-2012-2291824, Opinion and Order entered August 9, 2012 at 62-63.

⁵³ *Id.* at 65 ("... we reiterate that it is within the RLECs' or other parties' control as to whether the provisions of a particular Chapter 30 Plan are used to file an exogenous event petition.").

⁵⁴ *Id.* at 64.

price cap plan, the RLECs effectively are limited in the ability to collect the higher prices by the competitive marketplace. This reality does not render banked revenues meaningless. Nor does it mean that CenturyLink should be faulted for not having “availed itself” of unused banked revenue amounts, as the Recommended Decision finds.⁵⁵

No different, except perhaps in magnitude, the current tax cuts under the TCJA, the President Bush tax cuts of 2001 and 2003, which continued under President Obama, also reduced corporate taxes.⁵⁶ There were no filings made or Commission inquiry, however, of the price cap companies addressing, let alone requiring, a reduction in rates.

So, despite all of the changes occurring over the last two decades there has not been one exogenous event for which recovery has been sought and approved. This underscores the limited and narrow application of this aspect of price cap regulation as was intended by the OCA and the Commission.

For all of the foregoing precedent setting reasons, the Recommended Decision’s pronouncement that the TCJA is an exogenous event cannot be plausibly maintained. Nor is there any way to force fit the tax reductions into one of the three exogenous events listed in the RLECs’ Chapter 30 price caps.

- The FCC has not shifted federally tariffed revenue responsibility to the state jurisdiction. The first exception is not met.
- While the TCJA is a federal legislative change, it is “captured in GDP-PI” and, therefore, fails the second test.
- Nor is the TCJA a “[u]nique change[] in the telephone industry” and, moreover, it is reflected in the overall inflation factor as measured by GDP-PI. The third instance is a failure also.

⁵⁵ Recommended Decision at 22.

⁵⁶ These include: The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA); the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA); the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010; and the American Taxpayer Relief Act of 2012 (partial extension).

Were the Commission to ignore the clear language of the Plans, the result would be a double counting of the financial impact on carriers—once through the lower GDP-PI and second through the change based on each company’s specific tax circumstances. This is the outcome that the FCC warned of in its original orders creating the Federal price cap regime.

The issue can be resolved simply. That the effect of tax savings from the TCJA, inasmuch as it is applicable to corporations across the entire United States economy, will be captured in the GDP-PI is beyond dispute. The Commission has previously so found, as has the FCC, and the BEA confirms this understanding. That across-the-board tax decreases do not constitute an exogenous event is true as a matter of law.

VII. THE COMMISSION SHOULD RESOLVE THIS ISSUE AND NOT DEFER TO THE OCA COMPLAINTS FOR RESOLUTION

In retrospect, litigation is not an effective procedure for the resolution of whether the TCJA is an exogenous event. Two years into the process, the OCA component cases have languished and are no closer to resolution than they were the day that the initial complaint was filed in early 2018.

The Commission may rule as a matter of law on the question of whether the GDP-PI calculation includes corporate income taxes, by simply relying upon its own compelling precedent and a plain meaning review of the terms of the plans that it has previously approved. Clearly also, the Commission can recognize, as evidence,⁵⁷ the Bureau of

⁵⁷ 52 Pa. Code §5.406 (“(a) A report, decision, opinion or other document or part thereof, need not be produced or marked for identification, but may be offered in evidence as a public document ... where it may be found, if the document is one of the following: ... (2) An official report, decision, opinion, published scientific or economic statistical data or similar public document which is issued by a governmental department, agency, committee, commission or similar entity which is shown by the offeror to be reasonably available to the public”); See also, 52 Pa. Code §5.408.

Economic Analysis, U.S. Department of Commerce background materials cited in these Exceptions.

The PTA is not aware of any factual disputes that preclude resolution of the legal questions presented and compel litigation. Once the essential legal question is resolved, the parties can decide whether to proceed to hearings. Without that guidance they are floundering.

As the RLECs and the PTA described in their Petition for Recission, the Commission's decision to temporarily stay its own examination of any TCJA exogenous effect would unduly burden and delay resolution of the issue and force the parties to incur the considerable time and expense of litigation. Unfortunately, this is precisely what has happened in the individual price cap filings of the RLECs.

Now, two years later, we find ourselves collectively, no closer to resolution. A settlement has been unfairly rejected, because the ALJs believe that a settlement will not be acceptable to the Commission. But the Commission cannot, nor should it, force parties to litigate, if they have no desire to do so.

The question is ripe for decision now and should be decided now. To the extent the Commission feels it does not yet have enough sufficient input to address the exogenous event question, it has several options at its disposal for gathering the information necessary to render an informed, final decision; none of which requires staying its own inquiry at this docket while deferring to the complaint proceedings and subjecting the RLECs (and the OCA and OALJ for that matter) to needless, piecemeal litigation. Ultimately, a thorough and complete record from all stakeholders - and not a limited record developed through the

adjudication of a series of disjointed of complaints - will best inform the Commission in reaching a final decision.

VIII. CONCLUSION

For the forgoing reasons, the Pennsylvania Telephone Association requests that the Commission grant its Exceptions in this matter and, moreover, restart its own investigation.

Respectfully submitted,



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