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**HAND DELIVERED**

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

**Re: Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund  
Docket No. I-00040105**

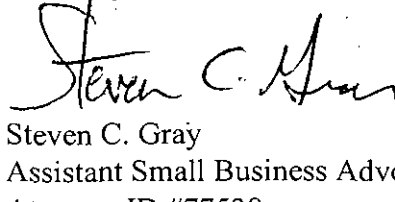
**AT&T Communications of Pennsylvania, LLC, et al. V. Armstrong Telephone Company - Pennsylvania, et al.  
Docket No. C-2009-2098380 et al.**

Dear Secretary Chiavetta:

Enclosed for filing are the original and nine (9) copies of the Main Brief, on behalf of the Office of Small Business Advocate, in the above-docketed proceedings. As evidenced by the enclosed certificate of service, two copies have been served on all active parties in this case.

If you have any questions, please contact me.

Sincerely,

  
Steven C. Gray  
Assistant Small Business Advocate  
Attorney ID #77538

Enclosures

cc: Parties of Record

John W. Wilson

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**I. Statement of Questions and Summary of Positions**

**A. Statement of Questions**

1. Should the Pennsylvania Public Utility Commission order the rural local exchange carriers to further reduce their intrastate access rates?

OSBA's answer: No.

2. Should the Pennsylvania Public Utility Commission allow the rural local exchange carriers to increase their intrastate access rates in order to help fund broadband deployment and ensure that intermodal competitors pay their fair share of those costs?

OSBA's answer: Yes.

3. If the Pennsylvania Public Utility Commission orders the rural local exchange carriers to further reduce their intrastate access rates, to what level should those rates be reduced?

OSBA's answer: Each rural local exchange carrier should reduce its intrastate access rates to the level needed to recover 25% of that rural local exchange carrier's total loop costs.

4. If the Pennsylvania Public Utility Commission orders the rural local exchange carriers to further reduce their intrastate access rates, how shall the rural local exchange carriers recover that reduced access charge revenue?

OSBA's answer: Section 3017(a) of the Public Utility Code, 66 Pa. C.S. § 3017(a), requires that the rural local exchange carriers be permitted to recover the reduced intrastate access charge revenue from their other noncompetitive services. The Pennsylvania Universal Service Fund could also be used to fund the recovery of the RLECs' lost access charge revenue.

5. Should the caps on increases to residential and business local exchange rates resulting from further access charge reductions be continued?

OSBA's answer: No. In the alternative, if the rate caps are continued, the caps should be continued for both residential and business customers and should be raised from their initial levels in 1999 by the rate of inflation since that time.

6. Should the Pennsylvania Universal Service Fund be modified so that rural local exchange carriers must demonstrate a need before they are able to draw on those funds?

OSBA's answer: Yes.

#### **B. Summary of Positions**

The Pennsylvania Public Utility Commission ("Commission") should not order the rural local exchange carriers ("RLECs") to further reduce their intrastate access rates. The RLECs have already reduced their intrastate access rates on two previous occasions. There is no need for further reductions at this time. The Complainant in this consolidated proceeding, *i.e.*, AT&T, has not demonstrated that the RLECs' intrastate access rates are above cost. Therefore, AT&T has not met its burden of proof. Rather than reducing access rates, the Commission should allow the RLECs to raise their intrastate access rates in order to help fund broadband deployment and ensure that toll carriers and intermodal competitors who use the RLECs' loops pay their fair share of those deployment costs.

If the Commission orders the RLECs to further reduce their intrastate access rates, each RLEC should reduce its intrastate access rates to the level needed to recover 25% of that RLEC's total loop costs.

If the Commission orders the RLECs to further reduce their intrastate access rates, Section 3017(a) requires that the RLECs be permitted to recover the reduced intrastate access



charge revenue from their other noncompetitive services. The Pennsylvania Universal Service Fund (“PaUSF”) could also be used to fund the recovery of the RLECs’ lost access charge revenue.

The caps on increases to residential and business local exchange rates resulting from further access charge reductions should be discontinued. The Commission should change its telecommunications policy in regards to customer assistance to be consistent with the Commission’s policy in the electric and natural gas industries, *i.e.*, assistance should be provided only to low-income residential customers. In the alternative, if the rate caps are continued, the caps should be raised by the rate of inflation. The residential rate cap would be set at \$21.00.

The PaUSF should be modified so that RLECs must demonstrate a need before they are able to draw on those funds.

## II. Factual and Legal Background

On September 30, 1999, the Commission entered the *Global Order*.<sup>1</sup> The *Global Order* created the PaUSF, reduced the access charges of the RLECs, and established a cap on local exchange rates for the RLECs' residential and business customers.<sup>2</sup>

On July 15, 2003, the Commission entered the *Rural Access Settlement Order*.<sup>3</sup> That Order approved a settlement that further reduced the RLECs' access charges, raised the residential and business local exchange rate caps, and left the PaUSF unmodified.

On December 20, 2004, the Commission entered an Order in the *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund* ("Investigation Order"), Docket No. I-00040105, which provided:

That an investigation to consider whether intrastate access charges and intraLATA toll rates in rural ILECs' territories should be decreased and to consider any and all rate issues and rate changes that should or would result in the event that disbursements from the Pennsylvania Universal Service Fund are reduced and/or eliminated is hereby instituted.

*Investigation Order*, at 7, Ordering Paragraph 1.

Subsequently, the Commission issued a series of orders staying the investigation.

On March 19, 2009, AT&T Communications of Pennsylvania, LLC, TCG New Jersey, Inc., and TCG Pittsburgh, Inc. (collectively, "AT&T") each filed individual complaints with the Commission against 32 RLECs. The 96 complaints requested that the RLECs be ordered to

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<sup>1</sup> *Joint Petition of Nextlink Pennsylvania, Inc., et al.*, 196 PUR 4th 172, 93 Pa. PUC 172 (Order entered September 30, 1999) *affirmed*, *Bell Atlantic-Pennsylvania v. Pennsylvania Public Utility Commission*, 763 A.2d 440 (Pa. Cmwlth. 2000), *vacated in part*, *MCI v. Pennsylvania Public Utility Commission*, 577 Pa. 294, 844 A.2d 1239 (Pa. 2004) (colloquially known as the "Global Order").

<sup>2</sup> These caps apply only when local exchange rates are being increased in tandem with access charge reductions. See *Buffalo Valley Telephone Company, et al. v. Pennsylvania Public Utility Commission*, 990 A.2d 67, (Pa. Cmwlth. 2009).

<sup>3</sup> *Access Charge Investigation per Global Order of September 30, 1999*, Docket No. M-00021596, *et al.* (Order entered July 15, 2003) ("Rural Access Settlement Order").

reduce their intrastate access rates to levels which match the rates each RLEC charges for interstate switched access.<sup>4</sup>

On April 24, 2008, the Commission entered an Order (“*April 2008 Order*”) which “further stayed [the investigation] pending the outcome of the FCC’s *Unified Intercarrier Compensation* proceeding at CC Docket No. 01-92 or for one year from the date of entry of this Order, whichever is earlier,” for the majority of issues set forth in the *Investigation Order*. *April 2008 Order*, at 31, Ordering Paragraph 1(b).<sup>5</sup>

Despite continuing to stay the proceeding with regard to access charges, the *April 2008 Order* also provided:

that this investigation is reopened for the express and limited purposes of addressing whether the cap of \$18.00 on residential monthly service rates and any corresponding cap on business monthly service rates should be raised, whether funding for the Pennsylvania Universal Service Fund should be increased, and whether or not a ‘needs based’ test (and applicable criteria) for rural ILEC support funding from the PaUSF in conjunction with the federal USF support payments that the rural ILECs receive should be established in order to determine which rural ILECs qualify for PaUSF funding as described in the body of this order.

*April 2008 Order*, at 30, Ordering Paragraph 1(a).

On April 30, 2009, the RLECs, represented by the Pennsylvania Telephone Association (“PTA”), filed Answers to each of the AT&T complaints. PTA also filed Preliminary Objections.

On June 26, 2009, PTA and The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania (“Embarq PA”) submitted a Petition Requesting Interlocutory Review and

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<sup>4</sup> AT&T Communications of Pennsylvania, LLC, *et al.* v. Armstrong Telephone Company – Pennsylvania, *et al.*, Docket Nos. C-2009-2098380, *et al.*

<sup>5</sup> *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers and the Pennsylvania Universal Service Fund*, Docket No. I-00040105 (Order entered April 24, 2008).

Answer to Material Questions in regards to the AT&T complaints. PTA and Embarq PA sought, among other things, to have the AT&T complaints dismissed.

On July 23, 2009, Administrative Law Judge (“ALJ”) Susan D. Colwell issued her Recommended Decision (“RD”) in the limited proceeding directed by the *April 2008 Order*.

On July 29, 2009, the Commission entered an Order in the AT&T complaint proceeding. The Commission ruled that the AT&T complaints would not be dismissed, but would be consolidated with the *Investigation Order*.

On August 5, 2009, the Commission entered an Order lifting the stay in *Investigation Order* at Docket No. I-00040105 (“*August 5<sup>th</sup> Order*”). The *August 5<sup>th</sup> Order* also addressed the scope of the newly consolidated *Investigation Order* proceeding. The Commission observed:

On December 20, 2004, the Commission entered an order in the above-captioned case instituting an investigation into whether there should be further intrastate access charge reductions and intraLATA toll rate reductions in the service territories of rural incumbent local exchange carriers. This investigation was instituted as a result of the Commission’s prior order of July 15, 2003, which discussed implementing continuing access charge reform in Pennsylvania.

*August 5<sup>th</sup> Order*, at 3. The Commission summarized the scope of the investigation initiated in 2004 as follows:

The December 20, 2004 order directed the Office of Administrative Law Judge (OALJ) to conduct the appropriate proceedings including, but not limited to, a fully developed analysis and recommendation on the following questions:

- a) Whether intrastate access charges and intraLATA toll rates should be further reduced or rate structures modified in the rural ILECs’ territories.
- b) What rates are influenced by contributors to and/or disbursements from the PaUSF?

- c) Should disbursements from the PaUSF be reduced and/or eliminated as a matter of policy and/or law?
- d) Assuming the PaUSF expires on or about December 31, 2006, what action should the Commission take to advance the policies of this Commonwealth?
- e) If the PaUSF continues beyond December 31, 2006, should wireless carriers be included in the definition of contributors to the Fund? If included, how will the Commission know which wireless carriers to assess? Will the Commission need to require wireless carriers to register with the Commission? What would a wireless carrier's contribution be based upon? Do wireless companies split their revenue bases by intrastate, and if not, will this be a problem?
- f) What regulatory changes are necessary to 52 Pa. Code §§63.161 – 63.171 given the complex issues involved as well as recent legislative developments?

*August 5<sup>th</sup> Order*, at 3-4.

The Commission ultimately concluded that “we are persuaded that the access charge investigation should be resumed at this time.” *Id.*, at 19. Furthermore, the Commission ordered “[t]hat the stay of the intrastate access charges portion of this investigation is hereby lifted.” *Id.*, Ordering Paragraph 2, at 21. The Commission also ordered:

That the participating parties shall address and provide record evidence on the legal, ratemaking and regulatory accounting linkages between: a) any Federal Communications Commission's ruling in its *Unified Intercarrier Compensation* proceeding; b) the intrastate access charge reform for rural ILECs in view of the new Chapter 30 law and its relevant provisions at 66 Pa. C.S. §§ 3015 and 3017; c) the Pennsylvania Universal Service Fund; and d) the potential effects on rates for the basic local exchange services of the rural ILECs to the extent this is consistent with the Commission's determinations in the limited investigation.

*August 5<sup>th</sup> Order*, Ordering Paragraph 5, at 21-22.

On August 19, 2009, a prehearing conference was held before ALJ Kandace F. Melillo. During that prehearing conference, ALJ Melillo ordered the parties to submit legal memoranda regarding the scope of the consolidated proceeding.

On September 2, 2009, the OSBA submitted a memorandum of law regarding the scope of the consolidated proceeding.

On September 15, 2009, ALJ Melillo issued her *Order Addressing Scope of Consolidated Proceeding*.

On September 25, 2009, AT&T; Verizon Pennsylvania Inc., Verizon North Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, MCImetro Access Transmission Services, LLC d/b/a Verizon Transmission Services, and MCI Communications Services, Inc. (collectively, "Verizon"); Qwest Communications Company, LLC ("Qwest"); Sprint Communications Company, LP., Sprint Spectrum, LP., Nextel Communications of Mid Atlantic, Inc., and NPCR, Inc. (collectively, "Sprint"); Omnipoint Communications Enterprises LLC d/b/a T-Mobile; and Voicestream Pittsburgh LP d/b/a T-mobile (collectively, "T Mobile") filed a Petition for Review and Answer to Material Question in regards to ALJ Melillo's *Order Addressing Scope of Consolidated Proceeding*.

On December 10, 2009, the Commission upheld ALJ Melillo's *Order Addressing Scope of Consolidated Proceeding* with only minor modifications.

On January 20, 2010, the OSBA served the Direct Testimony of John W. Wilson.

On March 10, 2010, the OSBA served the Rebuttal Testimony of John W. Wilson.

On April 1, 2010, the OSBA served the Surrebuttal Testimony of John W. Wilson.

April 14, 15, and 16, 2010, evidentiary hearings were held before ALJ Melillo.

The OSBA submits this Main Brief in accordance with the procedural schedule in this case.

### III. Burden of Proof

In regards to the AT&T complaints and the specific relief sought in those complaints, AT&T, as the proponent of a rule or order, bears the burden of proof as set forth in Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a).

In order to establish a sufficient case to satisfy the burden of proof, AT&T must show that the RLECs are responsible or accountable for the problems described in the 96 complaints. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *appeal denied*, 529 Pa. 654, 602 A.2d 863 (Pa. 1992). In other words, the evidence presented by AT&T must be more convincing, by even the smallest amount, than the evidence presented by the RLECs and the parties aligned with them. *Se-Ling Hosier v. Marquies*, 364 Pa. 45, 70 A.2d 854 (Pa. 1950).

The Commission's decision on the complaints must be supported by substantial evidence set forth in the record. More is required than a mere scintilla of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (Pa. 1980).

Once AT&T has presented evidence sufficient to satisfy the burden of proof initially, the burden of going forward to rebut that evidence shifts to the RLECs. If the evidence presented by AT&T and the RLECs is of co-equal weight, AT&T has not satisfied its burden of proof. In order to rebut the RLECs, AT&T must provide some additional evidence. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *affirmed*, 501 Pa. 433, 461 A.2d 1234 (Pa. 1983).

Even though the burden of persuasion may shift throughout the consolidated proceeding in regards to the AT&T complaints, the burden of proof never shifts. The burden of proof



always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

**IV. Should the RLECs' Intrastate Switched Access Rates be Reduced?**

**A. Introduction**

The OSBA respectfully submits that the RLECs' intrastate access rates should not be further reduced in this proceeding.

As a general matter, OSBA witness John W. Wilson explained access rates as follows:

The cost of access includes the cost of switching a toll call in the local telephone companies' networks, the cost of transporting the call, and the cost of using the local loop facilities that were designed for toll services. Access rates are the charges made by ILECs [incumbent local exchange carriers] to toll carriers for the use of the local exchange company's network. Toll carriers consider these access charges as a cost in determining the toll rates that they charge to consumers for toll services. Access rates have historically recovered a portion of the loop and switching costs of the local telephone company, which is the facilities-based provider of access to consumers' telephones.

OSBA Statement No. 1, at 5.

Similarly, Office of Trial Staff ("OTS") witness Joseph Kubas stated, as follows:

Access service enables the IXC's [interexchange carriers] to use part of the RLEC's network without building a network of their own to each individual customer. Access is a service provided by local exchange carriers to other carriers for originating or terminating interexchange or 'toll' calls. Access charges generally apply to calls that begin and end in different local calling areas. Interstate access charges apply to calls that begin and end in different states, and intrastate access charges apply to calls that begin and end in different local calling areas within the same state. The Federal Communications Commission (FCC) oversees interstate access rates, and the states oversee intrastate access rates. Traffic sensitive access rates, such as switching, are assessed on a minute of use basis, where non-traffic sensitive access rates such as the Carrier Common Line Charge (CCLC) are assessed on a per-line basis.

OTS Statement No. 1, at 4.

Dr. Wilson noted that the cost of an ILEC's facilities is high, and that these facilities provide extensive capabilities:

Local exchange carriers have spent billions of dollars to develop access systems that are cost-effective and efficient in delivering all forms of telephone traffic: local exchange service; intrastate, interstate, and international toll; cellular; and Voice over Internet Protocol ('VOIP'). These local exchange network facilities allow the interconnection of all traffic because they were designed for all traffic, not simply local telephone calls. In addition, with very little added investment in these network facilities, local telephone companies have been able to provide broadband access through Digital Subscriber Line ('DSL') using the very same facilities.

OSBA Statement No. 1, at 5-6.

Significantly, the capabilities of these facilities are not customer-specific. Dr. Wilson explained:

Because basic loop systems are generally designed and installed on a mass basis rather than on a customer-specific basis, loop costs have been influenced by various service needs and new usage considerations as they have developed. With changes in customer usage, many new combinations of loop design and administration have been introduced and adopted for standardized loops. Standard loops must be capable of meeting various signaling and transmission quality requirements for a wide variety of services.

OSBA Statement No. 1, at 6.

IXCs, such as AT&T, need these local exchange facilities in order to complete their toll calls. Therefore, as a general matter, IXCs should contribute to the cost of the RLECs' local exchange facilities. The threshold question posed in this investigation is whether IXCs are paying more than their fair share of that cost to all or some RLECs.

## B. Commission Precedent

The Commission has agreed in the past with the principle articulated by Dr. Wilson in this proceeding, *i.e.*, that IXCs must pay their fair share of the cost of the RLECs' local exchange facilities. For example, the Commission stated as follows:

We reaffirm our findings in our September 5, 1995 Order at Docket No. L-00950105 that the local loop is a 'joint cost', not a direct cost of providing only those services included in the definition of BUS [Basic Universal Service]. It is used for a variety of services other than BUS and must be allocated among the services which utilize it. For universal service funding purposes, not allocating a portion of the local loop to all the services which utilize it fails to give recognition to the fact that the loop is used to provide many services in addition to BUS.

This finding is consistent with our earlier rulings including *Pennsylvania Public Utility Commission v. Breezewood Telephone Company*, 74 Pa P.U.C. 431 (1991) wherein we stated:

...[W]e consider the costs associated with the loop from the central office to the customers premises a non-traffic sensitive joint cost.

\* \* \*

We reject the ILECs' arguments that the local loop is not a joint cost because other services which use the loop do not result in any additional cost. We do not find the arguments of Bell's expert witness Dr. Kahn persuasive on this point. In particular, we do not accept the basis of Dr. Kahn's argument that because the loop is needed for local service and the incremental cost of the loop does not increase to provide other services, that its full cost must be attributed to local services. This same argument could be made with respect to toll service. Since the loop is necessary to provide toll service, it could at the same time be argued that the full cost should be allocated to toll, and in so doing the incremental cost to provide local service would be zero. Moreover, since the installation of an additional subscriber loop increases the capacity available for placing and receiving all three types of calls, the

telephone company cannot increase the capacity for local calls without concurrently increasing the capacity for toll calls.

*In re: Formal Investigation to Examine and Establish Updated Universal Service Principles and Policies for Telecommunications Services in the Commonwealth*, Docket No. I-00940035 (Order entered January 28, 1997), at 82-83.

As Dr. Wilson correctly concluded, the “Commission has thus found that the loop is part of the integrated telephone network and was built to serve both local and toll usage.” OSBA Statement No. 1, at 9.

RLEC access reductions have already been achieved as a result of the *Global Order* and the *Rural Access Settlement Order*. In spite of the reductions achieved to date, the OSBA is well aware that the Commission has “expressed a policy . . . for further access charge reductions.” *2006 Annual Price Stability Index / Service Price Index Filing of Denver and Ephrata Telephone and Telegraph Company*, Docket No. R-00061377 (Order entered December 8, 2006), at 9-10. However, the rationale for an “access charge policy that has been in place for over twenty years since the first access charge tariffs were approved in 1984” does not automatically apply to the telecommunications marketplace as it exists today in the Commonwealth. OSBA Statement No. 1, at 8. Indeed, it can be argued that, today, the RLECs themselves face competition from cellular and VOIP service providers that equals or exceeds the competition now challenging toll carriers.

The Commission should not order further access reductions (as sought by AT&T) unless there would be definite and substantial public benefits that would result from those reductions. In addition, any further reductions in the RLECs’ access charges must not rule run afoul of New Chapter 30.<sup>6</sup>

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<sup>6</sup> See the Act of November 30, 2004 (P.L. 1398, No. 183), 66 Pa. C.S. §§ 3011 – 3019 (“New Chapter 30”).

### C. New Chapter 30 and the RLECs' Amended NMPs

There is no statutory basis for any claim that the RLECs' access charges must be reduced in order to avoid violating New Chapter 30 . Nowhere in New Chapter 30 is the reduction of access charges mandated. In fact, rather than mandating reductions, Section 3017 of the Public Utility Code, 66 Pa. C.S. § 3017, simply prohibits the Commission from requiring "a local exchange telecommunications company to reduce access rates except on a revenue-neutral basis."

Significantly, Original Chapter 30 contained Section 3007, which required reductions in access charges and limited future increases in access charges. New Chapter 30 repealed Section 3007.

Furthermore, in New Chapter 30, the Legislature recognized access charges as a source of funding for an RLEC's broadband deployment. As set forth in an RLEC's network modernization plan ("NMP"), an RLEC's price stability mechanism ("PSM") allows that RLEC to raise its noncompetitive service rates annually to fund its broadband deployment. An RLEC may only use noncompetitive service revenue in calculating its annual revenue increases, *i.e.*, the annual inflation adjustment is applied only to the RLEC's total revenues from noncompetitive services.

Significantly, New Chapter 30 includes this definition:

**'Protected Service.'** The following telecommunications services provided by a local exchange telecommunications company *unless the commission has determined the service to be competitive*:

- (1) Service provided to residential consumers or business consumers that is necessary to complete a local exchange call.
- (2) Touch-tone service.
- (3) *Switched access service*.
- (4) Special access service.

(5) Ordering, installation, restoration and disconnection of these services.

66 Pa. C.S. § 3012 (emphasis added). The Commission has not determined that switched access service is competitive. Therefore, by definition, access is a noncompetitive service, and the revenue obtained by an RLEC from access charges is properly included in the noncompetitive revenue total which the RLEC may increase annually.

New Chapter 30 was enacted on November 30, 2004. The legislature was clear with regard to access charges. First, as set forth above, further access reductions were not mandated anywhere in New Chapter 30. Second, as set forth above, access charges were deemed a “protected service” under Section 3012, and thus were determined to be a noncompetitive service. Third, the legislature explicitly stated that:

a local exchange telecommunications company with an alternative form of regulation containing a price stability mechanism that files an amended network modernization plan under section 3014(b)(1), (2) or (3) (relating to network modernization plans) shall be subject to a modified inflation offset in its *price stability mechanism in adjusting its rates for noncompetitive services*.

66 Pa. C.S. Section 3015(a)(1) (emphasis added).

In addition, the legislature emphasized in Section 3011 of the Public Utility Code, 66 Pa. C.S. § 3011, its commitment to the “accelerated provision of advanced services and deployment of a universally available, state-of-the-art, interactive broadband telecommunications network in rural, suburban and urban areas.”

Consequently, any decision by the Commission to reduce the RLECs’ intrastate access rates should be constrained by the negative impact this would have on achieving the legislature’s stated goal of accelerating broadband deployment. The OSBA submits that the goal of accelerated broadband deployment should take precedence over “reducing intrastate access

charges in the rural ILEC territories to gradually mirror interstate access charges in order to bring about greater competition in those areas.” *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers and the Pennsylvania Universal Service Fund*, Docket No. I-00040105 (Order entered November 15, 2006) (“*Rural Access Order*”), at 14. In other words, rather than reducing access charges, the Commission should consider raising those charges to assure that IXCs pay their fair share of the cost of accelerated broadband deployment.

**D. Change Needed in the Access Charge General Public Policy Rule**

The Commission has held onto its general policy of reducing access charges for over twenty years in an effort to “spur competition.”<sup>7</sup> However, one need only turn on television to take judicial notice of the plethora of Voice over Internet Protocol (“VOIP”) telephone providers, the popularity of cellular telephones and “smart phones” of all types, stunning new wireless offerings from such non-traditional entities as Apple Inc., and attractive “triple play” (i.e., high-speed internet service, telephone service, and digital cable television service) offers from cable providers such as Comcast. In short, the telecommunications world has changed immeasurably since 1984, and has even changed radically since the Commission’s 1999 *Global Order*. Therefore, the OSBA respectfully submits that the Commission’s access charge policy has been overtaken by events.

The “new marketplace realities” are a compelling reason to abandon the general public policy rule favoring access charge reductions. The competition that the Commission so steadfastly sought through access charge reform has manifested itself in the form of a dynamic, intermodal marketplace wherein the old MCI WorldCom and the original AT&T have gone the way of the dinosaurs. As Dr. Wilson explained:

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<sup>7</sup> The Commission has characterized its movement toward lower access charges as a “general public policy rule.” *Rural Access Order*, at 14.



The historic economic rationale for access reductions was that toll services were paying more than their fair share of the cost of the local network. This was claimed to hinder the development of competitive toll services and local exchange services, but this is no longer true. The competitive market, at least for toll, has sorted itself out as the major toll carriers have been merged into local exchange companies (e.g., Verizon acquired MCI and SBC acquired AT&T and then retained the AT&T corporate name). Today, there is little facilities-based competition for loops and most toll and local competition rides over the local exchange companies' loop facilities.

OSBA Statement No. 1, at 10.

AT&T complains that there will not be robust competition without further intrastate access reductions. *See, e.g.,* AT&T Statement No. 1, at 34, *et seq.* The reality is that further access charge reductions are simply not needed. Competition, is, in fact, flourishing. Dr. Wilson observed:

[T]oll competition is established. As stated by Sprint witness Appleby, 'The toll market was deemed competitive long ago and it remains competitive today. Consumers have many choices for their toll calling needs ...' (November 30, 2009 testimony at 4).

OSBA Statement No. 1, at 10. Dr. Wilson continued, as follows:

The two biggest competitive threats to local telephone companies in the current environment are over different networks: wireless carriers over their own networks, and VOIP over broadband networks. In the FCC's February 5, 2006, Remand Order of the Triennial Review Order (commonly called the 'TRRO'), the FCC made it clear that markets were open and moving toward competition: 'we recognized the marketplace realities of robust broadband competition and increasing competition from intermodal sources, and thus eliminated most unbundling requirements for broadband architectures serving the mass market' (Page 2 of the TRRO). Local telephone companies now need the ability to set their rates with these new 'marketplace realities' in mind. Also, forcing local exchange consumers to pay for broadband development subsidizes new VOIP competition. In any case, the economics that were once used to shift the recovery of

local access costs away from toll usage and onto local consumers has changed.

OSBA Statement No. 1, at 11.

Rather than further reductions in access charges, the Commission should reverse its policy and allow RLECs to *raise* access charges as part of the annual PSM process. The legislature authorized larger annual revenue increases through the PSM process when the inflation offset was reduced under New Chapter 30. *See* 66 Pa. C.S. § 3015(a)(1). The goal was to accelerate broadband deployment. As Dr. Wilson testified, broadband benefits IXC's and all other users of the loops. Therefore, IXC's and other users of the loops should pay their fair share of the broadband deployment costs.

**E. Burden of Proof in this Proceeding**

AT&T carries the burden of proof with regard to its complaints seeking reduced access charges. Therefore, if AT&T asserts that the RLECs' access charges must be reduced to a certain level, AT&T needs to proffer evidence that supports that assertion.

For example, AT&T states:

The RLECs have acknowledged they face substantial competition in their respective service territories. As local exchange service has become increasingly competitive, access charges are subsidizing RLEC 'competitive venues.' *The simple fact is that subsidies have no place in a competitive market*, and should be eliminated to promote the development of competition. Here, that means reducing the RLEC intrastate switched access charges to parity with their interstate access rates.

AT&T Statement No. 1, at 48 (emphasis added).

In a different piece of testimony, AT&T claimed that the RLECs' access rates exceed their costs: "[I]nflated access charges harm the market and consumers by giving false price

signals and encouraging resources to be committed in a manner inconsistent with true consumer preferences.” AT&T Statement No. 1.1, at 3.

AT&T, however, has provided no proof of the existence of these access charge “subsidies,” nor has it demonstrated that access charges are “inflated.” As Dr. Wilson observed, “while the parties aligned with AT&T assert repeatedly that access charges are ‘inflated’ and above cost, they have presented no cost evidence to support their exaggerated claims.” OSBA Statement No. 1, at 9.

OTS witness Mr. Kubas stated as follows:

Since AT&T and the other IXCs have failed to provide a current cost of service study to support these claims, they have not shown that the current RLEC intrastate access rates are excessive or subsidy laden. While the Commission may have indicated that intrastate access charges provided some unspecified subsidy to BLES [basic local exchange service] rates in the past; however, since that time, intrastate access charges have been reduced, BLES rates have increased, and costs have changed over the past 15 years.

OTS Statement No. 1, at 9.

#### **F. Conclusion**

The OSBA respectfully submits that AT&T has not provided sufficient evidence in this proceeding to carry its burden of proof. Furthermore, AT&T has not provided sufficient reasons to reduce the RLECs’ intrastate access charges in light of the reductions already in place, and in view of the legislature’s public policy decisions as set forth in New Chapter 30.

V. **If the RLECs' Intrastate Switched Access Rates Should Be Reduced, to What Level Should They Be Reduced, and When?**

A. **Rate Levels**

If the Commission decides that the RLECs' access charges should be reduced even further, the OSBA submits that the reductions should be made on a case-by-case basis for each individual RLEC. As AT&T has documented, the current intrastate access rates charged by the RLECs vary from company to company. *See* AT&T Statement No. 1, at 35-36. OSBA witness Dr. Wilson explained as follows:

Rural carriers are a very diverse group of companies. Each has a different operating environment and their costs can be quite different. In addition, some companies have low access charges and some have high access charges due to different operating costs. There is no reason to assume that a 'one-size-fits-all' reduction in access charges should be ordered by the Commission. If the Commission determines that additional access charge reductions are required, each company should be reviewed on its own to determine its rates and access costs.

OSBA Statement No. 1, at 14-15.

As explained by Dr. Wilson, intrastate access charges should be set at the level needed to recover 25% of each individual RLEC's total loop costs. Dr. Wilson summarized the rationale for the OSBA's proposal as follows:

Federal law requires the interstate jurisdiction to assume some recovery of access costs that are attributable to both interstate and intrastate usage. The FCC has ordered a 25% assignment of total loop costs to interstate toll use. That leaves 75% to be recovered from the intrastate jurisdiction, and the Commission has jurisdiction to allocate that 75% in any way that it decides is reasonable. Based on the principle of equal availability of local access facilities for toll and local service, and the fact that 25% of the total is attributed to interstate usage, it would be entirely reasonable to allocate another 25% to intrastate access. That

would leave 50% of these joint and common costs to be covered by charges for local exchange services.

OSBA Statement No. 1, at 15. *See also* 47 CFR § 36.154.

The simplest way to set an RLECs' intrastate access charge would be to total the revenue that RLEC is currently collecting in interstate access charges. The RLEC may be using a subscriber line charge, usage charges, or both. The interstate access total would include all of these revenues, regardless of recovery mechanism. The RLEC could then develop its new intrastate access rate to produce the same amount of total revenue which is being recovered for interstate access. This would follow the recommendation of OSBA witness Dr. Wilson. In addition, it would set each RLEC's intrastate access rate on an individual basis by simply lowering the RLEC's intrastate access rate so that it recovers intrastate access revenue equal to its *total* interstate access revenue.

The OSBA respectfully submits that this proposal is a much more fair, rational, and reasonable approach that addresses each RLEC on an individual basis, rather than arbitrarily assigning each RLEC the intrastate access rates of Verizon, or setting each RLEC's intrastate rate at a level which does not include all interstate access revenue.

**B. Timing**

If the Commission were to order a further reduction in the RLECs' intrastate access rates as proposed by the OSBA, the OSBA is unaware of any reason why the RLECs' intrastate access rates should not be reduced within 60 days of the Commission's final Order in this proceeding.

**VI. If the RLECs' Intrastate Switched Access Rates Should Be Reduced, How Should Any Revenue Reductions be Recovered in Compliance with 66 Pa.C.S.A. 3017?**

**A. The Meaning of Revenue Neutrality under Section 3017**

Section 3017(a) of the Public Utility Code states:

The commission may not require a local exchange telecommunications company to reduce access rates except on a revenue-neutral basis.

66 Pa. C.S. § 3017(a).

As set forth above, intrastate switched access is a protected service under Section 3012, and the Commission has not, to date, declared that switched access service is competitive. Consequently, because access charges are a noncompetitive service, the access charge revenue obtained by the RLECs is included in their PSM noncompetitive revenue total. That noncompetitive service revenue total is the base to which the annual inflationary adjustment is applied through the PSM process.

Section 3015(a)(1) permits an RLEC to increase its noncompetitive service revenue in order to fund that RLEC's broadband deployment. Intrastate access charges are part of the noncompetitive service total used in the PSM calculation. Therefore, as required by Section 3017(a), an RLEC that has its intrastate access charges reduced must have that revenue made up, in its entirety, with revenue from other noncompetitive services. In that way, the RLEC is made whole in regards to the loss of noncompetitive service revenue from the access charge reduction and obtains the additional annual revenue (through the PSM process) to fund its broadband deployment.

Rate increases for an RLEC's competitive services may, on an absolute basis, make an RLEC whole in regards to the lost access charge revenue. However, the RLEC would not be made whole for purposes of its annual PSM filing, as competitive service revenue cannot be

included in an RLEC's PSM noncompetitive service revenue total. Consequently, with the intrastate access revenue missing, the RLEC would receive a reduced annual increase to its noncompetitive service revenue. This would violate Section 3017(a), and would thwart the purpose of New Chapter 30.

**B. Rate Increases**

**1. In General**

Each individual RLEC will have to calculate how much of its current intrastate access revenue will be lost if the Commission orders further access charge reductions. As required by Section 3017(a), the RLEC will be able to recover that revenue shortfall by increasing its local exchange rates, or other noncompetitive service rates, depending upon what other noncompetitive service revenue sources are available to that RLEC.

**2. Residential and Business Rate Caps**

The OSBA respectfully submits that the residential and corresponding business local exchange rate caps that have been in place since the *Global Order*, and that were raised in the *Rural Access Settlement Order*, should be discontinued. Dr. Wilson summarized the rate caps as follows:

When the first cap was placed into effect in September 1999 (as an offset to reductions in local network access charges for intrastate toll carriers), the cap was \$16 for residential local exchange service and there was a corresponding rate cap for business local exchange service. In July 2003, the residential cap was increased to \$18 (again, to offset below-cost local network access charges for intrastate toll carriers), and the corresponding business rate cap was increased on a dollar-for-dollar basis. The residential caps were instituted to sustain the affordability of basic local exchange telephone service for all citizens, especially those at the lower end of the income spectrum for whom affordability was a real economic issue. Such subsidies for lower income consumers were viewed as justified, not only on social welfare grounds, but also because the existence of universal service and the ability to readily

access a broader service subscriber base provided a more valuable network for all network users.

OSBA Statement No. 2, at 13-14.

The OSBA recommends that the Commission abandon the rate caps for all noncompetitive service residential and business customers. The rate caps effectively treat all of those customers as “low income” customers, in need of monthly assistance to pay their telephone bill. That is not the model that is followed by the Commission in either the electric or natural gas industries. *See, e.g.*, 52 Pa. Code § 69.264 (“CAPs should be targeted to low-income, payment troubled customers.”). *See also* 52 Pa. Code §§ 54.73 and 62.3.

There is no evidence (nor could there be) that every residential and business customer is in need of a *de facto* customer assistance program to pay the monthly telephone bill. Therefore, the OSBA recommends that the Commission align its policy for the telephone industry with the policy it has adopted in the electric and natural gas industries: create customer assistance programs targeted only at those residential customers that can demonstrate a need for help, and do not assume that every customer needs assistance in order to pay for telephone service.

In the alternative, if the Commission determines that it will continue its residential and business local exchange rate caps, the OSBA recommends that the residential rate cap be increased by the rate of inflation, based upon the caps set in the Global Order and the Rural Access Settlement Order. Dr. Wilson explained as follows:

The new Chapter 30 rules base annual rate adjustments on the overall health of the U.S. economy. From September 1999 through January 2010, the Consumer Price Index (‘CPI’) increased by 29%. Using this change in the CPI would suggest an increase in the rate cap of \$18 to at least \$20.65 per month for residential local exchange service customers who do not pass a needs test justifying a greater level of subsidized public support. In other words, if a cap that is generally applicable to all residential service subscribers is retained at all, it should now be adjusted to about



\$21 per month, with a lower cap being applicable only to low-income customers who qualify for greater public support pursuant to a needs test.

OSBA Statement No. 2, at 14-15.

The OSBA would apply this same inflationary adjustment to each RLEC's business local exchange rate cap.

In summary, the OSBA recommends that the residential and business local exchange rate caps be eliminated, and replaced with a customer assistance program that would target demonstrably needy residential customers. In the alternative, if those local exchange rate caps are continued, then they should be raised as set forth above.

### **C. Pennsylvania USF**

If the Commission orders a further reduction in intrastate access charges, almost all RLECs will have to recover that missing revenue from either increased rates for other noncompetitive services or from the PaUSF, assuming it still exists. The estimated amount of revenue that has to be made up through other RLEC noncompetitive service revenue increases, the PaUSF, or a combination of both, varies from \$76.85 million up to \$91.67 million. *See* AT&T Statement No. 1.2, at 22-23.

No other source of revenue is available to make the RLECs whole if the Commission orders further intrastate access charge reductions. Section 3017(a) requires the access charge reductions to be made on a revenue neutral basis. Absent additional support from the PaUSF, RLECs will have to increase their rates for other noncompetitive services (including their local exchange rates).

Additional funds will have to be made available to the PaUSF if it is to be used to offset these additional access charge reductions. Therefore, the current payers into the PaUSF will be ordered to pay more.

One alternative would be to limit the use of the PaUSF to those RLECs that have a demonstrated “need” for support. This would be similar to the low-income tests that determine eligibility for a customer assistance program in the electric and natural gas industries. For example, an RLEC may decide to keep its local exchange rates very low, and attempt to recover the balance of the lost intrastate access charge revenue from the PaUSF. A test should be in place to establish whether that RLEC’s request for PaUSF funds should be granted. Dr. Wilson explained as follows:

*Establishing a cap on rates and providing a corresponding subsidy from PAUSF when local exchange rates would otherwise exceed a specific level cannot be justified from an economic or social standpoint unless there is a ‘need’ for the PAUSF subsidy. To answer the ‘need’ question, the Commission must determine what is the ‘affordable’ rate and what are each ILEC’s costs? Determining an ‘affordable’ rate is not an exercise in economic principles; it is a public policy decision. After making this determination, each ILEC that wants to draw funds from the PAUSF should be required to demonstrate that its costs are substantially higher than the ‘affordable’ rate. If an ILEC’s costs are not substantially higher than the ‘affordable’ rate, then the ILEC should not be permitted to draw from the PAUSF.*

OSBA Statement No. 2, at 21-22.

If the Commission orders additional reductions in the RLECs’ intrastate access rates, the Commission must face the choice of raising the RLEC’s noncompetitive service charges, increasing funding to the PaUSF, or, most likely, both. The OSBA recommends that the PaUSF monies be disbursed to the RLECs after an adequate “needs” analysis is conducted. The limited PaUSF monies should go to those RLECs that actually need assistance in making up the lost

intrastate access charge revenue and avoiding unreasonable increases in rates for other noncompetitive services. The PaUSF funds should not go to those RLECs that simply wish to keep their noncompetitive service rates artificially low.

**VII. General Legal Issues**

**A. Retroactivity of any Access Rate Reductions**

This issue is not addressed in this main brief. However, the OSBA reserves the right to respond to other parties in its reply brief.

**B. Compliance**

This issue is not addressed in this main brief. However, the OSBA reserves the right to respond to other parties in its reply brief.

## VIII. Conclusion

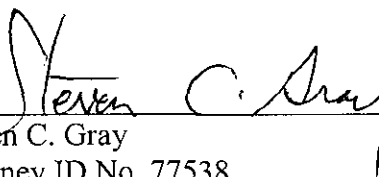
There is not a need for further RLEC intrastate access charge reductions at this time. Two access charge reductions have already occurred due to the *Global Order* and the *Rural Access Settlement Order*. In 2010, competition in all aspects of the telecommunications industry is thriving, and competitive pressures are arguably greater in many RLEC local exchange markets, from wireless and VOIP service providers, than in intrastate toll markets. Further reducing intrastate access charges so that IXC competition can be increased seems to be a solution in search of a problem. In fact, rather than reducing access charges, the Commission should allow RLECs to increase access charges as part of the annual PSM process. Allowing increases would assure that IXCs and intermodal competitors that use the RLECs' broadband networks help pay for those networks.

Complicating any further access charge reductions will be the issue of how to make the RLECs whole as required by Section 3017(a). If the intrastate access charges are reduced, the RLECs will have to increase their rates for other noncompetitive services, or they will have to draw more monies from the PaUSF, or both. If the Commission continues the "everyone is a low income customer" local exchange rate caps for residential and business customers, funding the RLECs' revenue neutrality will be further complicated.

Nevertheless, if the Commission decides to order further reductions in the RLECs' intrastate access charges, the OSBA recommends that the intrastate access charges be set so that they recover 25% of the total cost of the loops.

Finally, if intrastate access charge reductions are ordered, and the PaUSF continues to function, the OSBA recommends that a "needs" test be placed on RLECs' ability to draw those funds.

Respectfully submitted,

A handwritten signature in black ink that reads "Steven C. Gray". The signature is written in a cursive style and is positioned above a horizontal line.

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Dated: May 13, 2010

**APPENDIX**

**Proposed Findings of Fact**

**Proposed Conclusions of Law**

**Proposed Ordering Paragraphs**

### Proposed Findings of Fact

- 1) The RLECs have previously reduced their intrastate access charges in response to the *Global Order* and the *Rural Access Settlement Order*.
- 2) The Commission has determined that the loop is part of the integrated telephone network and was built to serve both local and toll usage. OSBA Statement No. 1, at 9.
- 3) The current intrastate access rates charged by the RLECs vary from RLEC to RLEC. AT&T Statement No. 1, at 35-36.
- 4) AT&T has provided no cost studies in this proceeding that demonstrate that the RLECs' access charges are in excess of their cost. OTS Statement No. 1, at 9.
- 5) AT&T has provided no cost studies in this proceeding that demonstrate that RLECs' access charges are providing subsidies to other services. OTS Statement No. 1, at 9.
- 6) From September 1999 through January 2010, the Consumer Price Index ("CPI") increased by 29%. OSBA Statement No. 2, at 14-15.



### Proposed Conclusions of Law

1) The Commission has concluded that IXCs must pay their fair share of the cost of the RLECs' local exchange facilities. *In re: Formal Investigation to Examine and Establish Updated Universal Service Principles and Policies for Telecommunications Services in the Commonwealth*, Docket No. I-00940035 (Order entered January 28, 1997), at 82-83.

2) The Commission has "expressed a policy . . . for further access charge reductions." *2006 Annual Price Stability Index / Service Price Index Filing of Denver and Ephrata Telephone and Telegraph Company*, Docket No. R-00061377 (Order entered December 8, 2006), at 9-10.

3) There is no statutory basis for any claim that the RLECs' access charges must be reduced in order to avoid violating New Chapter 30. Act of November 30, 2004 (P.L. 1398, No. 183), 66 Pa. C.S. §§ 3011 – 3019.

4) On November 30, 2004, 66 Pa. C.S. § 3005(e)(2) was repealed by the Act of November 30, 2004 (P.L. 1398, No. 183), 66 Pa. C.S. §§ 3011 – 3019.

5) Section 3017 of the Public Utility Code, 66 Pa. C.S. § 3017, prohibits the Commission from requiring "a local exchange telecommunications company to reduce access rates except on a revenue-neutral basis."

6) Access service is a protected service. 66 Pa. C.S. § 3012. The Commission has not determined that switched access service is competitive. Therefore, by definition, access is a noncompetitive service, and the revenue obtained by an RLEC

from access charges is properly included in the noncompetitive revenue total which the RLEC may increase annually.

7) RLECs are allowed to use a price stability mechanism for adjusting their noncompetitive service rates. 66 Pa. C.S. § 3015(a)(1).

8) The Commonwealth is committed to the “accelerated provision of advanced services and deployment of a universally available, state-of-the-art, interactive broadband telecommunications network in rural, suburban and urban areas.” 66 Pa. C.S. § 3011.

9) The annual revenue increases allowed by the PSM process were further increased in New Chapter 30 when the inflation offset was reduced. The goal was to accelerate broadband deployment. 66 Pa. C.S. § 3015(a)(1).

10) The FCC has ordered a 25% assignment of total loop costs to interstate toll use. 47 CFR § 36.154.

11) The Commission’s policy in the electric and natural gas industries is that customer assistance programs should be targeted to low-income, payment troubled customers. 52 Pa. Code §§ 69.264, 54.73, and 62.3

## **Proposed Ordering Paragraphs**

IT IS RECOMMENDED:

- 1) That the AT&T Complaints shall be dismissed;
- 2) That the RLECs shall not further reduce their intrastate access charges;
- 3) That the RLECs may raise their access charges through the PSM process;

and

- 4) That the \$18 cap on residential local exchange rates and the corresponding caps on business local exchange rates are removed.

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation Regarding Intrastate Access	:	
Charges and IntraLATA Toll Rates of Rural	:	Docket No. I-00040105
Carriers, and the Pennsylvania Universal	:	
Service Fund	:	
AT&T Communications of Pennsylvania, LLC	:	
Complainant	:	
v.	:	Docket No. C-2009-2098380, et al.
Armstrong Telephone Company-	:	
Pennsylvania, <i>et al.</i>	:	
Respondent	:	

**CERTIFICATE OF SERVICE**

I certify that I am serving two copies of the Main Brief, on behalf of the Office of Small Business Advocate, by e-mail and first-class mail (unless otherwise noted) upon the persons addressed below:

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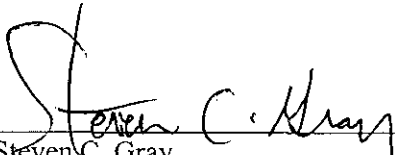
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